

The Emerging Global Scenario and the East Asian Perspective on Human Rights

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Introduction

This essay aims to consider various claims about "Asian values" made in relation to the East Asian human rights debate. I divide this discussion into two parts: In the first part I consider and challenge the claims for exception from important international human right standards made in the name of "Asian values". I believe these claims fail to capture the full richness of Asian values discourse, are tautological and are excessively deterministic. In this regard, I set aside presentation of the related economic development argument, which is the subject of another recent article (Davis, 1998). In the second part, I will offer a special version of liberal constitutionalism as a proper domestic venue for contemporary human rights and values discourse in East Asia. I believe liberal constitutionalism with substantial fundamental commitments to democracy, human rights, and the rule of law and sufficient attention to local indigenous concerns – what I call indigenization – can be appropriately responsive to local concerns with the development and maintenance of fundamental political values.

Claims about Culture

Turning first to the Asian values claims, I offer a four-fold critique of these culture-based claims: first, I will briefly address the Asian values claim on a substantive level; second, I will address a related cultural prerequisites argument which seeks to disqualify some societies from realization of democracy and human rights; third, I will consider claims made on behalf of community or communitarian values in the East Asian context; and fourth, a

recent shift to concern with institutions and their role in social transformation will be considered as a prelude to the constitutionalist argument addressed in the second half of this essay.

The Asian Values Debate

Taking up the first of these, the substantive content of the Asian values claim, here I focus on political values and particularly address this claim in the Confucian context. The substantive claim is that Confucian values are anti-democratic; Asian societies, according to Samuel Huntington, are said to favour authority over liberty, the group over the individual, duties over rights and such values as harmony, cooperation, order and respect for hierarchy (Huntington, 1993). In this view, East Asian societies are argued to be unsuited to democracy and human rights. That these claims are usually made on behalf of authoritarian leaders raises suspicion about their honesty.

In practical terms these claims are challenged both by the rapid recent development of democracy and human rights in several East Asian societies and by social activist and scholarly discourses which challenge these claims directly. The growing consolidation of democracy in East Asia speaks for itself. A direct attack on the intellectual foundations of the Asian values claim has also been launched by activists and analysts. They have challenged several of its components. Regarding the association of Confucianism with authoritarianism, Chinese scholars of the Confucian classics have noted that Confucianism did not embrace unquestioning acceptance of misguided rulership and that it shares with liberalism the commitment to higher norms. Confucian scholar Chang Weijen especially points out the prominent position of the golden rule in Confucian ethics (Chang, 1995).

Other scholars have challenged the motives of those who advance the above noted stereotypes of Asian values. Edward Said long ago noted that Western orientalism offered up its

conception of Asia as the other in part to justify Western dominance (Said, 1979). More recently other Asian scholars have noted the tendency of East Asian leaders and scholars to adopt orientalism as a self-defining discourse (Chua, 1995). The same conception that aimed at Western dominance now, in East Asian authoritarian hands, aims at creating East Asian exceptionalism.

A third line of reasoning would have us believe that East Asian intellectuals did not understand Western liberalism and democracy when first confronted with it in the early modern period. In the Chinese context this was said to produce a perverse reinterpretation which saw democracy as merely good government or social welfare, in line with the Chinese *minben* (people as a basis) tradition. There is no doubt that authoritarian reinterpretations did occur and that Chinese nationalism, following the May 4 Movement, did distort. But recent studies of early modern Chinese writings witness a great deal of understanding of leading Western liberal thinkers (Svensson, 1996).

Other Asian scholars and specialist have pointed out that much of what is done in the name of so-called authoritarian Asian values can be explained more often than not by expediency. Frequently this expediency is accompanied by other ideological constructs, such as Marxism, that have little to do with Asian traditions. Francis Fukuyama argues that the only neo-Confucian authoritarian system evident in recent East Asian experience was the government of pre-war Japan (Fukuyama, 1995).

Cultural Prerequisites

The second major argument, originally not intended as a cultural relativist argument, is the claim that societies which lack certain cultural prerequisites are not suited for democracy and human rights. This notion arose initially from studies that sought to examine the characteristics of civic culture were not likely to be

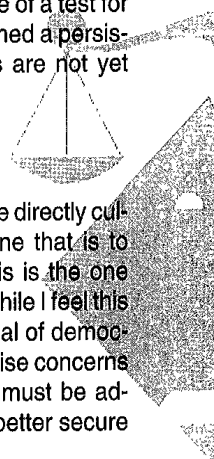
successful at democratization (Perry, 1994). It was as if societies had to pass a test for democracy. This scholarship could lend further support for authoritarian Asian values reasoning.

The problems with this reasoning are apparent. The most obvious is its tautological character. To suggest that a society that lacks democracy could somehow develop democratic culture is a questionable proposition. The fact of the matter is that many societies in East Asia proceeded with democratization, with or without cultural prerequisites. With democratic institutions in place, the emphasis has shifted to consolidation and to creating the institutions to make it work (Linz and Stepan, 1996). Nevertheless, scholars and politicians in East Asia have clung tenaciously to this claim concerning prerequisites (Perry, 1994, points out this problem). The tasks of documenting the presence of civic culture in Asia still contribute to a mindset that appears to conceive of a test for democratization. This has spawned a persistent argument that East Asians are not yet ready for democracy.

Claims about Community

My third critique considers a more directly cultural relativist argument, and one that is to some extent more credible. This is the one made on behalf of community. While I feel this argument fails to justify the denial of democracy and human rights it does raise concerns that I argue in the second half must be addressed by societies hoping to better secure human rights.

There are essentially three community-based arguments addressed here. The first is the romanticization of community. The Vietnamese village has been described as "anchored to the soil at the dawn of History ... behind it bamboo hedge, the anonymous and unseizable retreat where the national spirit is concentrated". The Russian *mir* was to save Russians from the "abhorrent changes being wrought in the West by individualism and industrialization"



suc(Popkin, 1986). Many have questioned just how liberating the traditional village was and many escaped when they had the chance. Few in East Asia's tiger economies have the option of unmolested village life today.

Another community-based claim emphasizing republican government and civic virtue has both ancient roots and is of contemporary interest. In many East Asian societies civic virtue is seen as the key to good government. Others are less confident of the persistence of such virtue and seek to craft a democracy that, in James Madison's terms, is safe for the unvirtuous (Putnum, 1993). The debate between Vaclav Havel, the anti-Communist idealist who emphasizes civic virtue, and Vaclav Havel Clause, the pragmatic post-communist politician who is concerned with interest representation (Simon, 1996) is likely to be rehearsed in post-communist and post-authoritarian East Asia.

The debate between Western and East Asian communarians is the most challenging contemporary discourse about community. While Western communarians are apt to see community as a venue for discourse and liberation, the neo-conservative brand of so-called communarianism evident in Singapore is hardly a venue for liberation (Chua, 1995). Western communarians have ultimately had to commit to some liberal values to preserve their discourse, while the Asian neo-conservative variety has also had to deal with increased demands for liberalization.

The Role of Institutions

The fourth and final critique under this topic of culture is to raise questions as to the path for solution. Scholars who are confronted with claims about culture and cultural prerequisites have increasingly had to consider precisely what avenues are available to meet increased demands for democratization and rights, to ensure participation. This has caused an increased attention to institutions. This new in-

stitutionalism has sought to determine how institutions can serve the purposes of social transformation that adhere to the democratization and human rights processes (Thelen and Steinmo, 1992). This new institutional project is less sanguine about merely transplanting ready-made Western institutions that the earlier efforts of modernization theorists. In considering what institutions can do I will now turn our attention to constitutionalism, the topic of the remainder of this presentation.

Constitutionalism

Constitutionalism offers a venue to respond to the various claims underlying the Asian values debate and a response to those who advance authoritarianism. As noted in the introduction, for me constitutionalism should include the fundamental elements of democracy, rights and the rule of law and elements of local institutional embodiment, what I call indigenization. In the late twentieth century the discussion of constitutionalism has become a global conversation, a conversation that is productive of the processes of universalizing human rights. Constitutionalism serves both as a conduit for shared international and local human rights and political values and the embodiment of those values. In this regard I emphasize three things: first, the empowering role of constitutionalism, in contrast to the usual view that emphasizes constraint; second, a more careful look at the content of the constitutive process; and third, indigenization of constitutionalism, as an avenue to hook it up to the local condition.

The Empowering Role of Constitutionalism

Taking up the first of these, it is important to emphasize the positive empowering role of constitutionalism (Holmes, 1988). I worry that constitutionalists place too much emphasis on the constraints of constitutionalism, always using language of "checking, restraining or blocking". This is important because under this constraint paradigm, newly elected democratic leaders

may view it as part of their mandate to override constraint to "get the job done". This results in a plebiscitarian, rather than a constitutional democracy (O'Donnell, 1996). Some may characterize this result as an illiberal democracy, as some scholars have advocated in East Asia (Bell, Brown, Jayasuriya and Jones, 1995).

Extra-constitutional action should more properly be understood as not just overriding constraint but as overriding democracy itself. Such extra-constitutional action does not just "get the job done" but in fact deprives the people of democratic power. Constitutionalist should vigilantly seek to engender discourse and empowerment. In a modern complex society this is the contemporary venue for values discourse. To better understand this claim we must consider the constitutive process.

The Constitutive Process

It is in the constitutive process that constitutionalism's discourse engendering and empowering roles come to fruition. This can be considered at two levels: the constitution-making process and constitutional implementation. Constitution-making is where the constitutional conversion begins. A constitutional assembly is a powerful venue for discourse about basic political values. In recent decades the East Asian landscape has been riddled with constitution-making exercises. In the 1980s and 1990s constitution writing in the Philippines and Hong Kong have offered prominent seemingly successful examples (Davis, 1996).

In describing the constitution-making process, Jon Elster describes a venue where both passion and interest operate (Elster, 1995). There are both upstream and downstream constraints, as well as processes for consensus-building and broadening bases of support. Upstream constraints consider political settlements and may also protect members of the former regime. For the Hong Kong Basic Law, as with the earlier Japanese Constitution, the upstream constraints were all but overwhelm-

ing. Downstream constraints look to ratification or acceptance. In the Philippines, after the people power revolution, downstream acceptance was the substantial constraint.

After a constitutional founding, successful implementation of constitutional government depends on appreciation of the discursive architecture in the ongoing processes of governance. More commonly appreciated here are the institutions for checks and balances. These institutions include institutions to control the purse-strings in regimes ranging from medieval estates to modern parliaments, and veto and administrative control in the modern executive. At present nearly every constitutional government in East Asia manifest some elements of this.

Less appreciated is the positive discursive machinery of constitutional judicial review, the power whereby courts review laws enacted by the elected branches of government for conformity to the constitution. In both Asia and the West this judicial role has sometimes been attacked as an affront to efficient and effective government and sometimes as an affront to democracy. One should be suspicious of the efficiency motives of such attacks. Constitutional judicial review has become the premier institution for securing human rights. More importantly, constitutional judicial review also serves as the engine for the basic constitutional conversation about political values and commitments (Bickel, 1986). This constitutional conversation proceeds as legislatures pass laws and courts respond and legislatures pass new laws. While much of East Asia has adopted Western civil and common law legal systems, only a few countries have fully functioning systems of constitutional judicial review. At present Japan, the Philippines and Hong Kong are prominent examples where this power is vested in the ordinary courts, as is more commonly done in common law systems. A Civil Law style constitutional court has existed in Taiwan for decades but only recently begun to function effectively. For the authoritarian re-

gimes of the region, both historically and at present, no or little judicial constraint is the norm. Under such circumstances the positive discourse-engendering role argued for here is out of the question.

Constitutional theorists have come to recognize, however, that constitutional judicial review is not the sole discursive engine for crafting political values and solutions. At moments of crisis, what Stephen Krasner calls punctuated equilibrium (Krasner, 1984), the entire people may be mobilized to civic action. In normal times the people may be content with representation and constitutional judicial review, while they largely focus on private affairs; while at times of what Bruce Ackerman calls constitutional politics the level of civic action may become extraordinary (Ackerman, 1991). Ackerman identifies three republics in American history, before and after the civil war and in the modern regulatory social welfare state initiated in the 1930s by the New Deal. There is evidence of such mobilization in the recent South Korean constitutional politics of reform and in the Japanese politics of resistance to corruption.

Indigenization of Constitutionalism

With a commitment to the constitutional fundamentals in place, a premier concern is that constitutionalism finds roots in the local soil. It is through indigenization that constitutionalism responds to the above noted concerns with values and community. Aung Sang Suu Kyi characterizes this indigenous quality as local institutional embodiment (Aung Sang, 1995). For indigenous institutions to work, however, the constitutional fundamentals of democracy, human rights and the rule of law must be in place. Otherwise, the local community is left with an implanted hegemonic discourse constructive of authoritarian power and destructive of genuine community values discourse.

Beyond the fundamentals that preserve the discourse there is considerable room for local

variation to achieve representation, both symbolic and real. If constitutionalism is understood to engender discourse then constitutionalists should consider the ways in which local culture and traditions may facilitate such discourse. Representation may be achieved through contemporary institutions which secure autonomy or minority rights, or through recognition of traditional ethnic or religious groups.

Legal structures may also embody these local distinctions. This may include, for example, allowing for the application of religious or tribal laws. In societies with long traditions of citizens petitioning leaders, a mechanism for petitioning elected officials could be employed or, perhaps, a modern version thereof, the ombudsman. Even a traditional monarch, who may retain symbolic and ceremonial functions, may take on the ombudsman role in a post-monarchical democratic society. Even when contemporary institutions are employed, in practice they may be expected to take on indigenous characteristics. The goal in all cases is orderly processes of discursive engagement or empowerment.

In a recent article I contrast the constitutional paths of modern Japan and China (Davis, 1998). While post-war Japan has a liberal constitutional system, there has been substantial indigenization in practice (Ford, 1996). Yet, with the fundamentals in place, the constitution does seem to work to encourage a core discussion on fundamental political commitments. Even the processes of reform of the former one-party dominance proceeded in an orderly fashion and have engendered renewed public concern with corruption and enforcement of legal norms. China, on the other hand, has rejected a commitment to the fundamentals. China's public discourse has tended to advance a hegemonic view which people challenge at their peril. The public order situation is an explosive one in which the Public Security Bureau and the military must play a central role. While engaging in economic reform the regime has engendered increased diversification of interest for which

inadequate representation is secured. The rule of law is shaky at best; encouraging increased corruption as the economic reform process goes forward. This has produced a value vacuum which the society is hard placed to deal with. There is growing evidence of concern to open up democratic and legal channels for representation of diverse interest. Opening up such channels will not create automatic solutions but such moves may offer hope for crafting orderly solutions.

Conclusion

The form of argument in this presentation has emphasized several specific points: first, that the Asian values argument, as a challenge to the implementation of constitutional democracy, is exaggerated and fails to account for the richness of values discourse in the East Asian region – local values do not provide a justification for harsh authoritarian practices; second, that the cultural prerequisites arguments fail because they ignore the discursive processes for value development and they are tautological, excessively deterministic and ignore the importance of human agency – it, therefore, makes little sense to take an entry test for constitutional democracy; third, the difficulties of importing Western communitarian ideas into an East Asian authoritarian environment without adequate liberal constitutional safeguards; fourth, the positive role of constitutionalism in constructing empowering conversations in modern democratic development and as a venue for values discourse; fifth, the importance, especially in a cross-cultural context, of indigenization of constitutionalism through local institutional embodiment; and sixth, the value of extending research focused on the positive engendering or enabling function of constitutionalism to the developmental context in general and East Asia in particular. I would hope this discussion attracts further cross-disciplinary interest in this evolving global constitutional project.

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