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Edited by Randall Peerenboom

Human Rights in Asia

A comparative legal study of twelve Asian jurisdictions, France and the USA
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16 Conclusion: comparative reflections on human rights in Asia

Albert H. Y. Chen

Introduction

The twentieth-century Chinese philosopher Fung Yulan examined the discourse and thinking which employed the distinction between “Chinese” and “Western”, and that which employed the distinction between “ancient” and “modern”. He pointed out that the correct description of the task or challenge for China in the twentieth-century is not “Westernization” but “modernization”. He wrote:

Some people say that Western culture is a motor car culture But motor cars did not exist in the West originally [and only came into existence at a certain point in history]. Having motor cars and not having motor cars is a distinction between the ancient and the modern, and not a distinction between China and the West.¹

I think the reference to “motor cars” in this passage can be perfectly substituted with “human rights”.

The concept and discourse of human rights is a unique phenomenon of modernity. It is true that it first appeared, in the course of the seventeenth and eighteenth centuries, in the sphere of Western civilization. But at the time, it represented an intellectual breakthrough and a political revolution. Something new was created that had never before existed in the history of the West – in the civilizations of ancient Greece, ancient Rome or the Middle Ages. The concept and discourse of human rights was a new invention of modern times, just as the steam engine was a new invention of modern times. And, as the contemporary Argentinean thinker C. S. Nino points out, “There can be no doubt that human rights are one of the greatest inventions of our civilization.”²

Scipiles may say that human rights are simply beautiful slogans, and that the reality of gross violations of human rights in modern history and in the contemporary world demonstrates the futility of human rights talk. They also doubt the possibility of the moral progress of humankind, as distinguished from progress in the spheres of science, technology and material life. I do not share this view.

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First, I think the fact that good ideas are often disregarded or not practised does not mean that the ideas are worthless, or that it is not important to distinguish between good ideas and bad ideas. The doctrine of human rights is an idea, as is Nazism, Fascism, the kind of Maoism that led to the Cultural Revolution in China, or the kind of Christianity that formed the background to the inquisitions in medieval Europe. These are different ideas, and they led to different practical consequences in history. History is a tale of suffering, cruelty, oppression and wars, and some ideas do lead to an increase in human suffering, while some others do lead to the alleviation of human suffering.

Second, I think it can be demonstrated that the modern doctrine of human rights is a good idea, and that the development of this doctrine is a sign of moral progress on the part of humankind. The possibility of humanity’s moral growth in the course of history was first raised by Kant in his 1784 essay entitled “Idea for a universal history with a cosmopolitan purpose”.³ Following up on Kant’s speculations, the twentieth-century Italian political thinker Norberto Bobbio writes:

My theory, which is inspired by this extraordinary passage of Kant’s, is that from the point of view of the philosophy of history, the current increasingly widespread and intense debate on human rights can be interpreted as a “prophetic sign” of humanity’s moral progress, given that it is so widespread as to involve all the peoples of the world and so intense as to be on the agenda of the most authoritative international judicial bodies.⁴

Reflecting on the moral resources developed by modern civilization, particularly the concept and discourse of human rights, the contemporary Canadian philosopher Charles Taylor writes that the “imperative of benevolence” associated with the modern human rights consciousness:

[C]arries with it the sense that this age has brought about something unprecedented in history, precisely in its recognition of this imperative. We feel that our civilization has made a qualitative leap, and all previous ages seem to us somewhat shocking, even barbarous, in their apparently untruffed acceptance of inflicted or easily avoidable suffering and death, even of cruelty, torture, to the point of reveling in their display . . . [H]igher standards in the relevant regards [have been] built into the moral culture of our civilization.⁵

Human rights were thus not part of pre-modern Western civilization, but rather human rights are a modern invention. The rise and globalization of human rights thinking may be interpreted as a sign of humanity’s moral progress, a quantum leap in the moral consciousness of humankind. From this perspective, the reception and development in Asia of the theory and

practice of human rights is an integral component of the processes of the modernization of Asia.

In this book, we have included chapters on the theory and practice of human rights in twelve countries or jurisdictions in East Asia, South-East Asia and South Asia, as well as chapters on human rights in France and the USA for the purpose of comparison between East and West. By comparing and contrasting the theory and practice of human rights in various Asian jurisdictions, and by further comparing and contrasting them with that in representative Western jurisdictions, we hope to acquire a better and deeper understanding of the phenomenon of human rights in Asia as it seeks to meet the challenges posed by the globalizing Western civilization, and to develop its own version of modernity.

In this concluding chapter, I will attempt to summarize our findings by: (a) classifying the jurisdictions studied into several categories, with the jurisdictions within each category sharing important similarities; (b) summarizing, comparing and contrasting the human rights situations in the jurisdictions concerned; and finally (c) making some general observations on the theory and practice of human rights in contemporary Asia.

Category 1: France, the USA and Japan

France and the USA may be regarded as the countries of origin of the modern theory and practice of human rights. They are also two of the most highly developed countries of the world. Japan is the most highly developed country in Asia, and its wealth rivals that of any major Western power. In terms of standards of economic development or levels of modernization, the three countries are comparable. I would therefore group them as Category I and seek to compare and contrast them in terms of human rights.

Both the French and the Americans can justifiably feel proud of their historical contribution to modern human rights. The American Declaration of Independence 1776 proclaimed the "self-evident" "truths" that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness". The Bill of Rights, inserted into the Constitution of the USA in 1791, is undeniably one of the most influential constitutional instruments in modern legal history. Of even greater impact on the continent of Europe was the Declaration of the Rights of Man and the Citizen promulgated by the French National Assembly in 1789.

Although the doctrine of human rights became a dominant political and legal theory in France and the USA at more or less the same time, the subsequent trajectories of the theory and practice of human rights in the two countries have diverged considerably. The chapters in this book on the two countries testify to such divergence. For example, the constitutional recognition and protection of human rights in the USA is, even today, still largely confined to the "first generation" human rights – civil and political

rights. On the other hand, the "second generation" human rights – social and economic rights – have gained their place in the French Constitutions of 1946 and 1958.

The Preamble to the 1946 Constitution (which has been reaffirmed in the Preamble to the 1958 Constitution) provides that "The Nation shall assure to the individual and the family the conditions necessary for their development".⁶ On education, it provides that the nation guarantees to children and adults equal access to education, and that it is the state's duty to organize free and public education.⁷ It provides that the nation shall guarantee health care to everybody.⁸ Furthermore, "Any human being who, by reason of age, mental or physical state, or economic situation is incapable of working has the right to obtain means of subsistence from the community".⁹ The constitution also refers to the right to work, although this is a constitutional objective only and not legally enforceable.¹⁰ In France, the right to fair housing is also recognized, though only at the legislative level and not at the constitutional level.¹¹

As pointed out by Dinusha Panditaratne in this volume, in the USA not only are economic and social rights absent from the constitution, but matters such as education and housing are largely outside the domain of the federal government. State constitutions and legislation do guarantee access to public education, although the Supreme Court has held that the right to receive education is not a fundamental right for the purpose of constitutional review under the equal protection clause.¹² On the other hand, the right to health care or medical treatment is neither guaranteed by the federal constitution nor by state constitutions.¹³ Panditaratne notes that "there is more prevalent belief in the USA than in most other industrialized nations that medical treatment is a product for private individuals to consume, rather than a right or entitlement for the government to ensure to all".¹⁴

As regards cultural rights, there seems to be greater sympathy for this concept in the USA than in France. In USA, there are numerous "reservations" in which American Indians and Alaska Native peoples practise self-government and cultural self-determination. In France, as noted by Gray Scoffoni in this volume, the general approach towards ethnic and cultural minorities is that of assimilation: "The conception of equality which prevailed during the Revolution derived directly from the image of a united and homogeneous national community".¹⁵ The constitution presupposes "only one (French) people composed of all citizens without distinction";¹⁶ and the "French concept of equality and of the indivisibility of the Republic prevents any constitutional recognition of minorities or any distinction made on ethnic criteria".¹⁷ Still, although the collective rights of minorities do not receive any constitutional recognition, the French government has introduced legislative and administrative measures on minorities' rights.¹⁸

Apart from their different approaches towards social and economic rights, the Americans and the French also differ in their attitudes to the international system of human rights protection. France is a party to most international

human rights treaties. It is also an active participant in the European systems for the protection of human rights, and is subject to the jurisdictions of the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg.¹⁹ By contrast, although the Department of State of the USA issues annual reports on human rights in countries around the world, the USA has acceded to few international human rights treaties. Some Americans seem to believe that "international human rights treaties are designed for *other* nations, whose domestic institutions fail to adequately protect rights",²⁰ and are thus not relevant to the USA where rights are already sufficiently guaranteed. It has also been pointed out that the USA has opposed the recognition of some concepts as human rights in international law, such as the right to life, the US insistence on the retention of capital punishment²¹ also stands in sharp contrast with the European consensus on the abolition of the death penalty. On the other hand, there do exist important strengths in the US system for the protection of human rights, such as the vibrant system of constitutional judicial review (which compares favourably with the French system which has only become more active since 1971),²² the mature culture of advocacy, lobbying and litigation on issues of rights,²³ and the vigorous protection of civil and political rights. In the area of civil and political rights, the US Supreme Court has in landmark cases like *New York Times v. Sullivan* and *Brandenburg v. Ohio*²⁴ set noble standards which many politically and socially less stable developing countries consider luxuries that they can ill afford. The post-9/11 developments²⁵ in US criminal procedure leave much to be desired, however. The US practice of affirmative action²⁶ to promote the well-being of groups historically suffering from discrimination may also be contrasted with the lack of support for reverse discrimination in France.²⁸

Turning to the case of Japan, the first point to note is that its current constitution, the 1946 Constitution,²⁹ provides for basically the same rights as those set out in the US Bill of Rights, plus social or welfare rights such as the right to receive education, the right to work, and the right to maintain minimum standards of living.³⁰ It also provides for judicial review of the constitutionality of laws. As the chapter in this volume on Japan demonstrates, however, the role of the courts in constitutional judicial review of human rights in Japan is very different from, and is of limited significance compared with, that of the US courts. Conservative Japanese governments, which have continuously been in power in the post-war period, have appointed conservative judges,³¹ and the courts have been consistently deferential to the legislative and executive branches of government.

The record of constitutional judicial review of the Japanese courts has been examined in detail by Shingenori Matsui in this volume.³² He points out that since the 1946 Constitution came into existence, there is a total of only nine cases in which the Japanese Supreme Court has declared legislative or governmental actions unconstitutional, including four cases in which statutes were

invalidated. Most of the cases involve property rights and economic freedoms, and very few of them concern civil and political rights.³³ A comparison of freedom of expression under US and Japanese laws shows that the scope of this freedom is broader in the USA.³⁴ As regards social rights, although they are provided for in the Japanese Constitution, their existence "appears to have no substantive implications since the Japanese Supreme Court has interpreted them as merely a political goal and not a judicial norm"³⁵

On the other hand, focusing exclusively on the courts' performance – or lack of lustrious performance – would belie the reality of human rights in Japan. Japan is a liberal constitutional democracy and one of the wealthiest nations of the world. The level of civil and political rights, as well as economic and social rights, enjoyed by the Japanese is among the highest in Asia, and compares favourably with most Western countries. Matsui has rightly pointed out that human rights in Japan cannot be judged simply by looking at the record of the courts.³⁶ A more complete picture of the human rights scene in Japan would take into account the fact that the concept and discourse of human rights is popular in the media and among many people; litigation on human rights issues has not been rare; and the advocacy of constitutional rights and human rights litigation often serve important moral and political functions.³⁷ On the one hand, it is true that there exist conservative opinions that emphasize social harmony and the collective interest rather than individual rights, and that human rights may not have become deeply rooted in Japanese culture yet.³⁸ On the other hand, the discourse of and social movements inspired by human rights still have vitality in Japanese civil society. Whether Japan will move closer to the West in the domain of human rights or will move farther away remains to be seen.

Category II: Singapore and Malaysia

In his famous book entitled *The End of History and the Last Man*,³⁹ Francis Fukuyama predicted the global victory of liberal democracy, but at the same time noted that "Singapore's authoritarianism . . . is distinctive in two ways. First, it has been accompanied by extraordinary economic success, and second, it has been justified unapologetically, not just as a transitional arrangement, but as a system superior to liberal democracy."⁴⁰ The governments of Singapore and Malaysia have in recent decades been the principal advocates of the doctrine of "Asian values" and human rights, and opponents of the hegemony of Western discourse and standards of human rights. It is argued that it is perfectly legitimate for non-Western countries to develop their own version of human rights, to work out a balance between individuals' interests and the collective interests that may be different from that in the West, and to choose to give higher priority to certain values (such as economic development, social and racial harmony, effective governance and political stability) rather than others (such as liberty of the person, freedoms of speech, association and religion).

As the chapters on Singapore and Malaysia in this volume demonstrate, there are striking similarities between Singapore and Malaysia. Both were under British colonial rule and inherited the English common law. They are neighbours, and Singapore was once part of Malaysia. The texts of their constitutions share much in common. Both are racially divided societies, and both have experienced the threat of communist subversion. In both countries, a governing party or coalition has been continuously in power since the founding of the postcolonial state. Both have actively pursued economic development; in this regard Singapore has been one of the great success stories of Asia, and Malaysia has also performed well in achieving growth and reducing poverty. The two countries have acceded to relatively few international human rights treaties.

Both Singapore and Malaysia had and still have notorious Internal Security Acts which they inherited from the colonial era, though the number of cases of preventive detention under these acts has declined over the years. In both countries, the legislature has introduced ouster clauses to limit the courts' jurisdiction in politically sensitive domains. Even in cases not covered by ouster clauses, where in theory judicial review of legislative and administrative actions is available, the courts have generally been deferential towards the executive and the legislature where matters of civil and political rights are concerned.

In Singapore and Malaysia, the law is at once an instrument for protecting proprietary interests, facilitating commercial transactions and promoting economic growth, and a tool for the restriction of civil and political rights in the interest of political and social stability in a multi-ethnic and multicultural society. For example, Societies Acts exist to control freedom of association. Civil actions in defamation are used to stifle criticism of government leaders and officials by opposition politicians. As H. P. Lee points out in relation to Malaysia, "Despite the aim of eroding [civil and political] rights, the government wants to ensure that it is seen to be acting 'legally': thus, the forms of legal processes are observed in the enactment of draconian legislation and its implementation via the judicial process".⁴¹ This observation is equally applicable to Singapore.

The discussion above should not however be taken to mean that there is no significant difference between Singapore and Malaysia as far as human rights are concerned. For example, at the constitutional level, Malaysia declares Islam to be the religion of the federation; the constitution recognizes the "special position of the Malays".⁴² On the other hand, as U-tam Thio points out in her chapter in this volume, Singapore's constitution only guarantees the rights of individuals and not the collective right of any ethnic group, although the interests of minority groups (such as Malays and Indians) are recognized by the constitution and taken care of at the legislative and administrative levels.⁴³ The education system in Malaysia gives certain privileges to Malays,⁴⁴ but Singapore recognizes no such privileges for any racial group.⁴⁵ Freedom of religion is more limited in Malaysia than in Singapore

in the sense that the constitution identifies Malays with Islam and it is not legally possible for a Malay to change his or her religion.⁴⁶

Singapore and Malaysia seem to provide classic examples of the subordination of civil and political rights to social, economic and cultural rights (or the imperatives of stability and development) where the trade-off between the two groups of rights seems to be successful in the sense that economic prosperity and social and political stability are actually achieved. It would probably be premature, however, to conclude that the situation we have described represents an "equilibrium" state that can and will continue indefinitely. The chapters in this volume on the two countries both suggest that the language and discourse of human rights are not without significance in politics and society.⁴⁷ As suggested by Thio, Singapore's participation, though limited, in the international human rights treaty regime is "promising".⁴⁸ In Malaysia, "NGOs have with great courage highlighted abuses of human rights. The national human rights commission, SUHAKAM, is shaping a role in broadening the education of the public on human rights".⁴⁹ It is therefore conceivable that demands from below and reform from above⁵⁰ may converge to produce improvements for civil and political rights in Singapore and Malaysia in future.

Category III: Taiwan, South Korea and Hong Kong

Historically, Taiwan, Hong Kong and South Korea (referred to as "Korea" below) all belong to the Confucian culture sphere. From the perspective of economic development and modernization, they – together with Singapore – are the "Four Little Dragons" of Asia. They have also been under colonial rule – British in the case of Hong Kong, and Japanese in the case of Taiwan and Korea, with colonial rule in Taiwan and Korea ending at the end of the Second World War, while Hong Kong continued to be a British colony until 1997, when it became a Special Administrative Region of China under a specially designed constitutional arrangement known as "one country, two systems".

Writing about Malaysia in the present volume, H. P. Lee commented that "One can observe a distinct correlation between the measure of enjoyment of civil and political rights and the degree to which an incumbent Prime Minister feels his leadership is threatened".⁵¹ Presumably, the more secure a regime feels about its rule, the more space the regime can allow for civil and political rights. This proposition can, I believe, explain the difference in the human rights situation (particularly civil rights such as physical integrity rights, freedom of speech and freedom of association) between Hong Kong on the one hand and Singapore and Malaysia on the other hand. In the post-war era, particularly after the riots of the 1960s, colonial rule in Hong Kong was relatively secure because the people of Hong Kong knew that the only alternative to British rule was incorporation into communist China – an option far worse than British rule. Thus the British Hong Kong

government could afford to grant the people more extensive civil rights than those granted in Singapore and Malaysia, as well as those granted in Taiwan and Korea in their eras of authoritarian rule.

After the signature in 1984 of the Sino-British Joint Declaration, which provided for Hong Kong's return to China in 1997, further steps were taken to strengthen the system of human rights protection in Hong Kong, culminating in the enactment of the Hong Kong Bill of Rights Ordinance in 1991. As explained by Carole Petersen in this volume, this statute established for the first time in the colony's history a system of judicial review of the constitutionality of legislation on human rights grounds. From 1985 on, the colonial government began in stages to transform the appointed colonial legislature into an elected one. Under the Basic Law of the Hong Kong Special Administrative Region which came into effect in 1997, Hong Kong is not yet a full democracy in the sense that neither the Chief Executive nor all the members of the legislature are elected by universal suffrage (though a portion of legislators are so elected). In this respect Hong Kong has not experienced the full democratization that has taken place in Taiwan and Korea.

Like Singapore and Malaysia, Taiwan and Korea could be regarded, until their democratization began in the late 1980s, as examples of the Asian "developmental state" in which civil and political rights were sacrificed for the sake of economic development (and thus economic and social rights) under the political tutelage of a benevolent dictatorship. But unlike Singapore and Malaysia, where the same party or coalition has been in power since independence, the post-war history of both Taiwan and Korea can be divided into a pre-democratization era and an era of evolving liberal democracy – "democracy" in the sense of the government being produced by free and periodical elections with multiparty competition for votes on the basis of universal suffrage, and "liberal" in the sense that basic civil rights (particularly freedoms of speech, press, association and assembly) are respected so that different voices can be heard in politics and can compete for votes. Both Taiwan and Korea have also experienced the success of a peaceful transfer of political power between different parties pursuant to a free and fair election. They seem to suggest an alternative model of Asian human rights to that provided by Singapore and Malaysia, the former model being to postpone the full enjoyment of civil and political rights until the country becomes wealthy enough, and social and economic rights reach a reasonable level, and only then radically improving civil and political rights.

The improvement in civil and political rights was truly radical in South Korea. As Hahn Chalihak points out in this volume, "the Republic of Korea was commonly seen by the international community, at least up until the late 1980s, as one of the worst violators of human rights".⁵³ Restrictions on physical integrity rights and civil and political rights were considered necessary not only for the sake of economic development but also to respond to the security threat posed by North Korea. Although the human

rights situation "has improved drastically"⁵⁵ in the era of democratization and Korea has not only ratified various human rights treaties but also accepted the Optional Protocol to the International Covenant on Civil and Political Rights,⁵⁴ the National Security Law has so far survived. Under the law people in South Korea may be punished for joining or supporting an "anti-state organization" (the obvious referent being North Korea), praising or encouraging the activities of such an organization, possessing documents with a view to doing so, or failing to inform the authorities after learning that someone has violated the National Security Law.⁵⁵ It has also been pointed out that there are still occasional violations of physical integrity rights by law enforcement officers: "the actual practices of the law enforcement apparatus in many respects still reflect the old ways".⁵⁶

Nevertheless, progress in human rights in Korea is real and undeniable. A constitutional court⁵⁷ and a national human rights commission⁵⁸ have been established in 1988 and 2001 respectively. Human rights NGOs have proliferated in a "civil society finally coming of age".⁵⁹ Steps have also been taken to address and redress the human rights abuses of the past, including providing compensation to victims and the restoration of their honour,⁶⁰ and the establishment of a special commission to investigate suspicious deaths.⁶¹ Drawing its inspiration from the Weimar Constitution, the Korean Constitution (1988) contains many provisions on social and economic rights, thus giving rise to a continuing discussion of the extent to which such rights are directly enforceable.⁶²

In his chapter on Korea in this volume, Hahn notes that the concept of rights was alien to Korea's traditional Confucian culture, and that "the purpose for which early modern Korean intellectuals argued for the recognition of rights was not so much to highlight the inviolability of the individual as to strengthen their state against its potential foreign aggressors".⁶³ Frederick Lin, writing about Taiwan in this volume, makes a similar observation about the rights guaranteed by the Constitution of the Republic of China (1947) which is now in force in Taiwan: "maintaining national security and stability, rather than securing the liberty of individuals, was the main purpose of the ROC [Republic of China] Constitution at its inception".⁶⁴

As in the case of Korea, Taiwan was liberated from Japanese colonial rule at the end of the Second World War. Also as in Korea, Taiwan experienced authoritarian rule during the process of its economic rise as one of the "Four Little Dragons", in both territories, democratization began in the late 1980s, resulting in dramatic improvements in physical integrity rights and civil and political rights. The chapter on Taiwan in this volume highlights the contribution that the Council of Grand Justices – Taiwan's constitutional court – has made to such improvements, and demonstrates the mutual interaction between the work of the constitutional court and the democratic movement in society.⁶⁵ The Council has declared various laws made in the authoritarian era to be unconstitutional,⁶⁶ and it has gained the

trust of the people. Increasing numbers of petitions for constitutional review have been lodged with the Council,⁶⁷ and “the Grand Justices have established their reputation as the protectors of the constitution.”⁶⁸

Many areas of human rights law and practice have been reformed in Taiwan in the era of democratization, including criminal procedure, police powers, administrative procedure, and freedoms of speech, assembly and association.⁶⁹ Reformers have actively borrowed from the human rights jurisprudence of the USA and Germany.⁷⁰ Since Taiwan is not recognized by the international community as an independent sovereign state, however, it has not been able to participate in the international system for the protection of human rights.

At the end of his chapter on Taiwan in this volume, Lin raises the following interesting questions: “An important question relevant to human rights in Taiwan is whether the initial success of implementing human rights in Taiwan implies the compatibility of traditional obligation-based Chinese political theory and rights-based Western theory. Alternatively does it mean that the influence of traditional Chinese culture is lessening in Taiwan.”⁷¹ The same questions may be raised with regard to Hong Kong and Korea. If, as suggested at the beginning of this chapter, human rights are an invention of modernity and have universal significance, then the acceptance and rooting of human rights in Taiwan, Hong Kong, and Korea may be interpreted as an essential element of the modernization of Confucian culture as it responds to the challenges of modernity.⁷²

Category IV: Thailand, the Philippines and Indonesia

Thailand, the Philippines, and Indonesia may be grouped into one category in this study since they are all South-East Asian states which have undergone a political regime transition from authoritarianism to democracy – in 1992, 1986 and 1998 respectively, and are all in the process of consolidating liberal constitutional democracy. In this sense they are similar to Taiwan and Korea which have been grouped under the previous category, Category III. There are however at least three differences between Categories III and IV: first, as a matter of geographical location, Category III territories are in East Asia, and Category IV countries are in South-East Asia. Second, in terms of culture, Category III territories are all within the “Confucian culture sphere”, whereas Category IV states are not (with Buddhism, Catholicism and Islam being the dominant religions in Thailand, the Philippines and Indonesia respectively). Third, in terms of levels of economic development, Category III territories are among the “Four Little Dragons” of Asia, while Category IV countries are trying to catch up, with Thailand taking the lead for the moment.

As a symbol for the victory of liberal democracy and human rights, Thailand’s 1997 Constitution is “an exemplary Constitution.”⁷³ The process of its drafting was “the most democratic ever, with extensive popular

participation throughout the whole country.”⁷⁴ In its constitutional design, the principle of checks and balances was given full effect, with the establishment of various independent institutions such as a constitutional court, an administrative court, an ombudsman and a national human rights commission.⁷⁵ In the spirit of democracy, a requisite number of citizens may initiate a bill themselves.⁷⁶ The constitution affirms the concept of human dignity⁷⁷ and provides for a wide range of constitutional rights, including “community rights” (such as those relating to the management and conservation of natural resources and the environment),⁷⁸ consumers’ rights and the right to resist peacefully acts aimed at overthrowing the constitution.⁷⁹

Since the end of the era of rule by military government, Thailand has seen clear improvements in civil and political rights.⁸⁰ The authoritarian laws of the previous military regime are in the process of being reformed.⁸¹ In the domain of national security, the anti-communist law has been changed.⁸² As Viti Muntarhorn points out in this volume, however, the reforms have not gone far enough. For example, the media are still “shackled”;⁸³ the anti-queued Press Act of 1941 has not been overhauled; “various laws to liberalize media freedoms have not yet been promulgated.”⁸⁴

Muntarhorn also makes a more general point, which is that democracy does not necessarily guarantee human rights;⁸⁵ “the mere fact that an administration is democratically elected does not automatically imply that it will promote and protect human rights in a comprehensive manner.”⁸⁶ In his view, the populist government elected in 2001 has run the country like a corporation, and has in its pursuit of economic development not hesitated in “trampling on the economic, social and environmental rights of some sections of the population.”⁸⁷ It has also committed human rights violations in its war against drug trafficking (in which there have been extra-judicial killings)⁸⁸ and its struggles against the separatists in the south, where three provinces are under martial law.⁸⁹ In other contexts, there are also “many instances of abuse committed by elements of law enforcers, including extra-judicial killings, torture, abductions, and other violence.”⁹⁰

A few years before Thailand underwent its transition to democracy in the midst of popular protest against its military government, the Philippines also experienced the upsurge of “people power” which led to the toppling of the Marcos regime. Indeed, the peaceful revolution of 1986 in the Philippines was the first demonstration of people’s power in East and South-East Asia in the wave of democratization that swept this part of the world in the last two decades of the twentieth century. Filipinos can also justifiably feel proud of their “human rights constitution”⁹¹ of 1987, which represents the fruit of the struggles against dictatorship.

Raul Pangalangan begins his chapter in this volume by pointing out that “Rights-based discourse pervades public debate in the Philippines, owing to a long history of political struggles animated by the values of Western liberalism.”⁹² Liberal values in the Philippines can be traced back to the independence movement against Spain culminating in the 1899 revolution,

and were further cultivated during US rule in the first half of the twentieth century. Although suppressed by the Marcos regime, human rights discourse has become triumphant in the era of democracy, drawing its strength partly from "the historical nightmare with the Marcos dictatorship"⁹⁵ and the lessons of human rights violations in that era. As a result, the Philippines stands out among its neighbours in South-East Asia as a country that is particularly "human rights friendly".

The Philippines is a party to all major international human rights instruments.⁹⁶ Unlike the case in most Asian countries, the Philippines' Constitution recognizes the domestic legal force of treaty obligations, and the human rights enshrined in such treaties may be and have been "invoked directly in Philippine courts and, more significantly, have been made the basis for granting judicial relief."⁹⁵ The constitution itself contains a strong bill of rights (on traditional civil and political rights),⁹⁶ establishes an independent commission on human rights,⁹⁷ and provides a declaration of principles and state policies which sets forth social and economic rights and welfare claims.⁹⁸ Indeed, the courts have held that some of these social and economic rights, such as the right to health and the right to a balanced and healthful ecology, are directly justiciable in the courts.⁹⁹

The Philippines also stands out among its neighbours in allowing a broad scope for freedom of speech and in institutionalizing new modes of political participation. For example, its Supreme Court has used US jurisprudence (such as the "clear-and-present danger test" and the "dangerous tendency test") in interpreting the free speech clause in the constitution,¹⁰⁰ and has adopted the test in *New York Times v. Sullivan*¹⁰¹ for protecting public criticism of officials and public figures from defamation suits.¹⁰² The Congress of the Philippines has enacted the Initiative and Referendum Act to actualize the people's "residual and sovereign authority to ordain legislation directly through the concepts and processes of initiative and of referendum".¹⁰³

Despite significant achievements in democracy and human rights in the Philippines, it has, as Peerenboom points out in the first chapter of this volume, "struggled economically, posting some of the lowest rates in the region".¹⁰⁴ The Filipino case reminds us of the grim reality that the dominance of rights discourse and the practice of liberal democracy do not guarantee economic growth, and the level of social and economic rights enjoyed by people in a country where such rights are justiciable before the courts is not necessarily higher than that in a country where such rights are not justiciable. Thus Pangalangan writes towards the end of his chapter in this volume: "As memories of the martial law years recede, and a new generation emerges that was exposed only to the dismal failure of the democracy that followed, the totalitarian temptation will re-emerge. Already, we hear echoes of the debate during the martial law era under Marcos, between democracy and political rights as 'First World' luxuries, and economic and social rights as 'Third World' imperatives".¹⁰⁵

The Philippines' neighbour, Indonesia, is also a developing country plagued by poverty and corruption. It is however also the most recent showcase of democratization in East and South-East Asia and of democratization in a state that is predominantly Muslim. The process began with the fall of Soeharto in 1998 and culminated in the first direct popular election of the president in 2004. In terms of its participation in the international human rights treaty regime and of the law in the books, Indonesia has become very "human rights friendly". It is a party to most international human rights treaties.¹⁰⁶ Its National Commission of Human Rights was highly regarded even during the Soeharto regime.¹⁰⁷ Human rights NGOs have flourished in recent years.¹⁰⁸ The Human Rights Law of 1999 provides for a wide range of human rights, including the right to self-development, the right to justice, the right to security, the right to welfare, and the rights of women and children, among others.¹⁰⁹ The constitutional amendment of 2000 has also made detailed provisions for human rights, including the right to establish a family, the rights of a child to live, grow and develop, the right to live in physical and spiritual prosperity, the right to work, and the right to social security.¹¹⁰

As Hikmahanto Juwana points out in this volume, Indonesia has seen concrete improvements in the area of civil and political rights.¹¹¹ There is definitely much greater freedom of speech, freedom of the press and freedom of demonstration than before, when criticism was stifled in the name of harmony and consensus.¹¹² On the other hand, the promises of human rights in other domains have remained unfulfilled.¹¹³ There is a huge gap between the law in the books and the law in action. International human rights commitments have been undertaken mainly to satisfy foreign governments and international public opinion without the infrastructure that is necessary for implementation being put in place.¹¹⁴ Human rights law is largely a matter of "political rhetoric".¹¹⁵ Foreign legal models are copied without sufficient attention to the domestic reality.¹¹⁶ The pre-existing culture, mentality, values and attitudes are slow and hard to change.¹¹⁷ "[N]ew legislation has embedded new concepts that require society's values to change abruptly. The legislation may be seen as unfit for the local community as it does not have a good understanding of the new values".¹¹⁸ Finally, separatist movements in several provinces (particularly Aceh) have led to emergency powers being resorted to, with inevitable tolls on human rights.¹¹⁹

Category V: India

As the most populous democracy in Asia and in the world today, India stands out among Asian nations as a major contributor to the theory and practice of human rights. As discussed by Upendra Baxi in this volume, the people of India have been the pioneers in conceiving of human rights as including the collective right of a people to self-determination and to liberate itself from alien rule.¹²⁰ The enactment of the Indian Constitution

in 1949 was an important step forward in the world history of constitutionalism. One of the innovations of the constitution is (in addition to providing for traditional civil and political rights and judicial review for their enforcement) the inclusion of a chapter on directive principles of state policy which provide for various social, economic and cultural rights.¹²¹ Some of these rights, such as the right to education,¹²² the right to food,¹²³ and the right to health,¹²⁴ have since become justiciable and enforceable in the courts. The Indian model provided for judicial enforceability of fundamental rights, and the constitutional obligations on elected officials to pursue the directive principles of state policy “has infected many a post-colonial constitutionalism.”¹²⁵

The Indian judiciary has not only been activist in the defence of social and economic rights. It has also acted in an exemplary manner on many issues of civil and political rights in recent decades. For example, since 1977 the Supreme Court has developed a jurisprudence of due process of law for the protection of the right to life and liberty.¹²⁶ It has “incrementally whittled down the preventive detention powers and processes.”¹²⁷ It has held that the constitutional rights to life and to certain freedoms may not be suspended even in a state of emergency.¹²⁸ Judicial redress is available to give effect to the constitutional right to free and fair elections.¹²⁹ Freedoms of speech and press, as well as the people’s right to know, have been well defended.¹³⁰ On the whole, the judicial role has been “democracy-reinforcing”¹³¹ and “has contributed to the creation and sustenance of social space for different social movements, legal pluralisms, and flourishing diverse fighting faiths.”¹³²

This is not to suggest that all is well with human rights in India. Indeed, as Peeterboom points out in the first chapter of this volume,¹³³ India, together with Indonesia and China, are the Asian countries covered in the present study with the least satisfactory scores on the “political terror scale”, which can be used as a measure of physical integrity rights; he explains the Indian case by ethnic and religious tensions. Communal violence is referred to at several points in Baxi’s chapter on India in this volume. The poverty and social inequality in India are also well known. India, then, is not an example of an Asian country where human rights are perfectly protected; it is, rather, an example of how the notion of human rights can be and has been used in Asia in the struggle for a better tomorrow. Baxi talks about taking “human suffering seriously as the very prerequisite of taking human rights seriously”.¹³⁴ The suffering of the past and the present in India is immense; but human rights provide a hope for the future. Thus as Baxi writes:

Human rights were perceived to provide ways of righting historic, millennial wrongs. Salient among these were: the abolition of practices of discrimination on the ground of “untouchability”, the restoration of the rights of the Indian indigenous peoples, elimination of gender injustice and inequality, the removal of human slavery and bondage,

and the promotion and protection of the rights of religious, cultural, and linguistic minorities. . . . When we recall that all this happened in a world almost altogether bereft of contemporary human rights languages, logics, and paralogics, the normative achievement remains indeed astounding.¹³⁵

Category VI: China and Vietnam

China and Vietnam, together with North Korea which is not covered in the present study, are the only Marxist-Leninist states in Asia, and are among the few remaining Marxist-Leninist states in the world. The ideology of the communist parties of China and Vietnam was originally hostile to the idea of human rights. Until the 1980s, the term “human rights” was within the forbidden zone of scholarly and public discussion in China.¹³⁶ “Human rights” was regarded as a bourgeois notion, originally developed by the bourgeoisie in its struggles against the political and social systems of feudalism; and it was thought that the notion as used in capitalist states was deceptive because in those states, the majority of the people lived under oppression and exploitation and the human rights formally guaranteed by law were illusory. The right to private property, in particular, was considered the source of evils in capitalism.

Another aspect of Marxist and socialist thinking about human rights has been to stress the importance of social and economic rights, and the unity and inseparability of rights and duties¹³⁷ – citizens have rights but at the same time have duties – and the priority of the community’s collective interests over the rights of the individual. Thus in the words of the Chinese Constitution (1982), citizens “in exercising their freedoms and rights, may not infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens.”¹³⁸ Unlike Singapore and Malaysia, China has not relied heavily on the “Asian values” thesis. Instead, in recent years it has emphasized the importance of economic development,¹³⁹ the right to subsistence and social and economic rights, and insisted that the protection of national sovereignty against foreign domination is a prerequisite for the enjoyment of human rights by citizens within the nation.¹⁴⁰

On the ideological front, however, both China and Vietnam in the 1990s abandoned the Marxist-Leninist hostility to the notion and term of “human rights” and have actually embraced “human rights” as a noble and even universal ideal for humankind. The White Paper entitled “Human Rights in China”¹⁴¹ issued by the Chinese State Council in 1991 – the first of a series of White Papers on human rights issues published since then – proclaimed that:

It has been a long-cherished ideal of mankind to enjoy human rights in the full sense of the term. . . . As a developing country, China has

suffered from setbacks while safeguarding and developing human rights. Although much has been achieved in this regard, there is still much room for improvement.

In the Chinese constitutional amendment of 2004, the principle that the state shall respect and protect human rights was written into the constitution,¹⁴² which previously contained the term "citizens' rights", but not "human rights". In the case of Vietnam, the constitutional affirmation of "human rights" came even earlier: in the 1992 Constitution, the principle of respect for and protection of human rights was introduced.¹⁴³ Private property rights and the law-based state (*Rechtsstaat*) also received constitutional recognition in Vietnam in 1992,¹⁴⁴ and in China by its constitutional amendment of 2004 (as regards private property rights) and 1999 (as regards the law-based state and "ruling the country according to law").¹⁴⁵ Both China and Vietnam are now parties to a number of international human rights treaties.¹⁴⁶

There are other similarities between China and Vietnam. They both have a tradition of Confucian culture, and the modern synthesis of Confucianism with socialism has initially produced a society that is unsympathetic to the notion of the individual's rights.¹⁴⁷ Both societies are however in the transition from communist totalitarianism to authoritarianism, with the loosening of the control of the party-state on many aspects of citizens' lives. Market-oriented economic reforms have proceeded in both countries, generating a huge space for private business activities. There is also – at least relative to the pre-reform era – more toleration of speech, expression, religious activities and social groups in domains where the party-state does not feel threatened and the authority of one-party rule is not challenged. All the same, the general impression seems to be that civil and political rights exist only at the sufferance of the authorities and are not effectively secured by legal and judicial institutions. And although past achievements in social and economic rights have been considerable given the initial starting point of extreme poverty, marketization has in recent years resulted in the weakening of state welfare provisions and a greater pressure on families and social groups to take care of themselves,¹⁴⁸ as well as increasing social and economic inequalities among the people.

The deficiencies in civil and political rights in mainland China are well known. For example, human rights violations are sometimes committed in the course of "strike hard" campaigns against crimes,¹⁴⁹ and capital punishment is used for a wide range of offences.¹⁵⁰ The system of "administrative detention" is notorious under which persons may be deprived of their liberty by the police without the need for a trial by an independent court.¹⁵¹ Falun Gong and "house churches" have been persecuted.¹⁵² Strict political controls are imposed in Tibet.¹⁵³ The media, publications and the Internet are subject to censorship; all media and publishing houses are state owned, editors are occasionally dismissed and publications occasionally closed down on political grounds.¹⁵⁴ Organizing groups and advocating non-violent change

of the system of one-party rule would amount to the crime of subversion,¹⁵⁵ independent trade unions are not allowed.¹⁵⁶ State secrets are broadly defined and so is the offence of obtaining or releasing state secrets.¹⁵⁷ On politically sensitive issues, the line between what is permissible and not in speech and publication is sometimes "vague and fluid": "What may be tolerated in some circumstances may be subject to greater restriction when there are certain aggravating factors present."¹⁵⁸

In his chapter on China in this volume, Peerenboom points out that it is internationally recognized that many human rights may be restricted, provided that the restrictions are prescribed by law, for a legitimate purpose and are necessary and proportionate, and he suggests that the restrictions may be different in different countries.¹⁵⁹ He goes on to ask: "But even accepting such differences, are the restrictions imposed by China necessary? To some extent, the response turns on assessments of how stable China is."¹⁶⁰ His view seems to be that it may be justified under certain circumstances to restrict rights in the interest of political and social stability. He believes that in the case of China, there is "a clear majority preference for stability and economic growth, even if that means postponing democracy and tolerating for the time being greater restrictions on civil and political rights. Conversely, there is little support for political dissidents or for liberal democrats . . . Similarly, there is wide support for the war on crime, including the death penalty and other harsh punishments."¹⁶¹ However, he concludes by pointing out that economic reforms should be accompanied by political reforms.¹⁶² In his view, "the government is unnecessarily restrictive of civil society, and would do well to loosen the reins on freedom of speech and assembly", although "the government may still impose more restrictions on civil and political rights than do economically advanced, politically stable Western liberal democracies".¹⁶³

As in the case of China, Vietnam also severely limits civil and political rights in order to maintain one-party rule. Thus religious organizations and activities are tightly regulated by law.¹⁶⁴ The media are state owned, editors are subject to control and politically sensitive issues may not be discussed in the media.¹⁶⁵ Writing on Vietnam in this volume, John Gillespie notes that "even high-ranking party officials and respected war veterans have been charged and jailed for agitating for multi-party democracy".¹⁶⁶ Violations of rules of criminal procedure have occurred, particularly in politically sensitive cases.¹⁶⁷ Lawyers' rights are not respected,¹⁶⁸ although "[p]rocedural evidence from criminal lawyers suggests that greater press scrutiny combined with more clearly defined procedural rules have improved the delivery of criminal justice for those accused of non-political crimes".¹⁶⁹

Gillespie is not completely pessimistic about human rights there. He points out, for example, that even in the midst of extensive controls on freedom of expression, circumvention is sometimes possible, and the "polycentric power structures within the party and state . . . lead to different interpretations about the limits of free speech".¹⁷⁰ The Press Law has made it possible for

journalists to “investigate a wide range of state abuses and social problems”¹⁷¹ and even to “gain sensitive information from state officials and protect sources from investigation”.¹⁷² Journalists compete for breaking news and stories that expose new social problems.¹⁷³ Entrepreneurs enjoy autonomy from direct party supervision, and there has been a “revitalization of groups and associations formed as a result of local initiatives.”¹⁷⁴ “Unauthorized gatherings, even demonstrations, are occasionally tolerated. With the notable exceptions of political and religious organizations, the state is permitting an increasingly diverse group of associations to flourish. World Values Survey data show that Vietnamese are more likely to belong to mass organizations and associations (2.53 groups) than Chinese (0.91) and Japanese.”¹⁷⁵

The nascent civil society has not however led to social movements demanding rights for the people. Gillespie points out that there is in Vietnam “low public demand for democratic rights”;¹⁷⁶ people have little expectation about legal protection of their rights, and prefer to rely on personal connections rather than formal legal processes.¹⁷⁷ “Interest groups . . . have limited opportunities to shape the political morality underlying conferred rights . . . discourses that shape official attitudes to human rights primarily take place within party and state circles.”¹⁷⁸ The communitarian view prevails that a “trade-off between the collective good and private rights”¹⁷⁹ is legitimate, so that “if most people enjoy religious freedom, for example, it does not matter that a few are disenfranchised.”¹⁸⁰ This seems to coincide with Peerenboom’s assessment of the prevailing sentiment in China discussed above.

Concluding reflections

“The swift rise of human rights as a normative benchmark for any government claiming legitimacy must surely rank as one of the most inspiring humanitarian stories of all time.”¹⁸¹ The postmodernist critique of “grand narratives” notwithstanding, I believe it is possible to interpret the story of human rights as a story of social struggles for a better and more humane world with less cruelty, less injustice, more toleration and more benevolence. Just as E. P. Thompson describes the idea of the rule of law as an “unqualified human good”,¹⁸² the same may be said for the idea of human rights. The language of human rights is primarily the language of the weak, the oppressed, the exploited, the disadvantaged, the marginalized, the minorities, those who are discriminated against, and those who have little power and wealth, a language which they and their sympathizers use to struggle for political, social and economic systems in which their human dignity, basic needs and welfare can be better recognized than before.¹⁸³ “The rights discourse is important for political and social mobilization throughout much of Asia.”¹⁸⁴ and “social movements have constructed claims for human rights” and succeeded to varying extents in “getting these rights institutionalized”.¹⁸⁵

In the modern history of the West, the human rights idea was born in the midst of intense religious conflict and in the course of the struggle against royal absolutism, under which rulers could arbitrarily deprive subjects of their life and liberty. Civil and political rights – the “first generation” human rights – can be interpreted as a response to the might of the modern state in which immense power of coercion and violence has been concentrated. As capitalism and industrialization gave rise to new forms of social and economic inequality, the idea of social and economic rights – the “second generation” human rights – was conceived, partly under the influence of socialism and Marxism. These rights may be regarded as a response to – or a “safety net”¹⁸⁶ for – the risks and insecurity posed by the capitalist system to the well-being of ordinary people. Thus it has been pointed out that human rights represent essential protection for people in the modern world of sovereign states and the capitalist market.¹⁸⁷ In so far as the people of non-Western parts of the world also live under the power of the modern state and the merciless operation of the capitalist world system, the doctrine and institutions of human rights are as necessary for their welfare as they are to people in the West.¹⁸⁸

It is therefore natural that although the concept and language of human rights first originated in the modern West, they have been borrowed by people in Asia and elsewhere in their social and political struggles, whether against imperialism and colonialism (thus the invention of the right to self-determination), Western domination of the world economy (thus the invention of the right to development), or against the despotism of their governments (thus reliance on the concept of civil and political rights), or against poverty, economic inequality, social injustice and discrimination (thus reliance on social, economic and cultural rights). Although people may still disagree on the theoretical origins of or philosophical justifications for human rights, the legitimacy of human rights has become unquestioned, or even unquestionable, in the contemporary world, and human rights principles and standards have also become a principal moral criterion for the evaluation of a government’s legitimacy to rule.¹⁸⁹

My own interpretation of the study in this book is that there has been, generally speaking, an ascendancy of human rights discourses, practices and institutions in East, South-East and South Asia in recent times. This can be attributed both to the post-cold war international environment and to endogenous social and political dynamics in several countries. The transition from authoritarianism to democracy in individual countries (the Philippines, Taiwan, South Korea, Thailand, Indonesia, listed roughly according to the chronological order of democratization) has resulted in regimes that are more “human rights friendly” than before – in the sense that they are more willing to participate in the international system for the protection of human rights,¹⁹⁰ as well as readier to engage in domestic law reform to promote human rights, and to establish human rights commissions or constitutional courts. In these countries, there is also evidence – as supplied by

relevant chapters in this book – of a significant improvement of civil and political rights¹⁹¹ since the transition to democracy, although it will take time for a human rights culture to take roots and to grow in some of these countries.¹⁹²

Apart from the abovementioned countries that moved from authoritarianism to democracy, three other Asian jurisdictions covered in the present study can also be considered “human rights friendly” (to the doctrine and institutions of human rights): they are Japan, Hong Kong and India. Japan, a liberal democracy since the end of the war, has inherited significant elements of the US constitutional system of human rights, although social practices differ from that of the USA. Hong Kong’s human rights are still largely shaped by the common law system as strengthened by a bill of rights. India may be regarded as Asia’s stronghold in the defence and development of human rights theory and practice: “Whatever the practices in India, the Indian government has a firm commitment to rights: its constitution provides for a strong protection of rights, its Supreme Court has an exemplary record in upholding rights and freedoms and its newly-established Human Rights Commission has been particularly energetic in pursuing violations of rights”.¹⁹³ Another commentator wrote of the Indian contribution to the world’s human rights jurisprudence as follows:

[I]n most Third World societies the legitimacy of [human] rights will be linked to how economic and social rights are vindicated. In this context the Indian experience of social action litigation is a telling example . . . The facts presented by an Indian reality have forced Indian lawyers and the Indian Supreme Court to take the initiative and create new vistas with regard to human rights in Third World societies . . . Therefore the transportation of the human rights idea to India as part of the Federal Indian constitution has not only given these ideas a new cultural context, but the cultural context itself has enhanced and developed the concept of human rights.¹⁹⁴

In trying to resolve the issues raised by the human rights debate between universalists and relativists, Jack Donnelly has argued that whereas the concepts of human rights have universal validity, contextual and cultural differences may justify divergent interpretations of the concepts within a particular range, as well as further differences in modes of implementation within an even wider range.¹⁹⁵ Joseph Chan draws a similar distinction between the meaning of human rights which should be the same in different countries and cultures, and the weight of and ranking of different rights and the scope of and limits to rights which may all vary from place to place.¹⁹⁶ Charles Taylor believes in the possibility of an overlapping consensus (in the Rawlsian sense) at the global level on norms of governing conduct, though there may be different philosophical background justifications of such norms and different mechanisms for the enforcement of such norms in different societies

and cultures.¹⁹⁷ The human rights situations in the “human rights friendly” countries in East, South-East and South Asia mentioned above seem to testify to the viability of these theories which on the one hand affirm the universality of human rights and on the other hand recognize the legitimacy of differing interpretations and manners of implementation in different countries and societies.

The remaining countries to be considered are China, Vietnam, Singapore and Malaysia. They (together with a few countries not covered by the present volume such as North Korea and Myanmar) are the East and South-East Asian countries which so far have been most resistant to the hegemony of the “Western” discourse of human rights, particularly Western criticisms of their human rights records and Western interference with domestic affairs within their sovereignty. Following the orthodox Marxist approach to human rights, China and Vietnam stress the priority of social and economic rights, particularly the right to subsistence and to development. Lee Kuan Yew of Singapore and Mahahir Mohamad, former prime minister of Malaysia, have been the principal advocates of “Asian values”, suggesting that Western rights-based thinking and individualism are not suitable for Asians who cherish the community and the family, prefer harmony to confrontation, and believe that the requirements of economic development and social and political stability may override certain civil rights of individuals.

The Bangkok Declaration on Human Rights adopted by the governments of more than thirty Asian states in 1993¹⁹⁸ and the Vienna Declaration adopted by the World Conference on Human Rights¹⁹⁹ in the same year both affirm the “indivisibility” and “interdependence” of human rights. One interpretation of “indivisibility” – that preferred by human rights advocates – is that civil and political rights may not be traded off for economic and social rights. However, another possible interpretation – that preferred by countries resisting Western human rights diplomacy – is that there should not be overemphasis on civil and political rights, but sufficient weight should be given to economic and social rights.²⁰⁰ The two interpretations are not necessarily inconsistent with each other. It is possible to recognize the importance of economic and social rights, and at the same time to query whether countries such as China, Vietnam, Singapore and Malaysia are curtailing civil and political rights in circumstances where the restrictions are not necessary nor proportionate for the purpose of ensuring economic and social rights.²⁰¹ As Donnelly points out, the “liberty trade-off” may not be defensible at all.²⁰²

In my view, neither the “priority of economic rights” argument nor the “Asian values” argument is convincing, and none of the four countries concerned (i.e. their governments and those defending them) have developed a coherent theory of human rights that can compete in persuasive power with the dominant paradigm of human rights in contemporary international law as based on human rights treaties to which an overwhelming majority of states in the international community are now parties. As regards the

“economic rights” argument, there is no clear evidence that authoritarianism is more capable of achieving economic development than liberal democracy (there are examples and counter-examples either way),³⁰⁸ and achieving economic development does not necessarily mean fulfilling social and economic rights.³⁰⁴ Indeed, some strategies of economic development may result in gross social and economic inequality and the denial of social and economic rights for many. Even if the postponement of civil and political rights for the sake of economic development was justified in the particular circumstances of a country at a particular historical moment, this does not answer the question of whether it is now time to take steps towards liberalization and democratization (i.e. following the footsteps of South Korea, Taiwan and Thailand where economic growth achieved under authoritarian rule was followed by democratization). Finally, the important intrinsic value of human rights should also be recognized, irrespective of their instrumental value in relation to economic development.³⁰⁵

The “Asian values” argument was developed in the context of the ethnically divided societies of Malaysia and Singapore in which social and racial harmony is essential if political and social stability and economic development are to be secured.³⁰⁶ Some curtailment of civil and political rights in the aftermath of communal riots (as in the case of Malaysia in 1969) is justifiable even according to the standards of international human rights law. But this does not mean that such curtailment can be justified for an indefinite period of time. It is doubtful whether the need for “political stability” can be a valid excuse for the denial or restriction of civil and political rights to such an extent as is practised in some Asian countries. As regards the argument on the basis of culture, the easy answer is that a culture is neither unified nor static. There are different voices – the voices not only of officials but also of workers, peasants, the middle class, intellectuals, businesspersons, NGOs, and so on. The majority voice today may become a minority voice tomorrow. There were times – not too long ago – when Western culture accepted slavery (in the USA), denied women the suffrage, discriminated against people on the basis of race, ethnic origin or religion, or accepted as normal the use of punishment considered cruel and inhuman today. But Western culture now considers these practices clear violations of human rights. Furthermore, what the majority of people in a culture believe in at a particular historical moment may not be right: “it is hard to justify cultural practices of widow-burning, genital mutilation and the oppression of minorities. Human rights become valuable only when they establish higher moral standards than exist in the traditional culture of a society.”³⁰⁷

Thus the future of Asian human rights turns on cases like China, Vietnam, Singapore and Malaysia. I for one am cautiously optimistic. There appears to be a trend in these countries of diminishing resistance to the theory and practice of human rights which have now established themselves in their Asian neighbours. In Malaysia, a national human rights commission has been established and is promoting human rights education. Singapore

has begun to participate in the international human rights regime. The concept of human rights received formal constitutional recognition in Vietnam in 1992, and in China in 2004. Both China and Vietnam are now parties to a number of international human rights instruments.

I believe that these countries’ increasing participation in the international human rights system is of far-reaching significance. The development of international human rights law provides a firm doctrinal and institutional basis for the dialogue of different states, cultures and civilizations on human rights issues, and the search for an “overlapping consensus” on at least some of these issues. As pointed out by a Japanese scholar of international law: “taken as a whole, international human rights instruments can no longer be characterized as products of the West. They are the products of long discussions, controversies, and negotiations among various nations with diverse civilizational backgrounds. . . . [T]hese instruments represent common normative standards based on the widest attainable consensus among nations with diverse perspectives.”³⁰⁸ For example, socialist and communist nations have contributed to the expansion of the concept of human rights to cover social and economic rights. Third World countries have contributed to its further expansion to cover the right to self-determination and the right to development.³⁰⁹ In today’s world, the human rights movement has become a “global politico-cultural movement”³¹⁰ which is not merely Western-inspired but finds indigenous support in many non-Western parts of the world. This, then, is the global and historical context in which our study of human rights in Asia should be placed.

In his essay entitled “Asia as a fount of universal human rights”, Edward Friedmann points out that “the extraordinary rise of human rights sentiment in Asia in the last quarter of the twentieth century could betoken a great future potential for democracy and human rights.”³¹¹ He even believes that “Asia could well become a world leader in human rights in the twenty-first century.”³¹² We may not be as optimistic as he is, but we would probably agree with him that “Asia can be decisive for the future of human rights.”³¹³ Each contributor to this volume is a witness on the state of human rights in the country or jurisdiction concerned. It is for the reader to make his or her assessment of the present situation and future prospects. Human rights postulate a social and political ideal for humankind to realize, and at this historical juncture nobody in East or West, North or South can be complacent about the realization of the ideal. The nobility of the ideal inevitably implies the difficulty in realizing it.³¹⁴ The project of human rights is an unfinished project of modernity. It is to be hoped that Asians, as relative latecomers to modernity, may also contribute their share to this project. Inoue Tatsuo writes of the project of liberal democracy:

I consider liberal democracy to be an unfinished project, not only in the sense that it has yet to be fully implemented, but in the deeper sense that its foundations, principles, and institutional devices leave much to be

clarified, refined, and developed. Asian voices can and should be incorporated into this process.³¹⁵

I believe exactly the same may be said of the unfinished project of human rights.

Notes

- 1 Chen Lai (ed.), *Feng Youlan yueci* [Fung Yulan Anthology], Beijing: Huaxia Press, 1993, p. 105.
 - 2 C. S. Nino, *Etica derechos humanos*, Buenos Aires: Paidós Studio, 1984, p. 13, quoted in Norberto Bobbio, *The Age of Rights*, trans. by Allan Cameron, Cambridge: Polity Press, 1996, p. 64.
 - 3 I. Kant, *Political Writings*, Cambridge: Cambridge University Press, 2nd edn, 1991, pp. 41–53.
 - 4 Bobbio, *supra* note 2, at p. 35.
 - 5 Charles Taylor, *Sources of the Self: the Making of the Modern Identity*, Cambridge, MA: Harvard University Press, 1989, pp. 396–7.
 - 6 Article 8 of the Preamble.
 - 7 Article 13. See chap. 2 of this volume, p. 72.
 - 8 Article 11 of the Preamble. See chap. 2 of this volume, p. 73.
 - 9 Article 11. *Ibid.*
 - 10 *Ibid.*
 - 11 *Ibid.*
 - 12 *San Antonio Independent School District v Rodriguez* (1973) 411 US 1; see chap. 3 of this volume, pp. 100–1.
 - 13 *Ibid.*, p. 101.
 - 14 *Ibid.*, p. 102.
 - 15 See chap. 2 of this volume, p. 74.
 - 16 *Ibid.*, pp. 76–7.
 - 17 *Ibid.*, p. 77.
 - 18 *Ibid.*, pp. 78–9.
 - 19 *Ibid.*, p. 65.
 - 20 See chap. 3 of this volume, p. 87.
 - 21 *Ibid.*, p. 99.
 - 22 *Ibid.*, pp. 95–6.
 - 23 See chap. 2 of this volume, p. 66.
 - 24 See chap. 3 of this volume, p. 85.
 - 25 See the discussion of these cases at pp. 90–1 of this volume.
 - 26 See chap. 3 of this volume, pp. 92–3 and 96–9.
 - 27 *Ibid.*, pp. 107–9.
 - 28 See chap. 2 of this volume, p. 77.
 - 29 This constitution departed significantly from the Meiji Constitution of 1889; see chap. 4 of this volume, pp. 121–3.
 - 30 *Ibid.*, pp. 125–6 and 140.
 - 31 *Ibid.*, p. 148.
 - 32 *Ibid.*
 - 33 *Ibid.*, p. 146.
 - 34 *Ibid.*, pp. 146–7.
 - 35 *Ibid.*, p. 148.
 - 36 *Ibid.*, pp. 148–9.
 - 37 *Ibid.*, p. 149.
-
- 38 *Ibid.*
 - 39 Francis Fukuyama, *The End of History and the Last Man*, New York: The Free Press, 1992.
 - 40 *Ibid.*, p. 241.
 - 41 See chap. 6 of this volume, p. 216.
 - 42 *Ibid.*, p. 192.
 - 43 See chap. 5 of this volume, p. 174.
 - 44 See chap. 6 of this volume, p. 211.
 - 45 See chap. 5 of this volume, p. 174.
 - 46 See chap. 6 of this volume, pp. 196–7.
 - 47 See chap. 5 of this volume (on Singapore) and chap. 6 of this volume (on Malaysia).
 - 48 See chap. 5 of this volume, p. 179.
 - 49 See chap. 6 of this volume, p. 219.
 - 50 For example, it remains to be seen whether Prime Minister Abdullah Ahmad Badawi in Malaysia or the post-Lee Kuan Yew leadership in Singapore might take a different approach to human rights from that adopted by Mahathir bin Mohamad and Lee Kuan Yew.
 - 51 See chap. 6 of this volume, p. 216.
 - 52 See chap. 8 of this volume, p. 265.
 - 53 *Ibid.*, p. 269.
 - 54 *Ibid.*, p. 265.
 - 55 *Ibid.*, p. 279.
 - 56 *Ibid.*, p. 272.
 - 57 *Ibid.*, p. 273; see also Hålm Chahark, “Rule of law in South Korea: rhetoric and implementation”, in Randall Peerenboom (ed.), *Asian Discourses of Rule of Law*, London: Routledge, 2004, p. 385, at p. 395.
 - 58 See chap. 8 of this volume, p. 266.
 - 59 *Ibid.*
 - 60 *Ibid.*
 - 61 *Ibid.*
 - 62 *Ibid.*, p. 286.
 - 63 *Ibid.*, p. 267.
 - 64 See chap. 9 of this volume, p. 300.
 - 65 *Ibid.*, p. 303.
 - 66 *Ibid.*
 - 67 *Ibid.*, p. 302.
 - 68 *Ibid.*, p. 303.
 - 69 See generally chap. 9 of this volume, pp. 298–319.
 - 70 *Ibid.*, p. 315.
 - 71 See chap. 9 of this volume, pp. 298–319.
 - 72 See Albert Chen, “Confucian legal culture and its modern fate”, in Raymond Wacks (ed.), *The New Legal Order in Hong Kong*, Hong Kong: Hong Kong University Press, 1999, chap. 16.
 - 73 See chap. 10 of this volume, p. 321.
 - 74 *Ibid.*
 - 75 *Ibid.*, p. 324.
 - 76 *Ibid.*
 - 77 *Ibid.*, p. 322.
 - 78 *Ibid.*, p. 323.
 - 79 *Ibid.*
 - 80 *Ibid.*, p. 325.
 - 81 *Ibid.*
 - 82 *Ibid.*, p. 332.
 - 83 *Ibid.*, p. 329.

- 84 *Ibid.*
 85 *Ibid.*, p. 325.
 86 *Ibid.*, p. 343.
 87 *Ibid.*, p. 338.
 88 *Ibid.*, p. 325.
 89 *Ibid.*, p. 326.
 90 *Ibid.*, p. 332.
 91 See chap. 11 of this volume, p. 349.
 92 *Ibid.*, p. 346.
 93 *Ibid.*, p. 360.
 94 *Ibid.*, p. 347.
 95 *Ibid.*
 96 *Ibid.*, p. 349.
 97 *Ibid.*
 98 *Ibid.*, p. 350.
 99 *Ibid.*, p. 357.
 100 *Ibid.*, p. 350.
 101 376 US 254 (1964) *Ibid.*
 102 *Ibid.*: see also chap. 3 of this volume, pp. 90 and 91.
 103 See chap. 11 of this volume, p. 351.
 104 See chap. 1 of this volume, p. 22.
 105 See chap. 11 of this volume, pp. 360–1.
 106 See chap. 12 of this volume, p. 364.
 107 *Ibid.*, p. 365.
 108 *Ibid.*
 109 *Ibid.*, p. 376.
 110 *Ibid.*, pp. 364 and 375.
 111 *Ibid.*, p. 379.
 112 *Ibid.*, pp. 371 and 373.
 113 *Ibid.*, p. 365.
 114 *Ibid.*, pp. 365–6.
 115 *Ibid.*, p. 379.
 116 *Ibid.*, p. 380.
 117 *Ibid.*, p. 366.
 118 *Ibid.*, p. 380.
 119 *Ibid.*, pp. 366–70.
 120 See chap. 13 of this volume, p. 390.
 121 *Ibid.*, p. 385.
 122 *Ibid.*, pp. 400–3.
 123 *Ibid.*, pp. 403–4.
 124 *Ibid.*, pp. 404–5.
 125 *Ibid.*, pp. 391–2.
 126 *Ibid.*, p. 392.
 127 *Ibid.*
 128 *Ibid.*, p. 387.
 129 *Ibid.*, pp. 387–8.
 130 *Ibid.*, pp. 395–8.
 131 *Ibid.*, p. 387.
 132 *Ibid.*, p. 384.
 133 See chap. 1 of this volume, p. 9.
 134 See chap. 13 of this volume, p. 406.
 135 See chap. 13 of this volume, pp. 393–4.
 136 See generally Albert Chen, “Human rights in China: a brief historical review”, in Raymond Wacks (ed.), *Human Rights in Hong Kong*, Hong Kong: Oxford University Press, 1992, chap. 5; “Developing theories of rights and human rights

- in China”, in Raymond Wacks (ed.), *Hong Kong, China and 1997: Essays in Legal Theory*, Hong Kong: Hong Kong University Press, 1993, chap. 5.
 137 See chap. 15 of this volume, p. 455.
 138 Art. 51 of the Constitution of the PRC.
 139 Vietnamese leaders have also “stressed that human rights and economic development are inextricably linked”: see chap. 15 of this volume, p. 472.
 140 Vietnam has similarly argued that “without national sovereignty, there will be no human rights”: *Ibid.*, p. 454.
 141 Information Office of the State Council, “Human rights in China”, *Beijing Review*, 4–10 November 1992, pp. 8–45; also available in a booklet form.
 142 See Albert Chen, *An Introduction to the Legal System of the People's Republic of China*, Hong Kong: LexisNexis Butterworths, 3rd edn, 2004, pp. 46, 54.
 143 See chap. 15 of this volume, p. 456.
 144 *Ibid.*, p. 455.
 145 See Chen, *supra* note 142 at pp. 45–6.
 146 See chap. 15 of this volume, p. 454 (on Vietnam); chap. 14, p. 413 (on China); see also Chen, *supra* note 142 at p. 54.
 147 See chap. 15 of this volume, pp. 453–4.
 148 See for example, chap. 15 (on Vietnam) in this volume, p. 467.
 149 See chap. 14 of this volume, p. 418.
 150 *Ibid.*, p. 415.
 151 *Ibid.*, p. 416.
 152 *Ibid.*, pp. 422–3.
 153 *Ibid.*, p. 423.
 154 *Ibid.*, pp. 426–8.
 155 *Ibid.*, pp. 424–5.
 156 *Ibid.*, p. 429.
 157 *Ibid.*, p. 426.
 158 *Ibid.*, p. 421.
 159 *Ibid.*, p. 430.
 160 *Ibid.*, p. 431.
 161 *Ibid.*, pp. 444–5.
 162 *Ibid.*, p. 446.
 163 *Ibid.* Pechoboom suggests that China follows the “Asian developmental model” of limiting civil and political rights before economic development is achieved. He also points out that comparative evidence shows that there is a correlation between the level of civil and political rights and the level of wealth; even so, China performs poorly in civil and political rights relative to the average performance in its income class, and this is has been typical for East Asian states.
 164 See chap. 15 of this volume, pp. 457–61.
 165 *Ibid.*, p. 463.
 166 *Ibid.*, p. 467.
 167 *Ibid.*, p. 470.
 168 *Ibid.*, p. 471.
 169 *Ibid.*
 170 *Ibid.*, p. 466.
 171 *Ibid.*, p. 456.
 172 *Ibid.*, p. 463.
 173 *Ibid.*
 174 *Ibid.*, p. 457.
 175 *Ibid.*
 176 *Ibid.*, p. 479.
 177 *Ibid.*
 178 *Ibid.*, p. 478.
 179 *Ibid.*, p. 477.

- 180 *Ibid.*
- 181 Randall Peerenboom, "Human rights and Asian values: the limits of universalism", *China Review International*, vol. 7, no. 2, Fall 2000, pp. 295–320, at p. 295.
- 182 E. P. Thompson, *Whigs and Hunters: the Origin of the Black Act*, Hammondsworth, Penguin Books, 1977, p. 266.
- 183 See generally Yash Ghai, "Rights, social justice, and globalization in East Asia", in Joanne R. Bauer and Daniel A. Bell (eds), *The East Asian Challenge for Human Rights*, Cambridge: Cambridge University Press, 1999, chap. 10, at p. 249; Yash Ghai, *Human Rights and Governance: the Asia Debate*, Asia Foundation's Center for Asian Pacific Affairs, Occasional Paper No. 1, November 1994, at p. 13; Yash Ghai, "Human rights and Asian values", *Public Law Review*, vol. 9, no. 3, September 1998, pp. 168–82, at pp. 178–9; Jack Donnelly, *International Human Rights*, Boulder, CO: Westview Press, 2nd edn, 1998, p. 20; Michael Freeman, "Human rights: Asia and the West", in James T. H. Tang (ed.), *Human Rights and International Relations in the Asia-Pacific Region*, London: Pinter, 1995, chap. 2, at p. 23; Inoue Tatsuo, "Liberal democracy and Asian orientalism", in Bauer and Bell (book cited above in this note), chap. 1, at p. 31.
- 184 Ghai, "Human rights and Asian values", *supra* note 183, at p. 169.
- 185 Ian Neary, *Human Rights in Japan, South Korea and Taiwan*, London: Routledge, 2002, p. 8.
- 186 Ghai, *Human Rights and Governance: the Asia Debate*, *supra* note 183, at p. 16.
- 187 Donnelly, *supra* note 183, p. 22; Freeman, *supra* note 183, p. 18; Peerenboom, *supra* note 181, p. 304; Randall Peerenboom, "Beyond universalism and relativism: the evolving debates about 'values in Asia'", *Indiana International and Comparative Law Review*, vol. 14, no. 1, 2002, pp. 1–85, at p. 63; Onuma Yasuki, "Towards an intercultural approach to human rights", in Ko Swam Sik *et al* (eds), *Asian Yearbook of International Law*, vol. 7, Kluwer Law International, 2001, pp. 21–81, at p. 61; Ghai, "Rights, social justice, and globalization in East Asia", *supra* note 183, at p. 248.
- 188 Jack Donnelly, "Human rights and Asian values: a defense of 'Western' universalism", in Bauer and Bell, *supra* note 183, chap. 2, at p. 69.
- 189 Donnelly, *International Human Rights*, *supra* note 183, pp. 20, 28.
- 190 For example, it has been pointed out that "Despite many convolutions and points of resistance, there appears to be a gradual trend towards participating in UN human rights regimes by ASEAN states", "broadly correlating with levels of democratization", Philip J. Eldridge, *The Politics of Human Rights in Southeast Asia*, London: Routledge, 2002, pp. 2, 11.
- 191 As regards social and economic rights, the information provided by the chapters in this volume is not detailed and specific enough to form a solid basis for the comparison of different countries' performance in the domain of social and economic rights.
- 192 As pointed out by Eldridge (*supra* note 190, at p. 3), "communal and religious conflict, linked to high levels of criminality and corruption, have been aggravated in several states undergoing turbulent democratic transitions. The challenge, therefore, is to develop a more deep-rooted human rights culture across both civil society and state structures".
- 193 Ghai, "Human rights and Asian values", *supra* note 183, at p. 174.
- 194 Radhika Coomaraswamy, "Comments", in A. Eide and B. Hagvet (eds), *Human Rights in Perspective*, Oxford: Blackwell, 1992, p. 105, at pp. 108–9 (quoted in Ghai, "Human rights and Asian values", *supra* note 183, at p. 180).
- 195 Donnelly, *International Human Rights*, *supra* note 183, p. 34; Donnelly, "Human rights and Asian values: a defense of 'Western' universalism", *supra* note 188, p. 83.
- 516 Albert H. Y. Chen
- 196 Joseph Chan, "The Asian challenge to universal human rights: a philosophical appraisal", in Tang, *supra* note 183, chap. 3.
- 197 Charles Taylor, "Conditions of an unforced consensus on human rights", in Bauer and Bell, *supra* note 183, chap. 5.
- 198 For a summary of and excerpts from the Bangkok Declaration, see Tang, *supra* note 183, appendix 1, and Lynda S. Bell *et al* (eds), *Negotiating Culture and Human Rights*, New York: Columbia University Press, 2001, appendix B.
- 199 See: www.hri.ca/vienna+5/vdpa.shtml.
- 200 Peerenboom, "Beyond universalism and relativism: the evolving debates about 'values in Asia'", *supra* note 187, at pp. 36–7.
- 201 Referring to international human rights jurisprudence, Joseph Chan points out that "To justify restriction of a human right, it has to be shown, firstly, that the right to be restricted is in conflict with a legitimate aim, and, secondly, that the restriction is absolutely necessary and proportional to the protection of that legitimate aim. Many restrictions of human rights which occurred in Asia do not pass these tests". Chan, *supra* note 196, at p. 36.
- 202 Donnelly, "Human rights and Asian values: a defense of 'Western' universalism", *supra* note 187, pp. 72–4; Jack Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca: Cornell University Press, 1989, chaps. 9–10.
- 203 Amartya Sen, "Human rights and economic achievements", in Bauer and Bell, *supra* note 182, chap. 3, at p. 91: "[S]ystematic statistical studies give no real support to the claim that there is a general conflict between political rights and economic performance".
- 204 Ghai, "Rights, social justice, and globalization in East Asia", *supra* note 183; Ghai, *Human Rights and Governance: the Asia Debate*, *supra* note 183, p. 12.
- 205 Sen, *supra* note 203.
- 206 Edward Friedman, "Asia as a fount of universal human rights", in Peter Van Ness (ed.), *Debating Human Rights: Critical Essays from the United States and Asia*, London: Routledge, 1999, chap. 3, at p. 58.
- 207 Ghai, "Human rights and Asian values", *supra* note 183, at p. 173.
- 208 Onuma Yasuki, "Toward an intercultural approach to human rights", in Bauer and Bell, *supra* note 183, chap. 4, at p. 122. See also Onuma, *supra* note 187, p. 73.
- 209 "Taken together, the global human rights regime, built of treaties, establishing these three generations of rights in international law, is a set of standards co-authored jointly by the West, the socialist countries, and the Third World – in effect, the entire world". Peter Van Ness, "Introduction", in Ness, *supra* note 206, p. 1, at pp. 9–10.
- 210 Freeman, *supra* note 183, at p. 17.
- 211 Friedman, *supra* note 206, at p. 73.
- 212 *Ibid.*, p. 57.
- 213 *Ibid.*
- 214 As Yash Ghai writes: "The projection of human rights is difficult in all cultures and political systems, for neither in the abstract nor in practice are all its norms acceptable to all the people, and are frequently regarded as inconvenient by governments. This is why we should regard the universal respect for rights as the collective responsibility of us all". Ghai, "Human rights and Asian values", *supra* note 183, at pp. 169–70.
- 215 Inoue Tatsuo, *supra* note 183, at p. 29.

