

Human Rights and Governance: The Asia Debate

*Yash Ghai**

I. The International Context of Human Rights and Democracy

The history of human rights is ancient but its contemporary salience can be traced to the establishment of the United Nations and the proclamation by its General Assembly of the Universal Declaration of Human Rights in 1948. Since then the United Nations and related agencies have concluded a number of conventions to implement the provisions of the Universal Declaration by elaborating detailed formulations of specific rights and establishing some machinery for their supervision. Much of this work was done in committees of officials and did not, for the most part, attract much public attention. There were undoubtedly differences among groups of countries on the scope of particular rights, the priorities among them, and the extent of their enforceability. These were resolved within the committees and did not engage great public interest (even in the highly controversial instance of the right to development). However, in the last few years questions of human rights have achieved a high salience. This has revealed considerable differences among governments and intellectuals on the understanding, scope and importance of human rights.

There is broad agreement that a key purpose of society is to ensure the dignity of the human person. For many people, human dignity is to be secured through the protection of human rights. Others have different views on how to achieve this aim, but all would concede some role for human rights. However, there is no general agreement on the nature of human rights. The conception of

* Sir YK Pao Professor of Public Law, University of Hong Kong. This paper draws upon my two previous papers, "Asian Perspectives on Human Rights" (1992) and "Human Rights and Governance in Asia" (1994). The first paper was presented at a conference on Human Rights of Migrant Workers organised by the Scalabrini Migration Centre in Manila. It was also tabled at a workshop on Human Rights and Governance in Asia organised by the Asia Foundation in Manila in March 1993. The second paper was written at the request of the Asia Foundation as a record of my reflections on the discussions at the workshop. It was subsequently used as a background paper for an Asian Foundation sponsored dialogue on the same subject between Asia scholars and senior officers of the Clinton Administration and the United States Congress in Washington in June 1994. The present paper reflects also on the Washington discussions. I am grateful to the participants of all these meetings for their thoughtful and stimulating contributions. An earlier version of this paper appeared as an occasional paper of the Asia Foundation. The author is grateful to the Hong Kong Research Grants Council for support of his work on human rights.

the basis of human rights has varied from time to time, and from place to place. For a long time in the West, the belief that rights were derived from a divine ordering held sway, but it gradually gave way to the notion that rights originated from and were a response to the very nature of man. In that sense they are inherent and inalienable. This secularisation of the source of human rights arose under certain social and economic conditions which are said to mark the rise of market economic systems and consequently to emphasise individualism. In one way, it could be argued that basing human rights on the nature of man (and these days we must concede, woman) should lay the foundations for a universal regime. Unfortunately, this has not been the consequence—for a variety of reasons, it would seem. At first the attacks came from those who believed that these rights, associated with the market, served merely to strengthen the dominance of one social class over others, and to result in the misery of the general public. It was also perceived that the “man” of the market system is acculturated in its peculiar values and dynamics, “disembodied” from the community. In societies where the dominance of the market over culture and community has not taken place or is incomplete, this view of human rights does not command universal acceptance. Similarly where the sway of religion or tradition is strong, the secular basis of human rights affects their acceptability, for which they must draw from the orientation of a particular religion or tradition. The difficulties of establishing political order and political authority in several regions of the world have also brought into question the utility of norms that detract from the power of the government.

Differences over perceptions and status of human rights are not new. After the somewhat uneasy consensus over the Universal Declaration of Human Rights, serious conflicts emerged which were responsible for protracted negotiations over the instruments that were to implement the Declaration as well as for the fact that a truce was possible only through the bifurcation of rights into civil and political on the one hand, and economic, cultural and social on the other—with separate Covenants for each. The West conceived of rights largely as political, while the socialist States provided the impetus for economic and social rights. At the heart of the controversy was the role of the market in the organisation of the economy and the distribution of resources. The interesting point about contemporary controversies about human rights is that all the major contestants are committed to the market (the opponents of the market get little hearing now). The basis of differences has changed—an aim of this Paper is to explore what that is.

These contemporary differences have been highlighted by the context in which human rights have now achieved salience. An important aspect of that context is the collapse of the communist regimes in Europe, which removed the Cold War agenda and introduced space for discussions of liberty and freedom. The West took the opportunity to develop another agenda centring around human rights and democracy. This interest coincided with the growth of highly visible international non-governmental organisations (NGOs) which assumed a major responsibility for the scrutiny of the record of individual countries on human rights. The link of human rights to democracy was established through

the work of international aid agencies, particularly the World Bank and the United States Agency for International Development, which made "governance" a central feature of their development assistance. Good governance was largely equated with democratic institutions and practices (including transparency of policy-making and administration).

There are other aspects of the post-Cold War context which bear upon human rights. The collapse of the communist systems was attributed largely to the inefficiencies of command economies, and while a few years previously there was much talk of the crisis in capitalism, there was now a surge in the legitimacy of markets. Much effort has gone into the establishment of markets in Eastern Europe and formerly communist States in Asia; indeed a veritable and diverse profession has developed around this enterprise. In some respects these efforts represent an extension of privatisation and structural adjustment policies that had been adopted by or imposed on various States in Africa, Asia and Latin America, the effect of which was to diminish the economic role of the State. The marketisation of domestic economies was paralleled by the globalisation of capital, markets and services, as national barriers to investments and trade were removed (under pressure from world economic institutions). The thrust of globalisation came largely from the West, and served to increase its economic influence and hegemony over the rest of the world.¹ But it was presented, instead, principally in terms of the virtues of entrepreneurship, economic rationality and an efficient legal regime marked by security, predictability and transparency. The links of these developments to human rights were sought to be established through claims of increased choices for investors, consumers and workers, the restrictions on State power and the emergence or strengthening of civil society. So democracy, marketisation of economies, the promotion of human rights and the emergence of civil society were declared to be all of a piece.

The result of the approach of the West was to bring out clearly the implications of the human rights work steadily (and indeed sometimes obscurely, as with the Convention on the Rights of Migrants) developed through the United Nations and its agencies. It brought to the fore the responsibility of the international community for the protection of human rights everywhere, and thereby highlighted the ways in which national sovereignty has been qualified by the UN Charter and the human rights conventions. Relations between a State and its nationals were no longer a matter merely for that State; some fundamental norms of that relationship (enacted at an exponential rate, some claimed) were now defined in international law, and subject not only to the scrutiny of the international community but also to its sanctions. International relations themselves are increasingly mediated through human rights discourse and practice. Aid conditionalities, unthinkable a decade ago, have become

1 The globalisation of capital and markets should minimise rather than increase tensions between the West and the successful economies of East Asia. They enhance the interests and stakes of each side in the success of the other, and alliances are forged increasingly on transnational class lines than national. The international rhetoric of confrontation hides this emerging transnational identity.

common place. The legitimacy of international involvement was heightened not only by the moral authority of human rights and the collapse of political regimes associated in many minds with their denial, but also by the willingness of several countries to accept international assistance for establishing human rights and democracy (for example, Eastern Europe, Russia, Nepal, Cambodia, and South Africa) and considerable public support in many countries for such intervention in their own case. Further support for the emphasis on human rights and good governance was secured through arguments about their link to sustained economic and social development. However, not all governments have taken kindly to the internationalisation of human rights and democracy, although many of them are unable to carry their opposition to it to international fora because of their fragile political and economic systems and the dependence on external donors. Several Asian countries, particularly in South-East and East Asia, have offered a spirited rebuttal of this internationalisation.² They resent the interposition of the international community (and particularly the hegemony of particular countries within it) in their relations with their citizens, in an ever increasing number of areas. They also resent the leverage it has given these other countries (and international institutions) over their policies, and see the new approach as attempts to undermine their moral authority, disrupt their political stability, and retard their economic progress. Rather than, as in some other regions, withdraw from the debate, they have sought to provide an alternative framework for the discourse of human rights and democracy.³

Secure in the economic success of their policies which owe little to democracy or human rights, they contest the claims of the positive links between democracy (and human rights) and economic development. Another plank in their argument is that most of the rights which the West is purveying are "Western" in origin, oriented towards an individualistic society and therefore inappropriate to Asia where the values of communal action are highly prized. Furthermore, the priorities as between different human rights vary from country

2 In this paper I sometimes refer indiscriminately to "Asian governments". Clearly not all governments subscribe to views that I attribute to "governments". So that my position is not misunderstood, I should say that my paper does not deal with the Middle East. It is also useful to try to make distinctions as among clusters of Asian governments. Issues and politics in South Asia (India, Pakistan, Nepal, Sri Lanka and Bangladesh) are often different from that in East Asia (China, Japan, North and South Korea, Taiwan, and Vietnam). The former are more plural with specific parliamentary traditions underpinned by ethnic politics, while the latter are influenced by Confucianism and a measure of authoritarianism. But even this broad generalisation needs to be qualified, since Japan may be said to have shed authoritarianism some decades ago, while Singapore could be included for this classification with East Asia, and Malaysia with South Asia. See Richard Cullen, "Protecting Individual Rights: East Meets West" (mimeo, 1994).

The politicisation of the discourse of human rights, along the North-South divide, has nevertheless resulted in a certain closing of ranks, and the more vocal of the governments are able in regional and international meetings to muster a show of solidarity on the basis of their own doctrines, as was demonstrated in the pre-Vienna regional meeting in Bangkok in 1993.

3 Perhaps the most articulate statement of this position is Kausikan, "Asia's Different Standard" (1993) 92 *Foreign Policy* 24.

to country, and certainly in their own States, the priority must be given to economic and social rights. On a more doctrinal but basic level, they challenge the legitimacy of international involvement in human rights and national political systems on the argument that the fundamental principle of international law and relations is State sovereignty (to which belong these questions). They also accuse the West of hypocrisy, since it has long been engaged in violations of human rights, from slavery to colonialism, and the current decline of moral authority and public order in its own States.

The politicisation of human rights that has followed their internationalisation raises acute questions of theory and practice. What is the basis for international action on human rights? What justifies political and economic conditionalities? What abuses are inherent in conditionalities? How does one check these abuses, particularly those of “double standards” and “double speak”? Why should a State’s competence to deal with its citizens be circumscribed by reference to human rights or governance? At the heart of this debate lies the nature of human rights and the source of their authority. Are human rights determined by the culture or economic development of a country, contingent on history, or do they represent universal values true for all time and places? Stemming from considerations of theory and strategies, are some rights more basic than others? How do civil and political issues relate to economic and cultural rights? Is there a sequence in the development and achievement of human rights? How do human rights, the rule of law, and democracy relate to each other? How are human rights and democracy linked to economic and social development? What is the role of civil society? These are in fact extraordinarily hard questions, to which political theory does not provide ready answers. Yet some resolution of these questions is essential to place current international debates within a more rational, objective and consensual framework. The Vienna World Conference on Human Rights failed to resolve these issues, despite a “consensus” document. Consensus was achieved by genuflections to a series of contradictory positions, rather than an engagement with and the reconciliation of issues that divided them. The politicised environment of human rights discourse is not particularly conducive to a productive discussion of these issues. It is important to recall that these issues pre-date the North-South divide; and for a long time have been the basis of great controversy in Western political and social thought.

II. Asian Perspectives on Human Rights

As a backdrop to an exploration of some of these issues, I review the principal perspectives on human rights in Asia. In contemporary debates, it is generally assumed that there is one Asian view of human rights, and that it is opposed to the traditions of individual human rights that first developed in the West. It is easy to believe that there is a distinct Asian approach to human rights because some government leaders speak as if they represent the whole continent when they make their pronouncements on human rights. This view is reinforced because they claim that their views are based on perspectives which emerge from the Asian culture or religion or Asian realities. The gist of their position is that human rights as propounded in the West are founded on individualism and

therefore have no relevance to Asia which is based on the primacy of the community. It is also sometimes argued that economic underdevelopment renders most of the political and civil rights (emphasised in the West) irrelevant in Asia. Indeed, it is sometimes alleged that such rights are dangerous in view of fragmented nationalism and fragile Statehood.

It would be surprising if there were indeed one Asian perspective, since neither Asian culture nor Asian realities are homogenous throughout the continent. All the world's major religions are represented in Asia, and are in one place or another State religions (or enjoy a comparable status: Christianity in the Philippines, Islam in Malaysia, Hinduism in Nepal and Buddhism in Sri Lanka and Thailand). To this list we may add political ideologies like socialism, democracy or feudalism which animate peoples and governments of the region. Even apart from religious differences, there are other factors which have produced a rich diversity of cultures. A culture, moreover, is not static and many accounts given of Asian culture are probably true of an age long ago. Nor are the economic circumstances of all the Asian countries similar. Japan, Singapore and Hong Kong are among the world's most prosperous countries, while there is grinding poverty in Bangladesh, India and the Philippines. The economic and political systems in Asia likewise show a remarkable diversity, ranging from semi-feudal kingdoms in Kuwait and Saudi Arabia, through military dictatorships in Burma and formerly Cambodia, effectively one party regimes in Singapore and Indonesia, communist regimes in China and Vietnam, ambiguous democracies in Malaysia and Sri Lanka, to well established democracies like India. There are similarly differences in their economic systems, ranging from tribal subsistence economies in parts of Indonesia through highly developed market economies of Singapore, Hong Kong and Taiwan and the mixed economy model of India to the planned economies of China and Vietnam. Perceptions of human rights are undoubtedly reflective of these conditions, and suggest that they would vary from country to country.

The official view

Perceptions of human rights are reflective of social and class positions in society. What conveys an apparent picture of a uniform Asian perspective on human rights is that it is the perspective of a particular group, that of the ruling elites, which gets international attention. What unites these elites is their notion of governance and the expediency of their rule. For the most part, the political systems they represent are not open or democratic, and their publicly expressed views on human rights are an emanation of these systems, of the need to justify authoritarianism and occasional repression. It is their views which are given wide publicity domestically and internationally.

The unity of governments is more apparent than real. Although the Bangkok Declaration⁴ was endorsed by all the Asian governments at the April 1993 Asian regional preparatory meeting for the Vienna World Conference on Human

4 The Declaration has been published in the (1993) 57(3) *Law and Society Trust Fortnightly Review* 1 (1 May 1993).

Rights, some of them have a firm commitment to human rights and their record is better than one might expect from their endorsement of the Declaration. India is one example. Along with some other States, it is committed to human rights by its constitutional instruments, has a strong and independent judiciary, and despite problems and setbacks tries hard to maintain human rights. Nor is their adherence to traditional values and rules absolute; the Indian Constitution prohibits many traditional and religious practices like the discriminatory and degrading treatment of lower castes and provides for an equal treatment of women with men.⁵ The reason for presenting a united front is not unconnected with a perceived North-South confrontation (as is evident from the Bangkok Governmental Declaration, which stressed the need to avoid the application of “double standards” in the implementation of human rights and its “politicisation”).⁶ Asian governments feel that since the end of the Cold War, the West has focused its attention on what it perceives to be the “undemocratic” nature of Third World polities. In Africa and Latin America the concern with human rights is seen to be an instrument for the establishment or strengthening of the market, in an attempt to restrict the interventions of the State in economic relations. In Asia, however, the key economies are heavily market oriented, and for the most part are successful. Even China is now turning to the market, which is widely credited for China’s economic success. So the emphasis on human rights is not necessary as a spur to the market (and indeed, as I explore later, the relationship between the market and human rights is problematic).

Some Asian governments consider that the Western pressure on them for an improvement in human rights is connected with the project of Western global hegemony. This is to be achieved partly through the universalisation of Western values and aspirations, and partly through the disorientation of Asian State and political systems (and the consequent negative effect on their burgeoning economies). They have fashioned their response accordingly.

I turn first to “official” views of human rights of a number of influential Asian countries (Singapore, China, Malaysia, Indonesia). These views have developed primarily in response to two contingencies: the imperatives of control, and confrontation with Western pretensions. They are therefore formulated somewhat defensively. It also means, because they arise in the context of an engagement and a debate with the West, that they are formulated in universalistic terms, in the usual discourse of human rights. Several ingredients constitute the official view I am discussing. One which flows directly from both the contingencies is the assertion of “domestic jurisdiction” over human rights. Human rights are encapsulated within State sovereignty; the national treatment of human rights is no concern of other States or the international community. Self-determination, a concept which has been used to advance claims of human rights, is regarded as irrelevant to independent States.

5 Indian Constitution, see articles 14 and 17, and the Directive Principles of State Policy (particularly articles 42, and 46) which set a wide agenda of social reform consisting largely of attacks on traditional values and practices.

6 Note 2 above, para 7. These differences dominated the World Conference on Human Rights in Vienna, June 1993.

In its “White Paper” *Human Rights in China* (1991), the Chinese Government stated that “Despite its international aspect, the issue of human rights falls by and large within the sovereignty of each state”.⁷ The Chinese delegation to the UN Commission on Human Rights at its meeting in February 1993 urged that the World Conference in Vienna should

reiterate the principle of State sovereignty contained in the UN Charter and international law which is basis for the realisation of human rights. Only when the state sovereignty is fully respected can the implementation of human rights be really ensured.⁸

This is also pre-eminently the position of the other countries mentioned above.

Another element in the official view is the relativity of rights, determined by the economic, political and cultural circumstances of each country. The Bangkok Governmental Declaration “recognises that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional peculiarities and various historical, cultural and religious backgrounds”.⁹ This stance reflects the position in the Chinese White Paper which states that “the evolution of the situation in regard to human rights is circumscribed by the historical, social, economic and cultural conditions of various nations, and involves a process of historical development. Owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights.”¹⁰ “The Chinese use this framework to establish the priority of social and economic rights in their country, and much of the Paper is taken up with an account of the ending of pre-Communist regime practices of feudalism and other forms of human exploitation and the steady progress since in nutrition, education, health, the position of women and the disabled. Other countries too have used the state of national economic development as explanations for the failure fully to guarantee the complete range of human rights (“to eat their fill and dress warmly were the fundamental demands of the Chinese people who had long suffered cold and hunger”).¹¹

There are two major implications of this relativist position on human rights. The first relates to the conditions for political stability, and the other to the primacy of economic development. The implications of the first represent restrictions on civil and political rights. A forthright statement of this position is to be found in pronouncements of the Singapore Government following the detention of various social workers and activists in May 1987. I quote here from one such statement (dated 24 June 1987, and addressed by the then Minister for

7 *Human Rights in China* (1991). The Paper was published by the State Council to refute the charges of human rights violations in China. The quotation occurs *ibid*, p 11.

8 Statement by Mr Zhang Yishan, UN Doc E/CN. 4/1993/ SR 25, p 2 (17 February 1993).

9 Note 7 above, para 8 at n 1.

10 *Ibid*, p 2 at n 2.

11 *Ibid*, pp 4–5 at n 5.

Home Affairs, Mr Jayakumar, to United States Congressmen who had written to complain about the detentions). It contrasted the “resilience and cohesiveness” and shared values of the nation of the United States (which presumably makes possible the tolerance of human rights) to the fragility and heterogeneity of Singapore.

We are vulnerable to powerful centrifugal forces and volatile emotional tides. Like many other developing countries, Singapore’s major problem of nationhood is simply to stay united as one viable nation. ...In our short history, Singapore has repeatedly encountered subversive threats from within and without. ...To combat these threats to the nation, the usual procedures of court trials, which apply in Singapore to most criminal cases, have proved totally inadequate. The very secrecy of covert operations precludes garnering evidence to meet the standards of the criminal law for conviction. In many cases of racial agitation, the process of trial itself will provide further opportunity for inflammatory rabble rousing. ...Singapore cannot be ruled in any other way...Preventive detention is not a blemish marring our record; it is a necessary power underpinning our freedom.

(Another aspect of the Singapore by-passing the formal legal system, with its guarantees of openness and fairness, not discussed in the Minister’s statement, is the taped and doctored “confessions” extracted from the detainees under coercion, and then shown on the national television as proof of guilt and calculated to destroy their credibility and dignity.) These remarks were directed at a justification of administrative powers of detention without any kind of trial, but similar arguments have been used to justify other curtailments of civil rights, like the right to associate and assemble, of peaceful marches, of speech and expression. The Chinese Paper says that the people’s right to subsistence will be threatened in the event of social turmoil or other disasters, and that it is the fundamental wish and demand of the Chinese people and a long-term, urgent task of the Chinese Government to maintain national stability and concentrate their efforts on developing productive forces.¹²

The economic backwardness of Asia has been used to establish the primacy of economic development over human rights. The argument is, in part, that civil and political rights are neither meaningful nor feasible in conditions of want or poverty. Therefore the first priority of State policy must be to promote economic development. It is implied that economic development may well require restrictions on human rights, both to provide a secure political framework in which it can be pursued and to remove obstacles in its way (for example, through forced movement of people from lands required for “development”). Economic backwardness is also used to establish the priority as between different kinds of rights, in which civil and political rights occupy a lowly position (in part a response to an argument that human rights are indivisible, and all of them enjoy an equal status).

12 Ibid, p 8. There is of course no easy way to find out what the people of China want since there are no truly representative bodies or a free press—a point I return to later to establish the link between political rights and social rights.

The emphasis these governments purportedly place on economic development has led them to support the right to development. This right is a matter of considerable contention internationally, with developing countries arraigned on the side supporting it, and most developed countries united in their opposition to it. It certainly does not have the quality of other kinds of rights, which inhere in individuals or groups and for the most part are entitlements against the State. Nevertheless, the General Assembly of the United Nations adopted, in the face of abstentions by most Western States, a Declaration on the Right to Development on 4 December 1986.¹³ The Declaration ties the realisation of human rights in the developing countries to international economic aid for them and gives to "peoples" (presumably meaning "States") the right to "participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised". In return for these, several concessions are made in emphasising the indivisibility of rights and the claims of individuals to full participation in development and in the fair distribution of the benefits resulting from it.

The Declaration is a fuzzy document, trying to be all things to all persons. So while there are sections of it which can be used to advance the (more traditional) cause of human rights, the gist of it seeks to establish reason for the failure of the realisation of human rights in the international economic and political systems (including encroachments on the principle and practice of self-determination), while affirming that the primary responsibility for human rights are vested in States as part of their sovereignty. In other words, the rich countries must provide economic assistance to the poor countries, but must not question their human rights situation. (The Western riposte to the Declaration has been a massive imposition of political conditionalities on economic assistance and indeed, in the case of China, on economic relations and cooperation).

The Declaration is also an attempt to provide an alternative framework for the international discourse on human rights. It shifts the focus from domestic arenas (where most violations of human rights take place) to the international, and takes attention away from specific rights, for example, speech, assembly, social welfare to an ambiguous portmanteau right of development, for which in the nature of Third World affairs, the State must take the responsibility in defining and implementing it. Through the Declaration, Asian governments seek to promote the ideology of developmentalism which justifies repression at home and the evasion of responsibility abroad.

Another Asian initiative in changing the framework for the discourse on human rights is even more fundamental. The approaches discussed so far have taken the Western discourse as the main framework and have advanced qualifications to it or provided justifications for derogation from its values. Some governments have put forward the argument that the cultural matrix,

13 The Declaration is reprinted in, United Nations, *Human Rights: A Compilation of International Human Rights Instruments*, vol 1 (1994), p 548. I have criticised the Declaration in Ghai, *Whose Human Right to Development?* (1989).

within which relations between individuals and the State are embedded, is fundamentally different in Asia from that in the West. This matrix governs the nature and salience of human rights. This approach has been taken up aggressively in Singapore and Malaysia (less so in China, where the government's residual loyalty to Marxist thought is inconsistent with the adoption of this cultural approach, especially since so much of it is based on semi-feudal thought in Asia).¹⁴

I take as the basis of my discussion of this point an official 1991 statement of the Government of Singapore, *Shared Values*.¹⁵ The context of this White Paper is a concern of the Government that the cultural values of its people are under attack from foreign ideas and values. It poses the rhetorical question, "Can we build a nation of Singaporeans, in South-East Asia, on the basis of values and concepts native to other peoples, living in other environments?" It goes on, "If we are not to lose our bearings, we should preserve the cultural heritage of each of our communities, and uphold certain common values which capture the essence of being a Singaporean".¹⁶ It then finds certain perceptions and values which are common to the different ethnic communities of Singapore and which also distinguish them from society in the West. The key section of the Paper is devoted to a discussion of the relationship between the individual and society. Disputing the proposition that values are universal and common to all mankind, it states that there is a major difference between Asian and Western values in the balance each strikes between the individual and the community; Asian societies emphasise the interests of the community, while Western societies stress the rights of the individual. The Singapore society has always weighted group interests more heavily than individual ones. "This balance has strengthened social cohesion, and enabled Singaporeans to pull together to surmount difficult challenges collectively, more successfully than other societies. An emphasis on the community has been a key survival value for Singapore".¹⁷ The core values of the Asian society are identified as placing society above self, upholding the family as building block of society, and resolving major issues through consensus instead of contention. There is a strong element of Confucianism in this elaboration, although the Government denies that the values it propagates are purely Confucian. It, however, picks up an element of Confucian teaching as particularly relevant to Singapore. "The concept of government by honourable men (*junzi*), who have a duty to do right for the people, and who have the trust and respect of the population, fits us better than the Western idea that a government should be given as limited powers as possible, and should always be treated with suspicion unless proven

14 This sentence was written in 1993. As I revise it, today's *People's Daily*, 19 September 1994, (Beijing) starts the rehabilitation of Confucius, in several articles extolling the virtues of Confucianism as an aid to political stability and economic development.

15 Singapore Government, *Shared Values*, Cmd 1 of 1991 (Government Printers).

16 Both these quotations appear at *ibid*, p 1, and are taken from a presidential address to Parliament, January 1989.

17 *Ibid*, p 5 at para 26.

otherwise".¹⁸ The supremacy of political authorities is emphasised by the first of the Shared Values, "Nation before Community". Another aspect of Asian values, implicit though not explicit in the Paper, is the importance of duty as a counterpoint to right. The cohesion of society as well as the fulfilment of the individual is secured through a chain and hierarchy of duties. (The primacy of the notion of duty is emphasised elaborately both in the Chinese and Indian Constitutions.)¹⁹

The individual does not disappear altogether as a bearer of rights in the Singapore Paper. However, characteristically the concern with the individual is expressed more in terms of the obligations of the community to look after its less advantaged members. (In Singapore there is a twist to this, in that the "community" in question is the ethnic community of the individual, not the State, "to avoid the dependent mentality and severe social problems of a welfare state as experienced in many developed states",²⁰ laying the foundations of a kind of community corporatism in the wake of declining popularity of the ruling party, showing how much these questions are viewed in that country from the perspectives of governance and management).

Cultural "embeddedness" is not the only justification for this view of the relationship between the individual and the community and the interposition of the family. It is said to be also rooted in more pragmatic considerations. The White Paper hints at this, but it has been developed elsewhere. In at least South-East Asia, there is a strongly held view that an authoritarian political system is the secret of its economic success, and the frequent Singaporean mocking of the democratic efforts of the Philippines (with a rather inefficient economy) is advanced as proof of it. But there is also the belief that it is not the individual but the family (tied into a network of clan associations and relationships) which has been at the forefront of the phenomenal economic success of the region. There appears to be the view of a significant number of people (primarily but

18 Ibid, p 8 at para 41.

19 Chapter 2 of the Chinese Constitution is entitled "The Fundamental Rights and Duties of Citizens". Article 42 states that Chinese citizens have the right as well as the duty to work and article 46 says that they have the duty as well as the right to receive education. Other duties include safeguarding the "unification of the country and the unity of all its nationalities" (article 52); abiding by the Constitution and the law, keeping of State secrets, protection of public property, observing labour discipline and public order, and respecting social ethics (article 53); safeguarding the security, honour and interests of the motherland and a prohibition against acts detrimental to the security, honour and interests of the mother land (article 54); and to pay taxes (article 56). Article 55 states "the sacred duty of every citizen of the People's Republic of China to defend the motherland and to resist aggression" as well as to "perform military service and join the militia in accordance with the law".

The Indian Constitution requires citizens, *inter alia*, to abide by the Constitution, protect the sovereignty, unity and integrity of India, to promote harmony and the spirit of common brotherhood amongst all the people of India, and to renounce practices derogatory to the dignity of women, and to safeguard public property and abjure violence (article 51-A).

20 Ibid, p 7 at para 38.

not only, among the business community as is well evidenced in the debates in Hong Kong) that this combination of authoritarian rule and family and kinship networks lies at the root of economic success.²¹ This model (which reverses the normal understanding of the relationship between the market, individualism and the rule of law) is seen to be threatened by democracy and human rights. Hence democracy and human rights are not high on many people's agenda.

Other voices

There are other Asian voices as well. There are, admittedly somewhat muted or censored, the voices of the oppressed and the marginalised. There are the passionate voices of indigenous peoples whose cultures are destroyed by governments which claim to be the custodians of Asian cultures; they speak in a language which finds few resonances even in the West (because their language is threatening to the system of the market). There is the voice, rising in density, of the middle classes, with a stake in affluence whose new found prosperity and economic enterprise shows to them the virtues of the legal protection of property and the rule of law. There are the strident voices of ethnic minorities who seek collective autonomies which challenge the governments' claims of political monopoly and State sovereignty. An important and articulate group are intellectuals who are alienated from the State, and for the most part are not apologists for the regime. Intellectuals respond to and engage in international debates; and like the NGOs they form networks with their counterparts in other parts of the world.²² Like the NGOs they have a commitment to human rights and democracy (even in China there is a growing and vibrant academic community with a keen interest in human rights and constitutionalism).²³ They are less ready to accept Western conceptions in totality, and attempt to relate questions of human rights to specific national conditions.

I have space only to discuss the views of the NGOs which provide the most consistent and coherent alternative view of human rights to that of governments. An authoritative statement of the position of Asian NGOs was issued on 27 March 1993 on the occasion of the Asian intergovernmental conference on human rights preceding the Vienna World Conference.²⁴ It endorsed the view that human rights are universal, and are equally rooted in different cultures. While it supported cultural pluralism, it condemned those cultural practices which derogate from universally accepted human rights. Since in its view human

21 I have reviewed this literature (and examined its implications for the centrality or otherwise of the rule of law) in "Capitalism and the Rule of Law: Reflections on the Basic Law" in Wacks RI (ed), *Legal Theory: China, Hong Kong and 1997* (1993), p 343.

22 For a view of leading Indian intellectuals see Baxi, "The Right to be Human" (1986) 13(3) *India International Centre Quarterly*; Kothari S and Sethi H (eds), *Rethinking Human Rights: Challenges for Theory and Action* (1989); Baxi U, *Inhuman Wrongs and Human Rights* (1994), p 123.

23 For a succinct summary see Chen, "Developing Theories of Rights and Human Rights in China" in Wacks RI (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (1993).

24 Note 4 above.

rights are of universal concern and universal value, it does not regard the advocacy of human rights as an encroachment upon national sovereignty. Indeed it recommends international cooperation and solidarity for the promotion of human rights, as a refutation of claims of national sovereignty over human rights issues. The NGOs signatories of the statement support the principle of the indivisibility and interdependence of human rights.

If in these perspectives the views of the NGOs are at variance with those of governments, there is some common ground on other points. The NGOs attribute the poor state of human rights to the international economic order, whose reform through structural changes as well as the adoption of a Convention on the Right to Development, they urge. Unlike the governments, they see a much closer connection with domestic oppression and international exploitation, in the collaboration of local economic and political elites with multinational corporations and aid agencies. Unlike the governments, they are critical of the consequences of the market system. They share with governments the desire to establish a broad framework for the analysis of human rights, but their framework (unlike that of governments which is informed by a statist view of development) is suffused with notions of social justice, eradication of poverty through equitable distribution of resources and the empowerment of people, especially women and other disadvantaged communities. The NGOs also part company from governments in their assessment of the state of human rights, which they find marked by massive and terrible violations of these rights and pervasive lawlessness on the part of State authorities. They deplore the militarisation of their governments and societies which is a primary cause of these violations. Their prescription for the ills of their countries is thorough going democracy and an unambiguous recognition and enforcement of human rights

III. A Critique of Governmental Perspectives

Asian governments are right to insist that human rights must be located within the social and economic conditions of specific societies. So called universal human rights of the West have evolved over a long period of European history, responding to the changing configurations of power and the tasks of each epoch of history. Claims of universality and indivisibility of rights are hard to sustain in the face of the West's history of the oppression of its own people and of others, with slavery which once enjoyed religious approbation, abuse of child labour, the exploitation of colonies and the other depredations of imperialism and racism. Nor is the process of the development of rights complete. Social welfare rights were acknowledged only in this century, and the appalling degradation of the environment has now set the stage for a new conception of rights and responsibilities, in which the community will have to be accorded a key position as a bearer of rights as well as duties. There is no reason why contemporary concerns and fads in the West should define the parameters of international discourse in, and aspirations, of human rights.

That is, however, not to say that the framework adopted by Asian governments is justifiable. I start with one element of that framework, religion,

which has played a less important part in East Asia than in South and West Asia, but which is nevertheless supposed to give a uniform and distinctive character to Asian perspectives on human rights (although the invocation of religion is somewhat ambiguous since it is also argued that all religions are based on essentially the same values, and provide a common foundation for the primacy of human rights).

Religion

An immediate difficulty facing an exploration of the question whether a distinctive Asian perspective on human rights emerges from the religion of its people is that there are numerous religions in Asia, including all the world's major ones. Assuming that religion does indeed influence a people's perception of human rights, then one would have to concede that there would be a plurality of perspectives, not one. Even if we concede that for our inquiry what matters are "Asian" religions (Hinduism, Islam and Buddhism plus the influential set of beliefs represented by Confucianism), as reflecting more accurately Asian predispositions, they too vary in their beliefs and values. Nor does the same religion manifest itself uniformly in its discourse about human rights at all times and in all countries. Buddhism is militant and aggressive in Sri Lanka, asserting ethnic and religious superiority of one section of the population, while elsewhere, as in Cambodia, it has been a force for peace and the protection of the rights of all communities. Hinduism was once seen as tolerant and non-proselytising, providing a constitutional basis for secularism in India; today many of its adherents are militant and attack beliefs and institutions of other religions. The Hinduism of Nepal is more syncretised than of modern India, able to co-exist and even assimilate with other religions. In many East Asian countries, all religions seem to be mediated through Confucian thought and values, detracting from the specificity of the religion.

In many places religion takes its coloration from politics, woven into the apparatus of the State or claiming a special eminence in its affairs. While Western States separated State and religion (whatever the influence of religion on human rights), the contemporary tendency in many parts of Asia (particularly South Asia) is to connect religion with State. In some instances this has served to diminish the scope for human rights. Sometimes religion acts as a conservative force, at other times it is a major factor for change (and the same religion can play these opposite roles if we compare Christianity in Latin America with that in Europe).²⁵

25 A strategic question is how far one should use religion to legitimise rights. Religions can lend themselves to alternative propositions. Texts of most religions can be mined for contradictory interpretations. In the circumstances, is it best to separate the discourse of human rights from religion? One answer is no, on the assumption that since Asian people rely on religion for spiritual sustenance and sometimes political authority, rights should be anchored in religion. This may also counter the argument that human rights are foreign constructs by providing an autochthonous base for them in Asian beliefs and values.

As to whether religions can provide a basis for a universal or pan-Asian regime of rights, it is always hard to say what the essence of a particular religion is, but it would seem that different values are enshrined in different religions. Some like Hinduism have sanctified social and caste distinctions, and others like Confucianism, established a social and political hierarchy. Nor is equality the hallmark of Islam, for despite its ideals, its practices cleaved to a tribal and unequal society of its origin. Christianity justified slavery for centuries, and Christian-based Western political systems did not accommodate the equal rights of blacks and women until this century. Not all Asian States (including the largest of them) encourage the holding or the exercise of religious beliefs (preferring, as in China, to base the source of rights in popular sovereignty). Religions would not appear, therefore, to hold the key to universalism. Indeed most religions in some sense deny the claims of equality: traditionally, Hindus found people of other religion polluting, and most other religions have a notion of the "non-believer" to whom an inferior status is accorded in both religious and secular systems. Nor does religion provide a basis for a distinctive Asian perspective on human rights.

Culture

If an interest in religion is frequently motivated by the wish to find common roots for human rights, culture is explored to explain diversity and specificity. As noted above, some Asian governments claim that their societies place a higher value on the community than in the West, that individuals find fulfilment in their participation in communal life and community tasks, and that this factor constitutes a primary distinction in the approach to human rights. The Western pre-occupation with individualism is explained by the alienation resulting from its economic system which has sapped the vitality of the community, and forced introspection on individuals as a means towards their identity. This argument is advanced as an instance of the general proposition that rights are culture specific.

The "communitarian" argument is Janus-faced. It is used against the claim of universal human rights to distinguish the allegedly Western, individual-oriented approaches to rights from the community centred values of the East. Yet it is also used to deny the claims and assertions of communities in the name of "national unity and stability". It suffers from at least two further weaknesses. First, it overstates the "individualism" of Western society and traditions of thought. Even within Western liberalism, there are strands of analysis which assert claims of the community (for example, Rousseau); and most Western human rights instruments allow limitations on and derogations from human rights in the public interest, or for reasons of State. Western courts regularly engage in the task of balancing the respective interests of the individual and the community.²⁶ Within liberal societies there are nuances in the approach to and the primacy of human rights, as becomes evident when one examines the differences among the United States, Canada, France and the United Kingdom.

26 See for example, Kymlicka W, *Liberalism, Community, and Culture* (1989).

Furthermore, liberalism does not exhaust Western political thought or practice. There is social democracy, which emphasises collective and economic rights, and Marxism, which elevates the community to a high moral order, is also reflective of an important school of Western thought. There is much celebration in Western political thought of "civil society".²⁷

Secondly, Asian governments (notwithstanding the attempt in the Singapore Paper to distinguish the "nation" and the community) fall into the easy but wrong assumption that they or the State are the "community".²⁸ (A similar conflation occurs in the African Charter of Human and Peoples' Rights.)²⁹ Nothing can be more destructive of the community than this conflation. The community and State are different institutions and to some extent in a contrary juxtaposition. The community, for the most part, depends on popular norms developed through forms of consensus and enforced through mediation and persuasion. The State is an imposition on society, and unless humanised and democratised (as it has not been in most of Asia), it relies on edicts, the military, coercion and sanctions. It is the tension between them which has elsewhere underpinned human rights. In the name of the community, most Asian governments have stifled social and political initiatives of private groups. Most of them have draconian legislation along the lines of the British colonially inspired Societies Act³⁰ which gives the government pervasive control over civil society. Similarly rights to assemble and march peacefully have been mortgaged to the government. Governments have destroyed many communities in the name of development or State stability, and the consistent refusal of most of them to recognise that there are indigenous peoples among their population (who have a right to preserve their traditional culture, economy and beliefs) is but a demonstration of their lack of commitment to the real community. The vitality of the community comes from the exercise of the rights to organise, meet, debate and protest, dismissed as "liberal" rights by these governments.

27 See Cohen J and Arato A, *Civil Society and Political Theory* (1992).

28 Although, as I argue that the lip service to the "community" is hypocritical, the real "community" which motivates politicians is parochial and hynich, pursuing its selfish interest at the expense of other communities, and is the basis of public corruption and graft—and therefore nothing to be proud of. An interesting light on "community" occurred in Hong Kong in April 1994, when two shoppers beat up a shop assistant, while her colleagues watched but did nothing to defend her. However, she bore no grudge against them saying, "Even though I have known them for a long time what difference does it make? You cannot expect someone to help you. I am not their relative". (*Eastern Express*, 11–12 June 1994).

See Siu-kai Lau, "Utilitarianistic Familism: The Basis of Political Stability" in King A and Lee R (eds), *Social Life and Development in Hong Kong* (1981).

29 The African Charter was adopted in Nairobi in June 1981. Its preamble refers to the "values of their historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human rights and peoples' rights".

30 Typically such legislation provides that a society has to be registered before it can operate. The government has the discretion to refuse to register a society and to de-register it. It has the power to seek information from the society about its membership, finances and other affairs, and to control or prohibit political links with outside bodies.

Nor is the tight regulation of society as in China and Singapore particularly Confucian. Confucius argued against reliance on law or coercion, and advocated a government of limited powers and functions.³¹

Another attack on the community comes from the economic, market oriented policies of the governments. Although Asian capitalism appears to rely on the family and clan associations, there is little doubt that it weakens the community and its cohesion. The organising matrix of the market is not the same as that of the community. Nor are its values or methods particularly "communitarian". The moving frontier of the market, seeking new resources, has been particularly disruptive of communities which have managed to preserve intact a great deal of their culture and organisation during the colonial and post-colonial periods. The emphasis on the market, and with it individual rights of property are also at odds with communal organisation and enjoyment of property (and a further irony is that Asian leaders who allege their allegiance to communal supremacy and values are among the most ardent opponents of a Marxism that espouses the moral worth and authority of the community). Market policies have relied greatly on multi-national capital and corporations, which have brought new values and tastes, and are increasingly integrating their economies and elites into a global economy and culture. Indeed, it is these very considerations which prompted the Singapore White Paper, but the contradictions of official policies largely escaped its authors. It totally ignored the impact, indeed the onslaught, of modern technologies on traditional communities.

A final point is the contradiction between claims of a consensus and harmonious society, and the extensive arming of the state apparatus. The pervasive use of draconian legislation like administrative detention, disestablishment of societies, press censorship, and sedition, belies claims to respect alternative views, promote a dialogue, and seek consensus. The contemporary State intolerance of opposition is inconsistent with traditional communal values and processes. Contemporary State processes in Asia are less hospitable to community politics than the much derided adversarial processes of the West, which at least ensure a hearing for all parties.

Thoughtful Asians, who concede many of the above criticisms of a "communitarian" approach, nevertheless hold on to some important distinctions between the West and Asia, which they consider are rooted in culture. There is first the distinction between duties and rights. An aspect of this is the tendency in the West towards formalism, the transformation of values as legal rights, and the consequent emphasis on the rights and prerogatives of an individual. Based on a theory of competition and suspicion of authority, this leads to demands rather than concessions, to confrontation rather than reciprocity and accommodation. An emphasis on duties on the other hand leads to honour and

31 As with religion, Confucianism has been used for political purposes so that its essence has become somewhat obscure. It is undisputed, however, that Confucius was against tough laws and strong punishments, believing in the virtue of rulers and their sense of duty. See Rubin V, *Individual and State in Ancient China* (1976), and Van der Sprenkel S, *Legal Institutions in Manchu China* (1962), esp Chapters 2 and 3.

peace, as well as stability. It is argued that the rights-based emphasis leads to the impoverishment of society, so that in the search for the protection of the citizen against the State, the community collapses and non-State actors become the principal source of oppression and insecurity (making it unsafe to be on the streets of major metropolises after sunset). There is also the danger in formalisation of values as “rights” that the form may elude substance (so that the satisfaction of formal criteria hides realities that deny the values; as Professor Mazrui once said, the West may have abolished child marriages, but the number of teenage pregnancies and one parent families has vastly increased).

However, in the hands of an intolerant government, the concept of duties can become a justification as well as an instrument of authoritarianism. This is perhaps not inherent in the notion of duties because duties are also laid upon rulers (in the best Islamic and Confucian traditions), and indeed the notion of duty can be truly revolutionary. In practice, however, this is not how it often is, duties vary from person to person (persons at the top of the hierarchy having rights and those at the lower reaches, duties), reminiscent of feudalism. The emphasis on the fulfilment of duties, frequently betokening social, economic or political subordination, tends towards conservatism and the perpetuation of inequalities—antithetical to the claims of equitable development advanced by many Asian governments. Furthermore, the conflation between the State and community serves to strengthen the tentacles of the government over society. The notion of duties transferred from the community to the State changes its nature from inter-citizen obligations and responsibilities to the much more problematic case of State-citizen relations. The West has, to some extent, separated civil society from the State, creating a “neutral” public area and space for communities (from which of course the commanding heights of the State may be controlled), while in Asia the tendency is towards the convergence of the two, regarded perhaps as necessary for the legitimacy of the State³² but ultimately destructive of the community.

Even if we were to concede that Asian cultures or religions are distinctive and that these colour the perception and reality of rights, it is not clear why the global debate has taken the opposition of political and civil rights (“Western”) versus economic and social rights (“Asian”). Why should the communitarian approach suggest that economic and social rights are more important than political? It may be argued that traditionally, communities were hierarchically organised and that its cohesion depended on duties. But the communities were even less concerned with “development” which is undoubtedly more of a foreign concept than fair or accountable administration or harmony within the community. If human rights do not follow from Asian cultures, then neither does economic development. The same can be said of “Asian” religions, which are stereotyped as other worldly (like most religions), more concerned with

32 The argument here is that in non-Western States, legitimacy does not come from the rule of law, constitutionalism and the neutrality of State institutions, but from their association with religion and culture—which in the mostly heterogenous States, means the culture and religion of the majority community. See for example, Tiruchelvam, “Development and the Protection of Human Rights” (mimeo, 1993).

salvation in the next world than economic prosperity in this. Ethics are more important than power, and asceticism and austerity are values approved by most of these religions. Apart from the somewhat ambiguous position of Confucianism (which is mistakenly today regarded as development oriented rather than as preserving the status quo as traditionally regarded), there is little in "Asian" religions to support a privileged position for economic development. It is interesting that the most influential Christian church in Asia is Catholicism rather than the Weberian, development driven Calvinism or a variant of it! Asian governments are therefore on shaky ground when they invoke tradition to justify the primacy of development. If economic rights are seen to flow from "communal" or "collective rights" there is a misapprehension, for these rights are normally attributed to individuals, not groups (collective rights being associated with "solidarity" rights to a clean environment, property as commons, and a measure of equity, which are anathema to at least some Asian prime ministers).

If there is no substantial basis in community, culture or religion for economic and social rights, then why do Asian governments place such rhetorical emphasis on them? They sometimes say that civil and political rights are meaningless if the people are poor and illiterate. There is of course considerable truth in this, but there is reason to be sceptical about the sincerity of the governments for they have done little to establish economic rights or promote civil rights in countries which have achieved great economic success. The more plausible reason is that the talk of economic and social rights is diversionary, an attack on civil and political rights. Governments are anxious to minimise challenges to their authority or legitimacy, which means (as it seems to them) the suppression or emasculation of political opposition. A preference for economic rights might also arise from the consideration that it is much harder to hold governments accountable for them. They are for the most part, matters more of standards than precise rules and entitlements, their enforceability is problematic and they are widely regarded as contingent on resources. In fact these governments dislike talk of economic and social rights, except when engaged in global debates (many of them do not like talk of any rights). It is not easy to establish how civil and political rights threaten economic and social rights. The juxtaposition these governments play upon domestically is not between these different rights, but between civil and political rights and *economic development*. It is economic development, not economic rights, that they emphasise. They are, however, content to seek economic rights of *States*, the so-called developing States (as in their advocacy of the right to development). It is of course easy to understand why governments want economic development; it increases State resources, enables governments to establish larger armies, enhances the status of their leaders, and secures the support of the populace.

I conclude this section by reference to another distinction that is seen to flow from cultural differences—the role of the family (as that suggests an appropriate approach to study of human rights). It is frequently said that the bedrock of Asian societies is the family, and it has become fashionable to ascribe social problems in the West to the breakdown of family life. It is claimed for Asia that

mutual responsibilities within the family provide for the welfare of its members, ensure traditions of respect and rectitude, and promote social stability and economic development. The conversion of values into individual rights undermines the basis of family solidarity. However, countries which are not known for their practice of individual rights have found that the family may well be weakening under the pressure of other social and economic changes. A particular irony is that a legislator in Singapore, known to enjoy government support, recently introduced a bill to give parents the right to sue their children for maintenance (and the children the defence that the parents mistreated them when they were young!). It is hard to imagine that such a bill would achieve its objective of maintaining family solidarity!

The concern with the erosion of family values is instructive in a number of ways. At one level, it minimises the Asian claim for cultural distinctiveness and therefore relativity of rights. At another level, it provides another basis for relativity. Societies are constantly changing, and with economic and social changes, there are also changes in the perception of what is important and valuable to a community or a group. In other words, an assessment of the priorities in human rights alters with the underlying economic transformations. The West too has had its “communitarian” phase (and the community is still important there) and the family is even now cherished, even if old solidarities are beginning to dissolve under economic pressures. Asian governments which cheerfully and sometimes aggressively espouse “Western” notions of development and the market, find that they can no longer ward off its child, human rights.

The above analysis suggests that a useful perspective on human rights is drawn from history: the (dialectical) unfolding of rights, and representing social achievements. This in turn suggests that the development and understandings of rights are contingent on a variety of factors, moral ideas as well as material conditions, and that differences in their perception are attributable to them rather than to any inherent ideas of culture or community. This approach does indeed provide a basis for reconciling so called “Western” and “Eastern” perceptions of human rights. In my view this provides a better basis for global debates on this subject. The notion that distinct “Western” and “Asian” perspectives exist is inaccurate, ahistorical, and leads to unfruitful polarities (ignoring, for example, that the West also has a notion of duty (limitations on rights/freedoms)). Equally it distorts the debates on human rights, by suggesting that the key conflict is between the East and the West, rather than that it is within each. It detracts from the relevance and urgency of human rights discourse in Asia, the keen debates on the appropriate models for representation, governance and accountability, and equity. Asian intellectuals and activists need to rescue the debate from the present sterile phase to place it at the centre of national and regional politics.

If human rights have to be located in their social and economic contexts, what are the appropriate features that constitute the context for them in Asia? If one may generalise (keeping in mind the simplification that this may involve), the following specifics of the Asian situation stand out. The first point is that the function of human rights (and discourse on them) in Asia is quite different from

that in the West. Human rights in the West have responded to the configurations of power and economic relationships as they have evolved over a long period. They are consequently consistent with the patterns and structures of authority, and people's aspirations as well as expectations. There are no serious competing paradigms of political organisation. The role of human rights is to fine tune the administrative and judicial system and fortify rights and freedoms that are largely uncontroversial. In Asia, on the other hand, human rights have a transformative potential. They are a constant challenge to vested interests and authority in societies riven by enormous disparities of wealth and power, with traditions of authoritarianism and the helplessness of disadvantaged communities, of militarisation and the conjunction of corrupt politicians and predatory domestic and international capital. Human rights are therefore a terrain for struggle for power and the conceptions of good society. It is for this precise reason that Asian governments have engaged in the debate with the West; the real audience are their own people.

The second point is that there are massive violations of human rights in Asia, of the rights of women and children, of lower castes and otherwise disadvantaged communities, of ethnic minorities, and of workers. Violations range over the whole conspectus of human rights; civil and political rights, as well as cultural, social and economic; there are mass killings and widespread disappearances; torture; wide displacements of communities from their traditional abode; arbitrary detentions and extensive censorship of thought and expression. The State is a major culprit, brutalising whole populations, but massive violations also take place in and through civil society, sometimes with the connivance of the State, and frequently reflecting feudalistic and patriarchal dimensions of culture. Social conflicts, particularly those stemming from ethnic or caste differences, have politicised and militarised civil society in many States. These developments should caution us against over-romanticisation of civil society (which in India, for example, is a major source of the oppression of millions of people, through murder and rape, bonded labour, and a web of discriminatory and punitive customs and practices).³³

The third point is that despite these violations, human rights consciousness is low. Explanations for this paradox may lie in the weight of oppression over centuries, a fatalistic acceptance of one's miseries, and obstacles placed in the way of those who would seek to make explicit to the downtrodden the causes of their oppression. It certainly lies in the ethnic divisions of societies; ethnic consciousness can dull human rights consciousness, distinguishing us from

33 The framers of the Indian Constitution were well aware of these problems of civil society. Article 15 declared illegal discriminations on ground, *inter alia*, of caste, in, for example, access to wells, tanks, bathing ghats, roads and other places of public resort. Article 17 abolished untouchability and its practice in any form. Article 23 prohibited traffic in human beings and forced labour, particularly the traditional form of bonded labour known as "begar". There are various laws at the central and State levels to implement these provisions, particularly the Civil Rights Act 1955 (expanded and renamed as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act in 1989). Despite these attempts, the social and economic position of these disadvantaged communities shows little improvement.

“others” and facilitating justifications for their oppression. A major challenge to human rights workers is undoubtedly this ethnic consciousness which compels a perception of outsiders as less than human. Another cause of low human rights consciousness may be widespread poverty. Poverty is a great cause of the denial of human rights. The international system refuses to accept this reality—for largely political reasons. It refuses to acknowledge that poverty destroys human dignity; and without human dignity there can be no human rights; or indeed the capacity to challenge the system of oppression.

Thus economic development is undoubtedly important. But not just any kind of economic development. Economic growth must be accompanied by a wide measure of egalitarianism, the protection of the rights of workers, particularly migrant workers, and democratic practices at work places. Nor must economic growth be undertaken at the expense of land, customs and autonomy of long settled communities. Unless these and other community concerns are safeguarded in the process of economic growth, development is perverse and adds to the violation of human rights and dignity.

A further point about human rights in Asia is that challenges to their violations are not individual based, but group or class based. This is particularly the case in multi-ethnic States. The protection of human rights is therefore pursued through the group. This fact, and the fact that the State is a major violator of human rights, suggests strategies that are different from the traditional Western approaches which are legalistic and court centred. Asian strategies cannot realistically be court centred, however favourably the judiciaries may be disposed towards human rights (and for the most part they are not). Human rights conscientisation and mobilisation based on connections between them and their oppression are a fundamental starting point (connections which neither local governments or the West are anxious should be made).

Nor must the terrain of struggle be purely domestic. Despite the resistance of governments, the realisation of human rights in each country is intimately tied to wider global forces (particularly in the contemporary world wide pursuit of marketisation). Even today many governments in the Third World are surrogates for external economic and political interests, and it is necessary to take the battle to the homelands of these interests, just as it is necessary to recruit foreign interests to put pressure on domestic governments which deny their people the right to participate in decisions affecting their own destiny.

For Asians concerned with the welfare and dignity of their fellow citizens, the right strategy should embrace the universalism and indivisibility of human rights. The implication of universalism and indivisibility is that human rights can no longer be seen in national terms or responsibility or as contingent on particular economic systems. They raise global issues which highlight the responsibility of people in one State to peoples in others. They imply that consumers in the rich Western countries owe a duty to present generations in other parts of the world and to future generations everywhere. They necessitate the closure of the armaments industry. They require a more equitable international economic system. They import a more democratic international

system. Consistent with the dominant role of human rights in history, they raise a truly revolutionary agenda, sufficient to discomfort the West.

IV. Theoretical Issues

The polemics between the "West" and "Asia" on human rights has stimulated the search for a consensus on the importance as well as the scope of rights. One strategy has been to find agreement on the source of rights, but as pointed out above, this has not been promising. Another is to see if there can be a consensus on the purpose of human rights, at least at a very general level. One aspect of this approach has been to try to identify rights which form a "core" that all cultures and jurisdictions would subscribe to—the obvious candidates are the right to life, the prohibition of slavery, and the prohibition of torture—but beyond that, lists tend to diverge.³⁴ Equally, while every one would subscribe to the view that a primary purpose is to ensure the "inherent dignity" of a person, dissent starts with attempts to draw out its implications. Since it is assumed that the West regards civil and political rights as central to human dignity and Asia accords economic and social rights that primacy, much effort has been expended on the reconciliation of these types of rights. The Vienna Conference formulation was that "rights are indivisible"—but the riders that followed it demonstrated that priorities may need to be established and that these varied from place to place. I discuss this issue later in this section, for in my view it shows not only the scope of disagreement, but also a certain kind of consensus. Indeed I would argue that there is a measure of hypocrisy in the polemics between the West and the part of Asia I am discussing. The United States has cordial relations with the States which are the most outspoken proponents of the Asian position (and also some of them with a poor record of human rights)—Indonesia, Malaysia, Singapore, and occasionally and in the past, Thailand and South Korea. The United States provides security for them both through its own troops and the sale of arms (there are willing donors and willing recipients). There are extensive economic and trade relations between them. There is, in practical terms, very little disagreement on the agenda of the government of these States. The sincerity of the commitment of both parties to human rights has to be judged in this context of cordiality and fundamental common purpose.

(a) Conditionalities

How far should (in this instance) Western countries specify conditionalities on their aid or economic relations with other (in this instance) Asian countries? What is the justification for conditionalities? What are the dangers in conditionality? How effective are they?

The justification goes to the nature of the responsibilities of the international community for human rights, and here we have a confrontation between those who argue that contemporary international law has brought human rights within

34 Even the avoidance of pain, which one might suppose is a basic human instinct, does not hold in all cultures—forms of self-immolation or self-injury are practised as expressions of dissent or mourning, etc.

the jurisdiction of the international community, and those (which includes most Asian States) believing that they remain securely within national sovereignty. From these perspectives, one difficulty is that conditionalities are rarely imposed by the international community. They are imposed by a State or an association of like minded States, which clearly affects their legitimacy. As national or regional initiatives they do not of course require to be justified by a rule of international law on human rights; they are within the sovereignty of the donor/trading State.

The justification for conditionalities weakens if there is no agreement on the universality of rights. To those who believe in relativities, this may seem merely another form of cultural imperialism. They may also be seen as economic imperialism, for they have frequently embodied requirements of privatisation and de-regulation, and the general strengthening of the market mechanism, generally under the rubric of good governance. If conditionalities are not controlled by generally accepted norms, there is the danger of "reverse" conditionalities, instances of which are provided by economic boycotts or threats of them by Malaysia against the United Kingdom and Australia (if the latter did not curb the freedom of the press in their countries to criticise the policies of Malaysia or to make allegation of corruption against its leaders). Indonesia too has practised similar conditionalities in its relations with Australia (and recently against the Philippines in relation to the 1994 Manila conference on East Timor).

Justification may also depend on the kind of conditionalities. The earlier instances of conditionalities, particularly in Africa, related to the restructuring of the economies of the recipient States which involved privatisation, liberalisation and the reduction or elimination of the State provision of welfare services. Subsequent conditionalities related to the respect for human rights and the establishment of democratic practices. Political conditionalities may be easier to justify in that they reinforce internationally agreed norms of governance—human rights and self-determination. They also increase the options and self-expression of the people of the recipient States, and for that reason one welcomes them. Economic conditionalities, however, represent a more fundamental invasion of State sovereignty (for there are no international norms on how an economy should be organised) and they also close options for governments and people—and hence are undemocratic. There is thus a basic contradiction between political and economic conditionalities.

Conditionalities raise other kinds of problems as well. There is the danger of "double standards" in a dual sense; the standards or human rights practices of the "donor" may be little better than that of the recipient, and the donor may pick and choose States for conditionalities, further politicising the practice of conditionality. The United States, "the mother of all conditioners", is particularly vulnerable to these temptations; its record of connivance in the massive violations of the rights of the Palestinian people by Israel, and its active engagement in the destabilisation of democratic orders in many parts of the Third World being particularly despicable. Political conditionalities (for example, regarding good governance) are particularly offensive when the

“donor” engages in activities in the recipient country which are inconsistent with the conditionalities (forcing the recipient into a kind of schizophrenia)—a ready example (of widespread practice of Western States and corporations) is the deal made by the United Kingdom Government for the financing of a dam in Malaysia if Malaysia would purchase arms from the United Kingdom (not only is this corruption but also forcing the purchase of arms runs counter to the policy of the West to penalise such purchases).³⁵ Conditionality may threaten consistency in another sense; a State may decide that its national interests no longer lie in maintaining conditionality, and may abandon it after having initiated it (as with the recent United States decision on the Most Favoured Nation status for China). A country’s foreign policy is determined by many considerations, largely of its own self-interest, and therefore human rights are unlikely to be an important or consistent factor. A change of policy may raise a particular moral problem; an important casualty of this change may well be human rights activists in the “recipient” country who have staked a great deal (personally and otherwise) on continued support from abroad.

For the above reasons, conditionalities are not often effective—even if they lead to some temporary improvements. Those who impose and those on whom conditionalities are imposed are generally anxious to return to normal relations, and are therefore astute to find an improvement even if such a conclusion cannot be supported by the evidence. Conditionality can also backfire if the local government decides to whip up anti-foreign sentiments on its basis—as it may frequently suit its purposes. They engage the State and civil society institutions in a human rights dialogue with the donors, rather than with their own people. They may also sharpen polarities which are unlikely to be productive (and which may weaken the capacity of the imposing State to achieve progress through other means).³⁶ Smaller and weaker countries are more likely to be subjected to conditionalities (as the reversal of United States policy towards China demonstrates).

Although sometimes conditionalities may be necessary (especially if a government, with a poor human rights, is particularly intransigent, there is

35 See the resolutions of the European Community and the Council of Europe reprinted in DANIDA, *Human Rights and Democracy: Perspectives for Development Co-operation* (1993).

36 Mr John Shattuck, the Assistant Secretary of State and the highest ranking United States official with responsibility for human rights, described human rights conditionality as a “blunt weapon” in his defence of the reversal of the United States position on China, at an Asia Foundation Washington meeting (June 1994). He explained that it prevented the United States from having normal relations with China and precluded the use of other methods and instruments for change in China’s human rights pressure. However many people have interpreted the reversal of the United States policy as kowtowing to American business, and regard with distaste the unseemly haste with which Secretary for Commerce Ron Brown rushed to China with a coterie of business people to sign up several lucrative contracts.

The episode illustrates another danger with conditionalities: the reversal caused much confusion and was widely seen as a signal to human rights activists in China and elsewhere not to depend on the United States for support.

evidence of widespread dissatisfaction with the regime by the public, and there is multi-lateral support for the conditionalities), dialogue or other forms of “constructive engagement” are preferable—at least in the initial stages.

(b) Political and civil rights versus economic and social rights

The controversy over the priority of these two types of rights is not new. Representing a clash between “liberalism” and “Marxism”, it dominated the drafting of the International Bill of Rights, and resulted in a bifurcation of rights into two covenants (the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights). The ideological context of the controversy has, however, changed. By and large the market provides the matrix for the proponents on both sides. For example, while the Soviet Union was firmly opposed to the right to property (which does not feature in the Covenants), Asian governments (including China now) are wedded to it. The difference between the two sides lies in the vision of the market. In Western theory the market is autonomous, and the safeguarding of that autonomy requires a number of civil and political rights (property, freedom of movement, association and organisation, expression and an independent and rational legal order). The control of the State (which provides the legal and administrative framework for the market) by the ruling group comes from its prior dominance in civil society (emphasising yet again the importance of civil rights). Asian markets are organised in a much more authoritarian and rapacious manner; there is wide scale corruption; the State, more autonomous of social forces than in the West, is a means to control over economic resources and civil society; and many are still at the “primitive accumulation” stage. Administration is more important than the law; and the imperatives of control override those of economic rationality.

Although both the West and the Asian States are committed to the market, there is competition between them for the national or regional dominance of world markets. Just how the market is organised may affect the interests of the States differently. The West has an interest in equalising the conditions of competition and in the opening up of markets, while Asian States are concerned with twin objectives—of increasing competitive edge and political control. It is thus easy to understand why the West would want to emphasise transparency, accountability, functioning legal codes and courts and a narrowing of the role of the State. It is equally easy to see why Asian States would resist these, using the shibboleths of economic, social and cultural rights. Culture becomes particularly functional as both providing a moral and popular mode of differentiating the East from the West, as well as in slowing down political mobilisation at home. But since the market remains the operating matrix, the process, as I have pointed out above, is not without deep contradictions.

Ideological justifications for the success of the markets in Asia, harping upon the Confucian values of authority, obedience and the salience of the family in economic affairs, are used not to establish the irrelevance of civil and political rights but their destructive qualities. Economic and social rights attempt to mediate between the market and the community, to soften the impact of

market forces, to act as a safety net. Nothing in the present conjuncture enhances economic, social and cultural rights. On the contrary, the general acceptance of the market means that propertied and entrepreneurial classes have gained new salience, and that fresh restrictions on social and economic rights (including those of workers and in regard to the environment) are placed in the name of global competitiveness. Asian governments may have some justification to see the emphasis on workers rights and the environment as attempts by the West to reduce the competitiveness of Asian economies, but the restrictions nevertheless point to the shallowness of their commitment to economic rights. It is therefore unlikely that we shall get useful purchase on the question of economic and social versus political and civil rights by examining the stance of Asian governments.

If these inquires are unproductive, what then might be other approaches to the question? Here I must point to the negative consequences of the domination by lawyers of human rights questions. Armed with a number of international conventions, they have excessively juridified the debate, relying more on the text than the purpose of rights. Questions of justiciability have narrowed the range of rights that it is the responsibility of the State to protect. The focus on the State as the source of violations has tended to obscure the power (and the practice) of private groups to inflict massive denial of rights on individuals and communities, and to have led to a somewhat uncritical praise of civil society. Textual and legal analyses (which emphasise universalism) have also ignored the underlying social and economic circumstances which condition attitudes towards and the practice of human rights. I believe that it is in the examination of these circumstances that we can establish a link between political and economic rights.

Economic, social and cultural rights are particularly valuable in uncovering the rationale for human rights. Human rights were part of the post-war agenda of the United Nations which emphasised their close connection with peace, development and human dignity. Unlike the “negative” liberties of political rights, these other rights raise a different framework and pose larger questions—that of the purpose of society and State, of social responsibility and social justice, of equity, and the potential of the human person. They suggest that a person is born full of potentialities—potentialities which find fulfilment through civil and political rights, that of expression, association, and participation, but that these potentialities do not materialise without appropriate social and economic circumstances.³⁷ Undoubtedly poverty, as I have already argued, is the single most important cause of the violation of rights.

It is therefore necessary to move away from the polarities of civil and political rights on the one hand, and social and economic on the other. Each has a bundle of rights which vary in their impact on the State and citizens and not all are individually oriented (for example, the right of association serves political, economic and cultural functions). Their disaggregation and the purpose each

37 Fields and Narr, “Human Rights as a Holistic Concept” (1992) 14 *Human Rights Quarterly* 1.

serves may suggest different and more productive categorisations. The right of property is regarded as a civil right, yet it is pregnant with economic functions.

The better view is that rights are equal and indeed indivisible. Since one's perception of rights is governed by the state of one's belly, it could be argued that a certain level of literacy and economic security are essential for the exercise and enjoyment of civil and political rights. Equally, economic prosperity and high literacy without the freedom of expression or the right of association fail to develop the full potential of the human person, and the denial of these rights can be humiliating and degrading³⁸ (this position is increasingly being taken in recent international instruments on the rights of special groups—women, children and indigenous peoples, which have broken away from the bifurcation of the Covenants, being based on the understanding that real equality for women or indigenous people or the real protection of children's rights cannot be secured without major social transformations in their social and economic conditions).³⁹

A variation of this position is to acknowledge that both sets of rights are important and even that they are indivisible, but to concede that it may not be possible to achieve them all at once (the reform of the legal system to ensure civil rights of fair and speedy trial, for example, can be as expensive as

38 The case of migrants provides an illustration. A large number of people migrate from the relatively democratic Philippines to work in States which are less protective of human rights, like Singapore, Malaysia and the Middle East, suggesting that they value economic advancement over rights. On the other hand, professionals from Singapore are emigrating to countries in the West where personal and artistic freedoms are more highly valued, suggesting that economic wellbeing is not sufficient for human happiness and fulfilment.

This example also illustrates another theme of my paper, that one's view of human rights is coloured by one's economic and social status.

39 For example, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) guarantees not only the traditional political and civil rights and the general entitlement to equality before the law, but sanctions affirmative action, and requires States parties to:

take all appropriate measures (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on the stereotyped roles for men and women; (b) to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children...(article 5).

States have to take all steps to suppress all forms of traffic in women and exploitation of prostitution of women (article 6). Special responsibilities have been imposed on States in respect of rural women; in particular they are to ensure that rural women participate and benefit from rural development; participate in the elaboration and implementation of planning; have access to adequate health facilities, including information, counselling and services in family planning; obtain all types of training and education, formal and non-formal; access to agricultural credit and loans, and marketing facilities and appropriate technologies; and enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

providing water supply to rural areas). This stance raises the question of the instrumentality and sequencing of rights. Professor Amartya Sen has argued, for example, that a society that proclaims the urgency of basic needs, has first to have a democratic framework so that the society can decide what the basic needs are. He has also suggested that basic needs can probably not be met in a society which is not responsive to public pressures or public accountability.⁴⁰ One might add that the transformative potential of human rights (and that must be their role in many authoritarian and unequal societies in Asia) lies in the rights of association, speech and other trade union rights. One can turn to history for guidance on sequencing, but that might be another device to assert the priority of civil and political rights which may not be warranted in contemporary times. These issues are also raised in discussions on democratisation as it implies a process. They are therefore best explored in the section on governance below.

(c) Democratisation and governance

The context of this discussion is two-fold, one domestic and the other international. The domestic is the growing constitutionalisation of the political orders of several Asian countries—for example, Thailand, Taiwan, Pakistan, Cambodia, Bangladesh, the Philippines, South Korea, Hong Kong, Mongolia and Nepal. The international is the pressure for, or assistance towards, democratic and accountable political orders from Western donors and international economic institutions, particularly the World Bank (often expressed in the form of conditionalities). Sometimes domestic and international pressures coincide, but not always. Sometimes foreign pressures are towards marketisation (with the emphasis on clear legal regimes, transparency and level playing fields) as with the World Bank. At other times the stress is on democratisation as such.

The process towards better governance and democracy is extraordinarily complicated (even if governance and democracy had similar pre-conditions, which they may not), for it involves issues which, although they are often regarded as of a piece, have different dynamics and consequences—the development of civil rights, the rule of law and a liberal culture, democratic reforms through the extension of the franchise and other political rights, the securing of economic and social rights, and fair and transparent governance (to which in some instances we should add marketisation). One problem is that in contemporary constitutionalisation all these goals are being sought simultaneously. In any circumstances such a task would be daunting, but it becomes even more problematic because there may well, at least in the short

40 He illustrates his argument by a study of famines and shows that it was only when there was no freedom of expression or criticism that the governments were unable to anticipate shortages. He contrasts the relatively better position of immigrants in Britain, most of whom have the vote, with those in Germany, who do not. But he points to failures of democracy when preventing injuries or injustices in instances where it is not so easy to evoke human sympathy for them, unlike that in the case of major disasters. Sen, "Freedoms and Needs", *The New Republic* (10–17 January 1994), p 31.

run, be a conflict between them. In the 19th century, for example, the rule of law was considered to be under threat from democratisation. Many countries in the transition to democracy in this century have built in a deliberate "democracy deficit", in part to placate its former enemies, but also to create the capacity to absorb the social and political consequences of democratisation. It could be argued in historical terms that as democracy was preceded by civil rights and the rule of law, it was acceptable to the ruling group (because the economic and social rights of the bourgeoisie would be protected) and feasible (because of the importance attached to values and procedures which would moderate the consequences of popular demands), while democracy itself set the stage for economic and social rights. The relevance of this analysis in today's conditions may be questioned, although a plausible case can be made out that the fragility of democracy in many developing countries is due to the lack of traditions of civil liberties and the rule of law.

Democratic theory does not provide clear answers to a number of issues that require an instrumental solution—does economic liberalisation lead to political freedoms or vice versa (the Russia-China debate), is it more important to concentrate on the strengthening of civil society or the reform of State structures, can purely secular organisation of public power command legitimacy, what are the pre-conditions of democracy, what is the link between marketisation and human rights, and indeed the connection between different kinds of rights.

There is space only for some general comments. Let me first take the relationship between democracy and the market. The supporters of the market argue that it inevitably leads to democracy. The argument might be made on both logical and historical grounds. The market is a system of private economy, in which there is a massive decentralisation of decision-making and a wide scope for choice. Central to the market are private property, which ensures a measure of autonomy for individuals and groups, and the freedom of contract, which enhances choice and secures rights (and limits the powers of the State). Predictability and legal security, which are also essential to the market, lead to an expert and independent judiciary, and thus to the separation of powers. The market gives rise to or strengthens civil society, and provides a countervailing force to that of the State. In this analysis, the market is more dependent on rights than on democracy.

The historical case, however, is that the development of democracy in the West followed the rise of the market, and that parallel processes are underway in East Asia (in particular Taiwan and Korea). It would be argued that the market leads to certain forms of social formations which stimulate pressures for democracy. In particular it undermines traditional forms of economy and their corresponding forms of political authority, and frees labour from its previous constraints ("from status to contract"). It gives rise to a middle class with its specific interests, connected with rights and democracy, and the economic and political clout to protect them. It also facilitates the organisation of labour, leading to a competitive and pluralistic political order.

However, neither the logical or the historical evidence is conclusive. Drawing from a model of consumption, the former disregards the process of production (where economic coercion prevails and the mode of organisation is hierarchical). It also assumes a false dichotomy between the State and the market, ignoring their inter-penetration. The market favours a few and does not universalise rights, except perhaps at a formal level. The market oriented civil society substitutes economic pressures for direct political authority, but by that very fact removes accountability, and introduces a different mode of subordination. Similarly, the historical process may be no guide, since it was the market which shaped the State in the West, but it is the State which has shaped the market in Asia. Nor is the globalisation of capital and markets likely to be conducive to rights or democracy. Freed from a territorial nexus, capital may become even more irresponsible and less accountable—less responsive to public opinion and more accommodating of State restrictive practices in its pursuit of profit (as is demonstrated by the way in which both Murdoch and Turner have bent their communication empires to the censorship by China). The growing global dominance of the power of capital over political authority and structures diminishes rather than increases prospects of rights and democracy. The progress in rights and democracy has been achieved by the struggles of the workers and other disadvantaged communities, and not by the advocacy of capitalists.

Another problematic area is civil society, which has become something of a *deus ex machina* in the prescriptions for rights and democracy. The notions of civil society in contemporary discourse are hazy. Sometimes (as in Eastern Europe), it is used to refer to the marketisation of the economy—which I have argued is no reason for optimism. Other times it refers to non-State values and institutions outside the area of economy. But I have also tried to demonstrate that in most parts of Asia civil society so defined is responsible for great injustice and oppression, and is itself in much need of reform. Other times it is used to refer to civic organisations of professionals, workers, women and others, which not only lobby the State but also seek to humanise society. A particular species of them, the NGOs, have achieved much prominence in recent years, seen as champions of rights and democracy, and giving voice to the underprivileged. It is no time to enter into the debate on NGOs (whose positive contributions are numerous), except to sound a note of caution, as they proliferate under encouragement of or incentives from foreign donors, operate increasingly as consulting firms, and lose touch with, or accountability to, their local constituencies.

Let me finally explore some conflicts between human rights and democracy. (I do not refer to the older debates as to whether an entrenched bill of rights interpreted by non-elected judiciaries is compatible with democracy and whether it weakens the political process by its “legalisation” consequences, for it seems to me that the political process might be enriched, rather than impoverished, by rights in most developing countries and that the executive and the legislature have frequently few claims to democratic legitimacy). The formalisation and juridification of rights have thrust courts and tribunals at the

centre of their definitions and enforcement and their discourse has become increasingly specialised. This detracts both from the responsibility and capacity of elected bodies for human rights. The globalisation of human rights detaches specific rights from the national context and relevance. The transformative consequences of economic and social rights (for example, the revolution in the position of women or the shift of power from one caste to another in rural Nepal) may be threatening to an infant democracy because of the interests of incumbent leaders and influential groups.

It is true that certain kinds of rights may be pre-requisites to democracy—franchise, expression, and association. It is also true that certain rights may be better protected in a democracy than in other political systems. But the logic of rights is different from the logic of democracy. The former are individual centred (even when they concern social rights), while democracy is majority-centred. The scope of rights is drawn from the nature of the human person, the scope of democracy from the general will. Rights serve to limit State power, while democracy justifies its expansion. Rights may be said to be “rational” and purposive, but democracy is frequently messy and manipulative.

When there are conflicts, rights are likely to give into democracy.⁴¹ Although rights are now prescribed in considerable detail, and democracy is still nebulous (no international instrument defines or protects it), democracy seems to command greater legitimacy, at least in Asia. Rights are harder to enforce than democracy, in part because of the differing precision of definitions. It may also threaten existing power structures. For that reason, democracy may be used to suppress human rights. Politics are viewed largely as a formal business of professional politicians, as a kind of joust (to the finish) rather than as discourse, questioning the legitimacy of academics, journalists, and social workers, who wish to express opinions on policies (even in their areas of their own expertise). Democracy, seen largely as an electoral process, becomes plebiscitary. Democracy, seen as the access to State power, becomes manipulative and corrupting. Yet it is presented as the voice of the people, a talisman to ward off domestic and foreign pressures for rights and equity.⁴² But for that very reason it increasingly relies on, and caters to, sectional interests.

In the South Asian context, ethnicity has frequently provided that sectional interest. Ethnicity, linked to the democratic or at least the electoral process, has had, for the most part, negative effect on governance and human rights. Political parties have aggregated and articulated ethnic demands, the majority community

41 The inability of the United States Government to maintain a consistent policy regarding human rights conditionalities, especially in relation to China, is itself the result of United States democracy, as the administration feels compelled, for electoral reasons, to take into account views of corporations and workers who benefit from investments in and trade with China.

42 Consider the following statement of Dr Mahathir, Prime Minister of Malaysia, in an attack on the power of judges to interpret and decide on the validity of laws, “If the people want the Government to be restricted so as not to be able to draft certain laws, the people will cause the downfall of the Government...” quoted in Hickling and Wishart, “Malaysia: Dr Mahathir’s Thinking on Constitutional Issues” [1988–89] *Lawasia* 47 at 57.

has imposed its cultural forms on the State, and the rights of minorities have been trampled upon. The result has often been the militarisation of both the State and civil society and the application of oppressive legislation which has denied a whole array of political, civil, economic and social rights. And yet democracy of a sort has flourished and fed the process of the attrition of democratic values.

The time has come to forge and strengthen links between democracy and rights. Democracy, in all its dimensions, not merely electoral, has to be rehabilitated. The values of democracy provide the link to human rights. The strengthening of human rights would then mean strengthening democracy. But democracy, to validate and legitimise human rights, has to respond to the cultural and moral impulses of the society. Western forms of democracy (by which I mean the forms of former metropolitan powers) have not been appropriate for Asia (any more than for Africa). This may seem a route back to relativism. But it is the relativism of forms, not substance, and may be necessary for some sort of regime of universal values underpinning the dignity of women and men.