

LAW AND DEVELOPMENT OF CONSTITUTIONAL DEMOCRACY IN CHINA: PROBLEM OR PARADIGM?

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I. INTRODUCTION

China is frequently portrayed as a problem case for the law and development movement and modernization theories.¹ For some, the problem is that China has enjoyed remarkable economic growth in the

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¹ This article grew out of an invitation to attend a conference in New York in early spring 2005 on *Legal Evolution Toward a World Rule of Law: Development of Legality and Constitutional Democracy Worldwide*. China was included in a panel on problematic cases, as often happens at such conferences, along with Africa, the Middle East, and Latin America—which is to say, along with most of the world.

last several decades, apparently without the benefit of “the rule of law,” thus challenging the prevailing view that a legal system that enforces property rights is necessary, if not sufficient for sustained economic growth.

For others, the problem is political in nature. China has resisted the third wave of democratization, and remains an officially socialist state, even if a unique twenty-first century version of a socialist state that has endorsed a market economy and rule of law. Some fear that “since China is an increasingly important and influential country in world affairs, China’s continuous anti-democracy diplomacy would have significant impact on the diffusion of . . . democracy throughout the world.”² Indeed, some believe that Russia’s recent tilt toward authoritarianism reflects the influence of the success of the Chinese model of markets without democracy.³

Setting aside the issue of democracy, for others, the problem is human rights. Not only does China have a poor record on civil and political rights, but critics also fear that, unlike Japan, which did not attempt to challenge the Western powers during its economically powerful years, China is likely to take advantage of its growing economic and geopolitical influence to defend and advocate rights policies and a normative vision of the world at odds with current rights policies based on secular liberalism. Indeed, there are already signs of such intentions, most notably in the heavily politicized debates over “Asian values” and China’s attempts to influence the policies and restructuring of the UN’s Human Rights Commission. As a result, critics accuse China of adopting a strategy to divide and conquer by slicing up the concept of universality “little by little, region by region, to the point where there are few teeth left in the UN human rights monitoring and implementation mechanisms.”⁴

For others, the problem is that China is an outlaw regime that undermines geopolitical stability through selling ballistic missiles to rogue states, contributing to the proliferation of weapons of mass destruction, and threatening U.S. hegemony and military superiority. This view assumes that authoritarian regimes are a greater threat to world peace than democracies. It is also based on the historical observation that the rise of a new power has generally resulted in conflict and geopolitical instability. Accordingly, the U.S. and its allies must prepare now for the

² WHAT IF CHINA DOESN’T DEMOCRATIZE?: IMPLICATIONS FOR WAR AND PEACE 3, 5 (Edward Friedman & Barret L. McCormick eds., 2000).

³ Michael S. Bernstam & Alvin Rabushka, *Beijing Consensus for Russia?*, Hoover Institution Public Policy Inquiry, The Russian Economy, at <http://www.russianeconomy.org/comments/060204.html> (June 2, 2004).

⁴ Samuel Kim, *Human Rights in China’s International Relations*, in WHAT IF CHINA DOESN’T DEMOCRATIZE?: IMPLICATIONS FOR WAR AND PEACE, *supra* note 2, at 131, 143.

coming conflict with China, with debates as to whether the best way to do that is by trying to contain China or by engaging China in the hopes that a more interdependent and prosperous China will eventually join the fold of peace-loving liberal democracies.

Is China a problem case? I think not, or at least it is too early to tell. China is now following the path of other East Asian countries that have achieved sustained economic growth, established the rule of law, and developed constitutional or rights-based democracies, albeit not necessarily liberal rights-based democracies. This appears to be the most successful model for relatively large countries in the contemporary era to achieve high levels of economic growth, implement rule of law, and eventually democratize and protect the full range of human rights through some form of constitutionalism.

At this stage of development, China is meeting or exceeding expectations on most measures. The legal system has played a greater role in economic growth than often suggested, and is likely to play an even greater role in the future, which is consistent with the experiences of other countries in Asia and elsewhere.⁵

China has made remarkable progress in a short time in improving its legal system, having essentially begun from scratch in 1978. As of 2002, China's legal system ranked in the 51st percentile on the World Bank's Rule of Law Index, having risen from the 32nd percentile in 1996.⁶

Moreover, notwithstanding the repeated attempts by the United States and its allies to censure China for human rights violations and the steady stream of reports from human rights groups claiming deteriorating rights performance, Chinese citizens enjoy more freedoms, including civil and political freedoms, than ever before. In fact, with the exception of civil and political rights, China outperforms the average country in its income class on most major indicators of human rights and wellbeing.⁷

⁵ See RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 450-512 (2002) [hereinafter CHINA'S LONG MARCH].

⁶ For a more extensive treatment of legal reforms in China, see *id.* The index is part of the World Bank's Good Governance Indicators. Daniel Kaufmann et al., *Governance Matters III: Governance Indicators for 1996-2002* (June 30, 2003), available at <http://www.worldbank.org/wbi/governance/pdf/govmatters3.pdf>. According to the authors, the Rule of Law Index 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. Interestingly, the authors "cautiously conclude" that there is no evidence of "any significant improvement in governance worldwide, and if anything the evidence is suggestive of a deterioration, at the very least in key dimensions such as rule of law, control of corruption, political stability, and government effectiveness." *Id.* at 32.

⁷ See *infra*; see also Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 CORNELL INT'L L.J. 101 (2005) [hereinafter *Assessing Human Rights in China*] (arguing that China is subject to a double standard on rights issues in part because of the privileging of civil and political rights and the bias against non-democratic regimes).

To be sure, while China has acknowledged the importance and legitimacy of human rights, it has also challenged the pretense of a universal consensus on human rights issues, or at least the consensus among much of the cosmopolitan elite in economically advanced Western liberal democracies. Given the deeply entrenched view that even universal rights are contingent on local circumstances, China is unlikely to attempt to impose its own particular solutions to complex issues on other countries. Nevertheless, it may very well seek a shift in normative orientation toward a more flexible, contextualized approach, with greater toleration for non-liberal, communitarian or collectivist approaches to rights issues. However, where critics see such policies as a dangerous threat to the legitimacy of human rights, supporters see China's position as a necessary corrective to the hegemony of liberalism and the neo-imperialistic tendencies of the Western-centric human rights movement.

Of course, China's attempt to modernize will take decades to reach at least a relative state of equilibrium. Even then, the process of change will continue, if perhaps in less dramatic fashion, just as it does in the West. Moreover, capitalism, rule of law, democracy, and human rights are sufficiently contested in theory and varied in practice that—much to the chagrin of those who would choose to impose a highly idiosyncratic version of liberal democracy on China—the final outcome in China cannot, at this point, be accurately predicted. As China negotiates modernity and, indeed, post-modernity, it may very well give rise to one or more novel incarnations of capitalism, rule of law, democracy, or human rights.⁸ On the other hand, there is enough minimal determinate—dare I say universal—content to each of these four aspects of modernity to provide a teleological orientation to the process that is likely to survive into the coming decades, barring extraordinary catastrophes that radically change the nature of contemporary society.

If China is not a problem case, is it a possible model or paradigm for other developing countries, as some have suggested?⁹ There are

⁸ See generally CHINA'S LONG MARCH, *supra* note 5 (discussing competing conceptions of rule of law).

⁹ See, e.g., FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD (2003); JOSHUA COOPER RAMO, THE BEIJING CONSENSUS (2004). The Beijing Consensus ("BC") has been used to refer to a pragmatic approach to reforms, to rejection of a limited role for the state and greater emphasis on equitable growth, to rejection of the Washington Consensus, and to market reforms without democracy. Joshua Cooper Ramo, who coined the term "Beijing Consensus," described China as

[M]arking a path for other nations around the world who are trying to figure out not simply how to develop their countries, but also how to fit into the international order in a way that allows them to be truly independent, to protect their way of life and political choices in a world with a single massively powerful centre of gravity. *Id.* at 4.

aspects of China's experience that may be useful to other countries. However, China's developmental path is not a detailed blueprint for other developing states to slavishly follow for a variety of practical and normative reasons spelled out below.

II. THE EAST ASIAN PATH TO CONSTITUTIONAL DEMOCRACY

The "East Asian path"—a notion which admittedly serves a purpose useful, if at all, only at a high level of generality and reveals considerable diversity when subject to closer scrutiny—involves the sequencing of economic growth, legal reforms, democratization, and constitutionalism, with different rights taken seriously at different times in the process. In particular, the model involves:

- (i) an emphasis on economic growth rather than civil and political rights during the initial stages of development, with a period of rapid economic growth occurring under authoritarian regimes;
- (ii) a pragmatic approach to reforms, with governments following some aspects of the Washington Consensus and rejecting or modifying others, in particular, with governments: adopting most of the basic macroeconomic principles of the Washington Consensus for the domestic economy; rejecting or modifying the neoliberal aspects that would greatly reduce the role of the state through rapid privatization and deregulation, with the state also

In his view:

[The BC] replaces the discredited Washington Consensus, an economic theory made famous in the 1990s for its prescriptive, Washington-knows-best approach to telling other nations how to run themselves. The Washington Consensus was a hallmark of end-of-history arrogance; it left a trail of destroyed economies and bad feelings around the globe. China's new development approach is driven by a desire to have equitable, peaceful high-quality growth. Critically speaking, it turns traditional ideas like privatisation and free trade on their heads. It is flexible enough that it is barely classifiable as a doctrine. It does not believe in uniform solutions for every situation. It is defined by a ruthless willingness to innovate and experiment, by a lively defense of national borders and interests, and by the increasingly thoughtful accumulation of tools of asymmetric power projection. It is pragmatic and ideological at the same time, a reflection of an ancient Chinese philosophical outlook that makes little distinction between theory and practice. *Id.*

Ramo summarizes the BC in three theorems: reliance on cutting edge technology and innovation to keep ahead of the curve; sustainable development with equity rather than just higher GDP levels; and self-determination and peaceful co-existence to prevent powerful international actors from unduly influencing China's development choices. *Id.* at 11-12. While economic policies remain central, the BC as articulated by Ramo encompasses a broad range of political, social, and international relations issues.

more active in reducing poverty and ensuring minimal material standards to compete in a more competitive global economy;¹⁰ and modifying the prescribed relationship between the domestic and global economy by gradually exposing the domestic economy to international competition while offering some protection to key sectors and support to infant industries;

- (iii) government investment in human capital and government institutions as the economy grows and wealth is generated, including reforms to establish a legal system that meets the basic Fullerian requirements of a procedural or thin rule of law,¹¹ and, as the legal system becomes more efficient, professionalized, and autonomous, with a greater role for law in the economy and society in general;
- (iv) greater protection of rights after democratization, including rights that involve sensitive political issues, although with ongoing rights abuses in some cases and with rights frequently interpreted in a communitarian or collectivist rather than liberal fashion;
- (v) the beginning of nascent but limited constitutionalism during the authoritarian period, including the development of constitutional norms and the strengthening of institutions; the emergence of social organizations and the development of "civil society", albeit often with a different nature and political orientation than in Western liberal democracies and with organizations with limited political agendas; citizens enjoying economic liberties, rising living standards, some civil and political rights with limitations especially on rights that involve political issues and affect the control of the regime; limited judicial independence, with the protection of a full range of human rights and, in particular, civil and political rights suffering accordingly;
- (vi) greater protection of the a range of rights after democratization, including rights that involve sensitive political issues, although with ongoing rights abuses in some cases and with rights frequently given a communitarian or collectivist rather than liberal interpretation.

¹⁰ China has learned this lesson the hard way. While China has done reasonably well in addressing poverty, the focus on aggregate economic growth has led to rising inequality. In addition, the relatively low amount of public spending on education and health, combined with a turn toward market forces in the health sector, have increased social tensions. In recent years, the government has begun to increase public spending on education, health, and welfare services.

¹¹ On the differences between thin (procedural) and thick (substantive) theories of rule of law, see CHINA'S LONG MARCH, *supra* note 5, at 65-71, and the cites therein.

This very roughly describes the arc of several Asian states, including countries at various economic levels, stages of legal development, and with political regimes ranging from democracies to semi-democracies to socialist single party states. South Korea and Taiwan have high levels of wealth, rule of law compliant legal systems, democratic government, and constitutionalism. Similarly, Japan exhibits these traits, although it is a special case given its early economic rise and the post-War influence of the United States on legal and political institutions. Hong Kong, Singapore, and Malaysia are also wealthy, with legal systems that fare well in terms of rule of law, but are either not democratic (Hong Kong) or are non-liberal democracies (Singapore and Malaysia). Thailand, less wealthy than the others, has democratized, but has a comparatively weaker legal system and has, under Prime Minister Thaksin, adopted policies that emphasize growth and social order rather than civil and political liberties. China and Vietnam are at an earlier stage than the previously cited examples. They are lower-middle income countries and have legal systems that outperform the average in their income class, but are weaker than the aforementioned examples. They also remain single party socialist states, with varying degrees and areas of political openness.¹²

There are also examples of less successful paths in Asia (and elsewhere) measured in terms of wealth, rule of law, human rights, and other indicators of wellbeing. Some involve countries that democratized at lower levels of wealth. Others involve authoritarian systems that failed to invest in human capital and institutions. They tend to have the weakest legal systems and to be mired in poverty, with all of the human suffering that such plights entail.

A. The Mutual Reinforcement of Rule of Law and Economic Growth

Five East Asian countries or jurisdictions rank in the top quartile on the World Bank's Rule of Law Index: Singapore, Japan, Hong Kong, Taiwan, and South Korea. This is a remarkable achievement given the well-documented failures of the earlier law and development movement in the mid-1960s and 1970s, and of its more recent reincarnation under the banner of rule of law and good governance in the past twenty years. Despite large sums of money and the best efforts of international and

¹² See generally Randall Peerenboom, *Varieties of Rule of Law*, and the other chapters on each of the respective Asian countries, in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S.A.* (Randall Peerenboom ed., 2004) [hereinafter *ASIAN DISCOURSES OF RULE OF LAW*].

domestic actors, the results have, on the whole, been rather poor.¹³ Apart from North American and Western European countries, Australia, and Israel, the only other countries in the top quartile are Chile and French Guiana from Latin America, Slovenia as the lone (non)representative from Eastern Europe, and a handful of small island states and oil-rich Arab countries.¹⁴

The seemingly random countries in this odd grouping have one thing in common: wealth. All of the countries in the top quartile of the World Bank's Rule of Law Index, including the East Asian countries, are high or upper-middle income countries. This is consistent with the general empirical evidence that rule of law and economic development are closely related ($r=.82$, $p < .01$),¹⁵ and tend to be mutually reinforcing.¹⁶ Indeed, notwithstanding theoretical arguments for and against the claim that rule of law contributes to economic development, the empirical evidence is surprisingly consistent and supportive of the claim that implementation of rule of law is necessary though by no means sufficient for sustained economic development.¹⁷

Asia is often considered an exception to the general rule requiring rule of law for sustained economic growth.¹⁸ However, the role of law in

¹³ See, e.g., THOMAS CAROTHERS, PROMOTING THE RULE OF LAW ABROAD – THE PROBLEM OF KNOWLEDGE (Carnegie Endowment for Int'l Peace, Rule of Law Series, Carnegie Paper No. 34, 2003) (discussing problems in conception, operation, and evaluation of efforts to export rule of law and claiming that many of the lessons from prior experiences with law and development are superficial and often not acted on); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms and the "Rule of Law"*, 101 MICH. L. REV. 2275, 2280 (2003) ("Despite billions of aid dollars, programs to promote the rule of law have been disappointing."); Tim Lindsey, *Preface to LAW REFORMS IN DEVELOPING AND TRANSITIONAL STATES* (Tim Lindsey ed., forthcoming 2006) (claiming consensus that many if not most legal reform projects in developing countries have failed); YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 246 (2002) (claiming that most of legal transplants either fail or are largely unsuccessful, although allowing that optimists might view the reforms as half-successful).

¹⁴ These include Antigua and Barbuda, Barbados, the Bahamas, Bermuda, the Cayman Islands, Malta, Martinique, Mauritius, Puerto Rico, and Samoa, in addition to Oman, Qatar, Bahrain, Kuwait, and the United Arab Emirates. Several of the island states rely heavily on tourism and the provision of financial services to companies looking for tax havens for economic development. Most have populations between 50,000 and 500,000.

¹⁵ See Randall Peerenboom, *Show Me the Money: The Dominance of Wealth in Determining Rights Performance in Asia*, 15 DUKE J. COMP. & INT'L L. 75 (2005) [hereinafter *Show Me the Money*].

¹⁶ Alberto Chong & Cesar Calderón, *Causality and Feedback Between Institutional Measures and Economic Growth*, 12 ECON. & POL. 69, 69-81 (2000) (using time series data, the authors find that the causal relationship between institutions and economic growth runs in both directions, although the impact of greater growth on institutional development is stronger than the impact of institutions on growth); Roberto Rigobon & Dani Rodrik, *Rule of Law, Democracy, Openness, and Income: Estimating the Interrelationships* (Nat'l Bureau of Econ. Research, Working Paper No. W10750, 2004), available at <http://www.nber.org/papers/W10750>.

¹⁷ I summarize the main theoretical arguments for the relationship between rule of law and economic development as well as the critiques elsewhere. See CHINA'S LONG MARCH, *supra* note 5, at 451-58.

¹⁸ See Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Carnegie Endowment for Int'l Peace, Working Paper No. 30, 2002); John K.M. Ohnesorge, *The Rule of Law, Economic*

economic development in Asia is frequently underestimated because of the tendency to elide rule of law with democracy and a liberal version of rights that emphasizes civil and political rights.¹⁹ Although the political regimes may not have been democratic and the legal systems may not have provided much protection for civil and political rights, the Asian countries that experienced economic growth generally have scored high with respect to the protection of economic interests and the facilitation of economic transactions. A survey of economic freedoms in 102 countries between 1993 and 1995 found that seven of the top twenty countries were in Asia.²⁰ 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. Six states—Japan, South Korea, Taiwan, Hong Kong, Singapore, and China—experienced sustained growth of over 5% for the period from 1965 to 1995.²¹ The legal systems of these countries, with the possible exception of China, measure favorably in terms of economic freedoms and rule of law.

However, even in China, the legal system has improved significantly in the last twenty five years, particularly in the commercial area.²² In contrast, the legal systems of most of the low growth countries are among the weakest in the region. The following table presents a percentile ranking of Asian legal systems based on the World Bank's Rule of Law Index for the years 1996 and 2002.²³ Countries with better legal systems tend to have higher growth and more wealth, and vice versa. Indeed, the relationship between GDP and rule of law is stronger in the Asian region ($r=.91$) than for countries overall ($r=.82$), as indicated in Table 3 below.

Development and the Developmental States of Northeast Asia, in LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA 91 (Christoph Actons ed., 2003); Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89 (2003).

¹⁹ For the argument that law played a greater role than normally suggested, see KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995* (1999); MARK J. RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* (1999); CHINA'S LONG MARCH, *supra* note 5, at 450-512.

²⁰ Henry S. Rowen, *The Political and Social Foundations of the Rise of East Asia*, in BEHIND EAST ASIAN GROWTH: THE POLITICAL AND SOCIAL FOUNDATIONS OF PROSPERITY 1, 6-7 (Henry S. Rowen ed., 1998).

²¹ See *id.* Thailand, Malaysia, and Indonesia grew more slowly, at around 3.5% per year. Seven countries, including North Korea, Mongolia, Vietnam, Cambodia, Laos, Philippines, and Myanmar averaged less than 2% growth. *Id.*

²² For a more thorough discussion of the role of the legal system in China's economic development, see CHINA'S LONG MARCH, *supra* note 5, at 462-98.

²³ See Kaufmann et al., *supra* note 6.

Table 1: World Bank Rule of Law Rankings

Country	2002	1996
Singapore	93.9	99.4
Japan	88.7	88.0
Hong Kong	86.6	90.4
Taiwan	80.9	84.3
South Korea	77.8	81.9
Malaysia	69.6	82.5
Mongolia	64.9	70.5
Thailand	62.9	71.1
China	51.5	37.3
Vietnam	44.8	34.9
Philippines	38.1	54.8
Indonesia	23.1	39.8
Cambodia	20.1	16.9
North Korea	14.7	13.9
Laos	12.9	4.8
Myanmar	2.1	5.4

Despite such consistent and seemingly overwhelming evidence, there are still good reasons to be cautious in reaching broad conclusions about the relationship between rule of law and economic growth. Defining and measuring rule of law remains an issue.²⁴ Several of the main empirical studies relied on subjective measures from three sources: the ICRG and BERI surveys, and the World Bank's Rule of Law Index.

The relationship between rule of law and economic growth also appears non-linear.²⁵ For instance, rule of law may not be significant where a country is very poor and the economy is largely rural-based. A formal legal system that meets the standards of rule of law is costly to establish and operate. In some cases, norms of generalized morality, social trust, self-enforcing market mechanisms, and informal substitutes for formal law may provide the necessary predictability and certainty required by economic actors at a fraction of the cost of a developed and formal legal apparatus.

Formal and informal law, public ordering, and private ordering are complementary in many ways. Family businesses, networks of personal relationships, and private orderings exist in all legal systems, while cultural, economic, political, and economic contexts may vary between countries, leading to differences in the degree of importance or

²⁴ For a variety of criticisms of current measures of rule of law, including that many of the measures are too abstract to provide specific guidance to policymakers, see Kevin E. Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms*, 26 MICH. J. INT'L L. 141 (2004).

²⁵ ROBERT J. BARRO, DETERMINANTS OF ECONOMIC GROWTH: A CROSS-COUNTRY EMPIRICAL STUDY 28 (1997).

variations in particular practices.²⁶ As no extra-legal mechanism is a perfect substitute for a developed legal system, each works to support and overcome the weaknesses of the others. In general, however, relationships and social networks, clientelism, corporatism, and informal mechanisms for resolving disputes, raising capital, and securing contracts are at best imperfect substitutes that themselves often depend on formal legal institutions that meet the standards of a thin rule of law. Once a country reaches higher levels of economic development, the costs of a formal legal system are easier to bear. It is no accident that richer countries have better legal systems.

Rule of law is an ideal which admits of degrees. Obviously the legal systems in the prosperous Asian countries were not always so well developed. As critics note, all legal systems in Asia have deviated to some degree from the rule of law ideal. The various legal systems have been slow and inefficient, in some cases corrupt, and have frequently set up a variety of barriers to civil litigation.²⁷ In development to date, administrative officials were often allowed considerable discretion, particularly in Japan where administrative guidance played a crucial role in state development. To be sure, the amount of discretion compatible with rule of law is a hotly contested issue.²⁸ Clearly, legal systems everywhere allow for administrative discretion and employ a variety of legal, social, institutional, and political means for restraining and checking the discretion of bureaucrats. Thick conceptions of rule of law,

²⁶ See Randall Peerenboom, *Social Networks, Rule of Law and Economic Growth in China: The Elusive Pursuit of the Right Combination of Public and Private Ordering*, 31 GLOBAL ECON. REV. 1 (2002). Critics who challenge the relationship between rule of law and economic development often note that in some cases courts have played a minor role in enforcing contracts or resolving disputes, and emphasize that other institutions may provide substitutes for law. While true, such substitutes operate against a background of law, and often cannot function without the possibility of ultimately turning to the courts should other means for resolving the dispute fail. Furthermore, dispute resolution is only one of the economic functions of a legal system. The legal system also performs an enabling function by creating the basic infrastructure for transactions, including markets, security exchanges, mortgage systems, accounting practices, and so on. In any event, individual country studies (much less reliance on individual cases or even studies of a particular industry or sector) cannot disprove the general correlations found in larger empirical studies. China, for instance, clearly has advantages that other countries may not have, including potentially large markets and a wealthy and entrepreneurial force of overseas Chinese to draw on. But even assuming relatively high growth rates in some countries with weak legal systems, growth rates might have been higher with a better legal system. Finally, a legal system that is compliant with rule of law serves many laudable functions other than promoting economic growth, including limiting arbitrary acts of government and promoting fair (if not always just) outcomes.

²⁷ See, e.g., Ohnesorge, *supra* note 18; see also Upham, *supra* note 18; Clarke, *supra* note 18.

²⁸ See CHINA'S LONG MARCH, *supra* note 5, at 410-14 (arguing that in this period of transition during which the legislatures and courts are weak and laws often out of date or poorly drafted, there are good reasons for allowing administrative actors considerable discretion, although also arguing for the need to strengthen mechanisms for reviewing administrative decisions and holding state actors accountable).

which incorporate different elements of political morality,²⁹ will differ with respect to issues such as administrative discretion and administrative law more generally.³⁰

In any event, the legal systems in Japan, Taiwan, South Korea, Hong Kong, Singapore, and now China during periods of growth were still stronger and more functional than other legal systems in the region. Critics often speak of the “lack” or “absence” of rule of law during periods of high growth, as if rule of law were a discrete variable, either present in perfect form or absent altogether. This suggests that the legal systems were wholly dysfunctional, imposing no limits whatsoever on administrative discretion or state actors and providing no relief for private parties seeking to settle disputes. But surely the legal systems did not just suddenly appear in the top quartile of countries on the World Bank’s Rule of Law Index. Indeed, most critics allow that the legal systems played some role in their respective economies, and acknowledge that practices such as administrative guidance existed in regulatory environments that included legal limits as well as political, institutional, and economic constraints. Moreover, the role of legal systems has naturally changed, and continues to change, over time. As the legal systems have become stronger and more professionalized, they have played greater roles. In Japan, for example, poor economic performance and the Asian financial crisis have led to the restructuring of the bureaucracy and the curtailment of administrative guidance, which is now subject to tighter legal restrictions and judicial review. Globalization and domestic pressures have also led to proposals to overhaul the legal profession and legal education (a hot issue in South Korea as well).

Perhaps most worrisome for policymakers, implementing rule of law and achieving economic growth are complicated tasks. Even those at the center of the new law and development movement acknowledge the persistent difficulty in operationalizing the relation between law and development and the inability to specify with any reasonable degree of certainty precisely what is required at what stage for economic development. The problem, in a nutshell, is that rule of law is consistent with considerable institutional variation. The general principles of rule of law are too abstract to provide determinate advice on issues such as what the proper standing requirements should be for civil litigation, how many lawyers a society can tolerate, and whether they should be allowed to

²⁹ Such elements include different varieties of capitalism with corresponding conceptions of the proper role of the state, such as the development state as opposed to the minimalist libertarian state, the limited liberal state, or the most expansive social welfare or progressive state.

³⁰ See CHINA’S LONG MARCH, *supra* note 5, at 55 (discussing competing thick conceptions of rule of law); see also *id.* at 394 (discussing administrative law).

charge contingency fees, or whether courts should adopt a purposive or positivist form of interpretation.³¹

To complicate matters further, the rule of law agenda has continually been expanded. During the 1990s, in addition to the procedural and institutional features of a thin rule of law, the new law and development movement, spearheaded by international financial institutions ("IFIs"), incorporated under the banner of rule of law the substantive neo-liberal principles of the Washington Consensus. Faced with dismal results in many countries, including the financial crisis in Asia and a notable negative impact on social services and the most vulnerable members of society in Latin American countries and elsewhere, IFIs and human rights activists joined forces to expand the program to include a broader range of concerns including democracy, human rights, and the particular norms and institutions of liberal democracies.

The result has been greater conceptual confusion, with rule of law becoming a slogan to advance whatever substantive agenda or wish-list of rights, economic policies, and government practices the speaker chooses. Countries, particularly politically weak and financially dependent states, are in danger of losing control over the reform process and their own political agenda. While there are technical aspects to legal reform, the reform process is inherently political, with many discrete decisions to be made, often among second-best alternatives. Few if any reforms are Pareto improvements. Rather, there are winners and losers, both among individual citizens and state organs of power. Yet rather than allowing domestic political systems to weigh the costs and benefits, international actors are attempting to influence, if not outright dictate outcomes. Not surprisingly, in Asia and elsewhere, countries at low levels of wealth that have taken on the broader agenda and attempted to democratize and implement a full range of social and economic as well as civil and political rights have often experienced disappointing results.³²

B. *Investment in Human Capital and Institutions*

Performance on human rights standards, including measures of civil and political rights, and other indicia of human wellbeing, is highly

³¹ For variety within Asia in institutions and conceptions of rule of law, see generally ASIAN DISCOURSES OF RULE OF LAW, *supra* note 12.

³² See generally HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE U.S. (Randall Peerenboom et al. eds., forthcoming 2006) [hereinafter HUMAN RIGHTS IN ASIA]. See also Robert Pinkney, DEMOCRACY IN THE THIRD WORLD 6, 65 (2d ed. 2003) (noting that today very few of the third wave democracies have managed to consolidate democracy).

correlated with wealth.³³ Indeed, as Table 2 graphically depicts and Table 3 demonstrates, wealth is highly correlated with social and economic rights ($r=.92$),³⁴ women's rights as measured by the Gender Developmental Index ($r=.93$),³⁵ good governance indicators such as government effectiveness ($r=.77$),³⁶ rule of law ($r=.82$), control of corruption ($r=.76$),³⁷ civil and political rights ($r=.62$),³⁸ and even physical integrity rights, though to a lower degree ($r=-.40$). As countries become wealthier, they generally protect rights better as a whole.

³³ William H. Meyer, *Human Rights and MNCs: Theory Versus Quantitative Analysis*, 18 HUM. RTS. Q. 368 (1996) (GNP biggest contributor to civil, political, social, and economic rights); GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS AND ORGANIZATIONS ACROSS NATIONS* 248, 251 (2d ed. 2001) (wealth was the main factor affecting rights compliance, although individualism mattered in wealthier countries); Neil J. Mitchell & James M. McCormick, *Economic and Political Explanations of Human Rights Violations*, 40 WORLD POL. 476, 497 (1988) (higher levels of economic wellbeing associated with better physical integrity rights records); Clair Apodaca, *Measuring Women's Economic and Social Rights Achievement*, 20 HUM. RTS. Q. 139 (1998) (higher GDP associated with better performance on women's rights).

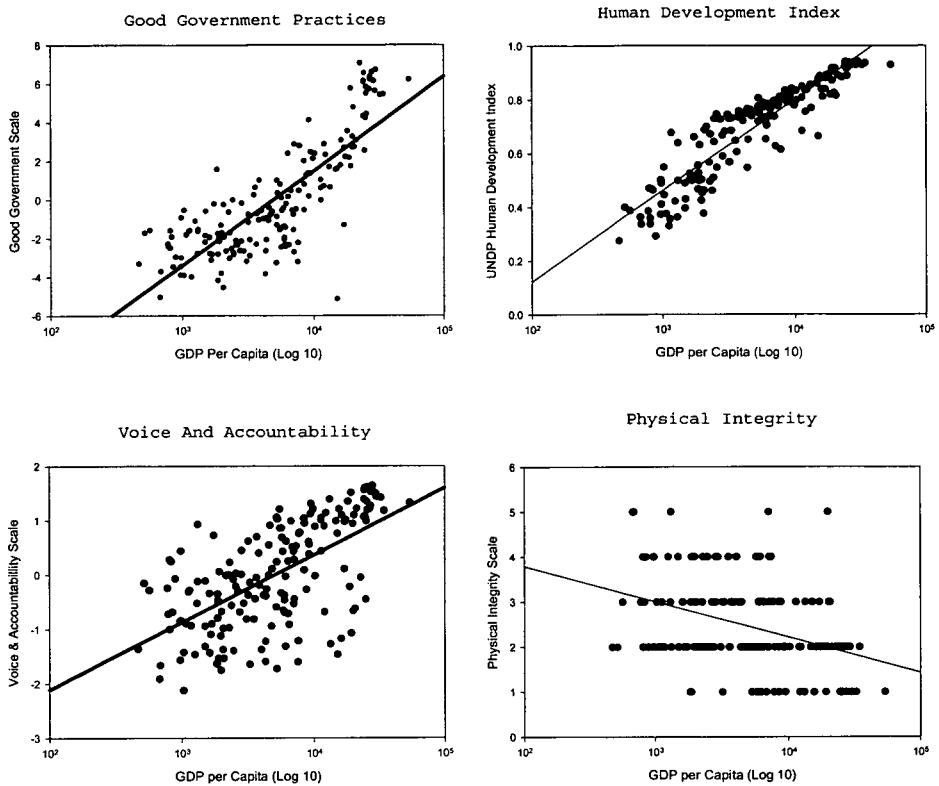
³⁴ The table is based on UNDP rankings for social and economic rights in 2002 as measured by the Human Development Index ("HDI"). The HDI measures the average achievement in a country in three basic dimensions: a long and healthy life based on life expectancy at birth; education and knowledge measured by adult literacy and combined primary, secondary, and tertiary enrollments; and a decent standard of living as measured by GDP per capita (US\$PPP). Some scholars have complained about the quality of the UN data. However, other studies using an alternative measure of physical quality of life have also found a very strong correlation between wealth and such indicators of wellbeing, including subsistence rights, life expectancy, infant mortality, and literacy. See Wesley Milner et al., *Providing Subsistence Rights at the End of the Twentieth Century: Do States Make a Difference*, in UNDERSTANDING HUMAN RIGHTS VIOLATIONS 110, 119 (Sabine Carey & Steven Poe eds., 2004) (using the Physical Quality of Life Index developed by Morris, and noting that strong relationship between wealth and better physical quality of life found in their study is consistent with earlier results of other scholars).

³⁵ The UNDP's Gender Development Index (GDI) index is also highly correlated with the HDI index ($r=.999$), suggesting that they capture largely the same phenomena. Accordingly, I have not produced a separate scatterplot for GDI as the graph is virtually identical to the HDI graph.

³⁶ "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. Kaufmann et al., *supra* note 6.

³⁷ "Control of corruption" measures perceptions of corruption, the effects of corruption on business, and "grand corruption" in the political arena. *Id.*

³⁸ Voice and accountability 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 and the independence of the media. *See id.*

Table 2: Wealth Effect (GDP) on Rights Performance

In general, Asian countries, especially East Asian countries, tend to do poorly on civil and political rights in relation to others in their income group. Moreover, even the most democratic regimes in the region score somewhat lower than the more liberal United States and France.³⁹ 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.⁴⁰ East Asian governments also tend to outperform other countries in their income group on good governance measures.⁴¹

³⁹ See *Show Me the Money*, *supra* note 15, Table 5.1, at 136, Figures 2.1, at 135, Figures 4.1, at 147, and the discussion thereof.

⁴⁰ *Id.*

⁴¹ *Id.*

In short, successful Asian states including Singapore, South Korea, Japan, Taiwan, and now Vietnam and China have implemented reforms, including institution-building measures and investment in education and human resources, which have benefited the broader populace. As Table 3 shows, 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, suggesting that there is a culturally based antipathy to liberal values that explains the variance in those regions.

In contrast, the relationship between wealth and all types of rights is consistently weaker in Latin America and Africa, suggesting that the culprit is corrupt and dysfunctional governments that serve the rich, if anyone, at the expense of the general populace.⁴² Reform efforts have largely been undermined by patronage systems in which state leaders divert state assets into the hands of a few and elites block reform efforts aimed at benefiting the majority of citizens.⁴³

⁴² See Thomas Carothers, *The End of the Transition Paradigm*, 13(1) J. DEMOCRACY 5 (2002) (distinguishing between two types of dysfunctional states, one characterized as feckless pluralism and the other as dominant-power, with the former more common in Latin America and the latter more common in Africa, and examples of both in the former Soviet republics).

⁴³ On the disappointing results in Latin America, see generally *Proceedings of the Fourth Annual Legal & Policy Issues in the Americas Conference* (2003), 16 FLA. J. INT'L L. 1 (2004). See also Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT'L L. 99 (2004) (grouping obstacles to rule of law into three general categories—resource and institutional capacity shortcomings; social-cultural-historical problems; and political-economy barriers—and arguing that political-economy obstacles, including opposition by key interest groups, have been the biggest barriers in Latin America and Central and Eastern Europe). Of course, Latin American and African countries differ in significant ways that affect the paths of legal reforms. Space limitations permit me to paint with only the broadest of brushes. For a more detailed discussion of several Latin American countries, see DEZALAY & GARTH, *supra* note 13.

Table 3: Correlation of Wealth and Measures of Development

Measure	Region								
	All	Africa	Asia	Australia and Pacific	Caribbean	Former Soviet Influence	Latin America	Middle East	Western Europe
Human Development Index (HDI) 2001	.92 **	.88 **	.93 **	.97 **	.86 **	.97 **	.88 **	.93 **	.94 **
Gender-related Development Index (GDI) 2001	.93 **	.87 **	.92 **	.98 *	.89 *	.97 **	.90 **	.92 **	.83 **
Rule of Law	.82 **	.58 **	.91 **	.95 **	.90 **	.81 **	.64 **	.89 **	.92 **
Government Effectiveness	.77 **	.49 **	.90 **	.98 **	.92 **	.85 **	.69 **	.78 **	.91 **
Control of Corruption	.76 **	.55 **	.88 *	.96 **	.81 **	.83 **	.67 **	.77 **	.86 **
Voice and Accountability	.62 **	.29	.50 *	.94 **	.75 *	.73 **	.34	.18	.85 **
PTS 2002 (AI & State)	0.40 **	0.22	0.42	0.74	0.71 *	0.21	.10	0.25	0.48 *
N	74	1	9		0	0	0	5	3

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

C. Legal Reforms, Economic Growth and Democratization

Rule of law and democracy tend to be mutually reinforcing.⁴⁴ However, rule of law need not necessarily march in lock-step with democracy, and in Asia and the Middle East several of the legal systems

⁴⁴ See, e.g., Rigobon & Rodrik, *supra* note 16, at 5 (finding that rule of law and democracy are mutually reinforcing: greater rule of law produces more democracy and vice versa, but the effects are not strong); Robert J. Barro, *Democracy: A Recipe for Growth?*, in CURRENT ISSUES IN ECONOMIC DEVELOPMENT: AN ASIAN PERSPECTIVE 67, 89-98 (Muhammad G. Quibria & J. Malcolm Dowling eds., 1997) (noting that there is little empirical evidence that rule of law promotes political freedom).

that score highest in terms of rule of law either are not democracies or are illiberal democracies.⁴⁵

Despite limitations on democracy,⁴⁶ the use of the legal system to suppress opposition, and a non-liberal interpretation on many rights issues, Singapore's legal system is regularly ranked as one of the best in the world. It was ranked in the top 99th percentile on the World Bank's Rule of Law Index in 1996 and in the 93rd percentile in 2002. By way of broad comparison, the United States and the average OECD rankings were in the 91st to 92nd percentiles for 1996 and 2002.

Like Singapore, Hong Kong has a well developed legal system that is largely the product of British colonialism. Until the handover to the PRC in 1997, the system was widely considered an exemplar of rule of law, notwithstanding the lack of democracy and a restricted scope of individual rights under British rule. After the handover, the legal system continues to score high on the World Bank's Rule of Law Index, with only a slight drop from 90.4 in 1996 to 86.6 in 2002.

Singapore and, even more clearly, Hong Kong show that democracy is not a precondition for a legal system that generally complies with the requirements of a thin rule of law. Among Arab countries, Oman, Qatar, Bahrain, Kuwait, and the United Arab Emirates are in the top quartile on the World Bank's Rule of Law Index but have a 0 ranking on the 0-10 point Polity IV Index.

Conversely, just as non-democracies may have strong rule of law legal systems, democracies may have legal systems that fall far short of rule of law. Guatemala, Kenya, and Papua New Guinea, for example, all score highly on democracy (8-10 on the Polity IV Index) and yet poorly on rule of law (below the 25th percentile on World Bank's Rule of Law Index).⁴⁷

Moreover, both democracy and rule of law are clearly related to wealth. Empirical studies have yet to sort out the complicated causal ways in which democracy, rule of law, and wealth interact to support each other.⁴⁸ However, one of the striking features of the successful transition

⁴⁵ What constitutes a democracy is also subject to debate. In the U.K., only 1.8% of the adult population was eligible to vote as of 1832, and only 12.1% as of 1884, with women receiving the right to vote only in 1930. In the U.S., only 5% of adults were eligible to vote in 1824, with Blacks obtaining the right to vote only in 1870, and women following in 1920. ZAKARIA, *supra* note 9, at 50-51.

⁴⁶ Singapore's rating for 2002 on the Polity IV scale was 2.

⁴⁷ Eight other countries receive an 8-10 score on the Polity IV Index and yet score below the 50th percentile of countries on rule of law: Bolivia, Peru, Jamaica, Macedonia, the Philippines, Moldova, Nicaragua, and Argentina.

⁴⁸ A recent study found that while democracy and rule of law are both related to higher GDP levels, the impact of rule of law is much stronger. See Rigobon & Rodrik, *supra* note 16, at 5; see also Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?* 36 GEO. J. INT'L L. (forthcoming 2006).

in Taiwan, South Korea, and more recently Thailand is that the transition to democratization has come only after economic growth reached relatively high levels.

In contrast, those countries that have attempted to democratize at lower levels have failed in the past, oftentimes reverting to authoritarianism. Indonesia tried democracy just after independence from the Dutch between 1950 and 1957. The experiment ended when Sukarno declared martial law. Thailand went through numerous cycles of democratic elections followed by military-led coups—there have been some seventeen coups attempts since 1932. 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. Nowadays, states that have attempted elections at low levels of wealth and with weak institutions, such as the Philippines, Indonesia, India, Cambodia, and now Timor-Leste, continue to limp along with low levels of economic development, pressing social order problems, and massive discontent with their corresponding political systems.

The experience of Asian countries in this regard is consistent with the experience of many countries elsewhere,⁴⁹ as well as empirical studies that show that democracies are unstable and vulnerable to economic downturns at relatively low levels of wealth.⁵⁰ All too many third-wave democracies have failed to generate economic growth, implement rule of law, invest in human capital, 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.⁵¹ Even where electoral

⁴⁹ Pinkney, *supra* note 32, at 65 (noting the remarkable fact that “almost all third world countries have had at least nominally pluralist political systems at some time in their history, yet the majority did not (or could not) build on these to establish durable forms of democracy.”).

⁵⁰ Adam Przeworski & Fernando Papaterra Limongi Neto, *Modernization: Theories and Facts*, 49(2) *WORLD POLITICS* 155, 178-79 (1997); Barro, *supra* note 44, at 89-98 (analyzing the effects of economic development on democracy, and concluding that “countries at low levels of economic development typically do not sustain democracy.”).

⁵¹ Between 1996 and 2000, only 27% to 37% of Latin Americans expressed satisfaction with democracy. Support for democracy in 2002 was lower than in 1996 in all but four countries. According to the *Latinobarometer*, 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%), parliaments (22%), and judiciaries (26%). Nevertheless, Latin Americans are reluctant to return to the recent past of authoritarian military regimes. 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. See COMISIÓN DE PROMOCIÓN DEL PERÚ, *LATINOBAROMETER: PUBLIC OPINION IN LATIN AMERICA* (2002); see also Juan Forero, *Latin America is Growing Impatient with Democracy*, N.Y. TIMES, June 24, 2004, available at <http://www.nytimes.com/>

democracy remains in place, governments exist in limbo states variously described as soft authoritarianism, semi-dictatorship, semi-democracy, or non-liberal electoral democracy.⁵²

Of course, not all authoritarian systems have succeeded in achieving economic growth, implementing rule of law, or in making progress on human rights and other indicators of human wellbeing. Laos, Myanmar, and North Korea are unfortunate reminders that authoritarian regimes may go badly astray. Successful reforms require, at minimum, governments that are willing to invest in institutions, people, and sound economic policies, coupled with some degree of luck.

D. *Constitutionalism and Rights*

Even during the authoritarian periods of successful Asian states, legal reforms began to empower legal institutions and give rise to constitutional norms, thus supporting nascent constitutionalism. To be sure, in most cases, judicial independence remained limited, with the protection of the full range of human rights and, in particular, civil and political rights suffering accordingly, until after democratization. Thus, the general pattern was for better performance in terms of social and economic rights, good governance, and law and order relative to civil and political rights.

Yet several caveats, qualifications, and disclaimers are in order. First, South Korea and Taiwan fit the model in that only after democratization did the courts emerge as independent and authoritative forces capable of handling even politically sensitive issues involving controversial constitutional amendments and the criminal liability of past presidents impartially.⁵³ In contrast, democratization in other countries at lower levels of wealth has exacerbated or at least failed to resolve shortcomings in the legal system, including problems with the authority and independence of the judiciary. In Indonesia, corporatist and clientelist ties between judges and the political, military, and business elite have undermined the authority and independence of the judiciary.⁵⁴ In the Philippines, the courts continue to be so heavily influenced by the

2004/06/24/international/americas/24PERU.html?ex=1089065297&ei=1&en=7f452d7bbb6ecb14 (United Nations Report finds that 56% of Latin Americans said economic progress is more important than democracy. Massive discontent has led to the downfall of six elected leaders after violent unrest, growing support for neo-authoritarian leaders, and the granting of extrajudicial powers to effective leaders. There have even been calls in Peru for the return of the authoritarian leader Alberto Fujimori, who was run out of office on corruption charges.).

⁵² See Carothers, *supra* note 42, at 5 (noting that the assumption that many third wave democracies are in transition to democracy is not accurate, and that the "majority of third wave democracies have not achieved well-functioning democracies or do not seem to be deepening or advancing whatever democratic progress they have made.").

politics of populist, people-power movements that basic rule of law principles are threatened.⁵⁵

Second, the degree of judicial activism varies dramatically from country to country. The courts in South Korea, Taiwan, India, and the Philippines are among the most activist. In Taiwan and India, the courts have gone so far as to strike down constitutional amendments as unconstitutional.⁵⁶ In contrast, the Supreme Court in Japan has rarely struck down laws. 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.⁵⁷

To be sure, activism is not the same as liberalism. In Thailand, the courts have shown a conservative inclination to side with entrenched interest groups.⁵⁸ Similarly, although Indian courts have come to the aid of the disenfranchised in a variety of ways, the courts remain organs of the state, with judges inclined by personal circumstances and professional training toward moderate rather than radical solutions.⁵⁹ In Korea and the Philippines, court decisions are often more a reflection of populism than liberal principles.⁶⁰

In general, Asian courts tend to be very deferential on matters of national security. National laws frequently prohibit or limit judicial review of many national security decisions. But even when judicial

⁵³ See generally Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y. J. 531 (2002) (observing that just a few years ago no one could imagine that the Council of Grand Justices would find newly-amended constitutional provisions unconstitutional); see also Hahm Chaihark, *Rule of Law in South Korea: Rhetoric and Implementation*, in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 12, at 385 [hereinafter *Rule of Law in South Korea*].

⁵⁴ Howard Dick, *Why Law Reforms Fail: Indonesia's Anti-corruption Reforms*, in LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES, *supra* note 13.

⁵⁵ Raul C. Pangalangan, *The Philippine "People Power" Constitution, Rule of Law, and the Limits of Liberal Constitutionalism*, in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 12, at 371.

⁵⁶ For a general discussion of cases in Taiwan, see Sean Cooney, *The Effects of Rule of Law Principles in Taiwan*, in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 12, at 417-45; for a general discussion of cases in India, see Upendra Baxi, *Rule of Law in India: Theory and Practice*, in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 12, at 324-45.

⁵⁷ For a general discussion of cases in Singapore, see Lia-ann Thio, *Rule of Law Within a Non-Liberal "Communitarian Democracy"*, in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 12, at 183-224; for a general discussion of cases in Malaysia, see H.P. Lee, *Competing Conceptions of Rule of Law in Malaysia*, in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 12, at 225-49.

⁵⁸ Vitit Muntarbhorn, *Rule of Law and Aspects of Human Rights in Thailand: From Conceptualization to Implementation*, in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 12, at 346, 362.

⁵⁹ Baxi, *supra* note 56, at 339 (noting that Indian activists "remain familiar with the meandering nature of judicial activism"); see also Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 515 (1989) (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).

⁶⁰ See Peerenboom, *supra* note 12, at 21; see also Pangalangan, *supra* note 55, at 375; cf. Hahm, *supra* note 53, at 385.

review is possible, Asian courts have been reluctant to challenge executive and parliamentary decisions involving national security.⁶¹ They also tend to impose more restrictions on speech and the media, freedom of association, and the exercise of religion than liberals would prefer.⁶² To some extent, these broad differences are attributable to different social and political philosophies, including majoritarian preferences for communitarianism or collectivism.⁶³

Third, cultural rights and personal integrity rights have varied depending on particular circumstances. Cultural rights have been influenced by the degree of ethnic diversity, the amount of religious conflict, and the extent to which ethnic or religious diversity has led to calls for autonomy and independence. Personal integrity rights have been affected by the degree of political stability, the need to wage civil war or battle insurgents, and, most recently, concerns over terrorism.⁶⁴

Fourth, successful East Asian governments 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. However, Asian states have generally not treated economic and social rights as justiciable. Rather, government policies reflect traditional paternalistic beliefs that rulers are obligated to ensure the material and spiritual wellbeing of the people. In East Asian countries, this belief derives largely from Confucianism; in other countries it may be supported by Buddhism, Islam, or other belief systems. While such traditions are grounded in a non-liberal worldview, they nonetheless provide a normative basis for social, economic, cultural, and collective rights claims today.⁶⁵

⁶¹ For a discussion of physical integrity rights and derogation of rights in times of emergency, national security laws, and the effects of the war on terrorism in Asia, see generally HUMAN RIGHTS IN ASIA, *supra* note 32.

⁶² See *Show Me the Money*, *supra* note 15, at 112; see also generally HUMAN RIGHTS IN ASIA, *supra* note 32.

⁶³ For empirical studies showing different value orientations in Asia, see generally CHINA'S LONG MARCH, *supra* note 5; Peerenboom, *supra* note 12; *Show Me the Money*, *supra* note 15. See also VIDHU VERMA, MALAYSIA: STATE AND CIVIL SOCIETY IN TRANSITION (2002) (distinguishing between Mahathir's nationalist perspective, a less state-oriented communitarianism that shares some of the nationalist disenchantment with Western liberalism, and a "traditionalism" that also rejects liberalism but is based on Islam); Thio Li-ann, *An i for an I: Singapore's Communitarian Model of Constitutional Adjudication*, 27 H.K. L.J. 152 (1997).

⁶⁴ See generally HUMAN RIGHTS IN ASIA, *supra* note 32.

⁶⁵ 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 (though

More recently, in response to the normative pressure of the human rights community to treat all rights as indivisible, several Asian countries have developed an active jurisprudence surrounding economic and social rights. This is also in line with a redistributive, developmental model of rule of law in several Asian countries. This conception of rule of law 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.⁶⁶ Thus, 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 in terms of judicial competence and the proper role for the courts.

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.⁶⁷ In India, the Bharatiya Janata Party ("BJP") government was voted out of office despite overseeing a period of rapid economic growth. The vote reflected a deep dissatisfaction with growing income disparities and widespread poverty amidst 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.⁶⁸

Indonesia offers another cautionary tale. After the fall of Suharto, reformers, flush with optimism, wrote into the Indonesian Constitution

mainly through a pay-as-you-go system). See generally Ian Holliday, *Productivist Welfare Capitalism: Social Policy in East Asia*, 48(4) POL. STUD. 706, 712–13 (2000).

⁶⁶ See Peerenboom, *supra* note 12, at 29–31.

⁶⁷ See generally CASS R. SUNSTEIN, AGAINST POSITIVE RIGHTS, IN WESTERN RIGHTS?: POST COMMUNIST APPLICATION 225 (Adras Sajo ed., 1996); but see Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921 (2004) (arguing that courts need to support social rights, if more in a direct fashion that provides the legislature flexibility in implementation rather than by specifying an immediate particular minimum level of entitlement for individuals, because such decisions may provide governments the political leverage to resist the harmful prescriptions of international financial organizations regarding democratization and marketization).

⁶⁸ Hahm Chaihark, *Human Rights in Korea*, in HUMAN RIGHTS IN ASIA, *supra* note 32.

some of the most forward-looking 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 enjoy a good and healthy living environment, and to obtain health services.⁶⁹ 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.⁷⁰ The Megawati government in low-income Indonesia has not been able to live up to such broad commitments or even to deal effectively with terrorism and rising crime rates.

In contrast, Thailand seems to be following a modified version of the Asian development model. Having democratized while still a middle-income country and with relatively weak institutions, the government is now struggling to improve the standards of living for citizens and maintain social and political order. The ruling party has acted in many ways like a traditional Asian government: a strong executive has pushed through policies aimed at ensuring economic development and a better standard of living for the majority, while cracking down on drugs, Islamic insurgents, and other potential sources of disorder, including government critics. As a result, the economy has recovered, and the deterioration in quality of life as measured by the UNDP HDI index has reversed. However, NGOs and rights activists remain critical of government policies, pointing out that notwithstanding considerable progress, problems remain with respect to disadvantaged hill-tribe peoples and other socially vulnerable individuals, and how economic development has come at the expense of transparency and political participation.⁷¹ Moreover, the war on drugs has led to more than 2500 extrajudicial killings, while the crackdown on Islamic insurgents has resulted in the deaths of at least eighty six Muslims. The government has also tightened control over the media and been critical of human rights organizations. Not surprisingly, human rights groups have protested. Asia director of Human Rights Watch Brad Adams has claimed that “Thailand has gone from being a beacon of freedom in the region to a country of high concern,” and that “[m]uch of the steady progress Thailand has made in the last decade has been rolled back under Thaksin’s tenure.”⁷² On the

⁶⁹ THE 1945 CONST. OF THE REPUBLIC OF INDON., art. 28H(1) (amended 2002), available at <http://asnic.utexas.edu/asnic/countries/indonesia/ConstIndonesia.html> (last visited Feb. 17, 2006).

⁷⁰ *Id.* at art. 28H(2). See generally Amartya Sen, *Capability and Well-being*, in THE QUALITY OF LIFE 30, (Martha Nussbaum & Amartya Sen eds., 1993); see also Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273 (1997).

⁷¹ See Vitit Muntarbhorn, *Human Rights in the Era of “Thailand Incorporated (Inc.)”*, in HUMAN RIGHTS IN ASIA, *supra* note 32 (noting that hill tribes have been disadvantaged in the education of their children and in their quest for Thai nationality).

⁷² See Human Rights Watch, *Thailand: Elections Amid an Assault on Rights*, (Feb. 3, 2005), available at <http://hrw.org/english/docs/2005/02/03/thaila10120.htm> (last visited Feb. 18, 2006).

other hand, the broader public appears to appreciate that governments in middle-income countries, such as Thailand, will inevitably have difficulty living up to the oftentimes idealistic standards of their critics. The overwhelming victory of Thaksin in the 2005 election suggests that most Thais are more tolerant and supportive of government efforts to address pressing economic issues within the limits of available resources and to maintain social order.

III. LAW AND DEVELOPMENT IN CHINA TO DATE

China is largely following “the East Asian path.” The government has emphasized economic growth and political stability, invested in human capital and institutions, including the legal system, and progressed slowly with political reforms.

A. *Economic Rights and Human Development*

China defends its human rights record by pointing to a stunning rise in wealth that has lifted over 150 million people 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 US\$4020, China, though growing, is a lower-middle-income country. An official average annual growth rate of 8.2% from 1975 to 2001 and 8.8% from 1999 to 2001 has resulted in steady progress in the United Nations Development Programme’s (UNDP) Human Development Index (HDI), from 0.52 in 1975 to 0.72 in 2001.⁷³ The Index measures life expectancy at birth, adult literacy, school enrollments, and standard of living.

China does much better relative to other countries on the HDI than it does on the index for civil and political rights. As expected given the high correlation between wealth and social and economic rights ($r=.92$), China outperforms low-income India on all measures, including infant mortality, life expectancy, and primary school enrollment.⁷⁴ Most notably, China’s high score on the UNDP Poverty Index (26), relative to its already relatively high HDI ranking (104), indicates that China has done quite well on tackling extreme poverty given limited resources.⁷⁵ Thus, although nearly half of the Chinese population lives on less than US\$2 per day, the actual standard of living in China, as measured by the

⁷³United Nations Development Programme (UNDP), *Human Development Index*, at http://www.undp.org/hdr2003/indicator/indic_4_1_1.html (last visited Nov. 8, 2004).

⁷⁴ See *Assessing Human Rights in China*, *supra* note 7, at 117.

⁷⁵ The Human Poverty Index-1 (HPI-1) quantifies poverty in terms of life expectancy, access to food and water, and education as measured by literacy rates.

Human Poverty Index, exceeds countries with higher incomes such as Iran and South Africa.⁷⁶

To be sure, economic growth in China has not benefited everyone 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,⁷⁷ although the number of poor urbanites has also grown dramatically. According to the UNDP, in 1998, the share of national income or consumption of the poorest 10% was 2.4%, and 5.9% for the poorest 20%, whereas the share of the richest 20% was 46.6%, and 30.4% for the richest 10%.⁷⁸ By 2003, the share of the top 20% had risen to 51%.⁷⁹ Meanwhile, 16% live on less than US\$1 per day, while 4.6% live below the national poverty line.⁸⁰ One-fourth of the population, or over 300 million people, lack sustained access to an adequate water source.⁸¹ In addition, 9% of the population is undernourished and 10% of children under five are underweight for their age.

Even with increases in the income gap in recent years, however, China is still roughly on par with the United States and other Asian countries such as Hong Kong, Singapore, the Philippines, and Malaysia, and considerably more egalitarian than Zimbabwe, South Africa, Chile, or Nicaragua.⁸² Moreover, the process of modernization inevitably involves

⁷⁶ Like other socialist countries, China was more successful than the average country at its income level in alleviating poverty and improving human development even before implementing economic reforms. However, like other socialist countries, China was not able to sustain the growth that is necessary, if not sufficient, to maintain improvement in human development. Thus, while economic reforms and the transition to a market economy have resulted in deterioration on some measures such as income equality or led to worse conditions for some people and created new marginalized groups, on the whole economic reforms have led to improvements for the vast majority of Chinese citizens on virtually all main human rights indicators. Moreover, while one can always question whether the government is using the increased wealth in the most effective way to address the many problems that still exist, China continues to outperform the average country in its income bracket on most indicators.

⁷⁷ Allen T. Cheng, *Rich-Poor Gap Among the Worst, Study Finds With City Earnings Triple Rural Incomes, Mainland Is On A Par With Zimbabwe*, S. CHINA MORNING POST, Feb. 26, 2004, at 7 (reporting that a Chinese Academy of Social Sciences (CASS) poll found urban incomes to be 2.8 times higher than rural incomes, although the actual gap is even greater if subsidies for medicine and education for urban workers are included).

⁷⁸ UNDP, *supra* note 73, at 284 (citing survey data from 1998). Unfortunately, data reported varies by year depending on availability, with the year not clearly indicated in some cases. While the World Bank estimates the Gini coefficient in 2002 to be 40.3, the official PRC press has reported higher numbers of 42.4 in 1996 and 45.6 to 45.8 from 1998 to 2000. See Li Heng, *How Wide Is the Gap of China's Individual Income?*, PEOPLE'S DAILY ONLINE, Aug. 31, 2001, at http://english.peopledaily.com.cn/english/200108/31/eng20010831_78962.html.

⁷⁹ *China's Reforms Cause Dramatic Widening Gap Between Rich and Poor*, AGENCE FRANCE-PRESSE, Mar. 9, 2003.

⁸⁰ UNDP, *supra* note 73. See also Jonathan Watts, *China Admits First Rise in Poverty Since 1978*, 2004 WLNR 4591584, GUARDIAN (UK), July 20, 2004 (noting that more than 800,000 farmers slipped below the national poverty line in 2003).

⁸¹ UNDP, *supra* note 73, at 223.

⁸² See *Assessing Human Rights in China*, *supra* note 7, at 118.

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.

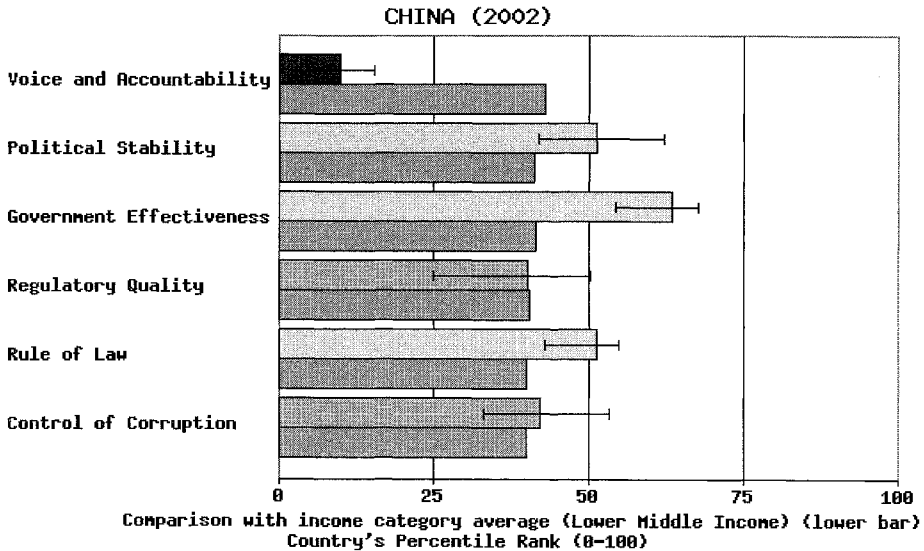
B. Institutional Development: Rule of Law and Good Governance

Critics are often quick to attribute any failure in governance, whether the belated response to SARS or AIDS, widespread corruption, or shortcomings in the implementation of rule of law, to China's political system, while downplaying similar problems in democratic states. However, as indicated in Table 4, China outperforms other countries in its income category, including many democracies, on core good-governance indicators.

China beats the average for lower-middle income countries in political stability, government effectiveness, rule of law, and control of corruption.⁸³ It is about average for regulatory quality, which is biased toward neo-liberal economic principles, and falls far short on the voice and accountability index, which measures civil and political rights.

To be sure, there are still many problems with China's legal system and governance. However, both have improved remarkably in the relatively short time since reforms began in 1978. Moreover, as rule of law is highly correlated with wealth, we can expect that the legal system will continue to improve as China becomes richer. Many of the shortcomings in the legal system are the type of systemic problems faced by many developing countries, including limited access to justice, inefficient and expensive courts, judicial corruption, and judicial incompetence. They will require time and additional resources to overcome.

⁸³ "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. 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. Kaufman et al., *supra* note 6.

Table 4: Quality of Governance in China

Source: D. Kaufmann, A. Kraay and M. Mastruzzi, 2003: Governance Matters III: Governance Indicators for 1996-2002 (<http://www.worldbank.org/ubi/governance/pubs/govmatters3.html>)

C. 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 ready even first-time acquaintances are to criticize the government, disparage top leaders, or call for faster political reforms. Academics regularly publish works criticizing 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, is ever more critical and free-wheeling.

At the same time, the government continues to impose, in some cases ruthlessly and with little regard for legal niceties or international opinion, severe limitations on civil and political freedoms when it deems the exercise of such rights 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 are the time, place, and manner of expression. What may be tolerated in

some circumstances may be subject to greater restrictions when there are certain aggravating factors present, such as attempts to organize across regions, reach an unidentified and potentially large audience via the Internet, or hook up with foreign organizations.

Accordingly, China receives a very low score on civil and political rights – ranking in the lowest 10% of all countries on the World Bank's voice and accountability index. China scores poorly relative to many countries in Asia, and even does poorly relative to its level of economic development.⁸⁴

Chinese leaders argue that given China's huge population and current level of economic development, subsistence is the most fundamental right. Moreover, stability is a prerequisite for the enjoyment of all rights. The need to ensure economic development and stability justifies limitations on the exercise of civil and political rights. This view is widely supported by Chinese citizens and by the majority of citizens in poor developing countries around the world.⁸⁵ Moreover, the government argues that the international human rights regime assumes a liberal democratic framework and emphasizes implicitly, and in some cases explicitly, individual autonomy to a degree not found in other traditions. Greater weight should be placed on the interests of specific groups within society, of the society as a whole and of the state itself. In addition, the emphasis on rights should not obscure the importance of duties and the responsibilities of individuals toward others.

While there is more truth to these points than often allowed by the government's harshest critics, the question remains whether the current limitations on civil and political rights are indeed necessary, proportional, or permitted under any reasonable interpretation of international law or even PRC law.

⁸⁴ See *Show Me the Money*, *supra* note 15, at 84.

⁸⁵ For several studies that show the high value assigned to order in China and the limited demand for democracy, see CHINA'S LONG MARCH, *supra* note 5, at 519. See also Pew Global Attitudes Project, *What Do Asians Think About Their Own Lives?*, in WHAT THE WORLD THINKS IN 2002 (2002), at <http://international.ucla.edu/asia/news/02pewpolla.asp> (recording that 60–84% of Indonesians, Indians, Filipinos, Vietnamese, and Chinese identify economic difficulties as their number one concern, with 37% of Indonesians, 44% of Indians, 57% of Filipinos, 31% of Vietnamese, and 18% of Chinese claiming difficulties in affording adequate food); Yun-han Chu et al., *Halting Progress in Korea and Taiwan*, 12(1) J. DEMOCRACY 122, 127 (2001) (noting that in a 1998 survey 65% of Koreans claimed economic development was more important than democracy, and that in a 1999 survey only one out of seven chose democracy); COMISION DE PROMOCION DEL PERU, LATINOBAROMETRO, OPINION PUBLICO LATINOAMERICANO, 2002, at <http://www.latinobarometro.org/Upload/prensa2002.pdf> (last visited Dec. 20, 2004) (finding that more than twice as many Latin Americans would choose development over democracy, while 50% agreed or strongly agreed with the statement that they would not mind having a nondemocratic government if it could solve economic problems). More than twice as many Chinese felt that economic development was more important than democracy, according to data from a nationwide survey conducted by Tianjian Shi in 2002. See E-mail from Tianjian Shi, Associate Professor of Political Science, Duke University (Aug. 13, 2004) (on file with author).

Civil and political rights may of course be restricted under certain circumstances. 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 (i) be prescribed by law; (ii) serve a legitimate purpose; and (iii) be necessary (in a democratic society). While this analysis is intended to be conducted on a case-by-case basis and 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. A case-by-case approach tends to "skew" the results toward greater civil and political rights, as it is always difficult to see how the actions or words of a particular individual could possibly constitute a threat to the much powerful state, or have much of an impact on a society of 1.3 billion people. Conversely, a wider perspective that considers the range of threats from a variety of different sources tends to support more conservative solutions. A broader approach will usually reflect a more utilitarian concern for aggregate social benefits, whereas a case-by-case approach fits more easily with a more moral absolutist or deontological approach in which rights trump social interests.

Not surprisingly, China and other Asian countries that have adopted a more restrictive interpretation of civil and political rights generally defend their positions not by arguing the specifics of individual cases but by pointing to larger empirical trends; in particular the records of other developing countries that have adopted a restrictive approach to rights as opposed to those that adopt a more liberal approach to civil and political rights. Thus, they point out that the East Asian countries that have succeeded in maintaining stability and social order, achieving economic growth, reducing poverty, and improving people's living standards have adopted a restrictive approach to civil and political rights, whereas other countries in East Asia and elsewhere that have adopted more liberal approaches, at least during their period of rapid economic development, have generally not managed to achieve political stability, economic growth, or the same level of achievement on other measures of rights and human wellbeing. Conversely, rights advocates make their cases by focusing on particular cases.

Neither approach is entirely satisfactory. The latter tends to underestimate the importance of stability and social order to economic growth and the protection of human rights; the former runs the danger of justifying any and all restrictions in the name of political stability, social order, and economic growth. Many people believe, for instance, that democracy is not appropriate for China at this stage and that, given the potential for instability, the government is justified in limiting certain civil and political rights in the name of social order (and, because social

chaos would undermine economic growth, in the name of development). Yet they also believe that the government unduly restricts civil and political rights. A more balanced approach is needed: one that moves beyond these general arguments to consider specific instances of restrictions, while at the same time bearing in mind that developing countries such as China face a number of threats to social order and political stability that wealthy, politically stable countries do not face. Thus, China is likely to reach a different balance, given the horrific consequences for everyone were China to become unstable or Cultural-Revolution-like social chaos to occur again.

As for the first prong of the three-part test, the Constitution, national laws, and administrative regulations provide ample grounds for restricting 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, sometimes an issue, given the broad and vaguely stated provisions on state secrets, subversion, and endangering the state. Still, it is unlikely that most defendants are unaware that they are crossing the line given previous convictions for similar behavior, though many clearly feel that their actions should not have been considered illegal in the first place. 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 has laid out with sufficient detail the acts constituting the offense of a 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 courts, in several cases, have provided little analysis of specific statements alleged to be evidence of subversion.⁸⁶

The restrictions in PRC law generally serve a legitimate purpose on their face, such as the safeguarding of national security, public order, or morality. However, in some cases involving criticism of government policies on AIDS, 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 as a whole. The

⁸⁶ See *Assessing Human Rights in China*, *supra* note 7, at 114.

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 since 9-11, and should be resisted in China and elsewhere.⁸⁷ Moreover, by invoking 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 U.S. apply a higher “least restrictive” standard for limitations of fundamental rights.

The Universal Declaration of Human Rights and other international agreements require restrictions to be necessary *for democratic order*, even though democracy is not required under the International Covenant on Civil and Political Rights. Some of the arguments for free speech in a democracy may not fully apply in a socialist state, although many of the arguments apply at least to some degree. 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 a non-democratic society. In most cases, however, the difference is 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.⁸⁸ Not everyone assigns the same value to civil and political freedoms relative to social order. Social order ranks much higher in the normative hierarchy of most Asian societies than it does in the normative hierarchy of Western societies.

But even accepting such differences, are the restrictions imposed by China necessary? To some extent, the response turns on assessments of China’s stability. Ironically, many liberal critics argue that China is very unstable, which tends to undercut their opposition to restrictions on civil and political rights.⁸⁹ China clearly faces a number of threats to

⁸⁷ Thomas Blanton, *National Security and Open Government in the United States: Beyond the Balancing Test*, in NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE 33 (Campbell Public Affairs Institute ed., 2003).

⁸⁸ See Joseph Chan, *Moral Autonomy, Civil Liberties, and Confucianism*, 52(3) PHIL. E. & W. 281 (2002).

⁸⁹ See generally GORDON G. CHANG, THE COMING COLLAPSE OF CHINA (2001).

stability, including increasing rural poverty, rising urban employment, a weak social security system in conjunction with a 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 outright 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 if they should not be exaggerated.

More generally, authoritarian regimes are particularly stable in the US\$3000 to US\$4000 per capita (PPP) range, more so than any other range, except where per capita income is less than US\$1000.⁹⁰ However, the likelihood of a transition to democracy increases when per capita income is between US\$4000 and US\$6000, with the tipping point at which a regime is more likely to be democratic than authoritarian being US\$4115. China is currently at US\$4020. Thus, China is just beginning to outgrow a highly stable period for authoritarian regimes, and is likely to become increasingly unstable as pressure for political reforms grows.

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.⁹¹ With one-fifth of the world's population, almost of half of whom are living on less than US\$2 per 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.

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 that their acts are not combined with any of the aggravating circumstances that increase the likelihood of unrest. While acknowledging the possibility of instability, many judicial 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 or state interests. It is difficult to see how either a broader categorical approach or a narrower case-specific analysis could justify the

⁹⁰ Adam Prezowski & Fernando Limongi, *Modernization: Theories and Facts*, 49(2) WORLD POL. 155, 161 (1997).

⁹¹ See Blanton, *supra* note 87.

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—including incidents of torture, the lack of transparency and a public trial, and excessively long periods of detention—violate both international and domestic laws. Nor should lawyers be harassed and prosecuted for trying to protect the legitimate rights of their clients, or environmental organizations and human rights groups unable to register or closed simply for raising issues of genuine public concern. Conversely, officials and police who rely on excessive force in dealing with demonstrators, or who turn a blind eye to local thugs who beat and intimidate protesters, should be held liable and severely punished as a deterrent to others.

With legal avenues to seek redress choked off, citizens are taking to the streets in massive, increasingly violent, protests.⁹² It is in the government's own interest to rectify these problems, as they tarnish the government's reputation at home and abroad, undermine the legitimacy of the Party, and run counter to the government's efforts to promote rule of law and maintain social stability.

D. Constitutionalism

At this stage, the main role of the Constitution has been to provide an initial distribution of power among state organs, and thus provide the background against which legal reforms, which frequently affect the balance of power among key state actors, are negotiated. For example, the Constitution now gives the Procuratorate the power to supervise the courts. In recent years, the Procuratorate has interpreted this power to mean that it has the authority to supervise final judicial decisions. As expected, the judiciary has argued that the Procuratorate's power of supervision should be eliminated, or at least limited to general oversight of the court or investigation of particular instances of judicial corruption. According to most judges, the Procuratorate should have no power to supervise individual cases. The courts have also come into conflict with the legislative branch over similar powers of individual case supervision and with administrative agencies over the power of judicial review of

⁹² See generally Richard McGregor, *China's Official Data Confirm Rise In Social Unrest*, FIN. TIMES, Jan. 20, 2006, at 2 (reporting on the announcement by the Public Security Bureau that "[p]ublic order disturbances" increased by 6.6 per cent to 87,000 in 2005 as a whole, but mob violence rose more quickly, by 13 per cent.").

agency decisions. For the time being, most of these conflicts can be solved only through Party intervention.

The Constitution, for a variety of reasons, has played a limited role in litigation to protect individual rights. Social activist litigation in China, while not unheard of, is rare, because China is not a common law system where cases have precedential value, the legal profession in China does not enjoy a high social status, and class action suits of the American variety are not possible under China's civil procedure rules. Moreover, except for one recent civil case involving the right to education, the Constitution has not been considered to be directly justiciable; and even that case did not involve enforcing the Constitution against the government.⁹³ Courts in China also do not have the power to strike down abstract acts in administrative litigation suits; in other words, courts may not overturn a generally applicable administrative regulation or rule simply because it is inconsistent with the Constitution or higher level court decisions. Although the court may apply the higher level law in the particular case, the conflicting lower level regulation remains in place.

The absence of an effective constitutional court or review entity has further reduced the importance of the Constitution as a source of rights protection. In any case, we should not place too much faith in the establishment of a constitutional court as a way to ensure the protection of rights. Even if there were a constitutional court or similar entity, it is doubtful that the Constitution would be interpreted in a liberal way given the prevailing statist socialist conception of rule of law, the existing threats to social order combined with support from both the ruling regime and broad public for stability, and the non-liberal orientation of the majority of Chinese citizens.

Nevertheless, the Constitution has served those inside and outside government as a source of empowerment for legal institutions and the development of constitutional norms.⁹⁴ In particular, the Constitution has played a role in establishing broad grounds of legality, accountability, and justice; which activists and reformers have then drawn on to push for reforms.

For example, activists, including several law professors, based their calls to eliminate Custody and Repatriation (收容遣送, *shourong qiansong*) (where migrants without residence permits could be held in administrative detention centers or sent back to the countryside without a

⁹³ See generally Shen Kui, *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case"*, 12 PAC. RIM L. & POL'Y J. 199 (2003).

⁹⁴ Michael William Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 N.Y.U. J. INT'L L. & POL. 1 (2002); CAI DINGJIAN, *THE SOCIAL TRANSFORMATION AND THE DEVELOPMENT OF CONSTITUTIONALISM IN CONTEMPORARY CHINA* (unpublished manuscript on file with author).

habeas corpus right to appeal before a judge) on general constitutional principles of equality and freedom of movement. They also pointed out the faulty legal basis for this practice. Whereas national laws required that all limitations of personal freedom be based on national laws passed by the National People's Congress, lower level administrative regulations provided the only legal basis for Custody and Repatriation.⁹⁵

The Constitution has also provided the normative basis for a series of discrimination cases. In one 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.⁹⁶ In another case, a person infected with Hepatitis B recently won an administrative litigation suit when he was denied a post as a civil servant because of his disease.⁹⁷ Other employment discrimination cases have challenged height, gender, and age restrictions.

Citizens have also drawn on constitutional principles to uphold privacy claims. In a much publicized case, a Shanxi couple was awarded damages after police stormed into their bedroom while they were watching an adult movie and a scuffle broke out between the husband and police, resulting in injuries to the husband.⁹⁸

To be sure, some of these cases have been dismissed on technical grounds, including lack of jurisdiction, failure to apply to the proper court, or the lack of authority to overturn an abstract administrative act. Many of these features are typical of the more limited authority of courts in civil law systems to "make law." Nor do these cases involve political dissidents or the right to free speech. Parties who invoke the Constitution to criticize the government or call for greater democratization have been

⁹⁵ See 国务院, 城市流浪乞讨人员收容遣送办法 [STATE COUNCIL, MEASURES FOR THE CUSTODY AND REPATRIATION OF URBAN VAGRANTS AND BEGGARS], May 12 Sess. (1982).

⁹⁶ For details, see 俞梅荪: 从教育部当被告的两案看招生制度创新的迫切性 [Yu Meisun, *On the Exigency of Renovating the College Recruiting System, Judging From the Two Cases Where the Ministry of Education is the Defendant*], 大纪元 [THE EPOCHTIMES], Apr. 23, 2004, at <http://www.epochtimes.com/gb/4/4/23/n519496.htm>, which also reports 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 Level and Higher Level People's Courts, the student took his case to the Supreme People's Court, where it is pending. As of the time of publication of this article, further information on the status of this case was not available.

⁹⁷ "乙肝歧视"第一案, 张先著胜诉 [Plaintiff Zhang Xianzhu Wins The First Case Of Discrimination Against Hepatitis B], 野草先锋 [Ye Cao Xian Feng], Apr. 3, 2004, at <http://www.yecao.net/html/20044324116-1.html> (last visited Jan. 14, 2006). 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. *Id.*

⁹⁸ 夫妻看黄碟案续: 当事人律师澄清案件三大疑点 [Case of Couple Watching Porno DVD Continues], 新华网 [XINHUA NEWS AGENCY], Dec. 22, 2002, at http://news.xinhuanet.com/newscenter/2002-12/22/content_666765.htm (last visited Jan. 14, 2006).

notably unsuccessful.⁹⁹ Nevertheless, these cases signal an increasing willingness on the part of plaintiffs, lawyers, and courts to look to the Constitution as the basis for norms and principles that may be applied in particular cases to expand protection of the rights of individuals, subject to current doctrinal and jurisdictional limitations in the authorities of courts.

More generally, the Constitution has provided the basis for a rule of law government in which state actors must act in accordance with law (依法治国, *yifa zhiguo*) and be held accountable for their decisions. The government signaled its commitment to a law-based order by amending the Constitution to expressly provide for a socialist *rule of law* state (社会主义法制国家, *shehuizhuyi fazhi guojia*). The deepening of a constitutional norm of legality is particularly evident in administrative law, where the Administrative Litigation Law allows citizens to challenge government actions to ensure their legality.¹⁰⁰

Legality, however, is a rather narrow and easily satisfied standard. For that and other reasons, the number of administrative litigation cases has remained small relative to the total number of administrative acts that could conceivably be challenged. Nevertheless, the Administrative Litigation Law also stands for the broader principle that government actors must be held accountable.

There are an increasing number of mechanisms to hold government officials and even judges accountable. The Administrative Reconsideration Law allows citizens to challenge government actions on the grounds of both legality and the much wider standard of reasonableness. Administrative supervision committees play a role similar to ombudsmen in other countries. In many places, these committees have merged operationally with Party disciplinary committees, enhancing their authority, if complicating their status, in light of rule of law principles that draw a line between law and politics. People's congresses have increased legislative supervision of administrative agencies and, more controversially, of the courts. The auditing system in particular has been greatly strengthened under the leadership of Li Jianhua, who has disclosed corruption and abuse of power at high levels. Other agencies such as the Environmental Bureau

⁹⁹ For instance, 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. In court, Wang did not contest the facts but argued the acts were legal. See *Assessing Human Rights in China*, *supra* note 7, at 104.

¹⁰⁰ For a more detailed discussion of administrative litigation, administrative reconsideration, and other mechanisms for holding government officials accountable, see CHINA'S LONG MARCH, *supra* note 5, at 394.

and Ministry of Labor and Social Security have also been more aggressive in ensuring compliance with regulations, including environmental and safety standards.

Further, despite limitations, the media has emerged as a powerful source of government supervision, to the point where some commentators have questioned whether the media is becoming a demagogue.¹⁰¹ Citizens have effectively used the media and Internet to hold the government and even the judiciary accountable. The Sun Zhigang case, where a college student was beaten to death while in administrative detention, was widely discussed in the media and on the Internet. The public attention was instrumental in the government's decision to eliminate Detention and Repatriation, the particular form of administrative detention used to detain Sun. Similarly, the Internet was flooded with criticisms of the court for its handling of the "BMW case," where a woman from an allegedly influential family drove her car into a crowd, killing one and injuring twelve. She received a suspended sentence for negligence rather than a much harsher penalty, including perhaps the death penalty, for intentional murder.¹⁰² Many people believed she received the lighter sentence because of her family connections. In the end, the government established a committee to review the case.

The media's job is being made easier by local freedom of information acts. A number of local governments, including those of Shanghai, Guangzhou, Shenzhen, and Beijing, have passed or are reviewing open government information acts. The State Council is also contemplating a national open government information act, and the National People's Congress has included a freedom of information law on the legislative agenda.¹⁰³

The Letters and Visits system provides citizens still another channel to challenge government actions.¹⁰⁴ Most governments, people's congresses, and courts have a Letters and Visits section to handle citizen complaints. Every year, millions of disgruntled citizens write letters to senior government leaders or make a pilgrimage to provincial capitals or Beijing to seek an audience with government officials. The Supreme

¹⁰¹ Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005).

¹⁰² "BMW Case" Reinvestigation Ends, CHINA DAILY, Mar. 28, 2004, at http://www.chinadaily.com.cn/english/doc/2004-03/28/content_318657.htm; see also Christopher Bodeen, *China's 'BMW Collision Affair' Draws Out Anger, Suspicions Against Newly Wealthy*, ASSOCIATED PRESS, Apr. 6, 2004.

¹⁰³ Jamie P. Horsley, *Shanghai Advances the Cause of Open Government Information in China*, FREEDOMINFO.ORG (April 20, 2004), at http://chinalaw.law.yale.edu/shanghai_article.pdf.

¹⁰⁴ See generally Carl Minzner, *Xinfaang: An Alternative to the Formal Legal System*, 42 STAN. J. INT'L L. (forthcoming 2006).

People's Court alone received 152,557 letters and visits in 2002, including 1140 inquiries from the People's Congress, of which 500 petitions were received during the National People's Congress session alone. Some courts devote more personnel to responding to letters and petitions and supervision issues than to actually hearing civil cases.

A related development has been the reliance on mass petitions signed by legal scholars, political scientists, well-known artists, and other elites in a number of high profile cases. As noted, legal scholars submitted a petition calling for the elimination of Custody and Repatriation after the death of Sun Zhigang. The arrests of Liu Di and Du Daobin for Internet postings also resulted in considerable public debate and the submissions of petitions. Liu Di, the Stainless Steel Rat, is a student at Beijing Normal University. She was detained and then released months later for operating a popular Web site and posting satirical articles about the Party, as well as articles calling for the release of Huang Qi.¹⁰⁵ Her arrest led to two online petitions signed by over 3000 people.

Similarly, 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.¹⁰⁶ 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 of probation.¹⁰⁷

The use of petitions to protest government decisions and to challenge court decisions amounts to an indigenous form of litigation activism.¹⁰⁸ It also seems to be an acceptable form of protest, although a

¹⁰⁵ Philip P. Pan, *China Releases 3 Internet Writers, but Convicts 1 Other*, WASH. POST FOREIGN SERVICE, Dec. 1, 2003, at A14.

¹⁰⁶ *Security Official Confirms Chinese Man Arrested for Internet "Subversion"*, BBC MONITORING ASIA PAC., Feb. 17, 2004.

¹⁰⁷ *Internet Dissident Found Guilty of Subversion, but Given Probation*, AGENCE FRANCE-PRESSE, June 11, 2004, available at 2004 WLNR 6934076.

¹⁰⁸ On the uses and limits of social activist litigation in China, see CHINA'S LONG MARCH, *supra* note 5, at 380-83. See also Michael W. Dowdle & Xinxin Yang, *Pragmatic Strategies For The Development Of Clinical Legal Aid In China* (paper prepared for the *Workshop on Regulations Compliance in China: The Lessons of Regulatory Effectiveness*, Georgetown Law Center, Georgetown University, Washington, Nov. 3-5, 2004, arguing that reliance on models of legal aid imported from Western common law jurisdictions that emphasize public impact litigation have met

recent campaign by conservative members of the Party against public intellectuals, combined with the detention and harassment of several leading academic critics, suggests the limits of the government's toleration.¹⁰⁹

It is true that mass petitions that mobilize social opinion are not always successful. While the public uproar in the BMW case led to a high level reinvestigation, the joint panel of provincial level judges and police ultimately found the court's decision was proper. Nor are the Du and Liu cases likely to be a watershed for freedom of speech and expression on the Internet. Both were fairly marginal cases, in that Du apparently got into hot water mainly for advocating rapid democratization in Hong Kong, while Liu wrote satirical criticisms of the CCP but did not expressly call for overthrow of the government or regime change. In contrast, Luo Yongzhong was sentenced to three years' imprisonment 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. Similarly, He Depu was sentenced to eight years in prison for collaborating with the banned China Democracy Party, posting essays on the Internet to 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. That Luo, He, and others would benefit from petitions is unlikely.¹¹⁰ The fact that legal scholars and others were willing to draft petitions for Liu and Du suggests that they saw those cases as stronger, both legally and politically. Petitions are not likely to lead the authorities to change policies deemed particularly important for social stability or other objectives.

Nor are the legal and normative positions taken in petitions always so clear-cut. In the Liu Yong case, where a former NPC delegate depicted as a mafia boss was sentenced to death subject to a two-year suspension, public demand for the death penalty was one of the reasons the Supreme People's Court retried the case and executed Liu.¹¹¹ Indeed, there are many cases where courts have cited the anger of the public and the demand for vengeance to justify death sentences. Over 99% of Chinese favor the death penalty, with over 20% thinking there should be

with limited success and fail to meet the needs of citizens simply for information regarding their rights and how and where to apply for welfare benefits and other benefits provided by the state).

¹⁰⁹ Joseph Kahn, *China Detains 3 Who Criticized Government*, N.Y. TIMES, Dec. 14, 2004, at A10.

¹¹⁰ For further details of these two cases, see *Assessing Human Rights in China*, *supra* note 7, at 104, and the cites therein.

¹¹¹ See generally *Chinese Agency Gives Details of Alleged Crime Boss' Trial, Execution*, BBC INT'L REP. (ASIA), Dec. 23, 2003, (discussing the unusual court procedure); *Death Penalty for China Crime Boss*, CNN, Dec. 21, 2003, at <http://www.cnn.com/2003/WORLD/asiapcf/12/21/china.mafia.ap/>.

more executions.¹¹² Public opinion is therefore a double-edged sword. While the public outcry over the Sun Zhigang case may have played a role in ending Detention and Repatriation, the public's demand to strike hard at crime simultaneously supports a harsh penal system and administrative detentions. Many judges have complained that public uproar over cases interferes with judicial independence and undermines rule of law, either directly by putting pressure on judges to decide a certain way or indirectly by inducing political actors to take up the issue and interfere with the court.

Notwithstanding such concerns, on balance, the use of petitions and the mobilization of social pressure serve positive roles in providing a vehicle for members of society to supervise the judiciary and influence government policies.

The broad constitutional principles of rule of law and government accountability are also evident in the revamping of the approval system. In recent years, the State Council has embarked on an ambitious program to overhaul the administrative review system for foreign and domestic companies alike in an effort to enhance efficiency and reduce corruption. The new approach confirms a change in policy toward greater deregulation and reliance on market forces. The Administrative Licensing Law provided further impetus for a more streamlined system and provided legal guidelines to ensure local officials do not abuse their power. Although the reforms are in part a response to corruption and rent seeking, they also reflect the demands of citizens for fairer, more transparent and efficient processes in setting up companies, creating mortgages, transferring technology, engaging in import and export, and conducting other commercial activities.

Another positive development is an increase in citizen participation in government decision-making processes. The Law on Legislation opened the door for greater public participation in the lawmaking process by calling for hearings and providing for public commentary on important laws. The National People's Congress is now drafting an Administrative Procedure Law that would expand the number of hearings and create other channels and opportunities for citizen participation in the administrative rulemaking and decision-making processes.

Citizens are also becoming more directly involved in the political process by standing for elections. Some individuals have been elected to people's congress without the backing of Party or government sponsors or

¹¹² See Hu Yunteng, *Application of the Death Penalty in Chinese Judicial Practice*, in *IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA* 255 (Chen Jianfu et al. eds., 2002).

their employers. Indeed, some candidates ran because they wanted to push for a particular cause, often related to protection of property interests, reflecting the emergence of strong entrepreneurial middle class; others wanted to test the election laws and promote democratization.

Representatives elected to office have also begun to show a greater concern for the demands of their constituents, with some representatives emerging as populists and social activists. One congressperson received considerable attention when she took out an ad in the local paper soliciting opinions and requests from her constituents. Others have developed a name for themselves by advocating rule of law, democracy, and civil rights. Some are known for their advocacy on behalf of particular interest groups such as migrant workers, laid off workers, or people whose houses have been taken by the government as part of the process of urbanization and development of city centers or industrialization in the countryside. Many of the populist legislators receive assistance from NGOs and lawyers.

More generally, the Party has increased intra-party democracy and sought to enhance the quality of government officials and civil servants by requiring officials to stand for election. Some localities have experimented with election of key Party members, including the Party Secretary. Similarly, some locales have experimented with direct elections at the town level, even though direct elections are currently limited to villages.

All in all, the public has higher expectations of the government. Businesses and a rising middle class expect a government that facilitates economic transactions and a legal system that protects their property rights. Citizens have a greater sense of their rights and are more likely to appeal to law and constitutional principles in making their claims, even if they also rely on appeals to broader normative principles such as justice government and on social networks and other mechanisms to achieve their ends. In response to public pressure and its own internal development logic, the government has taken steps to enhance the professionalism of civil servants, police, judges, and procuratorates.

Taken together, the various changes demonstrate an ongoing transformation in social, legal, and political culture. Upon taking office, Hu Jintao signaled a change by paying particular attention to the Constitution in his speeches, and through such symbolic gestures as holding Constitution Day to celebrate the increasingly important role of the Constitution in Chinese society. In 2004, the Constitution was amended to provide expressly that "the state respects and safeguards human rights," indicating perhaps a greater commitment to effective realization of the rights provided by the Constitution. In any event,

citizens and reform-minded insiders alike are taking advantage of the political space created by the government's invocation of rule of law, constitutionalism, and human rights to force the government to make good on these lofty goals. Although the legitimacy of the government is primarily dependent on continued economic growth complemented by appeals to a rising nationalism, it also depends, to some extent, on the government's ability to make good on its promises to establish rule of law, abide by the Constitution and enhance citizen participation in government.

To be sure, the government has moved cautiously on political reforms, as did other successful Asian states. Clearly, the government does not want to lose control. The direct election of representatives to people's congresses is still limited to the lowest level. Judicial independence remains limited. Despite improvements, many governmental institutions remain weak.

At present, however, the biggest limit on constitutionalism and constitutional reform is arguably that there are wide disputes at a fundamental normative level about the type of society China should be. The differences between statist socialists, soft authoritarians, communitarians, and liberals preclude the type of supermajorities needed to legitimate major constitutional reforms. As a result, while the Constitution has been amended three times since 1982, the changes have either been minor or served to provide a greater role to market forces and the private economy—an area where there is already a sufficiently dominant view among the various groups to legitimize these changes. To the extent that a dominant view exists on civil and political issues, the resulting amendments would produce a non-liberal state rather than a liberal democracy, at least if the process is determined by majoritarian preferences rather than a narrow group of elites.

E. Assessing China

How, then, do we assess efforts to implement rule of law in China to date? The task is more difficult than one might assume, given different possible time frames and standards of assessment.¹¹³

If one takes a snapshot view, there are still many problems. Individuals living and working in the system are likely to be both frustrated by and highly critical of ongoing problems. However, if one

¹¹³ For a fuller discussion of these issues with case studies to illustrate the difficulties, see Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting and Assessing Legal Reforms in China*, 27 MICH. J. INT'L L. (forthcoming 2006).

considers that rule of law took centuries to establish in Western states, the progress that has occurred in China in less than thirty years is remarkable.

Similarly, if one compares China to the United States or Europe, or measures China's performance against the idealistic standards of human rights activists, then one will be bitterly disappointed by "the lack of rule of law in China." However, comparing China's legal system to the standard of other developing countries, one cannot help but be more positive about the accomplishments to date and the prospects for the future.

The outcome of the assessment will also depend on which aspect of the legal system one focuses on. The quality of the judiciary varies by level of the court, region, type of case, and division within the court.¹¹⁴ Many of the problems with judicial corruption and competence are in basic level courts. On the whole, courts in the more developed eastern region and larger cities are more advanced than courts in the western or middle region and in small towns. Of course, a professional, competent, and honest judiciary is only one of the institutions required for a functional legal system; the legislature, police, procuratorate, as well as the legal, notary, and accounting professions are all progressing at different rates and confronting their own set of sometimes overlapping issues.

Different areas of law are also progressing at different paces. The judicial system has particular problems with two types of cases. First, direct threats to the regime arising from political dissidents, potentially disruptive religious-based movements such as Falun Gong, labor activists, and minority rights activists including Tibetans and Xinjiang Muslims claiming the right to self-determination are troublesome. These cases are problematic because they challenge the legitimacy of Party rule and test the limits of a socialist regime that rejects the concept of a neutral state to tolerate ideological diversity. They are also problematic because China is relatively unstable, and thus the government must proceed with caution given the high potential for social chaos.

Criminal law is the other main trouble spot for the legal system. Although a tiny minority of cases are political in nature, the overwhelming majority of criminal law and administrative detention cases are not.¹¹⁵ 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

¹¹⁴ See Hualing Fu, *Putting China's Judiciary into Perspective: Is It Independent, Competent and Fair*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 336, 344-48 (Eric G. Jensen & Thomas C. Heller eds., 2003).

¹¹⁵ See Randall Peerenboom, *Out of the Pan and into the Fire: Well-intentioned but Misguided Recommendations to Eliminate Administrative Detention in China*, 98 NW. U. L. REV. 991 (2004).

is little support for criminal law reforms on the part of the public, because the vast majority of citizens see such reforms as harming, rather than furthering, their interests. Many of the reforms have increased the efficiency and fairness of the legal system as a whole, as indicated in the higher scores on the World Bank's Rule of Law Index. Evaluating the system in terms of broader standards such as justice or human rights is more controversial, because justice means different things to different people, and conceptions of human rights are much contested, especially once one moves beyond the broad wish-list of oftentimes abstract rights in international treaties to how those broad provisions are interpreted and implemented in practice. In China alone, liberals, communitarians, neo-authoritarians, and statist socialists are likely to disagree over many specific issues, from the proper balance between national security and freedom of speech and association to the proper standards of judicial interpretation.¹¹⁶

IV. CONCLUSION: CHINA AND THE EAST ASIAN MODEL—LESSONS AND LIMITS

The dominant view is that efforts to export rule of law have been unsuccessful. Yet reforms have succeeded in many cases, most notably in East Asia, where the legal systems of Japan, South Korea, Taiwan, Hong Kong, and Singapore are all ranked among the best in the world. Indeed, China's success to date suggests that it is not a problem case.

It is, of course, still too early to judge China's efforts to establish rule of law and constitutional democracy, and whether China's rising will be peaceful. We do not know whether China will succeed in its efforts to achieve the same level of wealth as Japan, South Korea, Taiwan, Singapore, or Hong Kong. Nor do we know whether it will be as successful in implementing rule of law as they are, or in achieving the same level of success on human rights measures and other indicators of human wellbeing. Nor do we know when it will democratize in the sense of general elections for representatives in the highest offices or when, if ever, it will obtain a rank of 8-10 on the Polity IV Index. However, China's performance to date has exceeded expectations, and it appears to be progressing well along the same general path of its East Asian neighbors.

To be sure, China today will be judged a failure by those for whom the metrics are civil and political rights and democracy now, not later. But then, other Asian countries would also have been deemed

¹¹⁶ CHINA'S LONG MARCH, *supra* note 5, at 71-109.

failures at similar points in their developmental arc. Indeed, these Asian states might still be judged failures by those who insist on a liberal interpretation of rights, as these countries continue to score lower on civil and political rights measures than others in their income class, and to limit rights in ways consistent with a communitarian or collectivist interpretation. Then again, many in Asia would judge Western countries a failure by their preferred normative standards.¹¹⁷

If China is not a problem case, is it a possible model or paradigm for other developing countries? The success of China and other Asian countries suggests several important lessons for developing countries. First, much of the Washington Consensus was right, especially the points that focused on sound macroeconomic principles for the domestic economy, such as fiscal discipline, a broad tax base, and public expenditure on health care, education, and infrastructure. Other aspects, especially those involving opening the domestic economy to foreign competition or reflecting particular views about the role of the state in the economy popular at the time among neoliberals such as privatization or financial and trade liberalization, have proven to be incorrect or require adaptation by developing states in light of their particular circumstances. China's restrictions on trade and foreign investment, its undervalued currency, and the prudent pace of financial liberalization may upset politicians and their constituencies in wealthier countries, but they have served China's economic interests well—just as the restrictions and subsidies in wealthy countries have served their national economic interests well. China has enjoyed high growth rates without the shocks, including a sharp drop in GDP levels and rise in social unrest, that occurred in Eastern European countries, or the resulting currency crises that affected some of its Asian neighbors. While economists continue to debate the proper sequencing of reforms, China's experience supports a prudential approach that promotes competition within the domestic economy while gradually opening the domestic economy to foreign competition, and delays financial liberalization and in particular capital account convertibility until late in the game.¹¹⁸

Second, developing countries must continue to invest in human resources and institutional development. Contrary to some critical accounts, rule of law is essential for sustained economic growth. This does not mean that poor countries need to import wholesale the political-

¹¹⁷ See Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates about "Values in Asia"*, 14 IND. INT'L & COMP. L. REV. 1, 16 (2003).

¹¹⁸ For a more detailed discussion of the economic policies of China and other Asian countries in light of the Washington Consensus, see RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST (forthcoming 2006).

legal institutions found in wealthy states—they cannot and generally should not. Rather, they must take advantage of local resources to develop institutions that respond to local needs. Over time, there may be more convergence in institutions and practices, as countries become wealthier and are able to afford the costly infrastructure found in developed countries. But even then, there is ample room for institutional variation consistent with general rule of law principles.

Nor does the importance attached to rule of law assume that any legal system actually plays the role or lives up to the ideals sometimes suggested in civics textbooks. Legal systems are complex. There is always considerably more discretion than some of the interpretations of rule of law as a formalistic rule of rules would suggest. But as anyone who attempts to establish a business, or who is arrested, or who wants to challenge the government's seizure of his property in Bangladesh, China, or the United States knows, rule of law matters, and there are discrepancies in how well legal systems meet the generally accepted principles of a thin rule of law.

Third, and related, laws must reflect social norms and conditions. Liberal laws are not always appropriate. When laws are radically at odds with the deeply held views of the dominant majority, they are rarely implemented. This creates a gap between law on the books and actual practice that undermines respect for the legal system and rule of law, and fuels a resentful nationalism in Asia and other developing countries over the neo-imperialistic imposition of contested values.

There is undoubtedly much in the ever-expanding human rights corpus that people in developing states will find attractive. China has accepted much of the human rights agenda, and amended its laws to reflect basic human rights principles. However, it has been selective in its adaptation, rejecting some basic principles, and interpreting or implementing other principles in light of existing conditions. In that sense, it has adopted a pragmatic approach that seeks to particularize what are oftentimes exceedingly broad and abstract principles. In explaining the growing unease about universal claims, András Sajó points out:

[T]he unity of humankind under the current terms, to the extent unity is at all on offer, is unconvincing to those who feel that this comes at their expense
[P]roblems that came up time and again include lack of validity, bias, or even complete irrelevance of universal legal solutions to fundamental human problems
Further, human rights thinking and action often suffer

from the predominance of double standards, arrogance, and incompetent absolutism of bystanders.¹¹⁹

The crisis over universalism reflects concerns over the increasingly specific and comprehensive policy advice being given to developing countries, as well as the increasingly coercive means of enforcement, including the imposition of sanctions and in the extreme the use of military force to effect regime change in the name of humanitarian intervention and democracy.

Fourth, developing countries should take seriously the rising inequality that often attends development. Higher inequality leads to resentment, even if the poor lack the political clout to do much about it. The government should adopt economic reforms that benefit the broad majority first, as China and other East Asian states have done. Sacrificing economic efficiency in the name of equity and social justice is sometimes justified.

Fifth, political stability is essential. China has been able to maintain stability, though it has done so at considerable cost, including to the exercise of civil and political rights. This is a bitter pill to swallow. But sometimes it is necessary to take bitter medicine to ensure healthy development.

Sixth—another bitter pill—democratization at lower levels of wealth is likely to be counterproductive, as it generally has been in other developing countries.

Seventh, and perhaps the most important lesson for other countries, is that a pragmatic approach to reforms is essential. One of the keys to success in China and East Asia more generally has been the willingness to experiment, to try different approaches to solving common problems, and then to evaluate the results free of economic, normative, or political dogma. Although China is often portrayed as a country dominated by the rigid ideology of Leninist socialism, Chinese leaders have in fact been resolutely pragmatic, as captured in Deng Xiaoping's homey advice that the color of the cat matters not as long as it captures mice. Ironically, nowadays, it is the Western liberal democracies, particularly the United States, that appear to be dogmatic and fundamentalist—at least when it comes to giving advice to others on how to run their countries.

While the success of countries following the "East Asian Model" is impressive, there are ample reasons to be cautious about taking the

¹¹⁹ András Sajó, *Introduction: Universalism with Humility*, in *HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM* 1, 5 (András Sajó ed., 2004).

Model as the latest blueprint for developing states. To be sure, there are still doubts about whether there is an East Asian Model at all, and whether it contributed to or impeded economic growth. Nevertheless, the general economic approach appears sound. However, the model is stated at a level of abstractness that still requires policy-makers to make wise choices in light of particular circumstances. East Asian countries have diverged on specific policy issues, and other countries that follow the model will as well.

Even assuming the soundness of the East Asian Model, other countries may not be able or may not want to follow it. Having democratized, most developing states will not be able to restrict civil and political rights in the name of social stability and economic growth as have China and other East Asian states. Citizens of other developing countries may also object that the trade-off is unnecessary or not worth it in their particular case.

In addition, other countries may not have the political or economic power to resist external pressures to open the domestic economy to foreign competition in the way China has. A government's ability to set economic policy is now more constrained by the international trade regime. As a result of the WTO, the increasing reach of intellectual property regimes, and multilateral and bilateral trade agreements, states are less able to favor or protect domestic industries. Increased competition may also undermine the ability of states to protect labor or support a generous social welfare system. The "Wal-Mart phenomenon" may be pushing down margins everywhere, leading to a race to the bottom that undermines the ability of governments to delay political reforms by buying off the populace with higher material standards of living.

More fundamentally, each country faces unique challenges and opportunities. Along the way, many choices are made. Some institutions gain power, some lose power; some segments of society are made better off as a result of reforms, others are made worse off. Accordingly, the story of modernization or law and development in any given country is inevitably a story of politics—and largely local politics at that. Thus, it is not likely that any single model will apply everywhere. At a minimum, any model would need to be adapted in light of local conditions. Indeed, the key to the East Asian success has been a willingness to be pragmatic.

Pragmatism has always been about the application of creativity and intelligence to contemporary problems in order to devise novel and ameliorative solutions—which themselves will lead to further problems and the need to continue to experiment with an open mind. Open-minded reformers cannot afford to look only west or only east, only up to the state

or down to civil society, or only to culture, politics, or economics. A more context-sensitive approach is needed. Fortunately, no one seriously engaged in legal reforms in China seems to think that there is any other alternative.