# Asian Discourses of Rule of Law

## Theories and implementation of rule of law in twelve Asian countries, France and the U.S.

*Edited by*
Randall Peerenboom

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# ASIAN DISCOURSES OF RULE OF LAW

Rule of law is one of the pillars of the modern world, and widely considered necessary for sustained economic development, the implementation of democracy and the protection of human rights. It has, however, emerged in Western liberal democracies, and some people question how far it is likely to take root fully in the different cultural, economic and political context of Asia. This book considers how rule of law is viewed and implemented in Asia. Chapters on France and the USA provide a benchmark on how the concept has evolved, is applied and is implemented in a civil law and a common law jurisdiction. These are then followed by 12 chapters on the major countries of East Asia, and India, which consider all the key aspects of this important issue.

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# PREFACE:

## Overview of project goals, methodology, and structure

This volume on rule of law in Asia, France, and the U.S. is the first installment of a multi-year, multi-volume project that seeks to provide a better understanding of legal systems in Asia and their relationship to economic development, democracy, the protection of human rights, and geo-political stability in the region and the world. It also seeks to provide a much-needed empirical foundation to what has hitherto been an excessively abstract and overly politicized debate about "Asian values," or its more recent, politically correct reformulation "values in Asia."

### Values in Asia

Debates over "Asian values" have often produced more heat than light.[1] Supporters of universal human rights frequently dismiss the claims of some Asian governments as the self-serving rhetoric of dictators and (mis)represent their position as a morally reprehensible and philosophically absurd anything-goes cultural relativism. Defenders of Asian values often respond by attacking Western governments for past and present violations of human rights, and accuse them of cultural imperialism and ethnocentricity.

Clearly, authoritarian regimes have at times used the rhetoric of Asian values for self-serving ends, playing the cultural card to deny citizens their rights and then fend off foreign criticism. Just as clearly, there are many different voices within Asia, and anyone professing to speak for all Asians or of Asian values runs the danger of discounting these voices. Yet we need to be careful not to dismiss Asian values as merely a cynical strategy seized on by authoritarian regimes to deny Asian citizens their rights. More philosophical and nuanced accounts point out that, whatever Asian governments' political motivations, there are legitimate differences in values at stake.

While a number of sophisticated theoretical works have been written, what has been lacking to date in the discussion about values in Asia are systematic empirical studies to back up the strong theoretical (and in some

cases polemical) claims being made on both sides about the differences or lack thereof in fundamental values. Accordingly, this project will provide an empirical basis for the debate by examining the range of values in Asia through concrete legal cases and social-political events, and – to the extent that there are differences within Asia or between some or all Asian countries and Western countries such as France and the U.S. – explore the reasons for such differences.

The project involves a series of conferences to which specialists in twelve different Asian countries or jurisdictions (Japan, the Philippines, South Korea, China, Taiwan, Hong Kong, Singapore, Thailand, Malaysia, Indonesia, Vietnam, and India), along with specialists from the U.S. and France or Germany, have been or will be invited. The first volume sets the stage for subsequent volumes by providing a general overview of the dominant conceptions of law, organized around the theme of rule of law; and the institutional framework. Subsequent volumes examine specific areas of law or topics in law to determine:

- whether there are differences/similarities between the countries with respect to the rules;
- outcomes in particular cases (or the way events are handled if they are not subject to formal legal resolution);
- the justifications/explanations for such outcomes (legal reasons, cultural/philosophical explanations, or economic, political, institutional explanations).

Universalist advocates of human rights argue that there is an expansive overlapping consensus regarding human rights as set forth in the so-called International Bill of Human Rights – the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. In response, some Asian governments argue that the hard core of universal rights is extremely limited. There is little disagreement that some acts are bad, such as torture, disappearances, genocide and slavery, though even in these areas little disagreement does not mean no disagreement. For example, is cruel and unusual punishment, as allowed in Singapore and previously in Europe but now prohibited by the European Court of Human Rights bad? What about capital punishment? Is it cruel and unusual to keep people waiting on death row for more than five years, two years, one year?

Although there are many rights that people agree are desirable when stated at very high level of abstraction, agreement at this level of abstraction is not helpful in resolving most pressing social issues. What may seem like a pragmatic or overlapping consensus quickly breaks down once one moves beyond discussions about the desirability of the broad wish-list of rights contained in human rights documents to the difficult issues of the justifications for such

rights and how they are interpreted and implemented in practice. Undeniably, there is greater acceptance of the general idea of human rights than in the past, and even more agreement among more countries and people about particular human rights and how they are to be interpreted and implemented. There is also good reason to believe that the scope of agreement will increase over time. Nevertheless, there is still ample room for reasonable people to disagree over the content, justification, interpretation, and implementation of rights.

Systematic empirical studies will clarify the range of diversity with respect to other rights issues such as free speech, freedom of association, and freedom of the press. For instance, Thailand, one of the more tolerant countries in Asia in terms of freedom of speech and the press, prohibits the advocacy of communism, criticism of the government, and incitement of ethnic, racial or religious tensions. Yet without an examination of actual cases and the specific context it is not clear where exactly the lines are drawn, how onerous such restrictions are, what the penalties are, and whether the laws are applied fairly or used to attack opposition party figures and so on.

Empirical studies will also shed light on sexuality/gender issues (same-sex marriage, homosexuality, pornography, prostitution, transsexuality); obscenity laws; the public–private distinction and privacy issues (urine tests, mandatory treatment for drug addicts, identity cards, the right of companies to read employees' emails); the value of life (abortion, female infanticide, euthanasia, the right to die, eugenics, sale of body parts); paternalism and the limits of autonomy and consent (can experienced business persons consent to unconscionable contract provisions? Can dwarfs consent to dwarf-tossing contests where the participants compete in bars to see who can throw the dwarf the farthest? Can people consent to sadomasochistic acts that amount to criminal offenses in the case of non-consenting parties? Can criminal defendants consent to trial without counsel?); family law issues (domestic violence, spousal rape, children's duty to support their parents, parents' duty to take care of children, the right to divorce, child custody, the division of property upon divorce, inheritance laws, surrogate motherhood); labor issues (the right to form a union and to strike, minimum wage, child labor, the promotion of the family through the adoption of workplace rules and government-supported childcare programs); economic rights (the right to housing, medical care); cultural rights (the rights to the use of language, culturally important lands and waterways); freedom of religion; and collective rights such as the right to self-determination and the right to a clean environment as reflected in environmental laws.

Focusing on concrete legal issues across a wide variety of areas of law will clarify just how extensive the overlapping consensus actually is. It will also identify common ground and rationales that could be useful in expanding the overlapping consensus. And in some cases it will no doubt

demonstrate that overlapping consensus is not likely, or at least not likely given the current circumstances.

Legal cases show most clearly where societies draw lines on controversial issues that involve the rights and interests of individuals versus the rights and interests of the group or state. Although this issue has often been construed as a battle between Asian communitarians and Western liberals, it is a truly universal issue that everyone of whatever persuasion must face. It is certainly possible that the majority of Asians may prefer a different balance than the majority of Westerners, though again we need more detailed empirical studies to examine differences in practice across a wide range of specific issues. Of course, simply noting a majority preference one way or the other will not end the debates – those in the minority can continue to claim that they are right. But before we can turn to such normative arguments we must have a better sense of the differences and the reasons for them.

Nowadays, rights are increasingly the medium through which different factions struggle for power. Highlighting legal cases reveals much about who has power within a society. At the same time, legal cases generally result in legal opinions, scholarly articles, and coverage in the media that can be used to understand the rationales and justifications for reaching the particular decisions. Because there will generally be critiques and counterarguments, one can also get some sense of the diversity of views within a country. In some cases, poll results and other relevant survey data may be available to provide a better sense of the intensity of particular viewpoints within a given society. As not all issues will necessarily be resolved through the formal legal system, our study will also include important social and political events that do not make it to court and other issues dealt with through informal mechanisms.

Reference to "Asian values" should not be taken as an a priori endorsement of the concept as meaningful or useful, or of Asian values over other values. Asia is a big place, with tremendous diversity – too much, critics suggest, to speak about a singular set of Asian values. On the other hand, a pluralism of Asian values is still Asian values. There is nothing wrong with noting a diversity of values and still claiming that they are Asian. Nor need each country within Asia share every single feature. There may still be dominant patterns within Asia. It is true that "Asian values" is a construct. But then so are "the West" and "liberalism," both of which encompass a tremendous diversity of views. Nevertheless, there are still dominant trends in Western thought. Liberalism clearly has a stronger hold than communitarianism in the West, for example, whereas the opposite seems to be true in much of Asia (though perhaps collectivism is a more apt description than communitarianism). Any comparative project must begin by constructing categories that highlight certain features and thus simplify to some extent quotidian reality – what William James referred to as the boomin', buzzin'

confusion. The problem has not been that the East and West, Asian values and Western values are constructs, but that they have been overly simple constructs that lacked a firm empirical foundation.

In the final analysis, the key question is whether Asian countries share enough common ground for the term "Asian values" to be useful. To some extent, that will depend on what one's project is. There may be more common ground in certain areas of laws or with respect to certain issues than in others. It may very well be the case that "Asian" is too broad a qualifier to capture the significant differences for most comparative purposes, for example with respect to legal systems and conceptions of rule of law. However, at this stage, we need more detailed empirical studies across a range of issues in a number of Asian and Western countries before we can conclude that there is not enough in common among Asian countries and different from Western countries to render the term "Asian values" otiose.

Because "Asian values" has been tainted by misuse by politically oppressive regimes, one common suggestion is to replace it with "values in Asia." This change has the salutary effect of signaling a desire to move away from the overtly political use of the term by some Asian governments toward a more sophisticated approach sensitive to the pluralism within Asia. But eliminating references to "Asian values" and replacing it with "values in Asia" will not put an end to substantive debates about the universality of rights or shed any light whatsoever on how rights are to be interpreted or implemented in particular contexts in Asia. At best, it simply shifts the focus to a less grand level, whether that be country by country, area of law by area of law, or issue by issue.

## Comparative law

Asian legal systems have historically been given short shrift in studies of comparative law. Attempts to classify the world's legal systems often begin with the concept of a modern legal system found in some economically advanced Western countries as the paradigmatic or core example. Max Weber, for instance, attributed the success of some Western countries in part to their legal systems, which he described as logical, formal, and rational. In contrast, Weber considered the legal system of many Asian countries to be nothing more than a kind of arbitrary or irrational *kadi* justice where wise men allegedly determined what was best in a given situation based on their own judgment and interpretation of customary norms rather than by appeal to fixed standards or principles of general applicability.

The legal systems of Asia have fared no better in other more recent schemes,[2] often being dumped into the category of religious or Oriental systems or unceremoniously swept into the dustbin category of "other" (or in some cases not even considered to be legal systems at all).[3] Rene David's influential taxonomy, for instance, consists of three families – civil,

common, socialist – and the dreaded, descriptively empty, alien "other," into which he places China and Japan, along with African countries and states with Islamic, Hindu, or Jewish legal systems.[4]

Objecting to the Euro-American centrism of existing taxonomies, the renowned comparative legal scholar Ugo Mattei has proposed a new grouping. He describes three types of legal systems based on whether the primary source of social norms and order is law, politics, or philosophical and religious traditions.[5] In a *rule of professional law* or *rule of law* system, law is the main mechanism for resolving disputes and the state and state actors are subject to law. In addition, law is largely secularized and independent from religion, morality, and other social norms. In contrast, in a *rule of political law* system, the separation between law and politics is absent or minimal. Legal institutions are weak, and the law often does not bind government officials. This form of law is characteristic of former socialist states in transition and developing states.

The third category is *traditional law*, or what Mattei calls "the Oriental view of the law." These systems lack a separation between law and religion and/or are based on a "traditional transcendental philosophy in which the individual's internal dimension and the societal dimension are not separated." They are characterized by a reduced role for lawyers in dispute resolution and an increased role for mediators and "wise men," a high rate of survival of diversified local customs, an emphasis on duties rather than rights, a high value placed on harmony, the importance of a homogeneous population as a means of preserving social structure, family groups rather than individuals as the building blocks of society, a strongly hierarchical view of society, a high level of discretion left to decision-makers, a greater emphasis on the role of gender in society, a hurried and largely unsuccessful attempt to transplant Western legal codes and relationships, and a rhetoric of supernatural legitimization rather than an appeal to democracy and rule of law for legitimacy.

This family allegedly consists of Islamic law countries, Indian law and Hindu law countries, and countries with "other Asian and Confucian conceptions of law." It supposedly includes such widely disparate Asian countries as Japan, China, Thailand, Laos, Cambodia, Burma, Indonesia, India, Malaysia, the Philippines, Vietnam, North and South Korea, and Mongolia, as well as Islamic countries not in the Asian region such as Morocco, Tunisia, and Algeria.

Not surprisingly, such classification schemes have given rise to charges of Orientalism. A particular kind of law is considered not only necessary for economic development but an indicator of cultural achievement and civilization. Whereas the West has law, order, rule, reason, rational bureaucracies, predictability, and certainty, others have violence, chaos, arbitrary tradition, and coercive despotism imposed by rulers with too much discretion. In some cases, Asian countries are seen as incapable of implementing "the rule of law" or a modern legal system because of cultural factors. In other cases, the

superiority of Western legal systems is seen as justifying a missionary-like effort to transplant Western laws, institutions, norms, and values to Asia.

This project seeks to update our understanding of legal systems in Asia. The rapid change in many legal systems in Asia and the likelihood of further rapid development require new conceptual frameworks for understanding the purposes of law, the various roles of the legal systems, the ways in which they operate, and the development paths of legal institutions in Asian countries. The first volume examines these issues through the prism of rule of law. Subsequent volumes enrich this panoramic overview of the many ways rule of law is conceptualized and theorized in Asia and the institutional infrastructures through which legal systems in Asia operate, by examining in detail the operation of the legal systems across a wide range of issues and areas of law.

Given the tremendous diversity within Asia, one must wonder about the value of any category so broad as to include all of the very different countries in Asia, just as one must wonder about the utility of a concept as broad as Asian values. Accordingly, this project seeks to avoid distorting, strong-arm attempts to force all Asian systems into a single preconceived mold, model, or family by having country experts develop theories or models for understanding legal developments in their respective countries based on their extensive, in-depth local knowledge of indigenous discourses, debates, and issues.

While not expressly developed for comparative purposes, such categories and theories may prove useful for comparative law. Some countries appear to be confronting similar issues, and as a result some of the conceptual frameworks or theories may be useful in understanding legal developments across borders. Although developing an adequate taxonomy is at best the first step in explaining or predicting how, when, and why legal systems change, articulating different conceptions of law and the interest groups backing such conceptions may assist in predicting the likely path of development of a legal system. Taxonomies may also be useful in ensuring that legal reforms are appropriate for the particular type of system and existing conditions. To the extent that there are competing conceptions of law, taxonomies also enhance the process of normative evaluation by clarifying the differences and what is at stake. In short, while comparative law has suffered from attempts to oversimplify Asian legal systems and squeeze them into a single category, developing conceptual frameworks that capture the diversity of legal systems within Asia and different views within particular Asian countries may prove valuable in providing heuristic devices for understanding domestic legal development and for broader comparative purposes.

## Transplantability of law: conditions for success and reasons for failure

A key issue in comparative law, and a pressing concern of countries in Asia, as well as of multilateral and bilateral programs aimed at promoting rule of

law and legal reforms in Asia, is the transplantability of law. What accounts for the ability of some countries to develop functional legal systems, often by borrowing and adapting foreign laws and institutions, while other states continue to suffer from dysfunctional legal systems despite efforts to reform?

The diversity within Asia provides fertile ground for exploring the possibilities for, and limitations on, legal transplants. There is a wide range of countries at different stages of legal system development. Some countries studied here – France, the U.S., Japan, South Korea, Hong Kong, Taiwan – have mature legal systems. Others, such as China and Vietnam, are still in the early stages of institutional development. Legal systems vary from civil law to common law to mixed (civil-common and civil-common-socialist). Some of the states have mature market economies; others, such as China and Vietnam, have only recently endorsed market reforms. While globalization and the reach of the international legal and economic regimes have affected all, some countries are more integrated into the global economic order and international legal regime than others.

Political systems run the gamut: well-established democracies, states struggling to consolidate democracy, soft-authoritarian regimes, and reformist Marxist–Leninist, effectively single-party, socialist states. Some have good human rights records across the board. Others have pockets of problems, often with respect to certain civil and political rights. Still others offer little protection when it comes to many civil and political rights but do better with respect to other rights – or at least they are not significantly worse than other countries when it comes to economic, social, and cultural rights.

Some countries have built their legal systems largely on the basis of transplanted laws and institutions, often as a result of colonialism. Indeed, only Thailand did not experience colonialism, at least directly. Singapore, Malaysia, Hong Kong, the Philippines, and India are all now grappling with postcolonial attempts to reconcile the colonial legal system with local conditions, leading in some cases to movements to give greater expression to indigenous traditions and values. To that end, a variety of cultural and religious traditions, including Buddhism, Islam, Confucianism, and Daoism, may provide valuable resources. These countries also vary widely with respect to homogeneity and ethnic diversity, and with respect to wealth distribution and the existence of poverty. They also range in size from small city-states to the most populous country in the world, and from heavily urbanized to predominantly rural.

## Relationship between rule of law and economic development

The role of law in economic development in Asian countries has been the subject of great debate. Some scholars argue that law has not played a significant role. Rather, growth has been attributed to Asian varieties of capitalism, which for some means a strong developmental state in which a

technocratic bureaucracy determines industrial policy, picking and choosing winners and in some cases deliberately "getting the prices wrong." In a similar vein, some attribute economic success to a close relationship between government and business, described by some as clientelism or corporatism – or more disparagingly by critics as cronyism. Still other explanations highlight cultural factors that diminish the importance of clear property rights or emphasize diligence, hard work, education, and saving; the large number of family businesses; informal networks; and relation-based contracting and business practices.

The contrasting view holds that law has played a more important role in the growth of those Asian countries that have experienced high growth rates over long periods of time than is usually assumed, and that law is likely to play an even greater role in the future as some of the economies develop and countries become entrenched in the global economy. All parties realize, of course, that a functional legal system is not sufficient for economic growth. Other factors may be more important, including sound macroeconomic fundamentals and management; a stable business environment with low inflation; prudent fiscal policies; exchange rates to support exports; high savings and investment rates; high-quality human capital (good education and high literacy rates); merit-based bureaucracies; low income inequality; export promotion; success in attracting foreign direct investment and political stability.

Whatever the outcome of this debate, it is clear that the desire for economic growth and reforms in the economy have propelled legal system development in Asia. All of the Asian countries in this study have, or have committed to the development of, a formal legal system. Accordingly, the issue is not a mutually exclusive choice between formal and informal law or between public and private ordering. Formal and informal law, public and private ordering-each offer advantages and disadvantages, and are complementary in many ways. Since they are not perfect substitutes, each can support and help overcome the weaknesses of the other. The more difficult task is to determine *when* each type of ordering is best.

Legal systems that comply with the requirements of a thin or formal conception of rule of law are compatible with a variety of economic systems.[6] Conversely, substantive or thick theories of rule of law may be distinguished by differences in economic systems or varieties of capitalism. A conference on corporate law will explore how the various countries handle a common set of issues, thus shedding light on the relation between rule of law and varieties of capitalism within Asia.

This project will also explore an issue that has yet to receive adequate attention in the political economy or economics literature regarding law and development: the possibility of countries pursuing a form of "economic rule of law" where the legal system operates (for the most part) independently of political influence with respect to commercial issues but where other areas of