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## 16. The political economy and culture of human rights in East Asia

*Michael C Davis*

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### 1 Introduction

East Asian experience has long featured prominently among contemporary debates concerning human rights and development. The authoritarian East Asian challenge to human rights has set human rights in opposition to Asian cultural values and related East Asian developmental needs. While several East Asian countries have defied these claims and established constitutional democracies with liberal human rights protections, several others, including China and other post-communist countries in Southeast Asia, have continued to press these Asian values and developmental arguments to justify authoritarianism and severe limits on human rights. At a time when various UN reports relate achievement of the Millennium Development Goals to human rights and good governance,<sup>1</sup> several newly industrialised countries in East Asia have led the world in economic development.<sup>2</sup> This chapter will argue that full realisation of the promise of these achievements ultimately depends on constitutional reform that embraces democracy, human rights and the rule of law.

East Asian experience has tended to demonstrate that constitutional democracy with liberal human rights protection is the regime type most capable of addressing both cultural values and developmental needs. In the first generation of rapidly developing countries in East Asia, constitutionalism ultimately worked better in constructing the conditions for coping with the diverse interests that emerged in rapidly changing societies. While an East Asian brand of

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<sup>1</sup> Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc A/59/2005 (21 March 2005) ('2005 UN Report'); Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (United Nations, New York, 2004), [www.un.org/secureworld](http://www.un.org/secureworld) at 18 August 2007 ('2004 UN Report'). See also Kofi Annan, 'In Larger Freedom: Decision Time at the UN' (2005) 84 *Foreign Affairs* 63.

<sup>2</sup> See United Nations, *Millennium Development Goals Report 2007* (United Nations, New York, 2007), <http://www.un.org/millenniumgoals/pdf/mdg2007.pdf> at 18 August 2008.

authoritarianism, with strong commitment to good governance, worked reasonably well at managing early-stage development, liberal constitutionalism, with strong human rights and rule of law commitments, is thought to have provided better tools for consolidating these achievements at the high-end stage of economic and political development. In this analysis liberal constitutionalism is understood to include three core components: democratic elections with multiparty contestation; human rights, including freedom of expression; and the rule of law with firm adherence to principles of legality.<sup>3</sup> To these core components I add *indigenisation* as a fourth ingredient. Indigenisation is the local institutional embodiment that connects constitutional government to the local condition.

As a preliminary matter, it is important to note that the human rights debate in East Asia has tended to be situated in domestic constitutional debates. This defies a pattern evident in those parts of the world with multilateral regional human rights regimes. In most regions of the world, regional human rights treaties and supporting institutions have provided the tools for importing human rights standards vertically from regional transnational practice. The East Asian importation of rights, in contrast, has tended to be a process of horizontal or comparative importation of international human rights standards through domestic constitutional debates and interpretations. These human rights debates have especially engaged concerns with Asian cultural values and economic development, making the so-called 'Asian values debate' one of the pre-eminent human rights debates in the world. The cultural dimension often involves local movements to promote democratisation, human rights and the rule of law in the face of Asian cultural relativist claims. The economic dimension engages the contest between authoritarian economic development and liberal democratic reform as competing avenues to economic success.

Through these locally grounded debates, countries in East Asia engage familiar international concerns with civil and political rights and economic and social rights, but do so on distinctly local terms. An authoritarian regime might claim that it provides a more stable environment for development and better protection of local cultural and social values. Local democrats and outside critics may contest this, saying that liberal political freedom, a free press, the rule of law and democratic rights best allow a country to address these developmental and cultural issues. Arguing for civil liberties in the context of development becomes an argument not only for civil liberties but

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<sup>3</sup> Michael C Davis, 'The Price of Rights: Constitutionalism and East Asian Economic Development' (1998) 20 *Human Rights Quarterly* 303; Michael C Davis, 'Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values' (1997) 11 *Harvard Human Rights Journal* 109.

also for better protection of a wide range of economic and social rights, including such familiar rights as basic education, safe working conditions, a good environment, adequate health care and the like. The human rights debate is connected to the debate over political and economic stability. While human rights specialists may be more comfortable with an approach that is centered on the international human rights regime, this approach based on domestic constitutionalism may offer more immediate dividends in developmental terms by being better connected to the local condition. I believe it is precisely this strengthening of the domestic human rights debate fostered under East Asian conditions that offers something of interest to a world trying to deal with human rights concerns in many developmental contexts.

While the East Asian debate and the region would certainly benefit from the development of regional and national human rights institutions, human rights advocacy has to date been fundamentally grounded in domestic constitutional practice.<sup>4</sup> This chapter considers: first, the various claims on behalf of authoritarianism made in the name of Asian cultural values; second, authoritarian and competing East Asian claims relating to economic development; and third, the role of human rights and constitutionalism in addressing these issues. The aim is to look beneath the surface of this East Asian debate to better appreciate its contribution to human rights protection.

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<sup>4</sup> Efforts to reach a regional consensus on human rights have gone on for many years. Most famously, in 1993, as part of the Vienna World Conference on Human Rights process, governments across the entire Asian region reached a consensus on the Bangkok Declaration, which was rather sensitive to Asian cultural and sovereignty concerns: <http://law.hku.hk/lawgovtsociety/Bangkok%20Declaration.htm> at 18 August 2008. The Bangkok Declaration was not converted into an Asian regional human rights charter. More recently ASEAN members have signed an ASEAN Charter, which is essentially a constitution for the ASEAN grouping that was adopted at the 13th ASEAN Summit in November 2007: <http://www.aseansec.org/ASEAN-Charter.pdf> at 18 August 2008. The ASEAN Charter effectively removes the ASEAN non-interference policy and calls for the creation of an ASEAN Human Rights Body for ASEAN members only, making it the first Asian regional human rights treaty that, once fully ratified, will legally obligate members to respect human rights. While a body of experts has been set up to draft the human rights body terms of reference, the generality of the human rights provisions in the Charter (only calling for respect for human rights and the creation of a human rights body) and the lack of commitment among several member states offer little hope of a robust commitment. See Amnesty International, *The ASEAN Charter and Human Rights: Window of Opportunity or Window Dressing?* (Amnesty International, 2008) <http://www.amnesty.org/en/library/asset/ASA03/003/2008/en/384b86ba-4393-11dd-a1d1-2fa8cc41ebbd/asa030032008eng.pdf> at 18 August 2008.

## **2 The Asian values cultural debate**

The central challenge to human rights in East Asia has come from the so-called Asian values cultural debate. It is therefore useful to consider several prominent authoritarian-based East Asian arguments made on behalf of cultural values, including: first, the specific Asian values claims on a substantive level; second, a related cultural prerequisites argument which seeks to disqualify some societies from realisation of democracy and human rights; and third, claims made on behalf of community or communitarian values in the East Asian context. In introducing these Asian values arguments I will offer a critique of each, thereby rebutting the claim that human rights and democracy are culturally unsuited to Asian soil.

First, considering Confucian political values as the dominant value system in East Asia, the main substantive claim is that Asian values are illiberal and anti-democratic, rendering a liberal democratic human rights regime unsuited to the Asian cultural condition. East Asian societies are said to favour authority over liberty, the group over the individual, duties over rights, and such values as harmony, cooperation, order and respect for hierarchy.<sup>5</sup> East Asian supporters of authoritarianism have therefore argued that their societies are unsuited to democracy and Western liberal human rights practices. That authoritarian leaders are usually the promoters of these Asian values claims raises suspicion and has spawned a number of challenges to the claims.

The most obvious challenge is a simple empirical one: in recent decades the most successful Asian countries have generally moved on to adopt liberal democratic human rights regimes. The rapid recent development and consolidation of democracy and human rights in several East Asian societies speaks for itself. Former authoritarian systems, including those in Japan, South Korea, Taiwan, the Philippines and Indonesia all underwent democratic transitions and human rights reform in the last decades of the twentieth century. Hong Kong, Thailand, Mongolia and Malaysia have likewise seriously engaged the democracy and human rights debates through constitutional reform, though obstacles remain. While each of these systems has continued to be plagued with the lingering residue of their authoritarian past, the reformist direction is empirically evident and is indicative of a serious attraction to democracy and human rights in East Asian societies.

Beyond the challenge offered by developments on the ground, activists and analysts have offered a direct intellectual challenge to the Asian values claim, especially attacking its historical and philosophical roots. Chinese scholars of

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<sup>5</sup> Samuel P Huntington, 'Democracy's Third Wave', in L Diamond and M F Platner (eds) *The Global Resurgence of Democracy* (Johns Hopkins University Press, Baltimore, 1993) 3, 15.

the Confucian classics have noted that Confucianism does not embrace unquestioning acceptance of autocratic rule; that it shares with liberalism a commitment to higher norms.<sup>6</sup> Confucian scholar Wejen Chang has especially pointed out the prominent position of the golden rule in Confucian ethics.<sup>7</sup> Chang argues that the harsh autocratic practices of traditional Chinese rulers, sometimes known as neo-Confucianism, were more a structural imperative of dynastic rule and a product of Chinese legalism than a result of traditional Confucian thought.

Other scholars have challenged the motives of those who advance the above noted stereotypes concerning Asian values. Edward Said long ago accused Western societies of 'orientalism', of offering up a conception of Asia as 'the other' in order to justify Western dominance.<sup>8</sup> More recently Asian scholars have noted the tendency of East Asian leaders and scholars to adopt orientalism as a self-defining discourse.<sup>9</sup> In this latter conception of orientalism, East Asian exceptionalism replaced Western imperialism as the aim of Asian values discourse.

A related attack on the importation of Western human rights values is to argue that Asians in the early modern period simply did not understand the liberal Western institutions they were importing. So even when they attempted to import Western human rights values, the strong pull of Asian culture led them to reinterpret such Western concepts in Asian terms, surely marking Asian culture as unsuited to such importation. Such Asian reinterpretation saw democracy and related human rights as merely good government and social welfare, comparable to the Chinese *minben* (people as a basis) tradition.<sup>10</sup> There is no doubt that authoritarian-minded misinterpretations did occur and that Chinese nationalists, following the May 4th Movement, would sometimes distort Western liberal concepts.<sup>11</sup> But recent studies of early modern Chinese

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<sup>6</sup> Victoria T Hui, *War and State Formation in Ancient China and Early Modern Europe* (Cambridge University Press, Cambridge, 2005).

<sup>7</sup> Wejen Chang, 'The Individual and the Authorities in Traditional Chinese Legal Thought' (Paper presented for the Constitutionalism and China Workshop, Columbia University, 24 February 1995). Chang emphasised the Confucian admonition that people should treat others the way they wanted to be treated.

<sup>8</sup> Edward Said, *Orientalism* (Vintage Books, New York, 1979).

<sup>9</sup> Beng-Huat Chua, *Communitarian Ideology and Democracy in Singapore* (Routledge, London, 1995).

<sup>10</sup> Andrew J Nathan, 'Political Rights in Chinese Constitutions' in R R Edwards, L Henkin, and A J Nathan (eds) *Human Rights in Contemporary China* (Columbia University Press, New York, 1986) 77.

<sup>11</sup> The May Fourth Movement was triggered by the decision of the Versailles Conference on 4 May 1919 that the German concession in Shantung was to be transferred to Japan. This caused a political movement marked by Chinese nationalism and

writings demonstrate that Chinese intellectuals often had a good grasp of leading Western liberal thinkers.<sup>12</sup> Accordingly, this argument may simply exaggerate the claimed distortions and the limitations imposed by cultural values.

Much of what is done today in the name of Asian values can be explained more often than not by expediency. This expediency is often accompanied by other ideological constructs, such as Marxism, that have little to do with Asian traditions. Francis Fukuyama points out that the only neo-Confucian authoritarian system evident in recent East Asian experience was the government of pre-war Japan.<sup>13</sup>

A second line of Asian values argument, of more contemporary relevance, claims that societies which lack certain cultural prerequisites are not suited for democracy and human rights. These claims are rooted in earlier studies that sought to measure the degree of civic culture that existed in Western democracies.<sup>14</sup> This is a categorically different kind of attack than the above culture-based arguments because of its basis in social scientific democratic theory. Though such a theory did not aim to support cultural relativist arguments, it was converted into such a challenge in East Asian application. As pointed out by Elizabeth Perry, in comparative studies of political development and democratisation this hopeful line of reasoning became burdened with the pessimistic view that societies that lacked civic culture were not likely to be successful at democratisation.<sup>15</sup> It was as if societies had to pass a test for democracy. This lent further support for authoritarian Asian values reasoning. Did societies burdened with authoritarian Asian values offer poor soil for democracy and the concomitant values associated with human rights and the rule of law?

The tautological reasoning in this line of argument is apparent. To expect a society to develop democratic culture without democracy itself is a questionable proposition. Many societies in East Asia in fact proceeded with democratisation, with or without the allegedly required civic culture. With

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disillusionment with both the West and Chinese tradition. The ideological struggle between socialism and liberal democracy that would later become so important was born here.

<sup>12</sup> Marina Svensson, *The Chinese Conception of Human Rights: The Debate on Human Rights in China, 1898–1949* (Department of East Asian Languages, Lund, 1996).

<sup>13</sup> Francis Fukuyama, 'Confucianism and Democracy' (1995) 6 *Journal of Democracy* 20.

<sup>14</sup> Gabriel A Almond and Sidney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Sage Publications, Newbury Park, 2nd ed, 1989).

<sup>15</sup> Elizabeth Perry, 'Introduction: Chinese Political Culture Revisited' in J Wasserstrom and E Perry (eds) *Popular Protest and Political Culture in China* (Westview Press, Boulder, 1994) 1.

democratic institutions in place the emphasis then shifted to consolidation and further constitutional development.<sup>16</sup> Political elites and academics in East Asia have nevertheless clung tenaciously to this claim concerning prerequisites.<sup>17</sup> The ongoing task of documenting civic culture in East Asia contributes to a mindset that does appear to conceive of a test for democratisation. This has spawned a persistent argument by those in some communities that the local society is not yet ready for democracy and its related liberal human rights institutions.<sup>18</sup>

A third more consciously intended cultural relativist argument, and one that is to some extent more credible, is the community-based thesis. This argument fails to justify the denial of democracy and human rights, but it does raise some concerns that must be addressed by societies hoping to better secure human rights. For convenience here I divide community-based arguments into three categories: romanticisation of community, civic virtue and communitarianism. Romanticisation of traditional communities is a common theme in many modernising societies. The Vietnamese village has been described as ‘anchored to the soil at the dawn of History . . . behind its bamboo hedge, the anonymous and unseizable retreat where the national spirit is concentrated’; while the Russian *mir* was to save Russians from the ‘abhorrent changes being wrought in the West by individualism and industrialization’.<sup>19</sup> One may doubt just how liberating traditional village life was. Many in East Asia have migrated to the cities when they have had the chance. Few in East Asia’s diverse urban societies still have the option of pursuing a traditional village lifestyle.

The second community-based argument relates to civic virtue. In East Asia this argument has ancient roots and is most often associated with Confucianism. Authoritarian leaders and even some academics in the region argue that it is still of great contemporary relevance.<sup>20</sup> In this view, an emphasis on civic virtue, more than liberal institutions, is seen as the key to good government.<sup>21</sup> Even in the West, an emphasis on civic virtue has been a persistent theme throughout the modern period of democratisation.<sup>22</sup> But many

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<sup>16</sup> Juan J Linz and Alfred Stepan, ‘Toward Consolidated Democracies’ (1996) 7 *Journal of Democracy* 14.

<sup>17</sup> Perry, above n 15.

<sup>18</sup> See Davis, above n 3 (1997).

<sup>19</sup> Samuel Popkin, ‘The Political Economy of Peasant Society’ in J Elster (ed) *Rational Choice* (Blackwell, Oxford, 1986) 197.

<sup>20</sup> See Daniel Bell and Chaibong Hahm (eds) *Confucianism for the Modern World* (Cambridge University Press, Cambridge, 2003).

<sup>21</sup> Daniel Bell (ed) *Confucian Political Ethics* (Princeton University Press, Princeton, 2007).

<sup>22</sup> Alexis de Tocqueville, *Democracy in America* (Vintage Books, New York, 1945).

democratic founders have not been confident of the persistence of civic virtue and have sought to craft a democracy that, in James Madison's terms, is safe for the unvirtuous.<sup>23</sup> The earlier founding debate in the Czech Republic between Vaclav Havel, the anti-Communist idealist who emphasised civic virtue, and Vaclav Clause, the pragmatic post-communist politician who was more concerned with interest representation, is likely to be rehearsed in post-communist and post-authoritarian East Asia.<sup>24</sup> As has been true in other parts of the world, civic virtue alone will probably not be enough, nor will its persistence be reliable. While Asian philosophies such as Confucianism have often emphasised virtuous rule, Asian leaders, especially in the modern era, have seldom lived up to this standard, as high levels of corruption and tyranny have often prevailed.

A third community-based claim, which I label here simply as communitarianism, offers the centrality of community as an alternative to liberal individualism. Communitarianism is the most challenging contemporary discourse about community. In simple terms, Western communitarianism has tended to emphasise the common good over liberal individual rights and to emphasise the shared values of community. In this respect, communitarianism in the West has primarily offered a critique of liberalism. It also encompasses the civic virtue ethical components already discussed. There is, however, a wide gap between Western communitarianism and the more prominent forms of East Asian communitarian practice. While Western communitarians are apt to see community as a venue for democratic discourse and liberation, the conservative brand of communitarianism officially promoted in Singapore, and to some extent in China, is hardly a venue for democracy and liberation.<sup>25</sup> In East Asia, communitarian rhetoric has generally come with authoritarian government. Authoritarian East Asian regimes may seek to implant a value system that emphasises passive acceptance of the regime's dictates. Western communitarians, on the other hand, have often felt the need to commit to some liberal values to preserve their discourse and overcome some less acceptable values associated with traditional communities.<sup>26</sup> The Asian conservative variety of communitarianism has resisted increased demands for liberalisation. Those

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<sup>23</sup> Robert D Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press, Princeton, 1993).

<sup>24</sup> Aleksander Smolar, 'From Opposition to Atomization' (1996) 7 *Journal of Democracy* 24.

<sup>25</sup> Beng-Huat Chua, *Communitarian Ideology and Democracy in Singapore* (Routledge, London, 1995).

<sup>26</sup> The so-called liberal-communitarian debate has become a central debate in contemporary political philosophy: C F Delaney (ed) *The Liberalism-Communitarianism Debate* (Rowman and Littlefield Publishers, Lanham, 1994).

committed to addressing communitarian concerns may face the need to deploy some liberal institutions in ways that are responsive to these concerns or challenges.

### **3 The East Asian ‘economic miracle’ and the political economy of human rights**

The East Asian authoritarian developmental model has functioned as the other branch of the ‘Asian values’ debate. For human rights scholars, this is the part of the debate that may indirectly incorporate social and economic rights in its promise of rapid and stable economic development. Although it is really a political economy argument and not about cultural values, it has often been subsumed under the Asian values debate because of its relationship to the political strategies of authoritarian regimes in the area. As with the cultural claim, this political economy claim for authoritarian development has represented a powerful East Asian challenge to universal human rights. First chronicled in a 1992 World Bank report as the ‘East Asian miracle’,<sup>27</sup> the developmental achievement of the first generation of newly industrialised countries in East Asia was fairly evident in the rapid economic growth of the 1970s and 1980s. It has since been evident in the 1990s and the new millennium in the economic growth of the second generation of East Asian rapid developers.<sup>28</sup>

The East Asian authoritarian developmental model first took shape in Japan, whose development model was said to combine soft political authoritarianism with economic liberalisation in a planned capitalist economy. Under this model, economic guidance was offered by an autonomous bureaucracy led by the Japanese Ministry of International Trade and Industry (‘MITI’).<sup>29</sup> In his 1982 book, Chalmers Johnson emphasised the importance of a developmentally oriented elite, organised under a tripartite coalition composed of the dominant Liberal Democratic Party, the bureaucracy, and big business.<sup>30</sup>

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<sup>27</sup> World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (World Bank, Washington DC, 1992).

<sup>28</sup> See Paul Krugman, ‘The Myth of Asia’s Miracle’ (1994) 73 *Foreign Affairs* 62.

<sup>29</sup> See Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy 1925–1975* (Stanford University Press, Stanford, 1982).

<sup>30</sup> *Ibid* 51–2. With substantial state capacity these three worked together to ensure the coherent targeting of certain industries for production of exports under a system of export led growth (‘ELG’): see Chalmers Johnson, ‘Political Institutions and Economic Performance: The Government–Business Relationship in Japan, South Korea, and Taiwan’ in F C Deyo (ed) *The Political Economy of the New Asian Industrialism* (Cornell University Press, Ithaca, 1987) 136. ELG is distinguished from an import substitution industrialisation (‘ISI’) strategy, which aims to substitute local goods for imports, though both usually coexist.

Johnson differentiates between a 'market-rational' (regulatory) and a 'plan-rational' (developmental) capitalist system.<sup>31</sup>

The Japanese model, with varied modifications, was seized upon as the paradigm for East Asian economic development. In non-Japanese hands this model would involve much higher levels of authoritarian autocratic rule with related constraints on democracy and human rights, thus making it a central feature in the East Asian human rights debate.<sup>32</sup> Throughout East Asia authoritarian economic developmental success often offered an excuse for resisting liberal democratic constitutional change and international human rights standards. Such repression was deemed necessary for such regimes to stay in power and maintain their achievements.

This use of the Japanese model as a basis for denying democracy and human rights is paradoxical. For all of its soft authoritarian tendencies, Japan was actually a democracy, though a democracy with long-established one-party electoral dominance. Notwithstanding Johnson's soft authoritarianism characterisations in 1982, Japan had enjoyed for decades a degree of democracy, with a functioning electoral process, a moderately free press, multiple political parties and independent courts. As a democracy, Japan also offered a paradigm for the brand of illiberal democracy with less robust constitutional and human rights institutions that often followed the overthrow of authoritarianism in the region.

The Japanese economic crisis of the 1990s called into question Japan's developmental model. It also served to highlight the inadequacies of the Japanese brand of democracy in assertively coming to grips with Japan's continuing economic problems.<sup>33</sup> A system based on a tradition of bureaucratic planning appears to have difficulty producing politicians and institutions willing to take political responsibility. It has also produced a rather conservative judiciary with weak protection of human rights.<sup>34</sup>

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<sup>31</sup> Johnson, above n 29, 19. A 'plan-rational' system will be marked by bureaucratic disputes and factional infighting while a 'market-rational' system will tend toward parliamentary contest: *ibid* 22–3.

<sup>32</sup> Atul Kohli traces the role that Japanese colonialism played in facilitating this model. Atul Kohli, 'Where do High Growth Political Economies Come From? The Japanese Lineage of Korea's "Developmental State"' in M Woo-Cumings (ed) *The Developmental State* (Cornell University Press, Ithaca, 1999) 93. See Robert Wade, *Government and the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, Princeton, 1990); Stephan Haggard, *Pathways from the Periphery: The Politics of Growth in the Newly Industrializing Countries* (Cornell University Press, Ithaca, 1990).

<sup>33</sup> William H Overholt, 'Japan's Economy, at War With Itself' (2002) 81 *Foreign Affairs* 134.

<sup>34</sup> Michael K Young, 'Judicial Review of Administrative Guidance:

The difficulties that other East Asian economies encountered in the late-1990s East Asian financial crisis demonstrated similar political limitations in other East Asian emergent democracies. In spite of these limitations, the authoritarian developmental model has persisted as a model for the second generation of East Asian developers, including China and the post-Communist emerging developmental states in Southeast Asia. This authoritarian model remains a major challenge to human rights in the region.

This authoritarian developmental challenge in East Asia raises the question of whether authoritarianism with suppression of opposition and low levels of human rights protection will persist as a viable model in the region. The historical experience of the first-generation developers suggests this is unlikely. With economic success the authoritarian developmental state may become its own grave-digger.<sup>35</sup> The circumstances that seem to have been favourable to authoritarian development are more likely to be present in the early stages of development. At an early stage, proper economic policy may sometimes be more important for achieving economic growth than regime type.<sup>36</sup> But, at a later stage, political challenges may arise as workers and other subordinate classes demand a greater say in public affairs through protection of civil liberties and greater security for a range of basic social and economic rights.<sup>37</sup>

Several tendencies may operate at once. As economic elites become globally more competitive they may become less compliant and more corrupt.

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Governmentally Encouraged Consensual Dispute Resolution in Japan' (1984) 84 *Columbia Law Review* 923; Christopher A Ford, 'The Indigenization of Constitutionalism in the Japanese Experience' (1996) 28 *Case Western Reserve Journal of International Law* 3.

<sup>35</sup> See William W Grimes, *Unmaking the Japanese Miracle, Macroeconomic Politics, 1985–2000* (Cornell University Press, Ithaca, 2001); Meredith Woo-Cumings, 'The State, Democracy, and the Reform of the Corporate Sector in Korea' in T J Pempel (ed) *The Politics of the Asian Financial Crisis* (Cornell University Press, Ithaca, 1996) 116; Gregory W Noble and John Ravenhill, 'The Good, the Bad and the Ugly: Korea, Taiwan and the Asian Financial Crisis' in G W Noble and J Ravenhill, *The Asian Financial Crisis and the Architecture of Global Finance* (Cambridge University Press, New York, 2000) 80.

<sup>36</sup> Adam Przeworski and Fernando Limongi, 'Political Regimes and Economic Growth' (1993) 7 *Journal of Economic Perspectives* (1993) 51. They conclude 'that social scientists know surprisingly little: our guess is that political institutions do matter for growth, but thinking in terms of regimes does not seem to capture the relevant differences'.

<sup>37</sup> In defining economic development, in addition to the GDP, economists have paid attention to a range of social welfare indicators such as education, health, gender equality, life expectancy, working conditions, infrastructure and so forth: see Amartya Sen, 'Development: Which Way Now?' in K P Jameson and Charles K Wilbur (eds) *The Political Economy of Development and Underdevelopment* (McGraw Hill College, New York, 1996) 7; United Nations, *Human Development Report 2002*.

They may seek official assistance in insuring a compliant labour force, in securing loans and in otherwise gaining business-friendly policy. To better guard their privileges, they may resist political reform that may undercut their influence or capacity to get things done. David Kang describes the transformation of corruption under the East Asian developmental paradigm from a top-down predatory state with a weak business sector under early authoritarianism to a strong business sector with bottom-up rent-seeking *vis-à-vis* a fractured state in the early democratic period, both involving large amounts of corruption.<sup>38</sup> Corruption may also become a substitute for dysfunctional government institutions.

Both corruption and the overloading of government institutions tend to retard the protection of human rights. With increased wealth and education in the society, ordinary citizens may become resistant to elite monopolisation of power and demand greater transparency, participation and accountability. This requires political and legal institutional reforms, both of which are instrumental to human rights protection. Because of these developments, the trend of the 1990s in the East Asian newly industrialised countries ('NICs') was toward both political and legal reform and toward integration into world markets.

Unfortunately, as the economic crisis served to illustrate, even with democratisation or substantial reforms the problems of corruption and political overload often persisted. Post-authoritarian regimes failed to reform adequately as they attempted to maintain historical strategies of developmental success. Political reformers, such as Japan and South Korea, in the 1990s clung to developmental economic policies of interference in market decisions, even while pursuing political reform.<sup>39</sup> The second-generation developers have sought to exclude political reform entirely, with great implications for human rights. China's economic success without substantial political reform has spawned questions about whether China will somehow defy gravity and not follow its economic success with political reform and liberalisation.<sup>40</sup> China, one of the newest entries in the East Asian developmental achievement, has to date pursued policies of economic liberalisation and legal reform without

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<sup>38</sup> See David C Kang, 'Bad Loans to Good Friends: Money Politics and the Developmental State in South Korea' (2002) 56 *International Organization* 177, 182. Rent-seeking is understood as 'attempts by individuals to increase their personal wealth while at the same time making a negative contribution to the net wealth of their community': Thrainn Eggertsson, *Economic Behavior and Institutions* (Cambridge University Press, New York, 1990) 279.

<sup>39</sup> Overholt, above n 33.

<sup>40</sup> Minxin Pei, *China's Trapped Transition: The Limits of Developmental Autocracy* (Harvard University Press, Cambridge, 2006).

fundamental civil and political rights.<sup>41</sup> This has required suppression of dissent in general and particularly harsh containment of the public protests that have arisen over the denial of basic educational, health, labour and social rights. Many post-communist Southeast Asian countries in the early stages of economic development likewise cling to similar authoritarian repressive strategies with only limited legal reforms.<sup>42</sup> The difficulty with arguments for authoritarianism with law or other confidence-building institutions is that maintenance of such guarantees ultimately may require the security of a liberal democratic regime that fosters transparency, public accountability and human rights.<sup>43</sup>

The issue is not whether the East Asian brand of authoritarian developmentalism worked – it certainly brought about rapid economic development. The question is what political and institutional change will be required as the developmental process goes forward. The state institutions that are favourable to economic development in a free market system are generally believed to be those that afford the degree of order, reliability, transparency and participation sufficient to inspire confidence and thereby encourage entrepreneurial activity and investment.<sup>44</sup> State institutions with a higher degree of autonomy and transparency may better resist rent-seeking demands and secure open channels for the protection of basic rights. For a democracy this requires a sufficiently stable institutional base so that there are neither too many nor too few institutional actors with sufficient power over the decision-making process to either engage in excessive rent-seeking or interfere with efficient public decisions.<sup>45</sup> Both fighting corruption and attracting investment appear to require an institutional base that affords a balance of public decision-making autonomy and accountability. The kinds of institutions that generally are thought to achieve

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<sup>41</sup> Dali L Yang, 'China in 2001, Economic Liberalization and Its Political Discontents' (2002) 42 *Asian Survey* 14. According to a 2002 Organisation for Economic Co-operation and Development (OECD) report, China is experiencing the same economic difficulties as the earlier class of 'economic miracle' states, including high levels of corruption and large problems with bad loans, economic displacement and slow-down. OECD, *China in the World Economy: The Domestic Policy Challenges* (OECD, Paris, 2002).

<sup>42</sup> Andrew MacIntyre, 'Institution and Investors: The Politics of the Economic Crisis in Southeast Asia' (2002) 55 *International Organization* 81.

<sup>43</sup> See Jon Elster, 'Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea' (1993) 71 *Public Administration* 169, 199–201. Elster notes that the strength of the dictator is also his weakness: 'He is *unable* to make himself *unable* to interfere with the legal system whenever it seems expedient': *ibid.*

<sup>44</sup> See Mancur Olson, 'Dictatorship, Democracy, and Development' (1993) 87 *American Political Science Review* 567, 572.

<sup>45</sup> Kang, above n 38, 182; MacIntyre, above n 42.

these objectives relate to maintenance of democracy, human rights and the rule of law, the ingredients of modern constitutionalism.<sup>46</sup>

Theorists commonly use two approaches to connect liberal constitutional democracy and development. They may focus on the statistical correlation between democracy and development, or they may trace the causal mechanisms in the development context that lead to increased demands for democratic representation, rights and legality. The first approach may address both the survivability of democracy under various economic circumstances and the role of democracy in encouraging economic development or dealing with economic crises or shocks. The second approach is concerned with the causal mechanisms by which economic development contributes to democratisation, highlighting the ways in which such democratisation may be responsive to developmental needs.

Regarding statistical correlation, Adam Przeworski and others used world-wide statistics to gauge the survivability of democracies from 1950 to 1990.<sup>47</sup> Such statistics demonstrated a strong correlation between wealth and the survivability of democracy, and gave no support for using dictatorships to achieve development and democracy.<sup>48</sup> Gerald Scully, surveying 115 countries from 1960 to 1980, reversed the dependent variable to consider the effect of democratic institutions on the economy.<sup>49</sup> Scully notes that open societies with human rights, the rule of law, private property, and market allocation grew at three times the rate and were two-and-a-half times as efficient as societies in which the exercise of related rights was largely proscribed.

When it comes to the special circumstances of dealing with economic crisis or shock, Dani Rodrik finds further that democracy offers more favourable results. Rodrik argues that shock will tend to be worse in societies with deep latent conflicts and that democracy affords the ultimate institutions of conflict management.<sup>50</sup> This argument is supported by Donald Emmerson, who argues that, in the financial crisis, affected East Asian countries with high levels of political freedom were generally more resilient.<sup>51</sup> A democracy such as

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<sup>46</sup> Kang, above n 38, 182.

<sup>47</sup> See Adam Przeworski et al, 'What Makes Democracies Endure?' (1996) 7 *Journal of Democracy* 39.

<sup>48</sup> Ibid 44–9.

<sup>49</sup> Gerald W Scully, *Constitutional Environments and Economic Growth* (Princeton University Press, Princeton, 1992) 12–14, 183–4.

<sup>50</sup> See Dani Rodrik, 'Democracy and Economic Performance' (Paper presented at the Conference on Democratization and Economic Reform in South Africa, 16–19 January 1998).

<sup>51</sup> He contrasts the relatively strong recovery of Thailand and South Korea with Indonesia: Donald Emmerson, 'Americanizing Asia?' (1998) 77 *Foreign Affairs* 46, 52. See also Stephan Haggard, 'The Politics of the Asian Financial Crisis' (2000) 11

Taiwan fared better during the height of the crisis and democracies caught by the crisis, such as South Korea and Thailand, bounced back more quickly. Authoritarian China also fared much better, as its financial institutions were largely protected from global currency markets in what began as a currency crisis.

Considering the second approach, Dietrich Rueschemeyer and others argue that quantitative correlative studies reach the right conclusion, but fail to offer a reason.<sup>52</sup> They urge that the case for liberal democracy becomes compelling at a certain stage in the industrialisation process because industrialisation transforms society in a fashion that empowers subordinate classes and makes it difficult to exclude them politically.<sup>53</sup> The subordinate classes, especially the working class, have the greatest interest in democracy and its related rights protections, while the bourgeoisie have every incentive to roll back or restrict democracy.<sup>54</sup> Democracy affords institutions that can deal with diverse interests and the resultant conflicts that emerge.

The path to the demise of the South Korean dictatorship bears a striking resemblance to Rueschemeyer and colleagues' predictions.<sup>55</sup> Authoritarian leadership in South Korea was built on collusion between the military, the political leadership, and the large *chaebol* (local multinational corporations ('MNCs')).<sup>56</sup> The success of development policies under such a narrow coalition brought out a new class force in the 1980s under the banner of the *minjung* (the masses) movement.<sup>57</sup> The Park and Chun regimes' earlier policies of economic liberalisation without political liberalisation brought on the demise of the regime. At the end of 1997, after South Korea's financial collapse, the ruling party, rooted in the past authoritarian regime, was pushed out with the

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*Journal of Democracy* 130; Mark Baird, 'An economy in the balance', *International Herald Tribune* (New York), 19 September 2002, 6.

<sup>52</sup> Dietrich Rueschemeyer et al, *Capitalist Development and Democracy* (University of Chicago Press, Chicago, 1992).

<sup>53</sup> *Ibid* 1.

<sup>54</sup> *Ibid* 7–8, 50, 57–8. 'Capitalist development furthers the growth of civil society – by increasing the level of urbanization, by bringing workers together in factories, by improving the means of communication and transportation, by raising the level of literacy': *Ibid* 6.

<sup>55</sup> See Hagen Koo and Eun Mee Kim, 'The Developmental State and Capital Accumulation in South Korea' in R P Appelbaum and J Henderson (eds) *State and Development in the Asian Pacific Rim* (Sage, Newbury Park, 1992) 121–49. See also Rueschemeyer, above n 52.

<sup>56</sup> See Koo and Kim, above n 55, 144–5. This ruling coalition was decidedly narrower in South Korea than in the post-war Japanese prototype. It did not include the larger base of a popular well-organised political party and employed much more repressive policies.

<sup>57</sup> *Ibid* 145.

election of opposition leader Kim Dae-jung as president.<sup>58</sup> Backroom deals within the elite ruling coalition – what was then called crony capitalism – no longer inspired confidence. As David Kang highlights, both the late authoritarian period and the early democratic period were characterised by high levels of corruption.<sup>59</sup> South Korea was pushed to complete the reform process, to dismantle the developmental economic model that had persisted under democratisation.<sup>60</sup> This required South Korea to clean up the conglomerates by instituting systems of oversight and putting loans and other financial decisions on a more sound financial footing. This was added to the earlier efforts at political reform, instituting single terms for the president, a formally acceptable system of constitutional judicial review and greater rights protection through less strict control over the media and public organisations.

Taiwan, a textbook case of the East Asian miracle, appeared to follow a similar pattern. With economic success, increasing calls for democratisation were made in the 1980s. With pressure from below, a confident regime embraced the reform process in a top-down pattern. Along with democratic elections, the previously moribund systems of the rule of law and judicial review began to take on life. Taiwan fared much better than most East Asian countries in the early phase of the economic crisis, though it later showed signs of economic and political weakness associated with continued tension with China.

China is the next great East Asian challenge. China's recent policies of economic reform resemble the earlier authoritarian South Korean policies under Park Chung Hee (1963–79) of economic liberalisation without political liberalisation, accompanied by harsh human rights policies that aim to repress dissent.<sup>61</sup> Like South Korea, China has reached the current developmental juncture with very large industries and substantial numbers of industrial workers at risk in the reform process. Numerous worker-based demonstrations have highlighted these failures to meet basic needs. China's entry into the WTO has

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<sup>58</sup> See Kate Wiltrout, 'Kim Leads Knife-edge Korea Poll', *South China Morning Post* (Hong Kong), 19 December 1997, 1. This change of direction apparently received a further vote of confidence in late 2002, with the election of an even more liberal candidate from the same party, President Roh Moo Hyun. Weon-ho Lee and Sung-ho Baik, 'Generation 2030 Bursts Onstage', *International Herald Tribune* (New York), 30 December 2002, 7.

<sup>59</sup> See Kang, above n 38.

<sup>60</sup> Ibid; MacIntyre, above n 42.

<sup>61</sup> One should be cautious about this comparison. While the state-owned enterprises ('SOEs') do encompass the heavy industry sector in China, there are other reforming sectors where the trend is toward dispersal, rather than concentration, of economic activity. The historical Chinese emphasis on workers' rights may also serve as a counterweight, though workers have so far taken a bruising in the reform era.

further pushed China towards a more competitive posture. To accomplish this there was a need to reduce government interventions in the economy and develop regulatory regimes.<sup>62</sup> Ultimately, if the other East Asian examples are instructive, this will require constitutional reform, involving democratic reform, human rights and the rule of law, though the question of timing seems uncertain.

#### **4 Human rights and constitutionalism**

In the absence of regional human rights institutions, domestic constitutionalism has become the primary vehicle in East Asia for implementing human rights commitments. This may be supplemented by national human rights institutions.<sup>63</sup> Constitutionalism has offered a venue to respond to the various claims underlying the cultural values and developmental debates in East Asia, a response to authoritarianism. The concept of constitutionalism advanced herein, as noted above, includes the fundamental elements of democracy, human rights and the rule of law and elements of local institutional embodiment – what I call indigenisation.

In the late twentieth and early twenty-first centuries constitutionalism has become one of the primary vehicles for universalising human rights. Constitutionalism serves both as a conduit for shared international and local human rights and political values and the embodiment of those values. It provides the context in which the subordinate classes can voice their basic concerns relating to both civil and political rights and to economic and social rights. In this regard, this section emphasises two aspects of the constitutional equation in East Asia: first, the empowering role of constitutionalism, in contrast to the usual view that emphasises only constraint; and second, indigenisation of constitutionalism, as an avenue to hook it up to the local condition.

##### *A The empowering role of constitutionalism and human rights*

Theorists have worried that constitutionalists place too much emphasis on constraint, always using language of ‘checking, restraining or blocking’.<sup>64</sup> The

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<sup>62</sup> See OECD, above n 41. The OECD report points out, ‘Government interference leads to poor SOE management and inefficient operations, which foster low profits and high debt; this in turn makes it more difficult to restructure to improve efficiency and prompts government interventions that spread the problem by extracting resources from stronger enterprises to prop up those that are failing’: *ibid* 16.

<sup>63</sup> See Brian Burdekin, *National Human Rights Institutions in Asia* (Martinus Nijhoff Publishers, Leiden, 2007).

<sup>64</sup> Stephen Holmes, ‘Precommitment and the Paradox of Democracy’ in J Elster and R Slagstad (eds) *Constitutionalism and Democracy* (Cambridge University Press, Cambridge, 1988) 195, 226.

notion of voluntary constraint is a questionable proposition in a world where leaders frequently override constraint in the interest of expediency.<sup>65</sup> This may result in what Guillermo O'Donnell calls 'a caesaristic plebiscitarian executive that once elected sees itself as empowered to govern the country as it deems fit'.<sup>66</sup> Such an executive may effectively become an elected dictator and become more concerned about retaining power than protecting human rights.

Too much emphasis on constraint may cause constitutionalists to overlook the important empowering aspects of constitutionalism. The notion of constraint under constitutional government takes on meaning and force only through popular empowerment. Under constitutional government the processes of empowerment extend beyond the institutions of electoral politics to include the institutions of human rights and the rule of law. It is the integration of political and legal institutions in the processes of constitutional government that allows both empowerment and constraint to work.

East Asia has in recent years experienced the phenomenon of the powerful state and the hazard of unconstrained government, elected or otherwise. The most notorious East Asian examples where elected leaders used their mandate to pervert the constitutional order were some of the early South Korean experiments with democracy and the Marcos regime in the Philippines.<sup>67</sup> As noted above, theorists have responded with two nearly opposing alternatives, often applied paradoxically to the same regimes. Some have advocated instituting the rule of law and rights protection along with authoritarianism.<sup>68</sup> The difficulty with this option is in inducing such authoritarian leaders to consistently accept such constraint and respect human rights. There have been some aspirations toward this notion in Singapore, Malaysia and (until recently) Indonesia.

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<sup>65</sup> Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364; Linz and Stepan, above n 16, 19.

<sup>66</sup> Guillermo O'Donnell, 'Illusions About Consolidation' (1996) 7 *Journal of Democracy* 34, 44.

<sup>67</sup> Jang Jip Choi, 'Political Cleavages in South Korea' in Hagen Koo (ed) *State and Society in Contemporary Korea* (Cornell University Press, Ithaca, 1993) 13; S Guingona, 'The Constitution of the Philippines: An Overview' (1989) 65 *New Zealand Law Journal* 419.

<sup>68</sup> Shuhe Li and Peng Lian, 'On Market Preserving Authoritarianism: An Institutional Analysis of Growth Miracles' (Conference paper presented at the Chinese University of Hong Kong, Hong Kong, 8 March 1996). This argument picks up some general support in Giovanni Sartori's proposition that 'demo-protection' (protection from tyranny or constitutional constraint) travels better than 'demo-power' (implementation of popular rule) – 'nobody wants to be imprisoned, tortured or killed': Giovanni Sartori, 'How Far Can Free Government Travel?' (1995) 6 *Journal of Democracy* 101, 101–4. Sartori would not advocate that the absence of demo-power be accepted as a long-term solution.

Alternatively, some may advocate instituting democracy but replacing liberal constraints with alleged East Asian cultural constraints and communitarian processes of bargaining to establish a so-called illiberal democracy.<sup>69</sup> Paradoxically this approach may be the aspirational basis of the claims to democracy made by the same regimes in Singapore, Malaysia and Suharto's Indonesia. But an alleged democracy that prohibits or suppresses opposition without core constitutional constraints does not appear to be democracy at all. A system that places emphasis on social connections and networking may lead to particularism and clientelism.<sup>70</sup> This situation is difficult to distinguish from authoritarianism when it comes to the potential for abuse of power and neglect of human rights.

Extra-constitutional action should more properly be understood as not just overriding constraint but as overriding democracy and its concomitant guarantees of human rights and the rule of law. Such extra-constitutional action does not just 'get the job done' but, in fact, deprives the people of democratic power. To deprive people of freedom of speech does not just serve to eliminate meddlesome critics and achieve order but may, in fact, disempower the people in securing basic human rights, both political and economic. Constitutionalist should seek to engender discourse and empowerment. The legal and human rights institutions of constitutional government are enfranchising in nature; they work to engage the citizens in a political conversation about popular concerns and values. Contrary to the Asian values claim, in a modern complex society this is the contemporary venue for values and development discourse. This is what has inspired the Asian movement to constitutionalism. If constitutionalism is openly accepted as the venue for political choice, rather than merely constraint, then the ensuing discourse within this venue may engender respect for its important constraints and processes.

To better understand this claim we must consider the constitutive process. This process can be considered at two levels: constitution-making and constitutional implementation. Constitution-making is where the explicit constitutional conversation begins. A constitutional assembly is a powerful venue for

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<sup>69</sup> Some scholars have advocated an Asian model of democracy along these lines, characterising it as illiberal democracy: see, for example, Daniel A Bell, David Brown, Kanishky Jayasuriya and David Martin Jones, *Towards Illiberal Democracy in Pacific Asia* (Macmillan Press, London, 1995); Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 *Foreign Affairs* 22.

<sup>70</sup> In East Asia such clientelism has spawned economic and political systems that are particularly noted for problems of cronyism and corruption, problems that are frequently associated with East Asia's leading countries, for example, Indonesia, South Korea, China and Japan: Richard H Mitchell, *Political Bribery in Japan* (University of Hawaii Press, Honolulu, 1996).

discourse about basic political and human rights values. This is especially true because such assemblies are usually called on the heels of a national crisis, which is inherently engaging. In recent decades the East Asian landscape has been riddled with constitution-making exercises. In the 1980s and 1990s constitution-making in the Philippines and Hong Kong offered prominent, seemingly successful examples.<sup>71</sup> In such constitution-making processes Jon Elster describes a venue where passion, interest and reason operate.<sup>72</sup> There are both upstream and downstream constraints, as well as processes for consensus-building and broadening bases of support.<sup>73</sup> Upstream constraints consider political settlements and may also protect members of the former regime. For the Hong Kong Basic Law, as with the post-war Japanese Constitution, the upstream constraints were dictated by outside powers.<sup>74</sup> Downstream constraints look to ratification or acceptance. In the Philippines, after the 'People Power' revolution, downstream acceptance was the substantial constraint.

After a constitutional founding, successful implementation of constitutional government depends on appreciation of the discursive architecture embodied in the notion of checks and balances. Most appreciated in this regard is the positive discursive machinery of constitutional judicial review, the power whereby courts review laws enacted by the elected branches of government for conformity to constitutional requirements. Constitutional judicial review has become the premier institution for securing human rights in East Asia.<sup>75</sup> Constitutional judicial review serves as the engine for the basic constitutional conversation about political values and commitments.<sup>76</sup> This constitutional conversation proceeds as legislatures pass laws and courts respond and legislatures pass new laws.<sup>77</sup> While much of East Asia has adopted Western civil and common law legal systems, only the democratic or quasi-democratic countries of the region

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<sup>71</sup> See Guingona, above n 67; Michael C Davis, 'Constitutionalism and the Rule of Law in Hong Kong' (2006) 3 *Loyola University of Chicago International Law Review* 165.

<sup>72</sup> See Elster, above n 65, 377–86.

<sup>73</sup> *Ibid* 374.

<sup>74</sup> See Ford, above n 34; Michael C Davis, 'Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis' (1996) 34 *Columbia Journal of Transnational Law* 301.

<sup>75</sup> Mauro Cappelletti, 'The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis' (1980) 53 *Southern California Law Review* 401.

<sup>76</sup> Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, New Haven, 2nd ed, 1986).

<sup>77</sup> A court can use various avoidance and interpretation doctrines, what Bickel calls 'passive virtues', to carry on a complex dialogue with the elected branches of government and the people: Bickel, above n 76, 23, 65–70, 117.

have fully functioning systems of constitutional judicial review.<sup>78</sup> These countries include Japan, the Philippines and Hong Kong, with such power vested in the ordinary courts, and Taiwan, South Korea, Mongolia, Indonesia, and Thailand, where civil law special constitutional courts are employed.<sup>79</sup> For the authoritarian regimes of the region, little or no judicial review power is the norm. In an authoritarian environment it is unlikely that judges can be counted on to carry out such role assertively. Using a rational choice model, in the context of democratic constitution-making and implementation, Tom Ginsburg has traced the reasoning of both constitutional drafters and courts in creating or developing constitutional judicial review.<sup>80</sup> While one may question whether a narrow rational choice model can fully account for the decisions of actors whose interests and identity are mutually constituted as the process unfolds, it is clear that authoritarian regimes will have little commitment to such constitutional practices.<sup>81</sup>

Constitutional judicial review of legislative enactments is not the sole discursive engine for crafting state-based solutions to broader societal concerns. At moments of crisis – what Stephen Krasner calls ‘punctuated equilibrium’ – the entire people may be mobilised to civic action or intense reflection on political value concerns of fundamental importance.<sup>82</sup> In normal times

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<sup>78</sup> As a general proposition the structure of constitutional judicial review is divided into those systems with a central constitutional court deciding issues on referral from ordinary courts or other branches of government (usually civil law systems) and those decentralised systems where ordinary courts exercise this power in actual cases (usually common law systems): Mauro Cappelletti, above n 75, 401. Japan is the East Asian exception where a decentralised system exists in a civil law country. Hong Kong has both systems operating at once: a decentralised system for matters within local autonomy and a centralised review process by the National People’s Congress (‘NPC’) Standing Committee in Beijing (advised by a Basic Law Committee) on matters of central authority or involving local central relations. *Hong Kong Basic Law*, Arts 17 and 158. See Randall Peerenboom (ed) *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (Routledge, New York, 2004).

<sup>79</sup> See Ford, above n 34; Davis, above n 74; C Neal Tate, ‘The Judicialization of Politics in the Philippines and Southeast Asia’ (1994) 15 *International Political Science Review* 187.

<sup>80</sup> Tom Ginsburg, *Judicial Review in New Democracies, Constitutional Courts in Asian Cases* (Cambridge University Press, Cambridge, 2003). The rational choice model Ginsburg employs assumes that judges, public officials and constitution drafters will act in their narrow self-interest, typically in ways that aim to advance their power within the system.

<sup>81</sup> Michael C Davis, ‘Constitutionalism and New Democracies’ (2004) 36 *George Washington International Law Review* 681.

<sup>82</sup> Stephen D Krasner, ‘Approaches to the State: Alternative Conceptions and Historical Dynamics’ (1984) 26 *Comparative Politics* 223.

the people may be content with representation and constitutional judicial review, while they largely focus on private affairs; while at times of what Bruce Ackerman calls constitutional politics, the level of civic action may become extraordinary.<sup>83</sup> There is evidence of such mobilisation in the recent South Korean and Japanese constitutional politics of reform and resistance to corruption. Considerable civic action also accompanied the post-1987 constitutional reforms in Taiwan and the financial crisis and the overthrow of Suharto in Indonesia.<sup>84</sup>

*B Indigenisation of constitutionalism and human rights*

With a firm commitment to the constitutional fundamentals in place, a premier concern is that constitutionalism, with its democracy, human rights and rule of law ingredients, should plant its roots firmly in the local soil. Aung Sang Suu Kyi argues that as long as there is a genuine commitment to modern democratic values, there is room for variation in local institutional embodiment.<sup>85</sup> It is through local institutional embodiment – what I call indigenisation – that constitutionalism responds to the above noted concerns with values and development. For indigenous institutions to work, however, the constitutional fundamentals of democracy, human rights and the rule of law must be in place. Otherwise, authoritarian leaders may implant a hegemonic discourse constructive of authoritarian power and destructive of genuine community values. Local institutional embodiment may include traditional organisations and practices and more contemporary institutions responsive to developmental concerns. In this subsection I consider the ways in which constitutionalism and its related human rights institutions in East Asia have responded both to the cultural concerns raised in the Asian values debate and to developmental concerns likely to arise in post-authoritarian constitutional democracies.

Constitutionalists should consider the ways in which local culture and traditions may facilitate constitutional discourse under the umbrella of the core constitutional commitments discussed above. It is in local institutional embodiment that substantive communitarian concerns can be addressed. Local grass

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<sup>83</sup> Bruce Ackerman, *We The People* (The Belknap Press, Cambridge, 1991) 34–57.

<sup>84</sup> The 1987 lifting of martial law in Taiwan triggered popular demonstrations, a judicial review opinion ruling the failure to hold new elections for the Legislative Yuan to replace seats long held by mainlanders elected in the 1940s unconstitutional, a National Affairs Conference and ultimately full democratic elections: Jaushieh (Joseph) Wu, *Taiwan's Democratization: Forces Behind the New Momentum* (Oxford University Press, Oxford, 1995) 125–37. Indonesia experienced high levels of civic action and fundamental constitutional reform: see MacIntyre, above n 42.

<sup>85</sup> Aung San Suu Kyi, 'Transcending the Clash of Cultures: Freedom, Development and Human Worth' (1995) 6 *Journal of Democracy* 11, 13.

roots and minority representation may be achieved through contemporary institutions which secure autonomy or minority rights, or through recognition of traditional ethnic or religious groups. The aim is for a realistic discourse that is anchored in the community but responsive to the contemporary urban and industrial or post-industrial conditions.

Locally sensitive representation may include attention to the usual geographic political institutional options such as federalism or autonomy, as well as consideration of various electoral models that seem likely to increase representation of minorities. Other forms of representation may include substantive or symbolic recognition of distinct ethnic, religious or linguistic communities in which traditional leaders assume leadership roles. This may include a continuing role, symbolic or substantive, for traditional monarchs, such as is evident in contemporary Malaysia, Japan and Thailand.<sup>86</sup> Special minority group rights may be combined with individual rights; in East Asia there are many traditional indigenous groups or distinctive communities who are promised varied degrees of autonomy in the local constitutional system. However, East Asian governments, wary of outside intervention in their sovereign territory, may be reluctant to allow the type of international recognition such autonomous communities usually covet as security for the autonomy arrangement.<sup>87</sup> As a rare exception, China has allowed the security of internationally recognised status for Hong Kong under the Hong Kong Basic Law, as allowed under Article 31 of the Chinese Constitution.<sup>88</sup>

Arend Lijphart has described the effort by elites to overcome the destabilising effect of cultural fragmentation in Europe as ‘consociational democracy’.<sup>89</sup> The democratic element is important. A bargain across cleavage lines that only includes the elite strata would be merely authoritarian oligarchy and would not be likely to secure a channel for engaging popular will. The use of various forms of local institutional embodiment, along with core constitutional

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<sup>86</sup> Abdulahi An-Na'im, 'Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights' in C E Welch and V A Leary (eds) *Asian Perspectives on Human Rights* (Westview Press, Boulder, 1991) 31; Y Higuchi, 'The Constitution and the Emperor System: Is Revisionism Alive?' (1990) 53 *Law and Contemporary Problems* 51; C E Keyes, *Thailand: Buddhist Kingdom as a Modern Nation State* (Westview Press, Boulder, 1987).

<sup>87</sup> Robert H Barnes, Andrew Gray, and Benedict Kingsbury (eds) *Indigenous Peoples of Asia* (Association of Asian Studies, Ann Arbor, 1993); Michael C Davis, 'Establishing a Workable Autonomy in Tibet' (2008) 30 *Human Rights Quarterly* 227.

<sup>88</sup> See Davis, above n 71. This has allowed Hong Kong to secure a fairly robust system of human rights and the rule of law, though it still lacks full democratic development. Similar Chinese solicitude has not been extended to minority nationalities in Tibet and Xinjiang.

<sup>89</sup> Arend Lijphart, 'Consociational Democracy' (1968) 21 *World Politics* 207.

commitments, may engender more confidence in the system, encourage local connectedness to the constitutional order and facilitate genuine values discourse.

Beyond political representation, legal structures may also address important indigenous human rights concerns. This may include the application of religious or tribal laws and the provision for genuine autonomy for national or ethnic minority groups. For such autonomy arrangements to work, democratic commitments and basic rights must be emphasised. Traditional practices can be renovated or new institutions invented to sustain important indigenous rights while maintaining core constitutional commitments. For example, in societies with long traditions of citizen petition of leaders, a mechanism for petitioning elected officials could be employed or, perhaps, a modern version thereof, the ombudsman.<sup>90</sup> Even a traditional monarch, who may retain symbolic and ceremonial functions, may take on an ombudsman-like role in a post-monarchical democratic society.<sup>91</sup> Such tradition-bound institutions may open better avenues of communication and protection in ways consistent with historical experience. Even when contemporary institutions are employed, in practice they may be expected to take on indigenous characteristics. Contemporary institutions such as human rights tribunals or commissions, election commissions or corruption-fighting bodies may be employed to address those contemporary problems that neither the core constitutional nor traditional institutions adequately respond to. The goal in all cases is orderly processes of discursive engagement or empowerment.

Hegemonic claims of adherence to Asian values without a commitment to the core constitutional and human rights fundamentals are unlikely to engender a healthy values discourse or contribute to long-term public trust. One might contrast the constitutional paths of modern Japan and China.<sup>92</sup> While these countries bear comparison due to similar traditional values, striking differences are in many ways explainable structurally by their contrasting post-war constitutional paths. While post-war Japan has taken a liberal constitutional path, there has been substantial indigenisation in practice. Indigenisation has even transformed the practice of constitutional judicial review, as the courts are noted for a conservative system of constitutional

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<sup>90</sup> Hong Kong stands out as a system that makes use of an official ombudsman as an avenue of public complaint. This ombudsman role and a similar role played by legislative counsellors in the Hong Kong system appear to be valued for consistency to traditional Chinese systems of complaint – Chinese citizens to this day still travel to Beijing to file petitions over perceived injustices.

<sup>91</sup> This oversight role for a traditional monarch is still evident in contemporary Thailand and Japan.

<sup>92</sup> Davis, above n 3 (1997).

guidance.<sup>93</sup> Though conservative, this system has afforded increased rights protection and does seem to take constitutionalism seriously.<sup>94</sup> Even efforts at reforming the system of one-party dominance have been cautious, engendering renewed public concern with corruption.<sup>95</sup>

Without liberal constitutional fundamentals, China has advanced a hegemonic view concerning the constitutional fundamentals of democracy, human rights and the rule of law, which people challenge at their peril.<sup>96</sup> Constitutional judicial review is not allowed. Minority rights are poorly protected in a top-down system of control. The constitution provides for top-down legislative supervision by people's congresses, which are themselves not subject to competitive elections and are dominated by the central government. Even greater central control is achieved through the Chinese Communist Party. If review occurs at all it is either through informal guidance or through committee or party oversight in the passage of laws.<sup>97</sup> A collectivist notion of rights subjecting the rights of the individual to the interests of the state appears to undermine local rights protections.<sup>98</sup> The Public Security Bureau and the military take a central role in providing public security, often at the expense of basic rights.

China's economic reforms have engendered increased diversification of interests for which inadequate representation is secured. This neglect is especially pronounced for minority groups, some of which are looked upon with great suspicion. Commitments to legality, under the theory of rule by law, are shaky at best, encouraging increased corruption as the economic reform process goes forward. This has produced a values-vacuum, which the society is hard placed to deal with. Efforts to open up democratic and legal channels for representation of diverse and minority interests are often met by government indifference. Opening up appropriate legal and democratic channels will not automatically solve the current problems but such moves may offer hope for crafting orderly solutions in the future.

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<sup>93</sup> Young, above n 34, 970; Ford, above n 34, 25–9, 49–55.

<sup>94</sup> Ford, above n 34, 29–36.

<sup>95</sup> Richard H Mitchell, *Political Bribery in Japan* (University of Hawaii Press, Honolulu, 1996) 121–32.

<sup>96</sup> Owen M Fiss, 'Two Constitutions' (1986) *Yale Journal of International Law* 492, 501.

<sup>97</sup> *Constitution of the People's Republic of China* (1982) Article 67; Andrew J Nathan, 'Political Rights in Chinese Constitutions' in R Randle Edwards, Louis Henkin, Andrew J Nathan (eds) *Human Rights in Contemporary China* (Columbia University Press, New York, 1986) 77.

<sup>98</sup> *Constitution of the People's Republic of China* (1982) Article 51; R Randle Edwards, 'Civil and Social Rights: Theory and Practice in Chinese Law' in R Randle Edwards, Louis Henkin, Andrew J Nathan (eds) *Human Rights in Contemporary China* (Columbia University Press, New York, 1986) 41.

Many of the same indigenisation arguments addressed in relation to cultural values have obvious connections, as well, to economic developmental concerns. Recognition of distinct cultural groups clearly has market and developmental implications, as such groups address their distinct developmental problems and attract investment in various resources.<sup>99</sup> Beyond multiculturalism, economic developmental concerns implicate a wide range of local social and economic rights.

## **5 Conclusion**

This argument has emphasised several points: first, that the Asian values and other cultural arguments do not justify the choice of authoritarianism and the neglect of democracy and human rights; second, that under East Asia's current condition of substantial economic development, an authoritarian regime can no longer be adequately responsive to diverse developmental concerns; third, the positive role of constitutionalism in constructing empowering conversations in modern democratic development and as a venue for values and developmental discourse; and fourth, the importance, especially in cross-cultural and developmental contexts, of indigenisation of constitutionalism through local institutional embodiment. In the absence of the development of regional human rights institutions, in East Asia it has been the linkage of these points that has connected the constitutional regime of a given state or similar territorial community to the international processes of human rights and has established the importance of domestic human rights practices.

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<sup>99</sup> Amy Chua, 'The Privatization–Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries' (1995) 95 *Columbia Law Review* 223.