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Unit: I A Conceptual Understanding of Human Rights In this unit, you will learn about, Human Rights • Concept • Definition • Meaning and Nature • Human Values: Liberty, Equality and Justice Human Rights Meaning of Human Rights Human beings are born equal in dignity and rights. These are moral claims which are inalienable and inherent in all individuals by virtue of their humanity alone, irrespective of caste, colour, creed, and place of birth, sex, cultural difference or any other consideration. These claims are articulated and formulated in what is today known as human rights. Human rights are sometimes referred to as fundamental rights, basic rights, inherent rights, natural rights and birth rights. Definition of Human Rights Dr. Justice Durga Das Basu defines "Human rights are those minimal rights, which every individual must have against the State, or other public authority, by virtue of his being a 'member of human family' irrespective of any consideration. Durga Das Basu's definition brings out the essence of human rights. The Universal Declaration of Human Rights (UDHR), 1948, defines human rights as "rights derived from the inherent dignity of the human person." Human rights when they are guaranteed by a written constitution are known as "Fundamental Rights" because a written constitution is the fundamental law of the state. Characteristics and Nature of Human Rights Following are the characteristics of human rights: 1. Human Rights are Inalienable: Human rights are conferred on an individual due to the very nature of his existence. They are inherent in all individuals irrespective of their caste, creed, religion, sex and nationality. Human rights are conferred to an individual even after his death. The different rituals in different religions bear testimony to this fact. 2. Human Rights are Essential and Necessary: In the absence of human rights, the moral, physical, social and spiritual welfare of an individual is impossible. Human rights are also essential as they provide suitable conditions for material and moral upliftment of the people. 3. Human Rights are in connection with human dignity: To treat another individual with dignity irrespective of the fact that the person is a male or female, rich or poor etc. is concerned with human dignity. For eg. In 1993, India has enacted a law that forbids the practice of carrying human excreta. This law is called Employment of Manual Scavengers and Dry Latrines (Prohibition) Act. 4. Human Rights are Irrevocable: Human rights are irrevocable. They cannot be taken away by any power or authority because these rights originate with the social nature of man in the society of human beings and they belong to a person simply because he is a human being. As such human rights have similarities to moral rights. 5. Human Rights are Necessary for the fulfilment of purpose of life: Human life has a purpose. The term "human right" is applied to those conditions which are essential for the fulfilment of this purpose. No government has the power to curtail or take away the rights which are sacrosanct, inviolable and immutable. 1

6. Human Rights are Universal: Human rights are not a monopoly of any privileged class of people. Human rights are universal in nature, without consideration and without exception. The values such as divinity, dignity and equality which form the basis of these rights are inherent in human nature. 7. Human Rights are never absolute: Man is a social animal and he lives in a civic society, which always put certain restrictions on the enjoyment of his rights and freedoms. Human rights as such are those limited powers or claims, which are contributory to the common good and which are recognized and guaranteed by the State, through its laws to the individuals. As such each right has certain limitations. 8. Human Rights are Dynamic: Human rights are not static, they are dynamic. Human rights go on expanding with socio-eco-cultural and political developments within the State. Judges have to interpret laws in such ways as are in tune with the changed social values. For eg. The right to be cared for in sickness has now been extended to include free medical treatment in public hospitals under the Public Health Scheme, free medical examinations in schools, and the provisions for especially equipped schools for the physically handicapped. 9. Rights as limits to state power: Human rights imply that every individual has legitimate claims upon his or her society for certain freedom and benefits. So human rights limit the state's power. These may be in the form of negative restrictions, on the powers of the State, from violating the inalienable freedoms of the individuals, or in the nature of demands on the State, i.e. positive obligations of the State. For eg. Six freedoms that are enumerated under the right to liberty forbid the State from interfering with the individual. Human Values: Significance of Value Value in general is a part of philosophy. Philosophy is one of the basic subjects which deals with the basic problems of mankind. In its discourse, it deals with issues such as existence, knowledge, values, reasons, mind, and language. It's theoretical perspective developed by various theoreticians mainly based on a rational approach with critical outlook. Basing on the parameters of value, a number of other aspects developed to regulate the behavioral patterns of man. These values such as dignity, liberty, equality justice, ethics, and morals eternal., have had their significant impact to shape the human relations in a society. These philosophical concepts have a profound impact on law. The main aim and function of Law in any society is to regulate the relations between men and to alleviate the intensity of conflicts to promote peace, security, good and orderly behaviour of mankind to establish a conflict free society. This being the main function of law, it absorbs all the essential tools from every field of study with a critical outlook. This in turn will help to analyse each issue and lay norms to develop a rational human mind to achieve maximum results in their inter-relationships with each other. Since the concept of right and its exercise and regulation centered round basing on a number of values developed from ancient to modern times, they have had a great impact in the realization, promotion, and protection of human rights. In view of the linkage and importance that values play a significant role in the promotion and realization of human rights; the different concepts of values are examined in brief. Human Values "The value concept... [is] able to unify the apparently diverse interests of all the sciences concerned with human behavior." The above view of the psychologist makes it clear, the concept of value and its relationship with the behavioural pattern of individuals in a society. In general, we think of values that are commonly followed by us in day to day life. These values vary from person to person, depending on their experiences and circumstances in which they grow. However, there are certain basic values which are common to all. They are life, liberty, security, freedom, and success, security to life, kindness, pain and pleasure. Depending on the circumstances, which each person grows up considers which value is important to him. But adhering to values which are common to all, in the longer run develop a society to establish peace for the progressive all round development of all the sections of a society. This will help to learn to live with unity in diversity. According to a number of scholars, conceptually values are beliefs which are subjective in their exercise by each individual. Values motivate people to achieve their goals. Values transcend time and territory and develop relationships and regulate the behavioral patterns of individuals. These being the central aspects of values, a number of scholars identified ten basic values, which motivate and regulate the behavior of human beings in achieving their goals. They are: 2

? Self-destruction, which promotes an independent thought which results in a judicious decision-making process in creating or exploring the goal. ? Stimulation creates excitement, novelty and challenges in life. ? Hedonism (Self Satisfaction) brings in pleasure and sensuous gratification for oneself. ? Achievement demonstrates, the competence of individuals according to the standards of society. ? Power brings in social status and prestige, control over people, and resources. ? Security brings in harmonious relationship between individuals, to guide the society to establish a compatible environment for people to lead a life with pleasure and groom their freedoms. ? Conformity to social standards mainly regulates the behaviour of individuals, and prevent the wrong doing activities by individuals to themselves, and towards one another in the society. ? Tradition promotes the qualities of respect to the practices that are inherent in society. ? Religion promotes the innovation of knowledge and furtherance of values to the achievement of peace and security. It teaches a happy sharing of the benefits that are derived through the promotion of knowledge. ? Benevolence establishes the belief and enhances the qualities of welfare to promote the interests of the individuals with whom each one interacts in their day to day activities. ? Lastly, universalism promotes the qualities of understanding, appreciation, tolerance, and protection for the welfare of people. It takes care of developing harmonious living, and to work for the benefit of advancement of scientific knowledge, and to share the resources equally. The philosophy of human rights is similar with that of the above values. Therefore, values are one of the basic aspects of human rights. The strict adherence of human rights restores not only to values, but also in turn able to achieve peace, security and harmonious living community without any kind of discrimination that exist between individuals and nation-states. Dignity Dignity is another value that regulates the behaviour of individuals. Dignity is a relative term with regulatory nature. It prescribes the norms and ethical standards needs to be followed and adopted. In the day to day inter-relationships, individuals are expected to behave with one another in a dignified and honest manner. This concept dictates that every one of us has to exercise due caution and care in our relations without undermining the capacities of other persons. Further, it teaches us not to create a situation wherein others are made to undergo either emotional, psychological, physical, tense situations, or to harm their personality. Since dignity plays a vital role, in regulating the human relations and for the furtherance of human rights, (especially, the basic rights of liberty, equality, and freedom), the Universal Declaration of Human Rights (UDHR), in no uncertain terms declared that all individuals are equal in the eye of law. All are always deserving to be treated with utmost respect without harming the dignity of others. If people across the world follow the ethical norm of dignity without any deviance, the realisation of right would be easy. This fundamental norm applies to individuals and States to follow with strict adherence. In the modern context though a number of conventions, covenants, and declarations have been adopted in the international arena, to promote human rights on the concept of dignity. The lack of adherence by individuals and nation-states brought in untold sorrow, and miseries to mankind. The non-adherence to ethical values, especially, indecent behaviour of individuals at times, posing a number of problems in the contemporary era. This in turn has an effect in the promotion and realisation of human rights. Liberty Liberty is another concept which play a vital role in the promotion of human rights. Liberty is an ancient concept. This concept has its roots in the political philosophy. Several philosophers like, Hobbes, Locke, Rousseau, and many more have articulated Liberty in different contexts. In simple terms, liberty means, human beings are free to regulate their relations, and can govern their relations, behave at their own will, and be responsible for their acts. The concept of liberty is centred around responsibility or duty. Basing on the acts performed by individuals, liberty can be enjoyed or achieved. If the acts are bad or performed with an intention to defray anybody or deprive them of their legal claims, they not only affect the rights of others, but also of their own in the long run. This in turn will have an effect on the realisation of their rights. The concept of liberty is the basics for the development of a right. According to Hobbes, every individual is empowered to enjoy their freedoms freely without the interference of any other person. In his social contract theory, he argued that the divine will of kings to regulate the relations and to restrict the 3

freedoms of individuals is antithesis to liberty of individuals. The enlightenment of liberty by various political and legal philosophers, led to a number of political revolutions across the world. This in turn led to establish democratic societies on the basis of liberty of individuals to choose their leaders. In the contemporary era, the excessive arguments for liberty, and its indiscriminate exercise without strict adherence to duty by individuals in their numerous acts, again resulted in bringing miseries to the world. In order to resolve the problems and to provide a problem free world, the UN took a number of legal steps for the promotion of human rights. The aim of these acts of UN is to regulate the behaviour of the mankind and to guide them to discharge their duties to uplift the moral and ethical values. This in turn will help to restore liberty in its true sense and makes individuals to be happy for their legal and justified actions. Apart from the above, it is the duty of nation-states also to adhere to the principles of international law and human rights in their relations, respecting the concept of liberty of the other nations and their citizens. The Strict adherence to liberty and practice of self-restraint alone would yield the desired results in protecting the rights of every citizen as guaranteed by law. Equality Equality is another important component of human rights. From ancient to modern times, people are fighting to achieve this in terms of its practical application to each situation. In general, equality proposes to bring all the people into one category, and apply the principles of law, and justice without any distinction, whatsoever it may be among the individuals. Equality is a relative concept which may be distinguished basing on a number of factors, and the enjoyment of rights on an equal footing. The aim of the Universal Declaration of Human Rights and the Constitutions of the various countries including India are to treat all the people on an equal footing without any kind of discrimination. This may be referred to formal equality, wherein in the eyes of law all are equal. Although, all people are numerically considered as equal in the eyes of law, in providing the amenities or distribution of resources, all may not be considered or treated as equal in reality. This is because of the socio, economic, political and cultural conditions that prevail in each society. In order to uplift the people who are not equal on any ground specified above, they need to be given certain concessions and facilities to improve their status and to reach the equal status with that of others who are on a high pedestal. To achieve the rigour of equality and to fill the gap especially on socio-economic, and cultural grounds, the principles of international law of human rights provides for the necessary concessions to be extended, to people at the national level by states. This will result in to achieve the status of equality of all in the eye of law. Once they achieve the equal status in all respects, the concessions extended to specific group of people to uplift their status, may be withdrawn by the state. The same principle applies to states at the International level. Accordingly, the developed states need to extend concessions to the developing states. Justice Justice in simple terms may be defined as righteousness, fair and to be treated on just and equitable grounds. Justice is an important concept which has attracted a number of fields especially, law and philosophy. To achieve absolute justice, scholars have prescribed a number of factors. Basing on the various factors that are relevant to each society, and to fill the gap between unequal and equals, from ancient to modern times, a number of scholars have advocated various theories to achieve the concept of justice. In order to measure the concept of Justice, a number of tools are required. To achieve perfect justice, it lays its emphasis on concepts of equality, morality and ethics. The aim of human rights is to provide such stable conditions to everyone by the states, which alone could help to achieve the rights in a justiciable manner. According to Plato, Justice being the highest value, and to attain it, an individual has to be provided with all the necessary conditions to realise the right, and to discharge his duties towards society. It again lay emphasis on the actors and the state as well to discharge every single obligation with devotion of duty and respect for other values. Further Reading • Alston, Phillip (ed.), (1992), The United Nations and Human Rights: A Critical Appraisal, Oxford: Clarendon Press. • Bachr, Peter R, (1999), Human Rights: Universality in Practice, New York: Palgrave. • Baxi, Upendra, (2002), The Future of Human Rights, New Delhi: Oxford University Press. • Bhagwati, P.N., (1987), Dimensions of Human Rights, Madurai: Society for Community Organization Trust. 4
Unit: II Historical Foundation of Human Rights In this unit, you will learn about, • Introduction • Landmark development in Human rights • The Constitution of the United States of America (1787) and

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Bill of Rights (1791) • Declaration of the rights of man and of the citizen (1789) • The first Geneva Convention (1864) • The United Nations (1945) • The Universal Declaration of Human Rights (1948) •

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of Rights (1791) • Declaration of the rights of man and of the citizen (1789) • The

Human Rights in British India • The Genesis of the Protection of Human Rights act, 1993 Introduction Human rights, also known in various terms as 'natural rights', 'fundamental rights' etc. have been in vogue since olden times. The Human Rights issue came to limelight only after its drastic violation became frequent to the worst magnitude. As a significant salient feature, fundamental rights cannot be taken away by any legislature or any act of government. The history of human rights covers thousands of years and draws upon religious, cultural, philosophical and legal developments throughout the recorded history. It seems that the concept of human rights is as old as the civilization. This is evident from the fact that almost at all stages of mankind there have been a human rights documents in one form or the other in existence. Several ancient documents and later religious and philosophies included a variety of concepts that may be considered to be human rights. Notable among such documents are the Edicts of Ashoka issued by Ashoka the, Great of India between 272-271 BC and the Constitution of Medina of 622 AD, drafted by Muhammad to mark a formal agreement between all of the significant tribes and families of Yathrib (later known as Medina).However, the idea for the protection of human rights grew after the tragic experiences of the two world wars. Prior to the world war, there was not much codification done either at the national or the international levels for the protection and implementation of human rights. History teaches that in the 'state of nature' a man was free and could take away whatever he can. His mania for acquisition is kept under check by the fear of retaliation and injury by the external factors. This appears to be at odds with the cry raised in support of Human Rights. The enforcement and enjoyment of human rights is closely connected with the changing of the present position of the individuals from the object to the subject of international law as also with the total disarmament and the disbanding of the standing armies of all the nations of the world. Any programme for the promotion of human rights must include reorganization of the present state- system which stresses the national sovereignties. In other words, there must be an accepted system of a 'World Federal Government' so that the mankind may live in peace and prosperity, free from all wars, all wants thus paving the way for enjoyment of Human Rights as and when these become a reality for the lowest of the low. So long as the nations of the world do not accept this programme, the talk of human rights is mere demagogy. It would be wise to remember that "There is something in human history like retribution; and it is the rule of historical but by the offender himself". 5
Historical Background The concept of human rights is, historically, the flower of a European plant. It has now received the support of world nations. The term has come into common currency during the 20 th century, though the idea of "human rights" is essentially the product of 17 th and 18 th century European thought. 'Respect' is rights possessed by people as human beings. They include all fundamental freedoms and are based on

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mankind's demand for a life in which the inherent dignity

and worth of each human being will receive respect and protection. Human Rights were fundamental to the wellbeing of society under the influence of philosophers such as Grotius, Hobbes and Locke. Then, these rights were called "natural "rights, or "the rights of man". These natural or moral rights became part of the political agenda. Philosophers such as Thomas Paine in his essay, 'The Rights of Man', John Stuart Mill in his 'Essay on Liberty', and Henry David Thoreau in his 'Civil Disobedience', expanded the concept. Thoreau is the first philosopher to use the term, "human rights". This work has been extremely influential on individuals as different as Leo Tolstoy, Mahatma Gandhi, and Martin Luther King. Gandhi and Luther King, in particular, developed their ideas on non-violent resistance to unethical government actions from the work of Thoreau. The great religions of the world –Hinduism, Christianity, Buddhism, Taoism, Islam, and others contributed profoundly to the ideas on the dignity of the human being and are concerned with the duties and obligations of man to his fellow human binges. Ancient Indian thinkers like Manu, Parasar and Kautily had tried meticulously to protect the rights and dignity of individuals from the capacity of the rulers to protect the dignity of the citizens. The history of human rights may be traced to early slave revolts. Later, liberalism, Marxism, socialism and anti-colonial freedom struggles shaped the human rights perspective. Some important events, which have contributed for the growth of human rights movement, are the Renaissance, the Industrial Revolution the "Glorious Revolution" of 1688 that led to the English Bill of Rights, in 1689, the American war of Independence, 1776 and French Revolutions 1789, the Bolshevik Revolution 1917, and the World Wars I & II. The historical inquiry may help to understand the growth and development of human rights in different phases of human history, like Human Rights' their prevalence, relevance and recognition as well as their effectiveness. Hammurabi and the Prevention of Arbitrary prosecution, Human Rights have been intricately tied to the laws, customs and religions throughout the ages. The prime contribution to Human Rights could be seen from the efforts of Hammurabi, the Sumerian king. One of the first examples of a codification of laws that contain references to individual rights is the tablet of Hammurabi. The Sumerian king Hammurabi created the tablet about 4000 years ago. Hammurabi's laws created a precedent for a legal system. This kind of precedent and legally binding document protects the people from arbitrary persecution and punishment. The problems with Hammurabi's code were mostly due to its cause and effect nature, it held no protection on more abstract ideas such as race, religion, beliefs, and individual freedoms. Growth and Development of Human Rights in Different Phases of Human History The concern for human rights became popular particularly in the twentieth century, though it had its roots in different forms since the time immemorial. It is not static but a part of continuing dialectic process through which progress in the field might be manifested. In 539 B.C., the armies of Cyrus the Great, the first king of ancient Persia, conquered the city of Babylon. But it was his next actions that marked a major advance for Man. He freed the slaves, declared that all people had the right to choose their own religion, and established racial equality. These and other decrees were recorded on a baked-clay cylinder in the Akkadian language with cuneiform script. Known today as the Cyrus Cylinder, this ancient record has now been recognized as the world's first charter of human rights. It is translated into all six official languages of the United Nations and its provisions parallel the first four Articles of the Universal Declaration of Human Rights. 6 Landmark Development in Human Rights From Babylon, the idea of human rights spread quickly to India, Greece and eventually to Rome. There the concept of "natural law" arose, in observation of the fact that people tended to follow certain unwritten laws in the course of life, and Roman law was based on rational ideas derived from the nature of things.

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Documents asserting individual rights, such as the Magna Carta (1215), the

Petition of Right (1628), the US Constitution (1787),

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the French Declaration of the Rights of Man and of the Citizen (1789) and the US Bill of Rights (1791) are the written precursors to many of today's human rights

documents. The Magna Carta, or "Great Charter," was arguably the most significant early influence on the extensive historical process that led to the rule of constitutional law today in the English- speaking world. In 1215, after King John of England violated a number of ancient laws and customs by which England had been governed, his subjects forced him to sign the Magna Carta, which enumerates what later came to be thought of as human rights. Among them was the right of the church to be free from governmental interference, the rights of all free citizens to own and inherit property and to be protected from excessive taxes. It established the right of widows who owned property to choose not to remarry, and established principles of due process and equality before the law. It also contained provisions forbidding bribery and official misconduct. ? Magna Carta The Magna Carta came into existence in 1215, as a group of rebellious barons forced King John to sign a negotiated agreement. This agreement, which later became known as the Magna Carta, forced John to concede his supreme governmental power, which was instead to be exercised according to custom and law, and asserted the superiority of law and justice. Although King John subsequently repudiated the agreement, versions were reissued by King Henry II and King Edward I, in 1225 and 1297 respectively. The Charter laid dormant for centuries before being resurrected in the 17 th Century by Sir Edward Coke, in the revolution against King James I. Cooke upheld the Magna Carta as a reflection of the liberties enjoyed by all which had to be respected by the King, and that the King is not an absolute monarch, but also was subject to the law. The rule of law has been broadly defined as: [A] principle of governance in which all persons... including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated... it requires... measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. Further, the rule of law is said 'to ensure that people are not at the mercy of the momentary will of a ruler or a ruling group, but enjoy stability of life, liberty and property.' The rule of law is proclaimed to have originated famous of the Magna Carta, which states: No free man shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or in any other wise destroyed; nor will we pass upon him, nor condemn him, but

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by lawful judgment of his peers, or by the law of the land.

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by lawful judgment of his peers, or by the law of the land.

We will sell to no man, we will not deny or defer to any man either justice or right. One basic principle of the rule of law that has come as noted by Isaacs J in Ex parte Walsh and Johnson; Re Yates is that 'every free man has an inherent individual right to his life, liberty, property and citizenship.' The Magna Carta rejected the use of arbitrary power, placed limits on the power of the State, and proclaimed that no one is deemed to be above the law. This forms the basis of the understanding of the rule of law, in line with the definition above. The Magna Carta established the understanding of the supremacy of the law and that all are to adhere to the law. This understanding 7

of the Magna Carta and the rule of law is of great relevance to Australia today, as it ensured that Australians today are not at the hands of arbitrary power, and that there is equality before the law. ? Petition of Rights (1628) The next recoded milestone in the development of human rights was the Petition of Right, produced in 1628 by the English Parliament and sent to Charles I as a statement of civil liberties. Arbitrary arrest and imprisonment for opposing these policies had produced in Parliament a violent hostility to Charles and to George Villiers, the Duke of Buckingham. The Petition of Right, initiated by Sir Edward Coke, was based upon earlier statutes and charters and asserted four principals: (1) No taxes may be levied without consent of Parliament, (2) No subject may be imprisoned without cause shown (reaffirmation of the right of habeas corpus), (3) No soldiers may be quartered upon the citizenry, and (4) Martial law may not be used in time of peace. ? English Bill of Rights 1689 The end of the Glorious Revolution in 1688, heralded a new era in the history of Human Rights. This Bill was passed the parliament which established the parliamentary sovereignty and reduced the arbitrary powers of the English minority. This Bill incorporated certain fundamental basic Hunan Rights guaranteed to all citizens of England, the freedom of speech and certain other political rights. ? United States declaration of independence (1776) On July 4, 1776, the United States Congress approved the Declaration of Independence. Its primary author, Thomas Jefferson, wrote the Declaration as a formal explanation of why Congress had voted on July 2 to declare independence from Great Britain, more than a year after the outbreak of the American Revolutionary War, and as a statement announcing that the thirteen American Colonies were no longer a part of the British Empire. Congress issued the Declaration of Independence in several forms. It was initially published as a printed broadsheet that was widely distributed and read to the public. Philosophically, the Declaration stressed two themes: individual rights and the rights of revolution. These ideas became widely held by Americans and spread internationally as well, influencing, the French Revolution. ? The French Revolution The French Revolution was a period of radical social and political disorder in France and Europe. French society underwent massive changes as feudal, aristocratic, and religious privileges ceased to exist. The monarchy was abolished, and old ideas about hierarchy and tradition gave in to new Enlightenment principles of citizenship and inalienable rights. The French Revolution changed the world and even today the French people celebrate the Storming of the Bastille on July 14th 1789 as their national holiday. The triad "liberty, equality, fraternity" became popular with the French Revolution. Robespierre proposed in 1790 that it should be written in National Guard uniforms and in all flags. In 1848 this motto was defined in the French constitution as constituting a principle of the republic; it appears in the constitutions of 1946 and 1958. It had several variations, such as "unity, strength, virtue" used in Masonic lodges, or "liberty, security, property," "liberty, unity, equality" etc. During the Nazi occupation it was replaced by "work, family, fatherland". But it is the form known today that became the French motto, adopted also in other countries, such as in the Constitution of India of 1950. The first article

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of the Universal Declaration of Human Rights contains the triad: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." 8

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All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." 8

Interestingly, these three ideals have become social movements throughout history. Before discussing this aspect concerning each ideal individually, it is important to characterize how they are understood in this text. In terms of freedom, we should consider both the external and internal aspects of the human being. The external one has to do with giving freedom to people. In the Old Testament we already find the yearning for freedom in relation to a community, with the escape of the Jewish people from the slavery in Egypt (Exodus 1-12). Interestingly, they liberated themselves from the domination of the Pharaoh, but fell under the domination of Yahweh, a demanding and vengeful deity. This was necessary taking into account the human constitution of that period and as a preparation for what was to come later. They had to follow the commandments and other precepts, including the purity of race, otherwise they were rigorously punished. More recently, the notion of universal freedom appears, e.g. in the U.S. Constitution. In its famous 1791 "First Amendment", established to ensure civil liberties, it provides for freedom of religion, speech, press and the right of assembly. The important thing is that with it anyone became free to express his/her ideas.Another milestone of the movement for freedom was the abolition of slavery in the U.S, approved in 1863, setting free 4 million Africans. The "Lei Áurea" (Golden Law) that abolished slavery in Brazil was enacted in 1888. It was the last country in the Americas to completely put an end to slavery (the last country in the world was Mauritania in 1981). Nowadays, the notion of external freedom is rooted in the culturally evolved humankind. For example, scientists cherish their freedom of research, that is, being free to investigate what each one finds most relevant. Teachers and professors, especially the latter, value the freedom of teaching, that is, organizing and teaching their classes as they see fit. Interestingly, the syllabi of university courses are generally fairly succinct, allowing for instructors to present the subjects in their own way, introducing other topics and improvising their courses according to each class. Another kind of freedom is the inner freedom, the free will. Note that for a materialist or physicalist – a person who admits, ideally through working hypotheses and not by belief, that there are only material, physical processes in the universe and in humans –, free will cannot exist. The reasoning leading necessarily to this conclusion is fairly simple: an atomic particle cannot have free will, therefore neither can a cluster of them forming an atom, a cluster of atoms forming a molecule, a set of molecules forming a cell, a group of cells forming a tissue, a collection of tissues forming organs, and finally a collection of organs forming a living being or a human being. However, expanding the physicalist conception of the universe and of the human being, there is no problem in admitting, again ideally, as a hypothesis rather than a belief, that there are non-physical phenomena and processes that influence the behavior of matter, that is, which cannot be reduced to purely physical phenomena. I have a theory of how this is possible without violating "laws" and physical conditions. Briefly, let's consider that living beings assume in every moment some material state and that there are certain transitions to other states in course of time. Suppose that there are non-deterministic transitions from a certain state A to states B, C etc. This means that if a living being is in state A, one cannot physically determine if the next transition will occur to state B, or to C, and so on. Suppose, furthermore, that the choice of which non-deterministic transition will be made at each point in time requires no energy. In this case, the choice can be made by a non- physical member of the living being. This partially explains the origin and maintenance of organic forms of living beings, with their fantastic symmetries, such as our hands and ears. If their growth, done by cell subdivision, were not be controlled externally to the physical body, during growth and tissue regeneration the symmetry would not be preserved to the degree that it is observed. Furthermore, which cells of a given tissue of a living being will subdivide in the next instant is also a non-deterministic process. In this case, the cells to be subdivided can be determined by a non- physical "member" of the non-physical constitution of a living being, imposing the organic form and eventually maintaining symmetry. Another example of a possible non-determinism is the fact that certain genes may produce, each one, the synthesis of several different amino acids that subsequently produce proteins. In choosing which amino acid must be synthesized from a gene, something non-physical can influence the development of the living being. Note that if a living being were totally subject to physical "laws" and conditions, it would necessarily have a crystalline or 9

amorphous form, like the minerals, and not the typical organized, organic forms of species of living being. By the way, these typical forms allow us to externally recognize a plant or animal as belonging to their particular species. We recognize these shapes with our thinking, which suggests that in their origin they are also of the same nature as our thoughts. Note that any inner process that modifies a living being is not subjected to a complete sequence of detectable physical causes and effects: investigating this sequence inevitably leads to a dead end. For example, the reader can mentally decide to perform a certain movement with one arm and then actually do it. Suppose that during the movement some muscle tissues of the arm are changed, some of them contracting and others expanding, due to chemical or electrical impulses received from some so-called "motor nerves". Great. But why did the motor nerves produce these impulses? Suppose that they, in turn, received impulses from a region R1 of the brain. Great. But why did this region R1 issue these impulses? Suppose it did because it received impulses from another region R2. Great. But why R2 issued these impulses, and so on? It is thus impossible to determine the primary cause of a conscious, previously imagined movement we make. Following my conception of the world I will hypothetically assume the existence of free will in humans (but not in animals and plants). This hypothesis is based on my own experience of being able to determine a next thought, consciously choosing among several possible thoughts, without this choice being forced by preferences or remembrances. For example, I can mentally choose two numbers I have never seen or never thought about, and then choose one of them, "visualizing" it mentally for a few seconds, with closed eyes, as on a display of numbers for a queue, corresponding to numbers drawn by the people in the queue. Based on this hypothesis, external freedom should allow for inner freedom, that is, free will, to manifest itself. Note that it is possible to prevent the exercise of free will: just induce the person into a semi-conscious state like the one produced by excessive alcohol consumption, by psychotropic drugs, outbursts of anger or fear, sleep deprivation, brainwashing, stress, TV, and electronic games of the action/reaction or ego-shooter type (due the speed with which the player must react, because conscious thought is relatively slow). Therefore, it is interesting to consider that external freedom is appreciated because it allows a person to exercise inner free will, that is, to think freely, therefore to plan and then perform actions or to speak. This occurs, for example, when one allows a person to have ideas (when one allows a person freedom to exercise her/his free will) and express them (outer freedom of action or of expression). It is possible that this movement towards external freedom reflects the conquest of free will by humanity. That is, at a certain time in history people began to feel that they could have thinking freedom. By inner observation, they noticed they they could choose their next thought and focus on it. This can be experienced nowadays by anyone. By observing their freedom of thought with their own thinking, and the fact that they could carry out their previously planned actions in the world, people began to fight for outer freedom, that is, making it possible for them to externally execute those actions. No modern person should be content to follow commands, dogmas, laws and social rules without understanding their purpose and recognizing their validity. That is, they become suggestions and not impositions. For example, there is a law that prohibits crossing a red traffic light. If it is followed by fear of getting a fine or having the car hit by another vehicle, or by habit, one is not acting freely. But if one consciously recognizes that the law is valid because it protects other people from being injured and directs the traffic, it may be followed in freedom. As already said, the movement for universal freedom is relatively old, because it apparently began at the end of the 18 th century. Obviously, it has continued with increasing intensity until today. We are currently in full development of another universal movement, the human rights. Human rights, which are expressed in laws and social rules of conduct, have to do with equality. Everyone should be equally treated before the laws concerning rights and duties. For example, if a law requires that one should not discriminate based on gender, religion, nationality, ethnicity or physical disabilities, it must be equitably applied. It is interesting to note how equal opportunities are being given to physically disabled people to move around like people who do not have this deficiency. This is the fairly recent case of lowering 10

side walks for wheelchair users or installing mobile platforms on stairs where there are no elevators. Another manifestation of human rights is recognizing that sexual preferences are a strictly personal matters and nobody else has anything to do with it. If two people of the same sex decide to live together forever, they should have the same civil rights of two people of different sexes who have the same intention. The great social changes that are taking place in this area show another application of equal rights. It is wonderful to witness, at present, the universal emergence and development of the consciousness for human rights. But what is the cause of this development? It seems to me that it is the insight that there is something "behind" every human being intimately connected to her/him, which I will call Higher Self, the essence of every person. It is a non-physical member (and therefore has no gender), and it is independent of religion, ethnicity and nationality. This higher self is different from what I call the lower self, which encompasses the physical body and tastes, instincts, memory, temperament etc. The higher self, like the lower self, is absolutely individual – this is why identical twins usually end up with completely different interests and lives, despite having the same DNA and eventually very similar education during childhood and youth. It is because of this higher self that we can get in touch with universal and eternal concepts, such as mathematical ones. All higher selves, albeit different, are of the same nature, and constitute the very essence of every human being. Maybe it's the insight of it that has led to the universalism that is being strongly manifested in recent times. For example, in the European Union (EU) people have the right to live in any country, they are allowed to move freely from one country to another (a consequence of the Schengen Treaty of 1995). The universities allow students to take part of their courses at other universities in any EU country etc. In the same way as with free will, people with a materialist or physicalist conception of the world and of the human being cannot admit the existence of a non-physical higher self. For such people, the human being consists only of the physical body, as it was inherited and then modified by the environment. But in this case there can be no equality - note that a transplant is rejected because every human body is physically unique. Rather, for someone who admits the existence of non- physical processes and members in humans, there should be no impediment to suppose, ideally by hypothesis and not by belief, the existence of this higher self, the divine member existing in every human. The recognition of this higher self should be the conscious reason for respecting others, that is, the origin of the impulse for equality. As we have seen, the universal social movement for freedom is relatively old, that is, it began in the 18 th century. Moreover, the social movement for equality, especially concerning rights, is occurring and developing in present times. Note that, as with everything that is human and social (because society and social relationships depend on individuals), there is no rigidity in these areas and no clear boundaries. Every human being is unpredictable. The biggest killer can regenerate himself and become socially important. Thus, although the movements for freedom and equal rights have respectively appeared and developed in the past and present, one can find its manifestations, still incipient, in very remote times. And what social impulse will appear and develop in the future? It seems to me that the future holds the development of the third ideal of the French Revolution: fraternity, brotherhood. Let us first consider what it means. Perhaps another denomination provides a better understanding of the meaning of brotherhood: solidarity. In social terms, it is not enough to allow a person to be free and have equal rights with others: it is necessary to help the person to develop her/himself. We had in Brazil a sad example of what it means giving freedom without conditions and help to exercise it properly: the liberation of slaves threw them into the society without the slightest possibility of realizing themselves as individuals and even of surviving, because they were suddenly left without profession and without their master who, though often not treating them with dignity, at least provided them food and shelter. Thus, fraternity, solidarity, mean helping those in need. There are many people and institutions that already do this. For example, I greatly admire the Kardecist spiritist movement, which is so popular in Brazil (attention, I'm not a spiritist), for its extensive social work, such as 11

daycare centers, nursing homes, hospitals, help (in its particular way) for people with mental health problems etc. However, it seems to me that up to now there is no universal impulse of fraternity, as in the case of freedom and equal rights. If a group of people violates the freedom of others or their equal rights, this is normally regarded as a return to the past, that is, behaving as mankind behaved in ancient times, such as in the Middle Ages. However, there is a long way before regarding someone who does not help others as not being a modern person. This shows that there is still no widespread sense of fraternity. In fact, the latter is very old - it seems to me that the great introducer of universal fraternity (that is, not within a family or community) was Christ, who helped indiscriminately all who came to him, even if it annoyed members of his religious community, which was heavily ethnic. Note that he did not want to introduce a new religion, because that would not be a universalist impulse. It seems to me that he wanted to renew Judaism making it universal, and not an ethnic religion as was the case. The great Buddha introduced the doctrine of compassion and love, and wanted to end suffering. According to him, birth, disease, old age, death and not getting what one wants is what leads to suffering. His solution was the mental development of each individual so that the person withdraws from earthly matters, and from all desires and impulses related to the physical world. That was not Christ's message: according to him, suffering is part of our development, and we must overcome it by our actions here in the physical world, where we can choose to do good or evil, that is, where we can be free. Unfortunately, his message was totally distorted, and it continues to be so by many religions that claim to be Christian. We must not let these aberrations to dim his message and his example of life and, perhaps what is most important, the practice of selfless love, of altruism. A person who practices it should be considered as being a Christian, regardless of following a religion that does not consider itself Christian. Note that selfless love can only be exercised out of free will, that is, it should not be the result of an external imposition nor a habit or an inner pleasure of practicing it, because the pursuit of such pleasure would come from selfishness. Selfishness, egotism, is the opposite of selfless love. Selfless love comes from what I have very briefly characterized as the higher self, and selfishness from the lower self. Therefore, fraternity presupposes freedom and equality (recognition of the other as an equal, that is, also having a higher self). Notice that the development of selfishness was a necessity for mankind. Without it, we would not have developed the perception of our own individuality, and therefore of self- consciousness. However, we are now at the stage of having to supplant it by selfless love. As mentioned, the movements for freedom and equality appeared naturally, "automatically". As described above, the former appeared perhaps as a result of the emergence and development of free will which, to manifest itself, required external freedom. The latter arose from the intuitive perception of the higher self of the other. Will the movement for universal solidarity appear naturally due to an "automatic" development of humanity? If we look at social evolution since the last century, we can see an exacerbated increase of selfishness and greed. The capitalist system itself is based on Adam Smith's statement in his 1776 book The Wealth of Nations, that the satisfaction of selfishness and personal ambition would bring up an "invisible hand" that would distribute wealth and produce overall happiness. Unfortunately this "hand", which has indeed never been seen, must have never worked, because what we effectively see are growing economic inequalities and increasing social and individual misery – including the growing difficulty in social relationships, as well as addictions, not only to tobacco, alcohol and drugs, but also the most recent one, the Internet. International Journalist Jamil Chade, in his excellent 2009 book O mundo não é plano – a tragédia silenciosa de 1 bilhão de famintos [The world is not flat - the silent tragedy of 1 billion hungry people, in free translation] shows with realistic descriptions, including from his own experiences, the human tragedies caused by hunger and thirst. The most tragic aspect in this situation is that we produce or could produce enough food to feed the entire humanity. Only due ultimately to selfishness and greed of individuals, companies and governments, this inhuman situation is maintained. Food waste, inefficiency in production and consumption (e.g. eating meat is far less economically efficient than eating vegetables and dairy), improper industrialization (causing an impoverishment of food and the production of junk food, 12

without nutritional value) are some of the factors that could be changed if there was a real spirit of brotherhood, that is, having the needs of people in mind, rather than pursuing exaggerated profit. A symptom of the increased selfishness is also the fast growing competition. It turns out that any competition is inherently antisocial, because when one wins the other necessarily loses. The winner feels happy, accomplished and proud, and while the loser is at least frustrated. Therefore, the happiness of one person comes at the expense of unhappiness or frustration of another. The opposite of competition is cooperation, which is inherently social and fraternal. The growing selfishness, greed and competition makes me doubt whether we will naturally develop a spirit of brotherhood, as we have developed the spirit of freedom and equality. It is very possible to consciously develop this spirit, through self-education of adults and education of children and youth. For example, it seems to me that competitive games should be totally banned from schools, replaced by cooperative games. In one class, students who are good at a subject should help their classmates who have difficulties. At the senior high school classes students should do an internship in an institution to help children, adults or old people with difficulties or disabilities. Helping others creates a sense of solidarity, and the taste for the exercise of brotherhood, just as the contact with suffering develops compassion. By feeling compassion one can feel the responsibility to help others, and this is positive. However, it seems to me that the correct path is that one should cherish and contribute to the freedom and equality of others, and should perform fraternal actions. All this should be continually practiced out of a deep understanding of the human being. Unfortunately, this understanding cannot be obtained from a materialist, physicalist conception of the human being. If the latter is simply matter and is considered a mechanical-electrical machine, there is no harm in restricting its freedom (recall that this conception cannot admit the existence of free will), in not treating it as an equal (after all, we are all physically different), and in not helping it. Why could a material "thing" benefit from liberty, equality and fraternity? Only a psychotic person could think that s/he should handle a machine, e.g. her/his computer, with freedom, with equal rights and as something that needs help in a humane sense. Therefore, to open the way towards a future with a feeling towards universal fraternity we must initially pass by the stage of supplanting what I consider the greatest evil of humanity today: a materialist, physicalist, conception of the universe and of the human being. The self-education referred to above should start with abandoning the prejudice that humans consist only of matter and physical processes. However, beware, I am not suggesting here that one should embrace spiritual or religious currents or sects that are based on feelings of satisfaction, promising physical or psychological comfort, happiness or, even worse, material gains. I am proposing that one should abandon the materialist conception out of a truly scientific spirit, without prejudices, in pursuit of understanding, using conceptual transmission of knowledge and doing conscious research. This approach already exists. The Constitution of the United States of America (1787) and Bill of Rights (1791) Written during the summer of 1787 in Philadelphia, the Constitution of the United States of America is the fundamental law of the US federal system of government and the landmark document of Western world. It is the oldest written national constitution in use and defines the principal organs of government and their jurisdictions and the basic rights of citizens. The first ten amendments to the Constitution the Bill of Rights came into effect on December 15, 1791, limiting the powers of the federal government of the United States and protecting the rights of all citizens, residents and visitors in American territory. The Bill of Rights protects freedom of speech, freedom of religion, the right to keep and bear arms, the freedom of assembly and the freedom to petition. It also prohibits unreasonable search and seizure, cruel and unusual punishment and compelled self-incrimination. Among the legal 13
protections it affords, the Bill of Rights prohibits Congress from making any law respecting establishment of religion and prohibits the federal government from depriving

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any person of life, liberty or property without due process of law.

In federal criminal cases it requires indictment by a grand jury for any capital offense, or infamous crime, guarantees a speedy public trial with an impartial jury in the district which the crime occurred, and prohibits double jeopardy. Declaration of the rights of man and of the citizen (1789) In 1789, through a bloody revolution, the people of France brought about the abolishment of the absolute monarchy and set the stage for the establishment of the first French Republic. Just six weeks after the storming of the Bastille, and barely three weeks after the abolition

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of feudalism, the Declaration of the Rights of Man and of the Citizen (

French: La Declaration des Droits de Inhume et du Citoyen) was adopted by the National Constitution Assembly as the first step towards writing a constitution for the Republic of France. The Declaration proclaims that all citizens are to be guaranteed the rights of "liberty, property, security, and resistance to oppression." It argues that the need for law derives from the fact that "...the exercise of the natural rights of each man has only those borders which assure other members of the society the enjoyment of these same rights. "Thus, the Declaration sees law as an "expression of the general will, "intended to promote this equality of rights and to forbid "only actions harmful to the society." The first Geneva Convention (1864) In 1864, sixteen European countries and several American states attended a conference in Geneva, at the invitation of Swiss Federal Council, on the initiative of the Geneva Committee. The diplomatic conference was held for the purpose of adopting a Convention for the treatment of wounded soldiers in combat. The main principles laid down in the Convention and maintained by the later Geneva Conventions provided

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for the obligation to extend care without discrimination to wounded and sick military personnel and respect for and marking of medical personnel transports and

equipment with the distinctive sign of the red cross on a white background. The United Nations (1945) World War II had ranged from 1939 to 1945, and as the end drew near, cities throughout Europe and Asia lay in smoldering ruins. Millions of people were dead; millions more were homeless or starving. Russian forces were closing in on the remnants of German resistance in Germany's bombed-out capital of Berlin. In the Pacific, US Marines were still battling entrenched Japanese forces on such islands as Okinawa. In April 1945, delegates from fifty countries met in San Francisco full of optimism and hope. The goal of the United Nations Conference on International Organization was to fashion an international body to promote peace and prevent future wars. The ideals of the organization were stated in the preamble to its proposed charter: "We the peoples of the United Nations are determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind." The Charter of new United Nations organization went into effect on October 24, 1945, a date that is celebrated each year as United Nations Day. The Universal Declaration of Human Rights (1948) By 1948, the United Nations' new Human Rights Commission had captured the world's attention. Under the dynamic chairmanship of Eleanor Roosevelt ,the of widow president F.D. Roosevelt, a human rights champion in her own right and the United States delegate to the UN. The Commission set out to draft the document that became the Universal Declaration of Human Rights. Roosevelt, credited with its inspiration, referred to the Declaration as the international Magna Carta for all mankind. It was adopted by the United Nations on December 10, 1948. 14
In its Preamble and in Article 1, the Declaration unequivocally proclaims the inherent rights of all human beings: "Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and

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the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people...

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All human beings are born free and equal in dignity and rights:"

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All human beings are born free and equal in dignity and rights:"

The Member States of the United Nations pledged to work together to promote the thirty Articles of human rights that, for the first time in history, had been assembled and codified into a single document. In consequence, many of these rights, in various forms, are today part of the constitutional laws of democratic nations. Human Rights in British India The modern version of human rights jurisprudence may be said to have taken birth in India at the time of British Rule. The origin of this ideal in India lies in the history of India, especially in the struggle for freedom against the British rulers. When the British ruled India, resistance to foreign rule was manifested in the form of demand for fundamental freedoms and civil and political rights for the people. There was no fundamental law guaranteeing the subject's rights and liberties and they were humiliated and discriminated against in many ways, in their own country. British resorted to arbitrary acts such as brutal assaults on unarmed satyagrahis, internments, deportations, etc. The freedom movement and the harsh repressive measures of the British rulers encouraged the fight for civil- liberties and the demand for constitutional guarantees of some fundamental rights. The avowed objective of several national organizations including that of the Indian National Congress, in the beginning, was only to secure some civil liberties and human rights of non-discrimination on grounds of race, colour, etc., in the matter of access to public places, offices and services. Hence, National struggle for freedom from its earliest stages in its practical manifestation was largely directed against racial discrimination and to securing basic human rights for all the people. Under the British rule, human rights and democracy was suppressed, and socialism was anathema for the processes of administrative and judicial justice. Hence British period in India was rightly depicted as Kaliyuga or dark period in Indian history. It was the British rule that created ripples in the political and legal spheres leading to imposition of British political and legal culture on India. The entire system of the country was oriented to the needs of British imperialism and domination over India. Lord Macaulay rejected the ancient Indian legal and political system as 'dotages of Brahmanical superstition' and condemned ancient Indian legal heritage and its inner core as 'an immense apparatus of cruel absurdities.' The British looked down upon Indian values, myths, mores and lures as a lump of loath some and demeaning thought. Like-wise the language used by British rulers for Indians was disparaging. Lord Wellesley condemned Indians as 'vulgar, ignorant, rude and stupid' and Lord Cornwallis described as an axiom that 'every native of Hindustan is corrupt'. East India Company debarred Indians from high offices and deprived them of their political, social and economic rights. The British Indian rulers discriminated against Indians in matters of their political and civil liberties and rights. The legislature, executive and judiciary were oriented to protect and promote the interests of the British. The Courts administered justice according to law pretending to be impartial and neutral a veneer of justice between unequal interests the landlord and the peasants, rich and poor, master and servant. The impression gained in the Indian minds was that their sacred inalienable human rights and vital interests had been ignored, denied and trampled for the sake of England and English rulers. Indians were reduced to hewers of wood and drawers of water sinking in the deep morass of poverty, illiteracy and slavery. To these were added the exploitation of material resources and its wealth. In short, the law, the country and its wealth belonged to the British and not to Indians —one law for the rulers and the other for the ruled. The trials of Tilak and of Gandhiji were an eye-opener to all Indians that those human rights, fundamental freedoms and liberties and independence would not be granted to Indians. 15

It was because of stiff opposition from Indian people that the Charter Act of 1813 was enacted with a view to promote the interest and happiness of the native inhabitants in India. Similarly, the Charter Act, 1833 was passed to allow the Indian to enjoy some political rights. The Act made some definite and liberal steps towards the fulfilment of the rights of the natural born subjects of His Majesty as well as the natives of the said Territories. It was the first Act by which no discrimination was shown to any person by reason of his religion, caste, place of birth, descent, and colour. Following the provision of the Act, some of the rights were guaranteed to the people by some other Acts concerning the Government of India. For the political freedom of India, the formation of the Indian National Congress (1885) also gave a new vista for the cause of human rights which was being violated by the British rule in India. Influenced by the reformist movements in different parts of the world for the cause of freedom, the Nehru Report of 1932, the first commitment to civil liberties, and the Karachi Resolution of 1930, the most important commitment to individual and group rights, were prepared. These were included in the Constitution of free Indian as Fundamental Rights in Part III, and as Directive Principles of State Policy in Part IV, respectively. To conclude, however, the Indian perception of human rights does not emanate from the theory of a priori or natural rights doctrine of the West, rather it has its own base in ancient Indian culture and civilization. 'The Indian vision of rights emphasizes not only the individual but also the total person, a person whose interdependent rights and duties are determined by his/her position within a hierarchical network of relationship". The impact of Islamic religion, renaissance and reforms movements, British colonialism and the nationalist ideology played a vital role in the formation and practice of human rights in India. The Genesis of the Protection of Human Rights act, 1993 The Indian Civil Liberties Movements reached its pinnacle in last two decades as the democratic set-up has been mutilated with the absence of strong democratic ethos and crises of governability of Indian State ever since the period of emergency and the emergence of terrorist violence in 80s was not only a serious threat to civil liberties but to the credibility of Indian State as well. With the increasing threat of governability on the one hand and emergence of extra-legal separatist and terrorist forces on the other, the human rights situation has deteriorated especially in the areas affected by political insurgency. The State, in order to maintain its governability and to contend terrorist violence, has taken recourse to coercive measures which further lead to the phenomena of State-terrorism, human rights violation by security forces. As such the local human rights groups have become more active, started reporting the incidence of such violations that has entitled a kind of pressure for preservation of civil liberties. The internationalization of human rights issue and its propaganda in context of Kashmir insurgency as well as the denouncement of Indian human rights record by foreign non-governmental originations (NGOs) like Amnesty International, Asia Watch, etc., further intensified the pressure in this direction. Therefore, need for self-regulating human rights body for monitoring the human rights situation in India. In fact, the government had already intended to establish an internal body to counter the national and international pressure. The Protection of Human Rights Act, 1993 enacted in 1993, but the assent of the President of India was accorded on January 8, 1994. The Act was deemed to have come into force on the 28 th September 1993. The Act aimed to protect the human rights, provided for constitution of National Human Rights Commission, State Human Commissions in the States and Human Rights Courts for the purpose. The Act extended to whole on India, but it applies to the State of Jammu and Kashmir only to the matters pertaining to or relatable to any of the entries enumerated in List I and List III of the Seventh Schedule to the Constitution as applicable to the State. 16
The 'human rights' has been defined in Clause (d) Section 2 of the said Act, as

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the rights relating to life, liberty, equality and dignity of the individuals guaranteed by the Constitution or embodied in the International covenants and enforced by courts in India.

Further Reading • Alston, Phillip (ed.), (1992), The United Nations and Human Rights: A Critical Appraisal, Oxford: Clarendon Press. • Bachr, Peter R, (1999), Human Rights: Universality in Practice, New York: Palgrave. • Baxi, Upendra, (2002), The Future of Human Rights, New Delhi: Oxford University Press. • Bhagwati, P.N., (1987), Dimensions of Human Rights, Madurai: Society for Community Organization Trust. 17

Unit: III Theories and Classification of Human Rights In this unit you will learn about, • Meaning and Concept of Human Rights • Classification of Human Rights • Theoretical basis of Human Rights • Feminist Perspectives of Human Rights Meaning and Concept of Human Rights Human Rights are essential and basic rights for the human being to live the life as human being. Human Rights are those basic entitlements that make out life satisfying and meaningful to be free from fear, free from deprivation and full of opportunity to achieve the maximum possible goal of life. It is known as international rights to be given by God, by birth as human being. Human Rights are sometimes referred to as fundamental rights, basic rights, inherent rights, natural rights and birth rights. The concept of human right is not a recent phenomenon. It has existed under several names, not only in European thought but also in our country for many centuries. Its roots, however, lie in earlier tradition and documents of many cultures. There are evidences in history that people acquired rights and responsibilities through their membership in a group- a family, religion, class, community or state. The concept of human rights is the result of then long development of philosophical, political, legal and social reflection, inseparably connected to the social-democratic practices. Alighting from antiquity, the concept of human rights has covered a firm and rigid way. The ideas of profound philosophers of time such as Aristotle, Cicero, Grotius, Montesquieu and prestigious jurists found their reflections in many documents with institutional character with emphasized a well deliberate conception of human rights and liberties and much later the Universal Declaration of Human Rights adopted on 10th December 1948 by the General Assembly of the United Nations Organization ascertained for the first time in the history of mankind the fundamental human rights and liberties in a political legal document with universal character. The validity of the concept and the strength of its appeal arise as a result of synthesis of all the great modalities, various cultures, and diverse political and legal traditions. Classification of Human Rights Human rights may be classified in various ways. Lou is B. Sohn has classified human rights i n the following three categories. • The Human Rights of First Generation • The Human Rights of Second Generation • The Human Rights of Third Generation 1) The Human Rights of First Generation (Civil and Political Rights) 19
The human rights of the first generation are civil and political rights of the individuals. The civil and political human rights are collectively known as 'Liberty Oriented Human Rights' as they serve negatively to protect the individual from excesses of the state, that is why they are also called negative rights. The human rights of first generation reflect long established human values and as such are incorporated not only in almost every Constitution of various States but also in

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the Universal Declaration of Human Rights, 1948 (Articles 3 to 21); the international Covenant on Civil and Political Rights, 1966; in

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the Universal Declaration of Human Rights, 1948 (Articles 3 to 21); the international Covenant on Civil and Political Rights, 1966;

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Declaration of Human Rights, 1948 (Articles 3 to 21); the international Covenant on Civil and Political Rights, 1966;

the European Convention on Human Rights
and

Fundamental Freedom, 1950, and in American and African instruments of 1969 and 1981, respectively. These rights have developed from the time of Greek city states and over the period have found expression in different national charters. They have been concretized in the form of Magna Carta of I215; The America n Declaration of Independence, I776, and the French Declaration of the Rights of Man and the Citizen of I789. First- generation human rights are often called "blue" rights as they deal essentially with liberty and participation in political life. Civil rights are referred to those rights, which are related to the protection of right to life and personal liberty, e.g. right to life, liberty, security, free speech, assembly and worship etc. are some of the civil rights. Political rights may be referred to those rights, which allow a person to participate in the government, e.g. right to free elections and representative institutions are examples of political rights which provide legitimation, integration and participation by linking the ruler to the consent of the ruled. These rights are human rights arising out of the conflict between people and govern mental tyranny. For this reason, the main source of the civil and political rights is considered to be the America n and French Revolutions. These rights came as formal assurance against the oppression and arbitrary governmental tyranny. Moses Moskowitz calls the human freedom and liberty as "the fruits of struggle against the authority of state". As the civil and political rights are enshrined at the global level, they have given rise to rules of international customary law of general application and that's why Louis Sohn has suggested that "the consensus on virtually all provisions of the covenant on civil and political rights is so widespread that they can be considered as part of the law of mankind, a juscojens for all. 2) The Human Rights of Second Generation (Economic, Social and Cultural Rights) Second-generation human rights are related to equality, guarantee of mini mum necessities to the life of human being and they are fundamentally economic, social and cultural in nature. Rights to education, health, clothing, housing, adequate standard of living, just and favorable condition, freedom from want, fear or terror are examples of economic and social rights. These rights require that the Government should act to secure these to the people. Freedoms of thought, of communication, and of cultural and aesthetic experience are examples of cultural rights. These rights are sometimes called as "red" rights as they impose upon the government the duty to respect and promote and fulfill them, but this depends on the availability of resources. These rights are also called positive rights as it imposes positive obligation on the state. The economic, social and cultural rights, including the rights of the minorities are collectively known as the "Security Oriented Human Rights" because these rights collectively provide and guarantee the essential security in the life of an individual. In the absence of these rights, the very existence of human beings would be in danger. These rights are incorporated in the Universal Declaration of Human Rights, 1948 (Articles 22 to 28) and further

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in the International Covenant on Economic Social and Cultural Rights, 1966. The

main source for the origin of these rights
is considered to be the Russian Revolution of 1917 and the Paris Peace Conference of 1919. The Russian Revolution is significant in recognizing economic rights. The Paris Peace Conference is more significant for the establishment of the International Labour Organization. The real credit for giving expression to economic and social rights goes to the American President Roosevelt. He, for the first time expressed his hope for an instrument dealing with the economic and social rights. In his message to the Congress of January 6, 1941, President Roosevelt referred to the four essential freedoms viz., freedom of speech and expression, freedom of every person to worship God in his own way, 20

freedom from want and freedom from fear to which he looked forward as the foundation of a future world. " Freedom from want" formed the basis on which the concepts of economic and social rights were formulated. President Roosevelt in his another message to Congress in 1944 made the concept of "freedom from want" clear. He contemplated that "true individual freedom cannot exist without economic security and independence " and that "people who are hungry and out of job are the stuff of which dictatorships are made", thus economic truths have become accepted as self-evident. He was of the view that economic problems in the present-day world have acquired alarming magnitude, therefore, he advocated for drastic economic and social reforms. In his opinion, "true individual freedom cannot exist without economic security and independence ". These pronouncements had exercised their full impact upon the United Nations when it began to address itself to the human rights issue. 3) The Human Rights of Third Generation (Collective Rights) These are collective rights. These Development Oriented Human Rights are of a very recent origin, it originated in the late twentieth century. These rights enable an individual to participate in the process of all-round development and include environmental rights that enable an individual to enjoy the absolutely free gifts of nature, namely, air, water, food and natural resources, free from pollution and contamination. According to Louis B. Sohn, individuals are also members of communities- family, religious communities, social or professional communities or racial communities (groups) or political community, the state. It is not surprising, therefore, that international law not only recognises inalienable rights of individuals, but also recognises certain collective rights exercised jointly by individuals who are grouped into larger communities including people and nations. The right to self-determination, right to development, right to peace and right to solidarity, right to economic and social development right to a healthy environment, right to natural resources, right to communicate and communication rights. Theoretical Basis of Human Rights To have the essential understanding of human rights one is supposed to look at certain theories on the subject of human rights. The theories make available analytical tool to determine the subject matter of the concept up on which there might be conformity. A precise insight into the major theories of human rights are as follows: 1) Natural Law Theory Natural rights which were of the same category as relating to modern human rights were derived from natural law. The credit of giving birth to natural law goes to the Greek, with great scholars like Sophocles and Aristotle. Romans further developed it. According to Romans natural law embodied the elementary principles of justice which were the dictate of right reason. From this natural law based on right reason, 'the right of man as a legal or moral concept' first appeared i n the form of natural rights. These natural rights of man were moral rights which every human being, everywhere, always, ought to have simply because of the fact that, in contradiction with other beings, he is rational and moral. The natural rights of man, being embodiment of right reason, were "not the particular privilege of citizens of certain state, but something to which every human being, everywhere, was entitled in virtue of the simple fact of being human and rational. During the middle ages there was further development in the field of natural law, St. Thomas Aquinas preached for equality within the framework of a stable society. During the period of Reformation and Renaissance, philosophers like Hobbes, Locke and Rousseau propounded social contract theories advocating for individuals inalienable rights for life, liberty and estate, and insisted that the purpose of government was to protect these rights. However, these rights were retained by individuals within a system of social contract - a balancing factor. They are rights solely by virtue of being human irrespective of distinctions. 1) Natural Rights 21

This is the earliest theory traced back to ancient Greeks, which linked rights to man by nature. They were considered as inborn absolute, pre- civil and even pre- social. They can be asserted anywhere and everywhere. The Natural law theory led to the Natural rights theory. Thomas Paine, Gretius, Tom Paine, and John Locke, are the main exponents of this theory. They derived rights from god; to them every individual possesses a unique identity and expected to account for his actions as per his own conscience. For John Locke, the chief exponent of this theory, natural law can be understood as protective of the subjective interest and rights of individual persons. It is asserted that the failure to respect natural law, the violation of the principles of equality and non- arbitrariness, provided justification for the natural rights. The doctrines of natural rights have received their fullest expression i n the writing of John Locke and other social contract theorists. Under Locke 's view of human beings, in the state of nature, all that was needed was the opportunity to be self-dependent; life, liberty and property were the inherent rights that met this demand. The list of natural rights varied with each exponent. Most of the norm-setting of natural rights theories contain a priori elements deduced by the norm setter, thus, the rights considered to be natural differ from theorist to theorist, according to the theorist's conception of nature. The natural rights doctrine was frequently associated with metaphysical and theological principle and also natural rights were confined to negative rights protected against the state. The other weakness was that, the natural rights were claimed to be inalienable, absolute and unalterable and therefore, claimed natural rights unless confined to a single right, tended to come into conflict with each other. Bentham calls natural rights as "simple non-sense; natural and imprescriptible rights rhetorical non- sense, non-sense upon stilts. His rejection of natural rights derives from his analysis of rights and obligations, that is, one has a right only if one is supposed to benefit from another's compliance with an obligation. However, critics further argue that rights are not abstract, absolute or unidentified phenomena. Liberty as they argue, lives within restraints. So, restraints upon rights create social conditions where everyone has a sphere to develop his personality and correspondingly has his obligation to others. The effect of such criticism of natural law and natural rights theory was to undetermined the rationale behind the theory and also of its universality. "Rights and obligations are in fact the two sides of the same coin. Despite the above short-coming the theory of natural rights inspired the idea that any kind of unjust, arbitrary, or oppressive treatment to human beings is an assault upon humanity itself Apart from this it also provided the basis for the French, English and American Revolution thereby resulting in the Bill of Rights. 2) Resurgence of Natural Rights The revival of natural rights is a consequence of revival of the theory of natural law itself An approach kindred to that of 'natural law' colours the current movement to bind states by international covenants to observe human rights and fundamental freedoms, while to some extent a 'natural law ' philosophy underlines the Draft Declaration on the Rights and Duties of States of 1949 prepared by the International Law Commission of the United Nations. 'Natural law' was invoked also in order to justify the punishment of offenders, guilty of the grosser and more brutal kind of war crimes. Some of the factors that can be held responsible for the revival of natural rights theory are: the great wars of twentieth century and the need for peace and respect for human rights; need to counter dreadful treatment of people by totalitarian governments; need to make persons and states accountable for their crimes against humanity; desire for international peace and security and countering terrorism etc. Human rights have become a fundamental premise in the international premise in the international, political dialogue. The most important manifestation of human rights in the world scene is the belief that a totalitarian regime may no longer victimize its own people with impunity or in virtual silence. The twentieth century saw the resurgence and revival of natural rights as human rights. The natural rights doctrine remains one of the most powerful concepts and "its regained prominence is apparent in national and international law and politics". This is evident from the fact that almost every state in the modern
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world has incorporated the concept of human rights in its constitution. Importance of human rights is also recognised in international law - a number of instruments on human rights are made since 1948. 3) The Positivist Theory of Rights In the era of legal positivism Bentham held that rights could be evaluated by reference to the principle of utility and thereby shifted the basis of rights from morality to positive law. Austin, Kelsen and H.L.A. Hart and other jurist supported positive legal rights. Positivism dominated the legal theory during the nineteenth century and continued to be accepted in the twentieth century. According to the Positivists, the source of Human rights lies in the enactment of a system of law with sanctions attached to it. Classical positivists deny an a priori source of rights and assume that all authority stems from what the state and officials have prescribed. According to positivist theory the law is actually laid down; it is a command. It has to be kept separate from the law that ought to be. Hence the source of rights - human rights is to be found only in enactments of a system of law. H.L.A. Hart has a refined approach of this philosophy. He points out that whether someone has obligation on particular occasion is independent of the likelihood of his incurring the threatened evil on the particular occasion... what is required according to Hart, are rules that confer authority or power on persons to prescribe behaviour and to visit breaches of the prescriptions with the appropriate evils. For Hart, the rules may be primary and secondary rules, and they constitute the core of legal system. 4) The Marxist Theory of Rights According to Marxists rights are simply a bourgeois concept and product of bourgeois capitalist's society primarily designed to maintain and reinforce the predominance of the ruling class. Marxism is concerned with the nature of human beings. Marx regarded 'the law of nature' approach to human rights as 'idealistic' and 'historical'. He saw nothing 'natural' or 'inalienable' about human rights. In a society in which capitalists monopolise the means of production, he regarded the notion of individual rights as a bourgeois illusion. They regard the state as a coercive agency to uphold the particular type of social organization and law is a tool of the state that perpetuates and safeguards the interest of the dominant group in the society. Karl Marx believes that rights can exist and flourish i n a classless society where all are equal and no one is an exploiter. Thus, Marxism sees a person's essence as a potential to use one's abilities to the fullest and to satisfy one's needs. In a capitalist society protection is controlled by a few, hence it cannot satisfy the needs of the individual person. However, the contribution of Marxist thought to the development of international concern on economic, social, and cultural rights. It has also been found
in
the International Covenant on Economic Social and Cultural Rights,
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the International Covenant on Economic Social and Cultural Rights (ICESCR)

in I 966. This theory does not include religion, custom, tradition and morality as the integral components of human rights. Marxists hold that only by achieving the upliftment of the society or community, the higher freedoms of individuals can be achieved. Thus, even satisfaction of basic needs of individuals is contingent on realization of social goods. To sum up the society is an organic unit and welfare of the community is built upon the welfare of the individuals. Both go hand in hand45 Hence a good theory of rights should take into consideration the most conducive variable essential for the welfare of all the members of a society. 5) The Sociological Theory of Rights The sociological questions in jurisprudence are concerned with the actual effects of the law upon the complex of attitudes, behaviour, organization, environment, skills, and powers involved in the maintenance of a particular society. Conversely, sociological jurisprudence is also concerned with the effects of social phenomena on both the substantive and procedural aspects of law, as well as on. In the sociological theory of human rights, a primary contribution of the sociological school is its stress on obtaining a just equilibrium of interest among prevailing moral sentiments and the social and economic conditions of time and place. The father of the modern sociological school, Roscoe Pound pointed out that 23

'during the nineteenth century the history of law was written largely as a record of an increasing recognition of individual rights. He further pointed out that in the twentieth century "this history should be written in terms of a continually wider recognition of human wants, human demands and social interests". He did not try to give value preference to these interests. His guiding principle was one of "social engineering", that is, the ordering of human relations through politically organised society so as to secure all interests insofar as possible with the least sacrifice of the totality of interests. This approach is useful in the understanding of the scope of human rights and their correlation with demands. It takes into account the realities of the social process; and how to focus on rights in terms of what people are concerned about and what they want. The sociological approach as far as human rights are concerned, directs attention to the questions of institutional development aimed at classifying behavioural dimension of law and society, focuses on the problems of public policy and identifies the empirical components of human rights in the context of social process. Feminist Perspectives of Human Rights Introduction Feminist critiques of human rights seek to dismantle several hierarchies present in the human rights regime. By critiquing the basic assumptions of human rights as they were formulated in 1945–48, feminists have revealed that these definitions are inadequate, that men and women have different relationships with the state, and that rights are not fixed and immutable. Rather, they are historically, socially, culturally, and economically contingent. This essay explores feminist contributions to the human rights discourse in several ways. The first half of the essay chronicles and analyses the evolution of the "women's rights are human rights" discourse as well as the development of the notion of the indivisibility of rights. The second half of the essay looks the feminist debates with regards to women's human rights in three issue areas or contexts: globalization, democratization, and culture. The essay concludes with a discussion of the current challenges with regards to data collection in measuring the achievement of women's human rights. Although there are multiple feminisms, the terms feminist and feminism are used in a broad sense in this essay to connote a shared goal of seeking to re-articulate human rights in an effort to achieve gender equality, even though theoretical entry points into the discourse and resulting strategies may vary widely among feminists. Similarly, the concept of human rights has been contested in many ways, but it is beyond the scope of this essay to delve into these debates. Rather, the focus will be on what feminists have understood human rights to be in theory and in practice. Further Reading • Alston, Phillip (ed.), (1992), The United Nations and Human Rights: A Critical Appraisal, Oxford: Clarendon Press. • Bachr, Peter R, (1999), Human Rights: Universality in Practice, New York: Palgrave. • Baxi, Upendra, (2002), The Future of Human Rights, New Delhi: Oxford University Press. • Bhagwati, P.N., (1987), Dimensions of Human Rights, Madurai: Society for Community Organization Trust. 24
Unit: IV International Perspective On Human Rights American Convention on Human Rights "PACT OF SAN JOSE, COSTA RICA" (B-32) Preamble The American states signatory to the present Convention, Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man; Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states; Considering that these principles have been set forth in

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the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of

Man, and in the Universal Declaration of Human Rights,
and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope; Reiterating

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that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights;

and Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters, Have agreed upon the following: Part I- State Obligations and Rights Protected Chapter I – General Obligations Article 1. Obligation to Respect Rights

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The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms,

without any discrimination for reasons of

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race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or

any other social condition. For the purposes of this Convention, "person" means every human being. Article 2. Domestic Legal Effects Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes 25 and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms. Chapter II - Civil And Political Rights Article 3. Right to Juridical Personality Every person has the right to recognition as a person before the law. Article 4. Right to Life Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply. The death penalty shall not be established in states that have abolished it. In no case shall capital punishment be inflicted for political offenses or related common crimes. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority. Article 5. Right to Humane Treatment 1. Every person has the right to have his physical, mental, and moral integrity respected. 2.

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No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or

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No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or

treatment. All person deprived of their liberty shall be treated with respect for the inherent dignity of the human person. 3. Punishment shall not be extended to any person other than the criminal. 4. Accused persons shall, save in exceptional circumstances, be segregated from

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convicted persons, and shall be subject to separate treatment appropriate to their status

as unconvicted persons. 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners. Article 6. Freedom from Slavery No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner. For the purposes of this article, the following do not constitute forced or compulsory labor: Work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person; military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service; service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or work or service that forms part of normal civic obligations. Article 7. Right to Personal Liberty 1. Every person has the right to personal liberty and security. 26
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment. 4.

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Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of

the charge or charges against him. 5. Any person detained

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shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to

be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial. 6.

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Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that

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court may decide without delay on the lawfulness of his

arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies. 7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for non-fulfillment of duties of support. Article 8. Right to a Fair Trial Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ? the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court; ? prior notification in detail to the accused of the charges against him; ? adequate time and means for the preparation of his defense ? the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel ? the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; ? the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; ? the right not to be compelled to be a witness against himself or to plead guilty; and h. the right to appeal the judgment to a higher court. ? A confession of guilt by the accused shall be valid only if it is made without coercion of any kind. ? An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause. ? Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice. Article 9. Freedom from Ex Post Facto Laws No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not

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be imposed than the one that was applicable at the time the criminal offense was committed.

If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom. Article 10. Right to Compensation Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice. 27 Article 11. Right to Privacy 1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks. Article 12. Freedom of Conscience and Religion 1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private. 2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs. 3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others. 4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions. Article 13. Freedom of Thought and Expression Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either

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orally, in writing, in print, in the form of art, or through any other medium of

one's choice. • The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: • respect for the rights or reputations of others; or • the protection of national security, public order, or public health or morals. • The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. • Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence. • Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law. Article 14. Right of Reply 1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish. 2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred. 3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges. Article 15. Right of Assembly The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others. 28
Article 16. Freedom of Association 1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes. 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others. 3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police. Article 17. Rights of the Family • The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of non-discrimination established in this Convention. • No marriage shall be entered without the free and full consent of the intending spouses. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely based on their own best interests. The law shall recognize equal rights for children born out of wedlock and those born in wedlock. Article 18. Right to a Name Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary. Article 19. Rights of the Child Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state. Article 20. Right to Nationality 1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it. Article 21. Right to Property 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law. Article 22. Freedom of Movement and Residence 1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law. 2. Every person has the right lo leave any country freely, including his own. 3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others. 4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest. 5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it. 6.

pursuant to a decision reached in accordance with law. 29
7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes. 8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions. 9. The collective expulsion of aliens is prohibited. Article 23. Right to Participate in Government 1. Every citizen shall enjoy the following rights and opportunities: 2.
to take part in the conduct of public affairs, directly or through freely chosen representatives; 3. to vote and to
be elected
in
genuine periodic elections, which shall be by universal and equal suffrage and by secret
ballot
that guarantees the free expression of the will of the voters; and 4. to have access, under general conditions of equality, to the public service of his country. 5. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings. Article 24. Right to Equal Protection All persons

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are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 25. Right to Judicial Protection Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. The States Parties undertake: 1.

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to ensure that any person claiming such remedy shall have his

rights determined by the

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competent authority provided for by the legal system of the state; 2. to develop the possibilities of judicial remedy; and 3. to ensure that the competent authorities shall enforce such remedies when granted.

Chapter III - Economic, Social, And Cultural Rights Article 26. Progressive Development The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires. Chapter IV - Suspension Of Guarantees, Interpretation, And Application Article 27. Suspension of Guarantees In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time

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strictly required by the exigencies of the situation, provided that such measures are not inconsistent with

its other obligations under

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international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 30
17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

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Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons

that gave rise to the suspension, and the date set for the termination of such suspension. Article 28. Federal Clause Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention. Whenever two or more States Parties agree to form a federation or other type of association, they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized. Article 29. Restrictions Regarding Interpretation No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d. excluding or limiting the effect that

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the American Declaration of the Rights and Duties of Man and

other international acts of the same nature may have. Article 30. Scope of Restrictions The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established. Article 31. Recognition of Other Rights Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention. Chapter V- Personal Responsibilities Article 32. Relationship between Duties and Rights Every person has responsibilities to his family, his community, and mankind. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society. Part II - Means Of Protection Chapter VI - Competent Organs Article 33 The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: • a. the Inter-American Commission on Human Rights, referred to as "The Commission;" and 31

• b. the Inter-American Court of Human Rights, referred to as "The Court." Chapter VII - Inter-American Commission on Human Rights Section 1. Organization Article 34 The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights. Article 35 The Commission shall represent all the member countries of the Organization of American States. Article 36 • The members of the Commission shall be elected in a personal capacity by the General Assembly of the Organization from a list of candidates proposed by the governments of the member states. • Each of those governments may propose up to three candidates, who may be nationals of the states proposing them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate. Article 37 • The members of the Commission shall be elected for a term of four years and may be re-elected only once, but the terms of three of the members chosen in the first election shall expire at the end of two years. Immediately following that election the General Assembly shall determine the names of those three members by lot. • No two nationals of the same state may be members of the Commission. Article 38 Vacancies that may occur on the Commission for reasons other than the normal expiration of a term shall be filled by the Permanent Council of the Organization in accordance with the provisions of the Statute of the Commission. Article 39 The Commission shall prepare its Statute, which it shall submit to the General Assembly for approval. It shall establish its own Regulations. Article 40 Secretariat services for the Commission shall be furnished by the appropriate specialized unit of the General Secretariat of the Organization. This unit shall be provided with the resources required to accomplish the tasks assigned to it by the Commission. Section 2. Functions Article 41 The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers: a. to develop an awareness of human rights among the peoples of America; b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights; c. to prepare such studies or reports as it considers advisable in the performance of its duties; d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights; 32

e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request; f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and g. to submit an annual report to the General Assembly of the Organization of American States. Article 42 The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter- American Council for Education, Science, and Culture, in their respective fields, so that the Commission may watch over the promotion of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires. Article 43 The States Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of this Convention. Section 3. Competence Article 44 Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party. Article 45 • Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention. • Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration. • A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case. • Declarations shall be deposited with the General Secretariat of the Organization of American States, which shall transmit copies thereof to the member states of that Organization. Article 46 Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: 1. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law; 2. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment; 3. that the subject of the petition or communication is not pending in another international proceeding for settlement; and 4. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition. 5. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when: 6. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; 7. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or 8. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. Article 47 33

The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: • a. any of the requirements indicated in Article 46 has not been met; • b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention; • c. the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or • d. the petition or communication is substantially the same as one previously studied by the Commission or by another international organization. Section 4. Procedure Article 48 When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: If it considers the petition or communication admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case. After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed. The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received. If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities. The Commission may request the states concerned to furnish any pertinent information and, if so requested, shall hear oral statements or receive written statements from the parties concerned. The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter based on respect for the human rights recognized in this Convention. However, in serious and urgent cases, only the presentation of a petition or communication that fulfils all the formal requirements of admissibility shall be necessary for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed. Article 49 If a friendly settlement has been reached in accordance with paragraph 1.f of Article 48, the Commission shall draw up a report, which shall be transmitted to the petitioner and to the States Parties to this Convention, and shall then be communicated to the Secretary General of the Organization of American States for publication. This report shall contain a brief statement of the facts and of the solution reached. If any party in the case so requests, the fullest possible information shall be provided to it. Article 50 If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit. Article 51 If, within

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a period of three months from the date of the		

transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state 34

concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report. Chapter VIII - Inter-American Court of Human Rights Section 1. Organization Article 52 • The Court shall consist of seven judges, nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates. • No two judges may be nationals of the same state. Article 53 • The judges of the Court shall be elected by secret ballot by an absolute majority vote of the States Parties to the Convention, in the General Assembly of the Organization, from a panel of candidates proposed by those states. • Each of the States Parties may propose up to three candidates, nationals of the state that proposes them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate. Article 54 • The judges of the Court shall be elected for a term of six years and may be re-elected only once. The term of three of the judges chosen in the first election shall expire at the end of three years. Immediately after the election, the names of the three judges shall be determined by lot in the General Assembly. • A judge elected to replace a judge whose term has not expired shall complete the term of the latter. The judges shall continue in office until the expiration of their term. However, they shall continue to serve with regard to cases that they have begun to hear and that are still pending, for which purposes they shall not be replaced by the newly elected judges. Article 55 1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case. 2. If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an ad hoc judge. 3. If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an ad hoc judge. 4. An ad hoc judge shall possess the qualifications indicated in Article 52. 5. If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide. Article 56 Five judges shall constitute a quorum for the transaction of business by the Court. Article 57 The Commission shall appear in all cases before the Court. 35
Article 58 • The Court shall have its seat at the place determined by the States Parties to the Convention in the General Assembly of the Organization; however, it may convene in the territory of any member state of the Organization of American States when a majority of the Court considers it desirable, and with the prior consent of the state concerned. The seat of the Court may be changed by the States Parties to the Convention in the General Assembly by a two-thirds vote. • The Court shall appoint its own Secretary. • The Secretary shall have his office at the place where the Court has its seat and shall attend the meetings that the Court may hold away from its seat. Article 59 The Court shall establish its Secretariat, which shall function under the direction of the Secretary of the Court, in accordance with the administrative standards of the General Secretariat of the Organization in all respects not incompatible with the independence of the Court. The staff of the Court's Secretariat shall be appointed by the Secretary General of the Organization, in consultation with the Secretary of the Court. Article 60 The Court shall draw up its Statute which it shall submit to the General Assembly for approval. It shall adopt its own Rules of Procedure. Section 2. Jurisdiction and Functions Article 61 • Only the States Parties and the Commission shall have the right to submit a case to the Court. • In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed. Article 62 • A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention. • Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary

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of the Court. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the

provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement. Article 63 • If

the Court finds that there has been a violation of

a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party. • In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission. Article 64 • The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization 36
of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. • The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments. Article 65 To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations. Section 3. Procedure Article 66 Reasons shall be given for the judgment of the Court. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment. Article 67 The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment. Article 68 The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state. Article 69 The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Parties to the Convention. Chapter IX - Common Provisions Article 70 • The judges of the Court and the members of the Commission shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law. During the exercise of their official function they shall, in addition, enjoy the diplomatic privileges necessary for the performance of their duties. • At no time shall the judges of the Court or the members of the Commission be held liable for any decisions or opinions issued in the exercise of their functions. Article 71 The position of judge of the Court or member of the Commission is incompatible with any other activity that might affect the independence or impartiality of such judge or member, as determined in the respective statutes. Article 72 The judges of the Court and the members of the Commission shall receive emoluments and travel allowances in the form and under the conditions set forth in their statutes, with due regard for the importance and independence of their office. Such emoluments and travel allowances shall be determined in the budget of the Organization of American States, which shall also include the expenses of the Court and its Secretariat. To this end, the Court shall draw up its own budget and submit it for approval to the General Assembly through the General Secretariat. The latter may not introduce any changes in it. Article 73 37
The General Assembly may, only at the request of the Commission or the Court, as the case may be, determine sanctions to be applied against members of the Commission or judges of the Court when there are justifiable grounds for such action as set forth in the respective statutes. A vote of a two-thirds majority of the member states of the Organization shall be required for a decision in the case of members of the Commission and, in the case of judges of the Court, a two-thirds majority vote of the States Parties to the Convention shall also be required. Part III - General And Transitory Provisions Chapter X - Signature, Ratification, Reservations, Amendments, Protocols, And Denunciation Article 74 • This Convention shall be open for signature and ratification by or adherence of any member state of the Organization of American States. • Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organization of American States. As soon as eleven states have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any

or adherence. • The Secretary General shall inform all member states of the Organization of the entry into force of the Convention. Article 75 This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969. Article 76 • Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General. • Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification. Article 77 • In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection. • Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it. Article 78 • The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties. • Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation. Chapter XI - Transitory Provisions Section 1. Inter-American Commission on Human Rights Article 79 Upon the entry into force of this Convention, the Secretary General shall, in writing, request each member state of the Organization to present, within ninety days, its candidates for membership on the Inter-American 38 Commission on Human Rights. The Secretary General shall prepare a list in alphabetical order of the candidates presented, and transmit it to the member states of the Organization at least thirty days prior to the next session of the General Assembly. Article 80 The members of the Commission shall be elected by secret ballot of the General Assembly from the list of candidates referred to in Article 79. The candidates who obtain the largest number of votes and an absolute majority of the votes of the representatives of the member states shall be declared elected. Should it become necessary to have several ballots in order to elect all the members of the Commission, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the General Assembly. Section 2. Inter-American Court of Human Rights Article 81 Upon the entry into force of this Convention, the Secretary General shall, in writing, request each State Party to present, within ninety days, its candidates for membership on the Inter-American Court of Human Rights. The Secretary General shall prepare a list in alphabetical order of the candidates presented and transmit it to the States Parties at least thirty days prior to the next session of the General Assembly. Article 82 The judges of the Court shall be elected from the list of candidates referred to in Article 81, by secret ballot of the States Parties to the Convention in the General Assembly. The candidates who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties shall be declared elected. Should it become necessary to have several ballots in order to elect all the judges of the Court, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the States Parties. American Commission of Human Rights Statute of the Inter-American Commission on Human Rights - Approved by Resolution N0. 447 taken by the General Assembly of the OAS at its ninth regular session, held in La Paz, Bolivia, October 1979. Nature and Purposes Article 1 The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defence of human rights and to serve as consultative organ of the Organization in this matter. For the purposes of the present Statute, human rights are understood to be: • The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto; • The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states. Membership and Structure Article 2 • The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights. • The Commission shall represent all the member states of the Organization. Article 3 39

• The members of the Commission shall be elected in a personal capacity by the General Assembly of the Organization from a list of candidates proposed by the governments of the member states. • Each government may propose up to three candidates, who may be nationals of the state proposing them or of any other member state of the Organization. When a slate of three is proposed, at least one of the candidates shall be a national of a state other then the proposing state. Article 4 • At least six months prior to completion of the terms of office for which the members of the Commission were elected,1[1] the Secretary General shall request, in writing, each member state of the Organization to present its candidates within 90 days. • The Secretary General shall prepare a list in alphabetical order of the candidates nominated, and shall transmit it to the member states of the Organization at least thirty days prior to the next General Assembly. Article 5 • The members of the Commission shall be elected by secret ballot of the General Assembly from the list of candidates referred to in Article 4(2). The candidates who obtain the largest number of votes and an absolute majority of the votes of the member states shall be declared elected. • Should it become necessary to hold several ballots to elect all the members of the Commission, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the General Assembly. Article 6 The members of the Commission shall be elected for a term of four years and may be re-elected only once. Their terms of office shall begin on January 1 of the year following the year in which they are elected. Article 7 No two nationals of the same state may be members of the Commission. Article 8 • Membership on the Inter-American Commission on Human Rights is incompatible with engaging in other functions that might affect the independence or impartiality of the member or the dignity or prestige of his post on the Commission. • The Commission shall consider any case that may arise regarding incompatibility in accordance with the provisions of the first paragraph of this Article, and in accordance with the procedures provided by its Regulations. If the Commission decides, by an affirmative vote of a least five of its members, that a case of incompatibility exists, it will submit the case, with its background, to the General Assembly for decision. A declaration of incompatibility by the General Assembly shall be adopted by a majority of two thirds of the member states of the Organization and shall occasion the immediate removal of the member of the Commission from his post, but it shall not invalidate any action in which he may have participated. Article 9 The duties of the members of the Commission are: 1. Except when justifiably prevented, to attend the regular and special meetings the Commission holds at its permanent headquarters or in any other place to which it may have decided to move temporarily. 2. To serve, except when justifiably prevented, on the special committees which the Commission may form to conduct on-site observations, or to perform any other duties within their ambit. 3. To maintain absolute secrecy about all matters which the Commission deems confidential. 4. To conduct themselves in their public and private life as befits the high moral authority of the office and the importance of the mission entrusted to the Commission. Article 10 1. If a member commits a serious violation of any of the duties referred to in Article 9, the Commission, on the affirmative vote of five of its members, shall submit the case to the General Assembly of the Organization, which shall decide whether he should be removed from office. 2. The Commission shall hear the member in question before taking its decision. Article 11 40

1. When a vacancy occurs for reasons other than the normal completion of a member's term of office, the Chairman of the Commission shall immediately notify the Secretary General of the Organization, who shall in turn inform the member states of the Organization. 2. In order to fill vacancies, each government may propose a candidate within a period of 30 days from the date of receipt of the Secretary General's communication that a vacancy has occurred. 3. The Secretary General shall prepare an alphabetical list of the candidates and shall transmit it to the Permanent Council of the Organization, which shall fill the vacancy. 4. When the term of office is due to expire within six months following the date on which a vacancy occurs, the vacancy shall not be filled. Article 12 1. In those member states of the Organization that are Parties to the American Convention on Human Rights, the members of the Commission shall enjoy, from the time of their election and throughout their term of office, such immunities as are granted to diplomatic agents under international law. While in office, they shall also enjoy the diplomatic privileges required for the performance of their duties. 2. In those member states of the Organization that are not Parties to the American Convention on Human Rights, the members of the Commission shall enjoy the privileges and immunities pertaining to their posts that are required for them to perform their duties with independence. 3. The system of privileges and immunities of the members of the Commission may be regulated or supplemented by multilateral or bilateral agreements between the Organization and the member states. Article 13 The members of the Commission shall receive travel allowances and per diem and fees, as appropriate, for their participation in the meetings of the Commission or in other functions which the Commission, in accordance with its Regulations, entrusts to them, individually or collectively. Such travel and per diem allowances and fees shall be included in the budget of the Organization, and their amounts and conditions shall be determined by the General Assembly. Article 14 • The Commission shall have a Chairman, a First Vice-Chairman and a Second Vice-Chairman, who shall be elected by an absolute majority of its members for a period of one year; they may be re-elected only once in each four-year period. • The Chairman and the two Vice-Chairmen shall be the officers of the Commission, and their functions shall be set forth in the Regulations. Article 15 The Chairman of the Commission may go to the Commission's headquarters and remain there for such time as may be necessary for the performance of his duties. Headquarters and Meetings Article 16 1. The headquarters of the Commission shall be in Washington, D.C. 2. The Commission may move to and meet in the territory of any American State when it so decides by an absolute majority of votes, and with the consent, or at the invitation of the government concerned. 3. The Commission shall meet in regular and special sessions, in conformity with the provisions of the Regulations. Article 17 1. An absolute majority of the members of the Commission shall constitute a quorum. 2. In regard to those States that are Parties to the Convention, decisions shall be taken by an absolute majority vote of the members of the Commission in those cases established by the American Convention on Human Rights and the present Statute. In other cases, an absolute majority of the members present shall be required. 41

3. In regard to those States that are not Parties to the Convention, decisions shall be taken by an absolute majority vote of the members of the Commission, except in matters of procedure, in which case, the decisions shall be taken by simple majority. Functions and Powers Article 18 The Commission shall have the following powers with respect to the member states of the Organization of American States: ? to develop an awareness of human rights among the peoples of the Americas; ? to make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions and international commitments, as well as appropriate measures to further observance of those rights; ? to prepare such studies or reports as it considers advisable for the performance of its duties; ? to request that the governments of the states provide it with reports on measures they adopt in matters of human rights; ? to respond to inquiries made by any member state through the General Secretariat of the Organization on matters related to human rights in the state and, within its possibilities, to provide those states with the advisory services they request; ? to submit an annual report to the General Assembly of the Organization, in which due account shall be taken of the legal regime applicable to those States Parties to the American Convention on Human Rights and of that system applicable to those that are not Parties; ? to conduct on-site observations in a state, with the consent or at the invitation of the government in question; and ? to submit the program-budget of the Commission to the Secretary General, so that he may present it to the General Assembly. Article 19 With respect to the States Parties to the American Convention on Human Rights, the Commission shall discharge its duties in conformity with the powers granted under the Convention and in the present Statute, and shall have the following powers in addition to those designated in Article 18: ? to act on petitions and other communications, pursuant to the provisions of Articles 44 to 51 of the Convention; ? to appear before the Inter-American Court of Human Rights in cases provided for in the Convention; ? to request the Inter-American Court of Human Rights to take such provisional measures as it considers appropriate in serious and urgent cases which have not yet been submitted to it for consideration, whenever this becomes necessary to prevent irreparable injury to persons; ? to consult the Court on the interpretation of the American Convention on Human Rights or of other treaties concerning the protection of human rights in the American states; ? to submit additional draft protocols to the American Convention on Human Rights to the General Assembly, in order to progressively include other rights and freedoms under the system of protection of the Convention, and ? to submit to the General Assembly, through the Secretary General, proposed amendments to the American Convention on Human Rights, for such action as the General Assembly deems appropriate. Article 20 In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in Article 18: 1. to pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI

Man; 2. to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by 42

this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights; and, 3. to verify, as a prior condition to the exercise of the powers granted under subparagraph b. above, whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted. Secretariat Article 21 The Secretariat services of the Commission shall be provided by a specialized administrative unit under the direction of an Executive Secretary. This unit shall be provided with the resources and staff required to accomplish the tasks the Commission may assign to it. 1. The Executive Secretary, who shall be a person of high moral character and recognized competence in the field of human rights, shall be responsible for the work of the Secretariat and shall assist the Commission in the performance of its duties in accordance with the Regulations. 2. The Executive Secretary shall be appointed by the Secretary General of the Organization, in consultation with the Commission. Furthermore, for the Secretary General to be able to remove the Executive Secretary, he shall consult with the Commission and inform its members of the reasons for his decision. Statute and Regulations Article 22 The present Statute may be amended by the General Assembly. The Commission shall prepare and adopt its own Regulations, in accordance with the present Statute. Article 23 • In accordance with the provisions of Articles 44 to 51 of the American Convention on Human Rights, the Regulations of the Commission shall determine the procedure to be followed in cases of petitions or communications alleging violation of any of the rights guaranteed by the Convention, and imputing such violation to any State Party to the Convention. • If the friendly settlement referred to in Articles 44-51 of the Convention is not reached, the Commission shall draft, within 180 days, the report required by Article 50 of the Convention. Article 24 • The Regulations shall establish the procedure to be followed in cases of communications containing accusations or complaints of violations of human rights imputable to States that are not Parties to the American Convention on Human Rights. • The Regulations shall contain, for this purpose, the pertinent rules established in the Statute of the Commission approved by the Council of the Organization in resolutions adopted on May 25 and June 8, 1960, with the modifications and amendments introduced by Resolution XXII of the Second Special Inter-American Conference, and by the Council of the Organization at its meeting held on April 24, 1968, taking into account resolutions CP/RES. 253 (343/78), "Transition from the present Inter- American Commission on Human Rights to the Commission provided for in the American Convention on Human Rights," adopted by the Permanent Council of the Organization on September 20, 1979. Transitory Provisions Article 25 Until the Commission adopts its new Regulations, the current Regulations (OEA/Ser.L/VII. 17, doc. 26) shall apply to all the member states of the Organization. Article 26 ? The present Statute shall enter into effect 30 days after its approval by the General Assembly. 43

? The Secretary General shall order immediate publication of the Statute, and shall give it the widest possible distribution Further Reading • Alston, Phillip (ed.), (1992), The United Nations and Human Rights: A Critical Appraisal, Oxford: Clarendon Press. • Bachr, Peter R, (1999), Human Rights: Universality in Practice, New York: Palgrave. • Baxi, Upendra, (2002), The Future of Human Rights, New Delhi: Oxford University Press. • Bhagwati, P.N., (1987), Dimensions of Human Rights, Madurai: Society for Community Organization Trust. 44

Unit: V Rule of Law and Human Rights In this unit, you will learn about • Introduction • Bolstering the Shaky Foundations of the Human Rights Movement: Conceptual Issues • The Implementation of Human Rights and The Practical Limitations of Rule Of Law: Empirical Issues • Rule of Law, Economic Growth and Human Rights: The Limits of Altruism and other Obstacles • Rule of Law, Democracy And Human Rights: All Good Things need not go together • Rule of Law and War: After 2000 Years not Quite Inter Armes, Silent Leges, but not much better • Rule of Law, Transitional Justice, Nation-Building and the Establishment of Rights-Respecting Regimes: The Limits Of Law, Political Will And Knowledge • Rule of Law and Terrorism • American Exceptionalism and Rule of Law Introduction Rule of law in some form may be traced back to Aristotle, and has been championed by Roman jurists; medieval natural law thinkers; Enlightenment philosophers such as Hobbes, Locke, Rousseau, Montesquieu and the American founders; German philosophers Kant, Hegel, and the nineteenth century advocates of the rechtsstaat; and in this century such ideologically diverse figures as Hayek, Rawls, Scalia, Jiang Zemin and Lee Kuan Yew. Until recently, however, the human rights movement paid relatively little attention to the relationship between rule of law and human rights. The Universal Declaration of Human Rights mentions rule of law only in passing in the preamble, suggesting in typically cryptic fashion that “human rights should be protected by the rule of law.” Neither

the
other two main pillars of the "international bill of rights," mentions rule of law. Nor do most other early rights treaties, general assembly statements, committee reports or comments appeal to rule of law. In contrast, references to rule of law now regularly appear in general assembly resolutions, committee reports, regional workshop platforms and other human rights instruments. Rule of law
is central to the European Convention and is
one of the requirements to join the
European Union.The World Bank and the International Monetary Fund (IMF), limited by their charters from directly intervening in domestic political affairs, have emphasized rule of law and good governance.In 2002, the late U.N. Human Rights Commissioner Sergio Vieira de Mello made rule of law the centerpiece of his brief tenure in office. This Article considers several explanations for the international human rights movement's sudden heightened attention to rule of law. The human rights movement has increasingly encountered conceptual, normative and political challenges. In particular, the movement's claim to universality has been shattered by critiques that take issue with the secular, individualistic, liberal commitments of the movementIn contrast, rule of law appears to be widely accepted by people of different ideological persuasions. Christians, Buddhists and Muslims; libertarians, liberals and Confucian communitarians; democrats, soft authoritarians,
even socialists and neo-Marxists all find value in rule of law. Rule of law then may provide one way to shore up the shaky foundation of the human rights movement. Perhaps, as de Mello suggested, rule of law will be a "fruitful principle to guide us toward agreement and results," and "a touchstone for us in spreading the culture of human rights." Whatever the human rights movement's conceptual and normative shortcomings, the movement's biggest failure has been not making good on the promise of a better life enjoyed by all
in accordance with the utopian ideals contained in the ever-swelling list of human rights. Despite the movement's successes, we still live in a world where widespread human rights violations are the norm rather than the exception. Rule of law is seen as directly integral to the implementation of rights. Without rule of law, rights remain lifeless paper promises rather than the reality for many throughout the world. 45
Rule of law may also be indirectly related to better rights protection in that rule of law is associated with economic development, democracy and political stability, which are key determinants in rights performance. A long line of economists, legal scholars and development agencies from Max Weber to Douglas North to the World Bank have argued that rule of law is necessary for sustained economic growth. Rule of law protects property rights and provides the necessary predictability and certainty to do business. With one- fourth of the world's population living below the international poverty line of $581
a
year per capita, 790 million people lacking adequate nourishment, one billion living without safe water to drink, two billion suffering from
inadequate sanitation and 880 million lacking access to basic healthcare, economic growth is essential to the alleviation of some of the worst human suffering. Rule of law is integral to and necessary for democracy and good governance. Attempts to democratize without a functional legal system in place have resulted in social disorder, as in Russia, East Timor, Haiti, Kosovo, Afghanistan and
Iraq, and in the collapse of democratic regimes and their replacement by more authoritarian regimes in Indonesia in 1957, the Philippines in 1972, South Korea in the 1970s and numerous former Soviet republics. Rule of law is said to facilitate geopolitical stability and global peace. According to some, it may help prevent wars from occurring in the first place. It also provides guidelines for how war is carried out, limiting some of the worst atrocities associated with military conflicts. It offers the possibility of holding accountable those who commit acts of aggression and violate humanitarian laws of war, and it is central to the establishment of a rights-respecting post-conflict regime. Post 9/11 concerns over terrorism have also focused attention on rule of law as a means to hold terrorists accountable and to legitimize their capture and punishment, often through the promulgation of national defense and anti-terrorist laws. The war on terrorism has been characterized as a war on "our" way of life - on democracy, human rights and rule of law- and
ergo
on civilization itself. Kofi Annan claimed that the terrorist attacks on the United States "struck at everything [the United Nations] stands for; peace, freedom, tolerance, human rights...the very idea of a united human family[,] . . . all our efforts to create a true international society, based on

the rule of law." Conversely, rule of law plays a crucial role in ensuring that civil liberties are not encroached upon in the zeal to crack down on suspected terrorists and has been invoked to protest, for instance, the so-called Patriot Act. In addition, the upsurge of U.S. unilateralism and American-style cultural relativism has challenged the universality of human rights, exposed the soft underbelly of the international order and its vulnerability to power politics and threatened to undermine the foundation of the international legal order upon which the edifice of international human rights rests.Rule of law provides a rhetorical basis for challenging the world's sole reigning superpower.
Indeed, Annan recently reiterated that the U.S.-led invasion of Iraq was illegal and called on all nations, weak or strong, to abide by international law and uphold
rule
of law.
Taking each of these factors in turn, I critically analyze the relationship between rule of law and human rights in order to address the following: To what extent are the high hopes for rule of law justified? What are the conceptual, normative and practical limits of rule of law? What are the main obstacles to implementation of rule of law domestically and internationally? What changes in the international order would be required to realize the possibilities of rule of law? Given such limitations, what can we really expect for and from rule of law? I suggest that we must be more pragmatic in our approach, and more modest in our aspirations, for rule of law and its role in facilitating the implementation of human rights. In the final Section, I draw a number of more specific lessons and conclusions about each of the uses for which rule of law has been put. I.
Bolstering the Shaky Foundations of The Human Rights Movement: Conceptual Issues
In the past, support for the human rights movement was relatively costless for states given doctrinal limitations in the corpus of international rights law; the relatively undeveloped state of multilateral, governmental and non-governmental institutions for monitoring human rights violations; and the weakness of enforcement mechanisms. In recent years, the human
rights movement has become an increasingly powerful force capable of affecting governmental policies and actions to one degree or another in many, if not all, countries. Not surprisingly, the international human rights regime has become the subject of more critical scrutiny as it has become more powerful. As a result, there is now a greater awareness of a number of conceptual, normative, political and practical weaknesses in the human rights framework.Despite the considerable efforts of philosophers, the concept of a right remains notoriously contested and incoherent. There is no accepted understanding of what a right is whether collective or group rights and
non-justiciable
social, economic and cultural rights are really rights; of how rights relate to duties; or whether a discourse of rights is complementary or antithetical to, or better or worse than, a discourse of needs or capabilities. Nor is 46
there an accepted ranking of the different rights that make up the list of goodies included in the ever- proliferating set of human rights instruments and customary international law. Attempts to justify many of these allegedly universal rights have ended up demonstrating the lack of a firm
foundation for them and
have
highlighted how different traditions may be at odds with some rights while justifying other rights in different ways. Acknowledging the impossibility of offering a justification of rights persuasive to all, some rights proponents have sought comfort in a pragmatic consensus on human rights issues
or held out hope for the emergence of an overlapping consensus. But the

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pragmatic or overlapping consensus quickly breaks down once one moves beyond feel-good discussions about the desirability of the broad wish-list of

abstract

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rights contained in human rights documents to the difficult issues of the justifications for such rights and how they are

to be interpreted and implemented in practice. Many human rights issues implicate deep moral commitments, including religious views, traditional gender roles, different notions of freedom and autonomy and fundamental beliefs about the relationship of the individual to the state and other members of society. Because human rights issues raise these deep commitments, and because the international human rights movement's pretense of universalism leads to particular outcomes that may be defensible on liberal principles but are at odds with the principles and commitments of other traditions and
normative systems, the human rights movement has been accused of bias, arrogance and imperialism. Given differences in fundamental commitments, the human rights movement is now seen by many as the new religion, the latest crusade or a modern day inquisition, while others criticize the
movement as a well-intentioned if benighted hegemony at best, or malicious strong-arm politics and cultural genocide at worst. Several of the main fault lines may be quickly summarized. With Marxism and leftist critiques marginalized, Islamic fundamentalism constitutes the most radical theoretical and
practical challenge to the international human rights regime. Despite Herculean efforts to reconcile Islam with contemporary human rights through a variety of interpretive techniques, tensions remain, including: Sharia-based punishments that the international rights regime condemns as cruel and inhumane, such as cutting off the hands of thieves or stoning to death adulteresses; the status and treatment of women with respect to divorce, property rights and political participation; and most fundamentally the clash between theocracy and (liberal) democracy. Religion more generally remains a major source of contention, in part because of the inevitable tension between the freedom to practice one's religion and the freedom of others to practice their religion or to enjoy other freedoms and in part because of the liberal bias of the human rights movement, which has resulted in the human rights movement incorporating the
conflicts and tensions over religion within liberalism. These tensions are most evident in the Rawlsian attempt to exclude private religious views from the public sphere as the price for being
able to generate an overlapping consensus. The parallel at the international level occurs when rights bodies view with suspicion or dismiss attempts to justify particular practices based on religious reasons or by appeal to authoritative religious sources such as the Koran. More generally, critics of various religious persuasions have argued for a broader-based conception of rights, not founded on secular liberalism, which builds on a more inclusive spiritual and moral world view
drawn from the world's great religions including Buddhism, Islam and Daoism. One of the most direct threats to the movement to date came when increasingly assertive Asian governments, buoyed by years of economic growth, issued the 1993 Bangkok Declaration challenging the universalism of human rights and criticizing the international human rights movement for being Western- biased. Although it did not deny outright the universality of all rights, the Bangkok Declaration asserted that human rights must reflect the particular economic,
social, political, legal and historical circumstances of particular countries at a particular time.
The
ensuing debates over "

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Asian values" - or its more recent politically correct offspring "values in Asia" -

raised a wide range of issues. Some of the main points of contention were

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the compatibility of Confucianism, Buddhism and Islam with liberal democracy and human rights; the

relationship between rights, responsibilities and duties; and how to weigh rights against competing interests, including other rights claims, and balance the needs of individuals against the interests of the group and society. Demonstrating the need to avoid simplistic constructs of "the West" as well as "the East" or "Asia," many of the communitarian criticisms of the liberal biases of the human rights movement and the privileging of personal freedom and autonomy over social solidarity and stability paralleled communitarian critiques in the West. Another major area of dispute centers on economic issues. The widening gap between the rich and poor both within countries and among states has produced a fault line that runs along the North-South, developed-developing country axis. Emphasizing the right to development, the

Bangkok Declaration called for international cooperation to narrow the income gap and eliminate poverty, which it rightly declared to be 47
major obstacles to the full enjoyment of human rights. The Vienna Declaration was even more explicit: "The World Conference on Human Rights reaffirms that least developed countries committed to the process of democratization and economic reforms, many of which are in Africa, should be supported by the international community in order to succeed in their transition to democracy and economic development." Within both developed and developing countries, growing income disparities have led to a
revaluation of the international rights movement's privileging of civil and political rights over economic rights and challenges to the distinction between negative and positive rights. Meanwhile, the success of non-democratic and/or non-liberal Asian states highlighted the issues of

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whether authoritarian or democratic regimes are better able to achieve sustained economic growth and whether

certain

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Asian versions of capitalism are superior to the varieties of capitalism found in Western liberal democracies.

Still another fault line runs along gender lines. Feminists claim that international law in general and the human rights movement in particular are male-centric and discount the needs and interests of women. To further complicate matters, there are also significant divisions within feminist ranks. Women'
s
rights activists in non-Western countries have accused Western rights activists of ethnocentricism, paternalism and racism. For instance, in the heavily politicized debates over female circumcision, the Association of African Women for Research and Development have complained that Western rights activists are "totally unconscious of the latent racism" in their campaign and that they have forgotten that solidarity with women of different races and
different
cultures can only occur if there is mutual respect. Women's rights have been among the most contentious of all human rights issues, as evidenced by the number of reservations to key
provisions

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of the Convention on the Elimination of All Forms of Discrimination Against Women (

CEDAW).
Women's rights have encountered serious difficulties in implementation for a variety of reasons. Sociological explanations emphasize that U.N. bodies and other international rights organizations are dominated by men who presumably
will be less
sensitive to or concerned with issues such as sexual discrimination or harassment, domestic violence or wartime rape. Another explanation places the blame on the liberal distinction between the public and private spheres and the emphasis on civil and political rights over economic, social and cultural rights. While these explanations all have merit, the main obstacle is that gender issues are deeply embedded in a society's traditions and lifeforms, and thus require a holistic approach involving fundamental changes in social norms and structural changes in the economic, political and legal orders. These and other fault lines have become readily apparent as the human rights movement has gained in power and attempted to enforce increasingly specific interpretations of rights. The growing power of the international human rights movement has led to a backlash as countries have begun to feel the movement's bite. Whereas in the past, powerful Western countries raised little objection to the human rights movement as long as the movement concentrated on exporting liberal values and neo-liberal economic policies to developing countries, even powerful countries such as the United States now worry that the human rights movement is encroaching too far on state sovereignty. In response, some member states, again including the
United States,

regularly make reservations when acceding to rights treaties that undermine key provisions or prevent the treaty from having much if any domestic impact. In other cases, they
simply refuse to sign or ratify important treaties. Some states have taken the dramatic and unprecedented step of withdrawing from rights treaties rather than conform their policies to what they consider to be the unreasonable demands of international rights bodies out to impose one-size-fits-all solutions on countries whose contingent national circumstances render compliance impossible. Rule of law may seem to provide a bridge across the various fault lines. Islamic states from Egypt to Malaysia have endorsed rule of law. Asian governments including the socialist regimes in China and Vietnam that regularly object to the strong-arm politics of the international human rights regime have welcomed technical assistance aimed at improving the legal system and implementing rule of law. Communitarians and Liberals alike can find much of value in rule of law. Developing states that emphasize the right to development see rule of law as integral to development. Feminists in the United States and elsewhere have taken advantage of the legal system to push for enforcement of their rights, however they are interpreted. Perhaps then there is something to be gained from focusing on the common ground provided by rule of law as a way of restoring goodwill and recapturing the forward momentum lost in recent years by the increasingly contentious debates that have split the international rights community.
Closer scrutiny reveals both good news and bad news. A thin rule of law is universally - or nearly universally —valued and may be useful in protecting rights. However, a thin rule of law is consistent with considerable injustice and the abuse of human rights and allows such wide variations in institutions and outcomes that appealing to the requirements of a thin rule of law will not provide useful guidance on many important issues. On the other hand, disputes over competing thick conceptions of rule of law give rise to 48
many of the theoretical, normative and political conflicts just discussed, and thus undermine hopes that rule of law will provide a robust normative basis for bridging substantive differences on rights issues.
A.
Rule of Law to the Rescue? The Contested Nature of Rule of Law Despite its nearly universal appeal,

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rule of law, like human rights, is an essentially contested concept. It means different things to different people and has served a wide variety of political agendas from Hayekian libertarianism, to Rawlsian social welfare liberalism, to Lee Kuan Yew's soft authoritarianism, to Jiang Zemin's statist socialism,

to a Sharia-based
Islamic state.

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That is both its strength and its weakness. That people of vastly different political persuasions all want to take advantage of the rhetorical power of rule of law keeps it alive in public discourse, but it also leads to the worry that it has become a meaningless slogan devoid of any determinative content.

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At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful, if overly simplistic, notions of a government of laws, the supremacy of the law and equality of all before the law.

Beyond these threshold requirements,
conceptions of rule
of law can be divided into two general types, thin and thick. A thin conception stresses the formal or instrumental aspects of rule of law—those features that any legal system must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or
socialist, liberal or theocratic. Thus, laws must

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be general, public, prospective, clear, consistent, capable of being followed, stable, impartially applied and enforced.

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Moreover, laws must be reasonably acceptable to a majority of the populace or people affected (or at least the key groups affected) by the laws.

That laws be reasonably acceptable to the majority of those affected by them does not mean that the laws are necessarily "good laws" in the sense of normatively justified. The majority may very well support immoral laws. Even in countries known for rule of law, rule of law has existed side by side with great injustice, including: slavery, racism, apartheid, patriarchy, colonialism, capitalist exploitation and callous disregard for the suffering of others, not to mention unspeakable cruelty to animals and environmental policies that leave future generations to clean up the mess created by today's consumers. Because a thin rule of law is consistent with great evil, many scholars and rights activists argue that rule of law requires "good laws." On this view, rule of law requires laws that are grounded in some normative foundation that transcends the legal system itself. In the past, divine law or natural law provided the foundation; today, the more secular ideology of democracy and human rights provides the foundation for many people. The attempt to remedy the normative shortcomings of thin theories by incorporating particular
conceptions of rights and other features of political morality transforms

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thin conceptions of rule of law into thick ones. Thick conceptions begin with the basic elements

and purposes

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of a thin conception but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, Asian developmental state or other varieties of capitalism), forms of government (democratic, socialist, soft authoritarian, theocratic) or conceptions of human rights (libertarian, classical liberal, social welfare liberal, communitarian, compassionate conservative, "Asian values,"

Buddhist, Islamic,

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etc.). Thus, a liberal democratic version of rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of "legitimate" government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government and a liberal interpretation of human rights that generally gives priority to civil and political rights over economic, social, cultural and collective or group rights. Liberal democratic rule of law may be further subdivided along the main political fault lines in Europe and America: a libertarian version that emphasizes liberty and property rights, a classical liberal position, a social welfare liberal version, and so on.

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The wide variety of political beliefs and conceptions of a just socio-political order

around the world gives rise to multiple, competing thick conceptions of rule of law. In China, for example, there is currently support for four dominant models:

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statist socialist, neo-authoritarian, communitarian and liberal democratic. Statist socialists endorse a state-centered socialist rule of law defined by, inter alia, a

non-democratic system in which the Chinese Communist

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Party plays a leading role and an interpretation of rights that emphasizes stability, collective rights

as
well as, if not

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over, individual rights and subsistence as the basic right rather than civil and political rights. There is also support for various forms of rule of law that fall between the statist socialism type and the liberal democratic version. For example, there is some support for a democratic but non-liberal (New Confucian) communitarian variant built on market capitalism, perhaps with a somewhat greater degree of government intervention than in the liberal version; some genuine form of multiparty democracy in which citizens choose their representatives at all levels of government; plus an "Asian values" or communitarian 49 interpretation of rights that attaches relatively greater weight to the interests of the majority and collective rights as opposed to the civil and political rights of individuals. Another variant is a neo-authoritarian or soft authoritarian form of rule of law that, like the communitarian version, rejects a liberal interpretation of rights but, unlike its communitarian cousin, also rejects democracy. Whereas Communitarians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, Neo-Authoritarians permit democracy only at lower levels of government or not at all.

For instance, one prominent PRC political scientist has advocated a "consultative rule of law" that eschews democracy in favor of single party rule, albeit with a redefined role for the Party and more extensive, but still limited, freedoms of speech, press, assembly and association.
There is also support in India, Thailand, Indonesia and

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the Philippines for what might be called a developmental, redistributive justice model of rule of law. This form, with different variants in each of the countries, emerges out of a fundamental difference between these countries and economically advanced countries: the brutal reality of crushing poverty combined with severe disparities in income. Observing that nearly sixty percent of the nation's material resources are in the hands of some twenty percent of the population in Thailand, Vitit Muntarbhorn warns that this lack of equity "has dire consequences for the Rule of Law and human rights, precisely because the inequity may breed violence, if not disrespect for the law." He asks,

somewhat plaintively, "

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How can the Rule of Law help to foster equity and social justice?"

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Substantively, the developmental-redistributive model of rule of law has two main planks. The first is an international dimension that highlights the radical disparity between North and South and emphasizes the right of development, debt forgiveness and the obligation of the North/developed countries to aid the South/developing countries. The second plank is a domestic one and reflects the particular circumstances of each state,

though all are united in emphasizing social and economic rights and the need to do more to protect the most vulnerable members in society.

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In Thailand, concerns for redistributive social justice are found in the government's policies to achieve sustainable development, including rural development. Thus, the government has adopted a series of populist policies, including a universal

health care

100% **MATCHING BLOCK 73/130** W

scheme, a development fund for each village and debt moratorium for farmers.

In the Philippines, one catches glimpses of the

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alternative redistributive conception in the way rule of law is frequently linked to social and political philosophies that promise justice, social welfare and People Power based democracy. Whereas Western countries on the whole have been reluctant to assume obligations to allocate sufficient resources to satisfy economic, social and cultural rights, the 1987 Filipino constitution contained a long list of open-ended "directive principles" that reflect the tendency of the activist drafters of the constitution to codify "new" rights to education, food, environment and health.

As in

81% **MATCHING BLOCK 75/130** W

the Philippines, the Indian constitution codifies both civil and political rights and social and economic rights. However, whereas the former are considered fundamental and justiciable, the latter are considered progressive.

Nevertheless, aggressively activist Indian courts have favored interpretations that foster social and economic rights, giving them an "indirect justiciability."

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The Indian constitution also seeks to redress historical imbalances that have led to the subjugation of some groups,

and it reaches
beyond the state to private groups and social

100% **MATCHING BLOCK 77/130** W

practices. It thus outlaws in the name of equality caste-based practices of untouchability.

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A system of reservations or quotas ensures some representation for disadvantaged groups including the poor. In addition, the constitution enshrines a policy of affirmative action that creates a two-track system obligating the state "to specifically reform the 'dominant'/'majoritarian' 'Hindu' religious traditions in a fast forward mode, while leaving the reform of 'minority' communitarian/religious traditions to slow motion, minuscule change."

To ensure that these polices are implemented,

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the constitution creates a number of federal agencies to protect and promote the rights of

disadvantaged minorities. Rights activists generally prefer thick conceptions of rule of law to thin ones. In authoritarian and repressive regimes, thick theories allow reformers to discuss certain controversial political issues under the seemingly more neutral guise of a technical discussion of rule of law.

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For instance, in China, legal reformers have used a broad conception of rule of law as a means of discussing democracy, separation of powers and various human rights issues

from free speech to arbitrary detention. More generally, rights activists prefer thick theories because they provide rhetorical support for their particular political agenda. The unfortunate result, however, is that all too often parties appeal to rule of law, implicitly if not explicitly invoking a particular thick conception of

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rule of law, to criticize whatever law, practice or outcome does not coincide with their own political

or normative beliefs. For example, in Singapore, where the legal system is regularly ranked as one of the world's best in terms of rule of law,

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liberal critics of the government's communitarian policies have invoked rule of law to object to the lack of (

in their view)

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adequate workers' rights legislation, limitations on the right of peaceful demonstration and a regulatory framework that restricts the freedom of the local press. 50 Contrast such complaints with the following.

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Two government agencies issue conflicting regulations, and there is no effective legal mechanism to sort out the conflict. A suspect is entitled to a lawyer according to law, but in practice the authorities refuse to allow him to contact his lawyer. Your dispute with your insurance company regarding payment for hospital bills incurred as a result of a car accident remains pending in court after seven years due to judicial inefficiency. The rich and powerful are regularly exempted from prosecution of certain laws whereas others are prosecuted in similar circumstances.

The second set of issues invokes thin rule of law concerns. In contrast, the first set involves substantive issues that divide adherents of competing political philosophies and define different political factions.

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Articulating different thick conceptions makes it possible to relate political and economic problems to law, legal institutions and particular conceptions of

a legal system. Moreover,

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by highlighting differences in viewpoints across a range of issues, thick theories bring out more clearly what is really at stake in many disputes.

However, using a particular thick conception of rule of law to malign others who do not share one's political philosophy, and hence
one's
thick conception of rule of law, leads to the debasement of rule of law and the view that it is just a meaningless slogan devoid of content. Proponents of thin theories protest that
thick theories are based on more comprehensive social and political philosophies,
and thus
rule of law loses its distinctiveness and gets swallowed up in the larger normative merits or demerits of the particular social and political philosophy. As, Joseph Raz observes, If rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function.
We have no need to be converted to the rule of law just in order to believe that good should triumph. A non-democratic legal system, based on the denial of human rights, of extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of
law
better than any of the legal systems of the more enlightened Western democracies.

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Limiting the concept of rule of law to the requirements of a thin theory makes it possible to avoid getting mired in never-ending debates about the superiority of the various political theories all contending for the throne of justice.

Conversely,

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by incorporating particular conceptions of the economy, political order or human rights into rule of law, thick conceptions decrease the likelihood that an overlapping consensus will emerge as to its meaning.

Thick conceptions that require laws be good laws must specify what the good is. However,

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given the fact of pluralism, thick conceptions must confront the issue of whose good and whose justice. Liberals, socialists, communitarians, neo-authoritarians, soft authoritarians, new conservatives, old conservatives, Buddhists, Daoists, Neo-Confucians, new Confucians and Muslims all differ in their visions of the good life and on what is considered just, and hence what rule of law requires.

These categories are themselves exceedingly broad. There is considerable diversity on many issues within each one. In short, appealing to thick conceptions of rule of law that draw on particular conceptions of the economy, political order, gender roles, social justice and human rights brings the disputes that divide the human rights community under the umbrella of rule of law. Predictably enough, non-Liberals have accused proponents of a liberal democratic conception of rule of law of the same kind of ethnocentricism, arrogance and imperialism that they see in the human rights movement. The tendency to equate rule of law with liberal democratic rule of law has led some commentators to portray the attempts of Western governments and international organizations such as the World Bank and IMF to promote rule of law countries as a form of economic,
cultural, political and legal hegemony. Critics claim that liberal democratic rule of law is excessively individualist in its orientation and privileges individual autonomy and rights over duties and obligations to others, the interests of society, social solidarity and harmony. In Asia, this line of criticism
tracks the

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heavily politicized debates about “Asian values,” and whether democratic or authoritarian regimes are more likely to ensure social stability and economic growth discussed earlier. It also taps into

broader

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post-colonial discourses and conflicts between developed and developing states, and within developing states between the haves and have-nots over issues of distributive justice. In Islamic countries,

the debate takes the form of disputes over the role of religion, Sharia law, the rights of women and a host of other specific rights issues.
B.
The Inability of Rule of Law to Provide Effective Guidance on Specific Issues

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For all of its rhetorical appeal, rule of law, whether thick or thin, cannot provide much guidance with respect to

many crucial issues that affect human rights. Appeals to rule of law alone will not shed much light on such substantive issues as what is a proper time, place and manner restriction on free speech, when a particular restriction of freedom of assembly is
necessary for democratic order, or whether the 9/11 attacks on the United States constituted a threat to “the life of the nation” under Article 4 of the ICCPR. 51
The minimal requirements of a thin

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rule of law are compatible with considerable diversity in institutions, rules and practices. For example, the way powers are distributed and balanced between the executive, legislature and judiciary varies widely

in countries known for rule of law.

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Constitutional review is conducted by a variety of entities that enjoy different powers. The nature and degree of judicial independence, as well as the manner in which it is achieved, also vary. In some cases judges are appointed (through a variety of mechanisms), and in some cases they are elected. Nor will appeals to rule of law alone put an end to debates about what type of theory of adjudication is best - strict interpretation, purposive or Dworkin’s make- law-the-best-it-can-be approach.

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Institutional choices are often highly path-dependent: the initial choice of institutions and the way they operate and evolve over time is influenced to a large extent by a host of contingent, context-specific factors. Seemingly similar institutions, sometimes transplanted from one system to another, are likely to function differently from place to place. Thus, to assess the appropriateness and effectiveness of institutions requires an evaluation of their results in the particular context. For

instance,
all states preclude some political and administrative acts from
judicial review. Such decisions often include certain decisions by police regarding whom to arrest and

by
prosecutors regarding whom to prosecute; decisions regarding national defense, war and covert operations; and some highly technical issues left to administrative agencies. Rule of law therefore cannot require that every decision be subject to judicial review or else no country'
s legal system would merit the rule of law label.
Nevertheless, rule of law does require some limits on discretion and, arguably, the ability to challenge most government decisions in some way, whether through judicial review, internal administrative mechanisms or the electoral process whereby citizens can vote governments that misuse their power out of office. But exactly what is required is far from clear. Singapore, for instance, has a number of laws that allow for the restriction of individual liberties without judicial review. The Maintenance of Religious Harmony Act "allows
the
minister to issue preemptive 'restraining orders' to 'gag' politicians or religionists thought to be mixing
a volatile cocktail of religion and extremist politics, which could escalate racial-religious tensions."

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The government argues that given the sensitive nature of religion in multiethnic Singapore, issues involving religious harmony are crucial for the survival of the nation, and better left to the executive than to the judiciary or the legislature. The executive's decision is subject to review by the Elected President, and advisory councils composed of bureaucrats or religious and civic leaders are sometimes consulted to further diminish the dangers of a concentration of unchecked powers in the executive's hands. Nevertheless, liberal critics contend such justifications and mechanisms are inadequate and call for a more robust judicial review

that places more emphasis on the rights of individuals to speak and
to
practice their religion freely.

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Cases involving the declaration of national emergency and derogation of rights raise equally difficult issues.

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While the danger of abuse of power is apparent, advocates of different thick conceptions are likely to disagree over when national emergencies should be declared, who has the right to declare them and what type of review, if any, there should be. In Malaysia, the King, the titular head of the executive, acts on the advice of the Cabinet in deciding whether a state of emergency exists. Parliament, not the judiciary, has the power to review the decision and overturn it.

In the United States, the President has claimed broad powers for the executive in deciding how best to deal with terrorists and enemy non-combatants, much to the dismay of Civil Libertarians who want a greater role for the legislature and the courts in checking and reviewing executive decision-making powers.

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Appealing to rule of law will not suffice to sort out these issues. Both sides can appeal to their own particular thick conceptions, and a thin conception does not require all important decisions to be left ultimately to the courts

or that the court adopts a particular interpretive practice.

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In any event, concluding that a practice or decision is consistent or inconsistent with a thin rule of law or a particular thick conception of rule of law is not the end of normative debate.

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Rule of law is only one of many social values, and

only part of a comprehensive political philosophy. Thus, in some cases the values served by compliance with rule of law may be overridden by other important social values. This is most notable in recent discussions that the rule of law does not pertain to emergency situations. However, it arises in many other contexts involving resistance to narrowly legal but massively unjust laws and regimes. As the heroic struggles of Muhammad Ali, Martin Luther King, Mahatma Gandhi, Nelson Mandela and countless less famous individuals show,

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the rule of law virtues of predictability and certainty may at times need to give way to higher moral principles, considerations of equity, justified civil disobedience or even mass illegalities and populist movements that seek to overthrow the political system.

Ritualistic invocation of rule of law then will not put an end to the conceptual and normative debates that have undermined the universality of the human rights movement. Notwithstanding debates over these deep issues, perhaps rule of law may still be useful in practice. Therefore, we must still consider the extent to 52
which the renewed attention to rule of
law will help address the current serious shortcomings with respect to implementation of human rights. II. The Implementation of Human Rights and the Practical Limitations of Rule of Law: Empirical Issues Quantitative studies have shown that the protection of rights is influenced by, among other things, and in roughly descending order of importance: economic development, with a higher level of development associated with better protection of rights; international or civil wars, with war leading to more violations of rights; political regime type, with democracies protecting rights better than authoritarian or military regimes; regional effects, with Northern Europe and North America outperforming other regions, and with "region" often serving as a proxy for religion and culture and correlated with economic development and regime type; population size, with larger populations leading to higher rates of violation; and colonial history, with British colonialism linked to better rights protection. Interestingly, ratification of treaties does not translate into better protection for human rights, and may even have a negative effect, at least in the short term.
Only recently have empirical studies begun to test the relationship between "rule of law" or other legal system features and the protection of different types of rights. The neglect of law may reflect the skeptical view that human rights law in particular and international law more generally are mere window dressings. However, as the human rights movement has become more powerful, scholars have become more interested in testing the impact of law. The few studies available provide some limited general support for the thesis that rule of law and judicial independence help protect human rights. However, the studies raise a number of concerns regarding the definition and measurement of rule of law, the range of rights tested, the ability to control for other factors and sort out direct and indirect effects and the usefulness in identifying specific features of the legal system that are most important for rights protection. What appears to be the only study to date to test directly the relationship between "rule of law" and rights relied on a rule of law index that drew on subjective perceptions of the legal system.The index is constructed from sixteen different sources that measure a variety of
factors: trust in, and the legitimacy of, the legal system; crime, including violent crime, kidnapping of foreigners, organized crime, financial crime, money laundering and insider trading; property rights, including the enforceability of government contracts and private contracts, the enforceability of judgments and the protection of intellectual property rights; institutional factors such as the independence of the judiciary (influence of government, citizens and firms on the courts), an effective administrative law regime whereby parties can challenge government decisions; and the quality of the legal system, including the fairness, speediness, affordability of the judicial process, the honesty of judges and the quality of the police. Relying on subjective responses to questionnaires by different people in different countries gives rise to concerns about consistency and ideological bias. A more fundamental issue is whether the criteria that form the subject matter of the various surveys adequately capture rule of law. On the whole, the indicators in the World Bank index reflect many of the procedural

and institutional aspects of a thin rule of law. To be sure, perceptions about property rights, including intellectual property rights, or the independence of the courts may be influenced by one's ideological beliefs and may be tied to political and economic beliefs that form the basis for thick conceptions of rule of law. However, the index for the most part avoids the circularity problems that would arise if one incorporated into the index democracy and particular interpretations of contested economic, political or rights issues that define thick conceptions of rule of law.

One major disadvantage with such a broad index, however, is that it obscures which legal system features are related to better human rights performance. The utility of such aggregate rule of law studies for policymakers is therefore limited because the studies do not shed light on the particular institutional arrangements, laws or legal practices that are necessary or beneficial for the protection of human rights. Some studies have tried to focus on more specific issues such as particular constitutional provisions or institutions, with mixed results. One study relying on data from just 39 countries from 1948-1982 found that the constitutional guarantee of freedom of the press and provisions regarding a state of emergency were associated with less censorship and
fewer
restrictions on civil and political rights, while a constitutional restriction on free press produced the opposite result. However, a larger study found that constitutional guarantees of speech, assembly, association, religion and the press, as well as of the right to strike, were not associated with better protection of personal integrity rights, although a constitutional protection of freedom of the press was associated with fewer violations during times of civil war. Surprisingly, a ban on torture and the provision of a habeas corpus right were statistically significant but associated with more violations. In contrast, provisions for public and fair trials were statistically significant and associated with fewer violations. However, public and fair trials were not nearly as important as the impact of a large population, domestic and international war or democracy. 53

A third study sheds some light on these apparent inconsistencies by distinguishing between levels of threat. The study found that at low political threat levels, constitutional provisions regulating the declaration of a state of emergency and derogation of civil and political
rights had no effect. However, at mid to high levels, such provisions may actually be harmful because they provide the regime with a legitimate basis for declaring an emergency and derogating from rights. On the other hand, such prohibitions are likely to lead to fewer violations during extreme cases of civil war. Still another study adopted a more institutional approach, testing the effects of codification of a right in the constitution, judicial independence, federalism, separation of powers and the relative number of lawyers on the protection of political rights and the right against search and seizure. The study found that judicial independence is significant with respect to
the
protection of political rights and search and seizure even after controlling for wealth and other factors. The number of lawyers was significantly associated with greater protection of political rights, though not significant with respect to protection against search and seizure. However, federalism, separation of powers and constitutional provisions on search and seizure were not significant. While the attempt to disaggregate rule of law to test which elements are most important in what circumstances to the protection of which rights is a worthwhile endeavor, the approach is likely to produce weak and inconsistent results because of the wide variation among countries on key legal institutions and practices such as separation of powers, constitutional review, judicial review of executive power, judicial independence, the way judges are appointed, the tenure and
qualifications of judges and so on. A cursory glance around the globe is sufficient to demonstrate that countries known for rule of law differ dramatically in each of these areas and that what works in one place may not work in another.

Another problem with most of the legal system studies so far is that they have focused on physical integrity rights or relatively easy to monitor rights such as search and seizure. However, the relationship between rule of law and other "rights" is likely to be more difficult to measure and to explain. Cultural rights such as the right of minority groups to use their own language or affirmative action policies for members of particular groups are difficult to quantify. The theoretical link between rule of law and such rights is also murky. For example, whether a country should set aside a quota of commercial contracts or seats in parliament for a particular minority group is heavily dependent on the particular circumstances of the country. Appeal to thin rule of law principles will rarely if ever be determinative. Economic and social rights are generally not justiciable or are only partially justiciable in most countries. To be sure, governments might provide a variety of welfare benefits, including food and shelter, medical care and access to education. But citizens generally do not have the right to sue the government for such benefits in court.

It is possible that an equity-minded judiciary might help alleviate extreme poverty and promote social justice by overturning unjust

laws that favour the rich or that impose undue hardships on the poor. Thin rule of law principles, however, would require in most cases that judges apply the laws passed by the legislature and set out in the constitution, even if the judges themselves believe the laws are inequitable. Arguments about how activist the judiciary should be and the proper method and principles of constitutional
interpretation cannot be settled by appealing to the requirements of a thin rule of law alone and will turn in part on one's belief about judicial competence.
For instance,
attempts by activist judiciaries to address social inequities by interpreting economic rights provisions broadly have led to complaints that rule of law is being undermined in India and the Philippines. While such disputes also occur in the context of interpreting broad clauses regarding civil and political rights, they often give rise to additional concerns about judicial competence in that they involve resource allocation decisions arguably best left to the legislative and executive branches.
Quantitative studies have yet to make much headway in the complicated task of sorting out the direct and indirect effects of rule of law. Rule of law and economic development are closely related, as are economic development and human rights performance. Indeed, as the
following chart graphically depicts, wealth is highly correlated with social and economic rights (r=.92); women's rights, as measured by the Gender Developmental Index (r=.93); good governance indicators, such as government effectiveness (r=.77); rule of law (r=.82); control of corruption (r=.76); civil and political rights (r=.62); and even physical integrity rights, though to a lower degree (r= -.40). As countries become wealthier, they generally protect all rights better. Thus, to compare the performance of a high income country such as the United States to a lower middle income country such as China or a low income country such as Sudan makes about as much sense as comparing a piano to a duck.
Figure 1: Wealth Effect (GDP) on Rights Performance 54
Table 1 – Correlation of Wealth and Measures of Development 55
The
high correlation between wealth and rule of law, and between wealth and virtually every type of right and indicator of well-being, suggests that wealth rather than rule of law is the more important factor in rights performance. While this has yet to be demonstrated statistically, it makes intuitive sense in that it is much easier to come up with plausible explanations of how wealth leads to better rights performance than it is to explain how rule of law leads to better rights protection, particularly for non-justiciable social and economic rights. Wealthier countries can afford better medical care, better education and better sanitation systems. Affuence reduces the intensity of distributional conflicts by increasing the resources available for redistribution and decreasing the number of people at or below the poverty line. Development increases
the
ranks of middle class who seek to protect their growing property rights through political channels, including the electoral process, thus leading to stronger civil and political rights. Citizens of rich states are less likely to take to the streets to protest government policies, thus decreasing the threat to governments that result in physical integrity violations or curtailments of civil and political liberties. However, even assuming wealth is the more important factor in explaining rights performance, rule of law may have some independent direct positive impact as well. Moreover, because rule of law appears necessary, though not sufficient, for sustainable growth, efforts should also be made to promote rule of law as an indirect way of improving rights protection. To be sure, wealth is not the only factor that affects rights performance or even the most determinative factor for all rights in all cases. The relationship between personal integrity rights and GDP is weaker than for other rights because of continued police violence and other acts
classified as torture even in rich countries.
It is also weaker
because rich countries also react to war, terrorism and political stability by limiting civil and political rights and detaining and interrogating suspects in ways that are considered arbitrary detention or torture under international human rights standards (or at least may be so perceived by survey 56
respondents). Moreover, some countries exceed expectations relative to their income level while others fall far short. Distribution of wealth also matters: some countries are more egalitarian than others, with serious consequences especially for the most vulnerable in society. There is also some regional variation, particularly on voice and accountability, reflecting different political regimes and value structures and, in physical integrity rights, reflecting more wars and political instability in some regions. The rights performance of reasonably wealthy countries may deteriorate rapidly because of war, economic stagnation, natural disasters or problems like HIV/AIDS.
Even bearing in mind

such qualifications, while money may not be able to buy happiness, it does generally seem to buy a longer life, better education, more health care, better governance, more gender equality and even more civil and political rights. III. Rule of Law, Economic Growth and Human Rights: The Limits of Altruism and other Obstacles

One of the main motivating forces behind the turn toward rule of law has been the belief that legal reforms are necessary for economic development. A 1997 World Bank report, for instance, claimed that "countries with stable government, predictable methods of changing laws, secure property rights, and a strong judiciary saw higher investment and growth than countries lacking these institutions." Notwithstanding theoretical arguments for and against the claim that rule of law contributes to economic development, the empirical evidence is surprisingly consistent and supportive of the claim that implementation of rule of law is necessary, though by no means sufficient, for sustained economic development. A number of long-term, multiple-country empirical studies have shown rule of law to be positively correlated with growth. Robert Barro analyzed data from 85 countries for the periods 1965-1975, 1975-1985 and 1985-1990. He tested the impact of a number of independent variables, including rule of law. His rule of law index was based on International Country Risk Guide (ICRG) survey data compiled from the subjective responses of businesspersons regarding law and order. The law subcomponent assesses the strength and impartiality of the legal system and the order subcomponent assesses the popular observance of law. Higher scores indicate sound political institutions, a strong court system and provisions for an orderly succession of power. Lower scores indicate a tradition of
dependence on physical force or illegal means to settle claims. Barro's regression analysis found that an improvement in one rank in the
zero to six rule of law index raised growth rates by 0.5%. A recent study found that while democracy and rule of law are both related to higher GDP levels, the impact of rule of law is much stronger.The study also found that trade openness was good for rule of law but had a negative impact on income levels and democracy. Conversely, income levels had a small positive impact on openness, while democracy and rule of law had a negligible impact on openness. Other studies have found that clear and enforceable property rights are positively correlated with growth. Knack and Keefer relied on both the ICRG and the Business Environmental Risk Intelligence (BERI) surveys. The BERI survey does not directly ask about rule of law but includes questions about contract enforceability, the likelihood of nationalization, infrastructure and bureaucratic delays. Knack and Keefer conclude that institutions that protect property rights are crucial to economic growth and investment and the effect of such institutions continues to exist even after controlling for investment.

In a somewhat broader study, Clague, Knack, Keefer and Olson tested growth rates against the BERI standards, the contract-intensive money ratio (CIM), which is the ratio of non-currency money to total money supply,and the aggregate ICRG index, which is a composite of the indexes for the quality of the bureaucracy, corruption in government,
rule
of law, expropriation risk and the risk of government repudiation of contracts. Higher ICGR, CIM and BERI scores were associated with higher annual per capita growth rates, even in less developed countries. Another study based on the ICGR showed that rule of law is an important factor in determining the size of capital markets (both debt and equity) and that improvements in rule of law are associated with more domestically listed firms and initial public offerings per capita, a greater ratio of private sector debt to GNP and a higher amount of outsider participation in a country's capital markets. In a similar vein, Ross Levine found that countries that give a high priority to creditors receiving the full present value of their claims in bankruptcy or corporate reorganizations and in which the legal system effectively enforces contracts generally have more developed financial intermediaries and higher growth rates. Moving a country from the lowest quartile of countries with respect to the legal protection of creditors to the next quartile translates
into a
twenty-nine percent
rise in financial development, which increases growth by almost one percentage point a year. Still another study of seventy countries found that the "efficiency and integrity of the legal environment as it affects business, particularly foreign firms," was positively and significantly correlated with economic growth, even controlling for GDP per capita. It also found that, contrary to the speculations of some 57
theoreticians that corruption might increase economic growth, corruption lowers private investment, thereby reducing growth rates. Country and regional studies add further support. In Russia, privatization in the absence of rule of law led to widespread looting and diversion of state assets into private hands. In retrospect it is clear that Russian institutions were insufficiently developed to carry out massive privatization and ensure the smooth operation of capital markets. Economic reforms were undermined not only by weak courts but by weak supporting institutions. Russia's credit rating services, securities regulators, accountants and legal profession were simply not up to the demands of a modern economy. Asia is often considered to be an exception to the general rule requiring rule of law for sustained economic growth. However, the role of law in economic development in Asia is often
underestimated because of the tendency

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to elide rule of law with democracy and a liberal version of rights that emphasizes civil and political rights.

Although the political regimes may not
have been democratic and the legal systems may not have provided much protection for civil and political rights in some cases, the Asian countries that experienced economic growth generally scored high with respect to the legal protection of economic interests
and the facilitation
of economic transactions. A survey of economic freedoms in 102 countries between 1993 and 1995 found that seven of the top twenty countries were in Asia. Economic freedoms include protection of the value of money, free exchange of property, a fair judiciary, few trade restrictions, labor market freedoms and freedom from economic coercion by political opponents. Six states - Japan, South Korea, Taiwan, Hong Kong, Singapore and China - experienced sustained growth over 5% for the period from 1965 until 1995. The legal systems of these countries measure up favorably in terms of economic freedoms and rule of law, with the possible exception of China. However, even in China, the legal system has improved significantly in the last twenty-five years, particularly in the commercial area, to where it now ranks in the 51st percentile of legal systems
on the World Bank's rule
of law index. In contrast, the legal systems of most of the low growth countries are among the weakest in the region. The following table presents a percentile ranking of Asia'
s
legal system based on the World Bank's rule of law index for the years 1996 and 2002. Countries with better legal systems tend to have higher growth. As noted in Table 2, the relationship between GDP and rule of law is strong in the Asian region (r=.91), compared to r=.81 for all countries.
Table 2. World Bank Rule of Law Rankings County 2002 1996 Singapore 93.9 99.4 Japan 88.7 88.0 Hong Kong 86.6 90.4 Taiwan 80.9 84.3 South Korea 77.8 81.9 Malaysia 69.6 82.5 Mongolia 64.9 70.5 Thailand 62.9 71.1 China 51.5 37.3 Vietnam 44.8 34.9 Philippines 38.1 54.8 Indonesia 23.1 39.8 Cambodia 20.1 16.9 North Korea 14.7 13.9
Laos 12.9 4.8 58
Myanmar 2.1 5.4 Despite such consistent and seemingly overwhelming evidence, there are still good reasons to be cautious in reaching broad conclusions about the relationship between rule of law and economic growth and between economic growth and better protection of human rights. As discussed above, defining and measuring rule of law remains an issue. Several of the empirical studies relied on subjective measures from three sources: the ICRG and BERI surveys and Kaufmann et al.'s rule of law index.
Significantly, most studies to date do not purport to show that rule of law causes development, only that rule of law is positively correlated with economic development. Although, in general,

85% MATCHING BLOCK 104/130 W

a legal system that complies with the requirements of a thin rule of law

appears to be necessary to sustain long-term economic growth, rule of law may not be necessary or as significant where a country is very poor and the economy is largely rural-based. A formal

90% MATCHING BLOCK 105/130 W

legal system that meets the standards of rule of law is

costly to establish and operate. In some cases, norms of generalized morality, social trust, self-enforcing market mechanisms and informal substitutes for formal law may provide the necessary predictability and certainty required by economic actors for a fraction of the cost. Formal and informal law and public and private ordering are complementary in many ways. Family businesses, networks of personal relationships
and
private orderings exist in all legal systems, although the cultural, political and economic context may vary from one country
to the next, leading to differences in the degree of importance or variations in particular practices.

100% MATCHING BLOCK 106/130 W

Since they are not perfect substitutes, each can support and help overcome the weaknesses of the other.

In general, however, relationships and social networks, clientelism, corporatism and informal mechanisms for resolving disputes, raising capital, and securing contracts are at best imperfect substitutes that often depend on formal legal institutions, which

52% MATCHING BLOCK 107/130 W

meet the standards of a thin rule of law. Moreover, although these mechanisms are to some extent compatible with

rule of law, some are also incompatible in certain ways with rule of law. In addition, once a country reaches a certain level of economic development, the
costs of a formal legal system are easier to bear. Indeed, as we have seen, the rule of law is closely correlated with GDP. Therefore, rule of law is, to some extent, a function of demand. Economic reforms and development enhance the demand for rule of law, while legal reforms and rule of law contribute to economic development. There is both a push and a pull aspect to the process. Demand, however, will vary in a society. Most segments of society will benefit directly or indirectly from rule of law, both in economic and non-economic issues. However, some groups, companies or individuals - particularly those that rely on government connections - will be worse off if rule of law is implemented and may oppose reforms.
Key actors in the legal system may also have vested interests in the status quo,
and thus oppose reforms.
One reason citizens who are not involved in complex economic transactions will benefit from efforts to establish rule of law for commercial purposes is that development of commercial law is likely to have important spillover effects into non-commercial areas. Improving commercial law requires institution-building. A more independent and competent judiciary, a more highly trained legal profession and a more disciplined administration are of benefit to all. Further, institutional development is self-reinforcing. The successful resolution of cases, whether commercial or not, demonstrates the improvements in the legal system, resulting in increased trust in the judiciary and greater demand for the courts to resolve all manner of disputes. Of course, implementing rule of law and achieving economic growth are complicated tasks. Even those at the center of the so-called new law and development movement acknowledge the persistent difficulty in making the relation between law and development
operational
and the inability to specify with any reasonable degree of certainty precisely what is required for economic development. Chastened by fifty years of failed predictions by leading development pundits and international organizations, the World Bank unveiled a Comprehensive Development Framework, which declares that everything matters: economic policies; political and legal institutions, including rule of law, property rights regimes and security market regulatory mechanisms; human resources; physical resources; geography and culture. The Bank is also careful to point out that this holistic approach is difficult to
make operational and is
meant as a pragmatic guideline rather than a detailed blueprint. Hedging its bets still further, the Bank
takes pains to add that the "mixed record of development programs in the past suggests the need for both caution in application and realism about expected results." Nevertheless, these difficulties should not blind us to some important lessons that can be drawn from the experiments in stimulating economic growth during the last several decades. Not surprisingly, economic growth requires good economic policies, including sound macroeconomic policies that keep inflation down and 59
avoid recessions, as well as policies that encourage high savings, provide strong returns to investment, reduce corruption, increase competition and promote education. The free flow of information and technology are also important. Political processes that are open, participatory and inclusive are beneficial, as demonstrated by the Asian financial crisis, the looting of state-owned assets in Russia, the problems with crony capitalism in Indonesia and the difficulties in achieving equitable growth in South American countries. Efficient markets depend on a variety of institutions and professions to disseminate information,
as well as

reduce the costs of doing business and the likelihood of ending up in disputes. A professional corps of accountants, appraisers, credit rating services, securities companies and regulatory systems are all needed. As the empirical studies show, a legal system capable of enforcing contracts, maintaining competition, upholding property rights and protecting investors
against excessively predatory governments is also useful. Social capital is also important, including informal mechanisms for resolving disputes as well as cultural norms that allow cooperation and encourage trust, and thus reduce transaction costs. As with rule of law, however, economic reforms are path- dependent and interdependent. Even well-intentioned government leaders will not always be able to translate these broad principles into a coherent reform plan that is feasible given the local conditions and circumstances. While international efforts to stimulate growth
in developing countries
have been successful in some cases, we must face the unpleasant reality that there remains a wide gap between rich and poor countries, with devastating consequences for the rights and
well-being
of billions of people in poor countries. Every year, more than ten million children die of preventable diseases, some thirty thousand
a day. In some countries, one- third of children will not live to the age of five. Fifty-four countries were poorer in 2000 than in 1990; in twenty- one countries, human development levels decreased; in fourteen, life expectancy
for children
declined; and in twelve, primary school enrollment dropped in the last decade. Excluding China, the number of poor people actually increased by
twenty-eight
million in the 1990s. Although measures of global income equality raise a number of contentious issues, there is a general consensus that the difference between rich and poor countries is so grotesque as to shock the conscience: global income inequality is greater than the gap between rich and poor even in the most inegalitarian countries. The income of the richest
one percent
of the people is greater than the income of fifty-seven percent of the rest of the people in the world, while the income of the twenty- five million richest Americans exceeds that of two billion people. Despite such
gross inequality, aid from developed countries actually fell in the 1990s. Even with pledges to increase aid by $16 billion, aid from the 22 members of the OECD will account for only 0.26% of their gross national income. Yet agricultural subsidies in rich countries amount to more than $300 billion, some six times the total amount of official developmental assistance. Many failed states, racked by poverty, war and
often times
poor governance, are simply incapable of implementing rule of law or following sound economic policies. But even functional developing states continue to be frustrated by the lack of concrete efforts to breathe life into the right to development and the structural impediments to growth in the current international economic order. Economic growth, rule of law and better protection of rights across the board will be difficult to achieve without greater redistribution of assets, a reduction in agricultural
subsidies, debt relief and changes in the international trade regime, including the intellectual property regime, which provide less developed countries a better chance to compete with wealthier states and afford human rights and legal systems that are rule of law compliant. To be sure, providing more aid or redistributing global resources alone will not ensure economic growth, bring about an end to war and human suffering or necessarily lead to the realization of rule of law. In some cases, resources are likely to be squandered by government leaders, misappropriated for personal use or used to wage war on government enemies. Setting right persistently failed states would seem to require regime change, which gives rise to
complicated legal, political, and practical issues about humanitarian intervention, as well as concerns about a global state.
The well-off citizens of rich and powerful countries do not appear to have the stomach for such radical interventions, or even to support significant redistribution of global resources. Despite globalization and the ready availability of twenty-four-
hour news programs that feed us images of massive human rights violations around the clock, we define ourselves not in universal terms as featherless bipeds but in terms of more particular identities that distinguish between us and them. Notwithstanding all of the self-congratulatory talk of moral progress and the universality of human rights, most of us still stand idly by while much of the world's population lives in abject poverty, all too willing to work in unsafe conditions for a fraction of the wages made by their counterparts in developed countries - and, even then, workers in developed countries begrudge them the jobs. Our altruism has limits. We still want our lattes from Starbucks and our nice

houses with plasma televisions while others are starving and living impoverished lives, not only in other countries but right in our own communities. 60
On the rare occasion the international community does respond to a humanitarian crisis, the public's attention fades once the immediate emergency is over,
perhaps explaining why
humanitarian intervention has not led to improvement in human rights in the long term.
In the need for an immediate response, there is little time to reflect on the structural issues that produce failed states and the extent to which the international economic order is a contributing factor to the crisis. After the crisis passes, life in the developed world returns to normal, while those in the failed state continue to struggle along, often only to experience another crisis several years later. In
the end, the systemic problems that hinder economic growth in developing countries continue to undermine efforts to promote rule of law and protect human rights.
IV. Rule of Law, Democracy And Human Rights: All Good Things need not Go Together
The relationship between rule of law, democracy and human rights is difficult to sort out conceptually because of the contested meanings and interpretations of each and
is difficult
to test empirically because of problems in operationalizing and measuring them.
Many commentators who adopt thick conceptions of rule of law incorporate democracy into the concept of rule of law. Still others would accept that democracy is conceptually distinct from rule of law but maintain that rule of law is not (fully) realizable except in democracies.
However, some non-democratic states do, in fact,
seem to have had or to now

61%	MATCHING BLOCK 108/130	W

have legal systems that meet the requirements of a thin rule of law (at least as well as

other democratic countries known for rule of law). Singapore, for example,

97%	MATCHING BLOCK 109/130	W

has been described as a semi-democracy, pseudo-democracy, illiberal democracy, limited democracy, mandatory democracy, a "decent, non-democratic regime," a

soft authoritarian state and a despotic state controlled by Lee Kuan Yew. Critics
note that elections are dominated by the People's Action Party (

96%	MATCHING BLOCK 110/130	W

PAP) and opposition is tamed through the use of defamation suits against political opponents, manipulation of voting procedures, gerrymandering and short campaign times. Given the dominance of the PAP, accountability in Singapore is achieved not so much through elections as through other means such as allocating limited participation rights to the opposition, inviting members of the public to comment on legislation and using shadow cabinets where PAP members are asked to play an opposition role.

The primary role of law in Singapore

99%	MATCHING BLOCK 111/130	W

is to strengthen the state, ensure stability and facilitate economic growth. Many decisions are left to the state and political actors, primarily the Cabinet headed by the Prime Minister. Civil society is limited and characterized by corporatist relationships between the state, businesses, labor unions and society. Administrative law tends to emphasize government efficiency rather than protection of individual rights. While individual rights are constitutionally guaranteed, they are not interpreted along liberal lines.

97% MATCHING BLOCK 112/130 W

Lee Kuan Yew and other government officials have invoked Asian values to emphasize group interests over individual interests and to justify limitations on civil and political rights, including limits on free speech, such that citizens are not allowed to attack the integrity of key institutions like the judiciary or the character of elected officials without attracting sanction in the form of contempt of court or libel proceedings. Labor rights are also limited in the name of social stability and economic growth. Rejecting liberal neutrality, the government favors a more paternalistic approach where the state promotes a substantive normative agenda and actively regulates private morality and conduct. The government has appealed to Confucianism to support its paternalistic approach

and

96% MATCHING BLOCK 113/130 W

to promote social harmony and consensus rather than adversarial litigation. On the whole, the judiciary tends to follow the government's lead. Although the reason for that seems to be a genuine congruence of views on the part of most judges rather than overt political pressure on the courts, in some cases judges who have challenged the PAP have been reassigned. Despite the

limitations on democracy, the use of the legal system to suppress opposition and a nonliberal intepretation on many rights issues, Singapore's legal system is regularly ranked as one of the best in the world. The World Competitiveness Yearbook consistently ranks Singapore first. It was ranked in the top 99 th percentile on the World Bank Rule of Law Index in 1996 and in the 93 rd percentile in 2002. By way of broad comparison, the United States and the average OECD rankings were in the 91st to 92nd percentiles for 1996 and 2002.

89% MATCHING BLOCK 114/130 W

Like Singapore, Hong Kong has a well-developed legal system that is largely the product of British colonialism. Until the handover to the

People's Republic of China (
PRC)

96% MATCHING BLOCK 115/130 W

in 1997, the system was widely considered to be an exemplar of rule of law, notwithstanding the lack of democracy and a restricted scope of individual rights

under British rule. After the handover, the legal system continues to score high on the World Bank's Rule of Law Index, with only a slight drop from 90.4 in 1996 to 86.6 in 2002.

88% MATCHING BLOCK 116/130 W

With the change of government, however, has come a different value orientation. Tung Chee-hwa has, on occasion, invoked Asian values, suggesting to some that Hong Kong might be evolving toward a more Singaporean model. Signs of a possible shift include pressure on the media to toe the government's line; 61 limitations on free speech and assembly and, in particular, the requirement that demonstrators obtain prior approval from the authorities; consideration of a bill on religious sects, urged by Beijing, to control Falun Gong, along with the recent conviction of Falun Gong demonstrators; and the brouhaha over regulations, required under Article 23 of the Basic Law, dealing with a variety of potential threats to national security from sedition to disclosure of state secrets,

which resulted in some 500,000 people taking to the streets. The protesters, some of whom demanded faster democratization including election of the chief executive in 2007, were also upset by a downturn in the economy and the ineffective governance of Tung. Singapore and even more clearly Hong Kong show that

democracy is not a precondition for rule of law. Among Arab countries, Oman, Qatar, Bahrain, Kuwait and the United Arab
Emirates are
in the top quartile on the World Bank Rule of Law Index
but have a 0 ranking on the 0-10 point Polity IV Index. Conversely, just as non-democracies may have strong rule of law legal systems, democracies may have legal systems that fall far short of rule of law. Guatemala, Kenya and Papua New Guinea, for example, all score highly on democracy (8-10 on the Polity IV Index) and yet poorly on rule of law (below the 25 th percentile on the World Bank Rule of Law Index). In
short,
rule of law need not necessarily march in lock step with democracy,
even if democracy and rule of law generally tend to be mutually reinforcing.
Nor does democracy necessarily entail better protection of human rights. To be sure, many studies using a variety of methods and definitions find that democracy reduces human rights violations. However, the studies tend to assume a linear relationship: marginal improvement in democratization leads to a similar improvement in protection of human rights. Yet many qualitative studies have found that democratization has not led to better protection of human rights in the countries studied.
A number of quantitative studies support the disconcerting results of the qualitative studies by showing that the third wave has not led to a decrease in political repression, with some studies showing that political terror and violations of personal integrity rights actually increased in the 1980s.Other studies have found that there are non-linear effects to democratization: transitional or illiberal democracies increase repressive action. Fein described this phenomenon as "more murder in the middle" - as political space opens, the ruling regime is subject to greater threats to its power and so resorts to violence. More recent studies have also concluded that the level of democracy matters: below a certain level, democratic regimes oppress as much as non-democratic regimes.
Democracy consists of different elements, or dimensions, and thus, most studies use a composite index. The Polity IV measure, increasingly favored by researchers, is a
twenty-one-
point scale made up of five components: competitiveness of executive recruitment, competitiveness of participation, executive constraints, openness of executive recruitment and regulation of participation. Other composite measures of democracy include: civil liberties, freedom of press, minority protection and so on. Which elements matter the most for the
protection of human rights? Is there a sequencing effect that would recommend increasing political participation before increasing constraints on
the
executive, or vice versa? De Mesquita found that political participation and limits on executive authority are more significant than other aspects but that there is no human rights benefit at all until the very highest levels of political participation and executive constraints are achieved. However, these levels require moderate progress on each of the other sub-dimensions. In short: There is no significant increase in human rights with an incremental increase in the level of democracy until we reach the point where executive constraints are greatest and where multiple parties compete regularly in elections and there has been at least one peaceful exchange of power between the parties . . . . Put more starkly, human rights progress only reliably appears
to
toward [sic] the end of the democratization process. This finding is worrisome for human rights. Despite the much vaunted third wave of democratization in the 1980s and 1990s, regimes that combined meaningful democratic elections with authoritarian features outnumbered liberal democracies in developing countries during the 1990s. Moreover, even full democratization does not necessarily entail a liberal interpretation of human rights. As discussed previously, many critics object to the liberal interpretation of human rights, which emphasizes individual autonomy and choice at the expense of other values. Conflicting views over how the
often times
abstract principles set forth in rights documents are to be interpreted arise across a wide range of issues, including the rights of the criminally accused
versus the need to protect members of society from crime, the rights of women versus
traditional norms and the scope of legitimate limitations on free speech in the name of national security or social stability. Regional variations, even after controlling for wealth and regime type, demonstrate that there are differences in values among the majorities in different countries and that such values play a significant role in how rights are interpreted and implemented.
V. Rule of Law and War: After 2000 Years not Quite Inter Armes, Silent Leges, but not much better 62

Former U.N. Human Rights Commissioner de Mello eloquently captured the evils of war: We are living in profoundly challenging times for human rights. On this day, I would like us to think in particular of the countless number of civilians who are living in the midst of war and conflict and who continue to endure atrocities which should outrage the conscience of humanity. Their basic rights, those enshrined in human rights and humanitarian law are denied. . . . [F]or millions of victims of armed conflict, war represents the daily reality. Men and women are killed, maimed, raped, displaced, detained, tortured, and denied basic humanitarian assistance, and their property [is] destroyed because of war. Children are abducted, forcibly recruited into arms, separated from their families, sexually-exploited, suffer hunger, disease and malnutrition, and are unable to go to school. They are not only denied their present, but also their future . . . . The best chance for preventing, limiting, solving and recovering from conflict and violence lies in the restoration and defence of the rule of law. Armed conflict stands as a bloody monument to the failure of the rule of law. We must break the cycle of violence. Where armed repression strips people of their rights and dignity, let those responsible answer under the rule of law.

War is undeniably a serious threat to individual freedom and rights. However, is rule of law an antidote to war? To what extent can rule of law prevent war, limit abuses during war and contribute to transitional justice while laying the foundation for a rights-respecting future polity?

A.

Prevention of War The shortcomings of relying on rule of law to prevent war are painfully obvious in light of recent history. International and domestic wars are driven by ethnic hatred, greed, economic considerations, geopolitical concerns for stability and the struggle for power. Law is, for the most part, powerless in the face of these concerns. The U.N. regime was largely an attempt to bring war and the use of force within an international legal framework. But it has proven incapable of preventing wars: the twentieth century was one of the bloodiest, and the twenty-first is not shaping up to be much better. The Cold War undermined whatever hope there might have been that the Security Council would be able to play a moderating role during the early decades of the U.N. The NATO bombings in Kosovo and the American invasion of Iraq without Security Council approval have demonstrated further the limits of international law to prevent war in the post-Cold War era. In the eyes of many international law scholars, the NATO bombings and the American invasion of Iraq were illegal and demonstrate just how far away we are from an international rule of law. To be sure, some have argued the actions of NATO and the United States were legal, albeit based on a changing conception of laws of war, or as morally justified, even if illegal, based on humanitarian intervention to protect human rights or to promote democracy. The hand-wringing among international law scholars over the conflict between the illegality of NATO's intervention in Kosovo and their personal conviction in the morally compelling case for humanitarian intervention highlights the normative limitations of a thin rule of law and the need to weigh the values served by rule of law against other important social values, including the protection of human rights. Former President and Judge

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of the International Criminal Tribunal for the Former Yugoslavia (ICTY),

Antonio Cassese, succinctly stated the choices: Faced with such an enormous human-made tragedy and given the inaction of the Security Council . . . should one sit idly by and watch thousands of human beings . . . slaughtered or brutally persecuted? Should one remain silent and inactive only because the existing body of international law rules proves incapable of remedying such a situation? Or, rather, should respect for the Rule of Law be sacrificed on the altar of compassion? The conflict could be resolved by "legalizing" humanitarian intervention. One approach would be to recognize a customary international law right for a country or group of countries to intervene when certain standards are met. However, any such standards will be broad and subject to vastly different interpretations based on contested and complex facts. Ex ante and ex post assessments are also likely to differ widely given the impossibility of answering the counterfactual question: what would have happened if intervention had not occurred, assuming that some entity someday would be in a position to assess whether the intervention was legitimate humanitarian intervention or an illegal act of aggression? For now, and the

foreseeable future, the lack of an authoritative entity to review and pass judgment on the decisions undermines the predictability and certainty that is central to rule of law and the requirement that laws be impartially applied. Allowing states to determine for themselves when intervention is merited, subject only to the threat of possible censure and sanctions by the world community, suggests the possibility of anarchy rather than rule of law. However, given the high costs of intervention, the risk to a state's own citizens, the possibility of getting bogged down in a major reconstruction effort with little chance of success, and political pressure from the international community, a much more likely result is that only the strongest states will intervene. Nevertheless, that result is also problematic from a rule of law perspective in that given limited resources and political will, strong states 63
will intervene in an inconsistent and unprincipled way based on some mix of humanitarian concerns and self- interest. An alternative would be to require U.N. approval, perhaps amending the U.N. Charter to require less than unanimity on the part of the Security Council permanent members or a
super majority
of the entire Security Council or some combination thereof. However, there would still be a significant danger that U.N. decisions to intervene would be heavily politicized and that the standards for intervention would be stretched as necessary to reach what appear to some to be morally compelling cases. Moreover, there would still be moral and political pressure on states
to act outside the U.N. framework and intervene on humanitarian grounds when the U.N. fails to act, which is likely to be often given the large number of compelling cases for humanitarian intervention, the limited resources of the U.N., and political barriers
that would remain
even with a lower approval threshold for intervention. Accordingly, decisions to intervene on humanitarian grounds are likely to remain largely outside the framework of rule of law. The refusal to include crimes of aggression within the jurisdiction of the ICTY and, at least for the time being, the International Criminal Court (ICC), further demonstrates the extent to which war falls outside the parameters of rule of law. In establishing the ICTY, the "powers that be" did not want to undermine the possibility of reaching a settlement with Milosevic, with whom they were negotiating at the time, by allowing or forcing the ICTY to decide who the aggressor was and which parties were responsible for the conflict. Nor do the United States and many other countries want the ICC determining who the aggressor is and which parties are responsible to what extent for future conflicts.

B. Prevention or Mitigation of Abuses During War

While determinations of crimes of aggression (jus ad bellum) remain largely outside an international rule of law framework, issues of how war is to be conducted (jus in bello) have increasingly become subject to international law. The Geneva and Hague Conventions have been supplemented by a number of other conventions and an expanding body of customary international law that set limits on how war may be waged. Such rules are not wholly without effect, although their effectiveness should not be overstated. Some rules limiting certain weapons, such as chemical weapons, have generally been followed; rules regarding treatment of POWs have had a more mixed record of compliance, while rules protecting civilians have been more frequently ignored. There is some evidence that rule of law does reduce physical integrity violations, some of which would fall within the realm covered by international humanitarian law. Nevertheless, many of the countries with the worst human rights records are failed states, torn by ethnic conflict, and wholly lacking in the political will or institutional capacity to implement
the rule of law. Moreover, historically, even
countries known for the
rule of law have reacted to international war and domestic instability by cutting back on civil and political liberties and violating the laws of war. There are, from both thin and thick rule of law perspectives, a number of problems with this body of law and its implementation. There is something fundamentally odd if not
oxymoronic about humanitarian laws of war. One goes to war to defend one's way of life and all that one holds most dear, and does so by killing others. However, one is only supposed to kill others in a civil way. But why is it more humane, for example, to drop cluster bombs from 15,000 feet than to use chemical weapons? And even allowing that there is something terribly wrong about relying on civilians as human shields, what is particularly noble or humane about sacrificing one's own life by fighting an invading force with advanced weaponry in the open or in conventional ways? Why should the weaker side agree to fight by rules made by the stronger

side, especially when the stronger side routinely violates the rules when doing so is to its advantage and then claims that the rules have changed based on acceptance of its behavior by its allies? The American treatment of prisoners in Iraq is only the most recent in a long list of violations of the law of war by Western states. The Allied fire- bombing of German cities, the refusal of British and American Navies to rescue Germans left stranded in the water after their ships were hit and French executions of German soldiers in reprisal for killings of French insurgents all violated the existing laws of war. In Vietnam, apart from using Agent Orange and napalm- bombing, the United States systematically tortured and abused POWs and civilians. Meanwhile, defenders of the United States war on terror now argue that the laws of war have changed both with respect to jus ad bellum and jus in bello based on the "new" threat from terrorism and international approval or tolerance of American actions. An evolution in the political rationale behind the laws of war has also led to inconsistencies in the nature of humanitarian law. The earlier Hague rules sought to establish some ground rules between roughly equal states involving battles between lawful combatants. As such, they only applied to "civilized" (Christian) peoples: the British did not apply the laws of war to conflicts with Zulus. In contrast, the additional protocols of the Geneva Conventions
sought to address asymmetrical power by extending protection to "people's fighting 64
against colonial domination and alien occupation and against racist regimes."The change has resulted in considerable confusion, and highly politicized interpretations, regarding who is entitled to what protections under humanitarian laws of war. At one extreme, the Bush Administration has tried to deny virtually all rights to unlawful combatants, while human rights groups and most international law scholars argue that even unlawful combatants who violate the laws of war are entitled to certain protections. To be sure, many people find it hard to accept that unlawful combatants who engage in war crimes or who kill American occupational forces sent to liberate Iraq should benefit from the protections of the humanitarian laws of war. One might think that the torture of Iraqi detainees in Abu Ghraib and elsewhere would have demonstrated once and for all the need to ensure that even unlawful combatants and insurgents battling occupational forces be afforded certain protections. On the other hand, despite all of the moral indignation over the horrific images, the fact remains that torture exists as a common weapon of governments faced with extreme security challenges. Moreover, government officials, citizens and academics are increasingly arguing that torture and other physical integrity violations are justified. For instance, Amnesty International has claimed massive human rights violations in Nepal by both the military and Maoist guerrillas, including the killing and kidnapping of civilians, torture of prisoners and destruction of property. In defense of the government's suspension of constitutional freedoms
and harsh actions, Nepal's Prime Minister declared: "You can't make an omelette without breaking eggs. We don't want human rights abuses but we are fighting terrorists and we have to be tough." Ultimately, how much protection is provided depends on the severity of the threat. Deep conflicts over the nature, purpose, and justifiability of humanitarian laws of war give rise to different thick conceptions of a humanitarian rule of law. Should unlawful combatants be entitled to protections and, if so, which ones? Should torture be allowed in some circumstances and, if so, under what circumstances? Should the executive be able to derogate from civil and
political rights in times of emergency and, if so, should the decision be subject to legislative or judicial review? As discussed above, these issues cannot be resolved by appealing
to the requirements of a thin rule of law. Rather they will turn on differences in normative and political beliefs that underlie different thick conceptions of rule of law. The laws of war are equally problematic from a thin rule of law perspective. A thin rule of law requires that rules be reasonably clear. However, international humanitarian law is remarkably unclear in many crucial areas. Frequently, it consists of nothing more than general principles, often with an idealistic and—considering the context—surreal quality. Consider, for instance, the principles of proportionality and military necessity. Even the most basic issue of proportional to what remains unclear. Are American actions in the war on terror supposed to be proportional to past terrorist acts or possible future threats? Is proportionality to be justified based on the ability to deter future terrorist acts? If so, then a use of force wholly disproportionate to the original attacks might be justified as necessary to strike sufficient fear into would-be terrorists. A group of renowned scholars found that NATO had committed "relatively minor" breaches of international humanitarian law that were reasonable interpretations of the concept of "military necessity" in Kosovo.But was it really necessary or justifiable to take out basic civilian structures including bridges, telecommunications facilities and power stations? Even if necessary, NATO's decision to bomb from higher than 15,000 feet hardly seems to meet the proportionality requirement given that there were no casualties among NATO forces but more than 500 Serbian and Kosovar civilians killed and an additional 6000 wounded. The Independent International Commission admitted that some of NATO's decisions to attack dual use targets were "questionable under the Geneva Conventions and Protocol I," but then let NATO off the hook by pointing out in effect that breaches were the norm in practice, and thus apparently
were

justified or at least excusable: "State practice in wartime since World War II has consistently selected targets on the basis of an open-ended approach to 'military necessity,' rather than by observing the customary and conventional norm that disallows deliberate attacks on non-military targets."The Commission noted
that
the "NATO campaign was more careful, in relation to targeting, than was any previous occasion of major warfare conducted from the air. Apparently, violations of law that are less flagrant than the normal exceedingly egregious type are to be considered "minor breaches," regardless of the number of lives lost. The curious result from a rule of law perspective is that, rather than the simple determination of legality or illegality, there is a gray area of semi-illegal, at least for the victors. In the end, broad principles such as proportionality and military necessity provide precious little guidance in deciding the legality of dropping atomic bombs on Hiroshima and
Nagasaki, napalming Vietnam or carpet- bombing Cambodia, and are easily manipulated to justify whatever conclusion happens to satisfy one's political position. It is true that laws are often unclear. But the vagueness of humanitarian law is particularly problematic given the decentralized nature of international law. A wide variety of bodies are charged with interpreting 65
these laws and their domestic counterparts, including the ICJ, other U.N. bodies, international criminal tribunals, the ICC, and domestic courts claiming universal jurisdiction over serious crimes such as crimes against humanity and war crimes. These bodies do not share a common method or culture of legal interpretation. Some of them are heavily politicized. They may issue final judgments that the states and individuals affected have no further legal channels to challenge. Given the highly political and emotionally charged nature of the issues involved, these exceedingly vague concepts are likely to result in outcomes determined more by power politics and contested normative views than legal considerations in many cases. The dangers are most evident in trials in domestic courts under principles of universal jurisdiction. Rights organizations initially praised Belgium for adopting a universal jurisdiction law that allowed Belgian courts to try persons accused of war crimes and crimes against humanity in absentia, even when there was no link between Belgium and the alleged perpetrator of the crime, the
victims of the crime or the criminal act. The law was used to bring a
headquarters, Belgium amended the law to provide jurisdiction only where the alleged perpetrator or the victim was a Belgian national or resident and to funnel all suits through the federal prosecutor, whose decision whether to prosecute will be final. The expansion of crimes of universal jurisdiction, including crimes against humanity and war crimes, raises the possibility of victims of United States military actions holding American officials or military personnel criminally accountable for violations of vague humanitarian laws of war in heavily politicized domestic courts or of Palestinians pursuing Israeli officials for crimes against humanity or war crimes in the courts of sympathetic countries that have in the past themselves been at war with Israel. Whatever one thinks of the substantive merits of such claims, such cases highlight the thin rule of law requirement that laws be applied impartially and call attention to the important, albeit sometimes faint, line between law and politics.

The vagueness and undeveloped state of international laws of war highlight another thin rule of law concern that has plagued the international rights movement since Nuremberg: the retroactivity of laws. The requirement that laws generally be prospective enhances predictability and fairness. Although the predictability of law is often considered especially valuable for business people, the prospectivity of law is equally, if not more, important in the criminal context, as captured in the notion of no crime without penalty (nullum crimen sine lege). The arguments against retroactive criminal laws take on even greater weight in the context of international law, where the specter of victor's justice is so often close at hand. Recognizing this, the Report of the Secretary General that provided the foundation for the establishment of the ICTY declared that the Tribunal would only follow clear international laws. Yet the rules followed by the ICTY were far from clear. Several of the Tribunal's decisions were based, at least in part, on customary international law (CIL). However, the very notion of what constitutes CIL is now much contested. According to the influential Restatement (Third) of Foreign Relations Law, customary international law results from a general and consistent practice of states followed out of a sense of legal obligation. In recent years, these
requirements have been significantly watered down. No longer is the practice of the state primarily determined by reference to the state's actual behavior. Rather, state practice may now be based on verbal statements and symbolic or legal acts such as the ratification of treaties or
voting in favour of a particular resolution or declaration. Thus, official government statements condemning torture are evidence of state practice, even though the states that issue such statements may, in fact, continue to engage in torture. Similarly, the test for a general and consistent practice is now much less stringent, as evidenced by the ICTY cases in which the tribunal noted extensive differences in state practice and yet somehow managed to extract a clear rule of international law. In Erdemovic, which raised the issue of duress as a defense, the Appeals Chamber noted that states varied widely on the issue. In general, civil law countries tend to treat duress as a complete defense, whereas in some common law countries duress may be a complete defense

and,
in others, it may be a complete defense except with respect to first-degree murder, rape and some other crimes; and in still others duress is only a mitigating factor. Yet the Appeals
Chamber then opted for an unfavorable interpretation from the defendant's perspective, holding
that
duress was not a complete defense but only a mitigating factor. In reaching their decision, some judges drew on particular philosophical justifications that implicate different thick conceptions of rule of law, specifically rejecting a utilitarian approach. They also drew on contested policy considerations, including the desire to "facilitate
the development and effectiveness of international humanitarian law and to promote its aims and application by recognizing the normative effect which criminal law should have upon those subject to them." However, it is not clear, particularly given the judges' opposition to utilitarian reasoning and the requirement to apply only clear international law at the time, why the interests of the individual defendant in this case should be sacrificed to produce a better law for future cases. Dissenting, Cassese rejected such considerations: "[T]he majority of the Appeals Chamber has embarked upon a detailed investigation of 'practical policy considerations' and has concluded by upholding 66
'policy considerations' substantially based on English law. I submit that this examination is extraneous to the task of our Tribunal."
The fact that judges on the same ICTY panel often disagreed about state practices or whether a particular rule constituted CIL is difficult to reconcile with the requirement of clear and consistent practice to constitute CIL and the ICTY's mandate to only follow clear international law. Indeed, as in Erdemovic, the opinions of the tribunal often document at great length the lack of any clear practice among states. In some cases, the Tribunal attempted to avoid the problem by relying on general principles of law rather than CIL. The Trial Chamber in Furundzija noted that states define rape in different ways and, in particular, that they differ over whether forced oral sex constitutes rape or the lesser offense of sexual assault. Nevertheless, the Chamber then found that forced oral sex does constitute rape based on general principles of international law. But appealing to even less determinate general principles of international law cannot meet the ICTY mandate to apply only clear international law. The panel attempted to
justify its decision by arguing that forced oral sex constitutes an offense to human dignity. While this is surely true, not all offenses to human dignity, or even all sexual offenses to human dignity, constitute rape in many legal systems, much less violations of general principles of international law. Many serious offenses to human dignity are not illegal and surely do not rise to the level of violations of general principles of international law. Ignoring the pleas of a starving child as you enter Starbucks to buy a double mocha latte is a serious affront to human dignity. But that type of day-to-day indifference to the plight of others is not illegal. Human dignity is a vague notion. General principles of international law cannot just boil down to whatever the tribunal believes constitutes a serious offense to human dignity. Some of the other previously unsettled issues that were resolved by the tribunals include the U.N.'s authority to create a tribunal under Chapter VII when the conflict is not international, whether crimes against humanity may be based on persecution, whether state involvement is necessary for crimes against humanity and whether common Article 3 is part of customary international law. Apparently unaware of the requirement that only clear international law be applied, many rights advocates have praised the ICTY for developing and advancing international humanitarian law without attempting to address the issues of retroactivity and the consistency of these practices with the ICTY statute or
the requirements of a thin rule of law.
Similar
issues arise with respect to other international tribunals as well as
domestic courts that base their decisions on CIL or treaties interpreted in a purposive and evolutionary fashion. To be sure, all law, whether international or domestic, evolves, and international as well as domestic courts may adopt a purposive approach. Nor is every retroactive application of law illegal or morally
blameworthy. However, the ICTY was expressly required to apply only clear international law. More generally, international law differs in that CIL is supposed to be based on clear and consistent general state practices and also differs in the potential for abuse when non-elected international bodies or domestic courts with a political "axe to grind" are charged with making the decisions in often highly politicized contexts. The elements of a thin rule of law are, to a large extent, tied to notions of procedural rather than substantive justice. However, the ICTY and ICTR developed many
of
their procedural rules "on the fly."The tribunals were given greater leeway to invent procedural rules as needed.

the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of witnesses and other appropriate matters." While providing a sounder legal basis for rulemaking by the Tribunal, the provision nevertheless fails to satisfy the basic rule of law requirement that rules should be prospective. Critics of the provision have objected that the Tribunal is both making the rules and applying them, and then, where necessary, amending them, violating principles of separation of powers, undermining predictability and certainty and creating the possibility of partiality and arbitrariness. A number of procedural justice issues arose along the way that highlighted the thin rule of law value of a fair trial. The lengthy detention before trial led to concerns about arbitrary detention and violations of the right to a speedy trial. Some defendants were in custody for
months before they obtained access to a
lawyer. Defendants have also been unable to secure the attendance of defense witnesses. In some cases, the witnesses may be reluctant to testify out of safety concerns. In other cases, potentially key witnesses, such as former government leaders, may be prevented from giving testimony based on national security exemptions. To be sure, international tribunals operate under difficult conditions and raise many complicated issues of law that take time to research. Trials are often located far from the place where the conflict occurred and witnesses reside.
The international tribunals
need to rely on the cooperation of sometimes hostile states to provide witnesses and are hard-pressed to provide effective witness protection programs to prevent retaliation against witnesses. Moreover, both the ICTY and ICTR were underfunded and lacked the resources to pursue all of the cases in an expeditious way. Nevertheless, the utility of the international tribunals as a model for 67
demonstrating the value of rule of law to countries around the world is surely diminished when they fall far short of rule of law standards required of domestic legal systems.
While these sorts of procedural issues raise questions about the fairness of the proceedings, they pale in comparison to the more fundamental criticism that the proceedings are simply victor's justice. Although the ICTY and ICTR are not as obviously the political tool of the states that created them, as was the case in Nuremberg and for the Tokyo trials, the reality is that the tribunals are still supported by, and thus accountable to, the states that must approve their establishment and cooperate with them if they are to be successful. Critics initially questioned to what extent Western powers were committed to tribunals given the lack of adequate funding, claiming that tribunals were just a way of placating the pangs of conscience among citizens in
Western states. Once established, however, the prosecutors were under pressure to indict quickly, which led to the indictment of several "small fries" when prosecutors at the ICTY could not get their hands on the "big fish." Prosecutors were also under pressure to avoid the perception of bias and victor's justice by indicting parties from both sides of the conflict. As a result, some Muslims were arrested after critics complained about the failure to indict any Muslims in the first fifty indictments. On the other hand, Bosnian Croats argue that they are over-represented as perpetrators and under-represented as victims, while Serbs almost universally see the Tribunal as anti-Serbian. In Rwanda, many Hutus, who continue to protest their innocence, claim that too few Tutsis have been convicted; in Sierra Leone, the Revolutionary United Front (
RUF) complains, with considerable merit, that it is being unfairly
singled out even though the Kamajors, Civil Defense Forces and the Nigerian peacekeeping forces all committed war crimes. Although the judges may have no stake in the outcome of the ethnic conflicts per se, many of the judges who heard the cases had a long commitment to the development of international law and the advancement of human rights and saw it as their responsibility to decide cases consistent with the promotion of human rights and dignity. They were also likely
to be influenced by the general sense of outrage created by media reports that tended to simplify the events and dehumanize one side. Few judges are likely to have spent much time under the
wartime conditions under which military commanders must operate. Looked at from afar, war is ugly and morally reprehensible. It is hard to fathom many of the actions that occur in war or how seemingly decent people could carry out such acts. Furthermore, surely all judges were aware that a steady string of acquittals on narrow technical grounds would have undermined support among the general public and the states responsible for funding the tribunals. It is even less conceivable that the judges would have found
that

the ICTY was improperly established, notwithstanding legitimate concerns about the authority of the U.N. to establish such a tribunal. Most damaging to the credibility and legitimacy of the ICTY, and supportive of the claims of victor's justice and political bias, is the failure to prosecute NATO for alleged violations of the laws of war. Carla del Ponte, prosecutor for the ICTY, ultimately decided not to pursue claims relating to the justifiability of the bombing campaign as a whole or specific incidents or even to conduct an in-depth investigation, reasoning that "either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly
heinous offences." In contrast, Amnesty International issued a detailed report that concluded that NATO was guilty of war crimes. In one instance, a NATO pilot dropped not one but two bombs on a passenger train crossing a bridge, killing ten people and injuring fifteen more. Even assuming the pilot,
focusing on the target, did not see the train approaching until too late and that the smoke prevented the pilot from noticing that the train had continued forward into the second target zone, it would seem that
the
pilot acted recklessly in not verifying that the second target zone was clear before firing. After all, there was no immediate need to take out the bridge. Unless the pilot and NATO commanders were justified in believing that destroying the bridge at that particular moment was of such military importance as to justify the number of civilian casualties likely to be caused by continuing the attack, the attack should have been called off in accordance with the Geneva Convention. Moreover, obtaining evidence would not have been an insurmountable problem, as suggested by del Ponte, because there was a cockpit video, which NATO subsequently admitted speeding up almost five times in an apparent attempt to explain away the incident as an unfortunate accident resulting from the need to make a quick decision under adverse conditions. The ICTY's decision not to prosecute or even investigate numerous alleged crimes led to characterizations of the Tribunal as a hoax and a propaganda arm for NATO and to dismissals of the report as an amateur whitewash and a fraud. While the ICC will be an improvement over the ICTY and ICTR in many ways, it will still be subject to many of the same concerns and limitations. The crime of aggression remains undefined. Many of the crimes remain vague, which is one of the reasons why the United States has opposed the ICC. Although the court, like the ICTY, is required to apply only laws in place at the time of the crime, the court may apply statutory law, rules of 68 law and jurisprudential principles from previous cases, customary international law and general principles of law. Thus, what appear on their face to be relatively unobjectionable provisions are likely to be expanded over time in a controversial and retroactive manner, as in Erdemovic.
In addition, the decision-making processes, and the operation of the court more generally, are likely to remain highly politicized. The complementarity principle allows domestic systems the first opportunity to try alleged criminals, although the ICC will be able to try cases if the domestic trials are deemed a sham.The ICC may not hesitate to declare the trials of military officers in the military or even civilian courts in authoritarian regimes a sham. However, it remains to be seen whether the ICC will someday declare the trials of American or English soldiers in American or English military courts a sham or prosecute senior officials from Western countries under the same broad theories of command responsibility, or aiding and abetting applied to dictators, should the domestic system fail to prosecute.
With
relatively weak powers of enforcement, the ICC will also be dependent on the cooperation of other countries for extradition of defendants, assistance with collection of evidence and access to witnesses. The United States has already attempted to undermine the court by refusing to cooperate with the court and threatening other states that do cooperate with the court in prosecuting Americans. In 2002, President Bush signed the American Servicemembers' Protection Act, which prohibits
American
state or federal agencies from cooperating with the ICC, prohibits military assistance to most countries that ratify the ICC, restricts transfer of law enforcement and military information to states that become parties to the ICC, bars American participation in U.N. peacekeeping missions unless American soldiers are given immunity and authorizes the President to use "all means necessary and appropriate" to free American citizens held by or on behalf of the ICC. The Act conjures up absurd images of
American soldiers
parachuting into The Hague to free comrades accused of war crimes. The United States has also required other countries to sign bilateral agreements that they will not extradite any United States citizen sought for war crimes or crimes against humanity by
the
ICC, at pains of losing trade benefits, economic aid or military assistance. Whether the court will be able to function and acquire legitimacy without
American

support remains to be seen.
In sum, the laws of war present numerous problems from a rule of law perspective. The laws are vague and easily manipulated to serve political ends. They may even legitimate the use of force by providing superpowers the legal fig leaf needed to cover their acts of naked aggression. The selective establishment of war tribunals and
the
singling out of the leaders of a few countries call into question the generality of the regime and highlight one of the central pretenses of international law: the equality of all states, large or small. The rapid development of laws of war resulting from the alleged need to revise rules regarding preemptive strikes in the face of new threats and terrorism,
the
expansion of customary international law and its implications for interpretation of the Geneva Conventions have diminished, for better or worse, stability in this area of law and have increased the likelihood of retroactive application of the newly generated laws. While future development of this body of law may address some of the issues related to vagueness, stability and retroactivity, political factors are likely to continue to undermine the key rule of law principle of impartial application and implementation, particularly if the principles of universal jurisdiction become more widely accepted. Although the establishment of the ICC may obviate the need for universal jurisdiction to some extent, the effectiveness of the ICC is likely to be undermined without American support. In any event, the ICC is unlikely to challenge strong states on which it must rely for financial support and enforcement. The failure to indict officials from the strong states, while relying on an increasingly moralistic body of law to impose punishments on a steady parade of officials from failed states or states defeated militarily by the
United States
and NATO, will undermine
significantly the legitimacy of the ICC and tarnish its claims to the mantle of rule of law. Nor is it likely that a more developed body of law or even more rigorous and impartial implementation by the ICC, other international bodies or domestic courts will present much of a deterrent to initiating war or to the commission of atrocities in the waging of war. The Nuremberg and Tokyo trials, the ICTY and ICTR, and the establishment of the ICC have not resulted in any noticeable decrease in acts of aggression or wartime atrocities.
Rule of law requires that the gap between law on the books and actual practice be reasonably narrow. The gap between actual practice and human rights law in general, and laws of war in particular, is remarkably wide and is likely to remain so. Similar failings in domestic system - including weak institutions and enforcement powers, vague and changing laws applied retroactively, heavily politicized decisionmaking, external influence on the decisionmakers including the threat to withhold resources and refuse cooperation in an attempt to undermine the independence of the court and tribunal and a widespread sense among those subject to the system that the system is biased and illegitimate - would result in screaming howls of protest from the international rights community and assertions that the system does not even merit the label of a "legal system" much less the honorific title of "rule of law." 69
The point is not that rule of law principles must be abandoned completely given the failure to live up to them in this area of law. If anything, they should, in general, be taken more seriously. However, we must also face up to the difficulties of implementing rule of law in this area and not hold out unrealistic expectations. We must acknowledge that failures in this area
are not merely accidental but reflect the interest of powerful actors in the international order, and we must acknowledge, as in other areas of law, that contested views about the merits of many substantive and procedural issues will limit the utility of appeals to rule of law as a means of limiting aggression and abuse of force during times of war. Indeed, these observations and cautions apply as well to each of the next three sections on transitional justice, terrorism and American exceptionalism. VI.
Rule of Law, Transitional Justice, Nation-Building and the Establishment of Rights-Respecting Regimes: The Limits Of Law, Political Will And Knowledge Rule of law is central to efforts to hold former leaders accountable and
to
establish a rights-respecting regime. However, transitional justice and nation-building create special challenges from a rule of law perspective. As we have seen in Somalia, Bosnia, East Timor, Liberia, Afghanistan, Iraq, the former Soviet Republics and now Haiti (again), regime change is the relatively easy part. The difficult task is the post-regime construction of a new state capable of good governance, implementing rule of law and democracy and respecting human rights.
A. Competing Thick Conceptions of Rule of Law and Reconstruction Efforts: A Margin of Appreciation and the Limits of Tolerance

The success in rebuilding Germany and Japan after World War II may have produced a false sense of confidence in our ability to create liberal democracies. Germany and Japan were militarily defeated states with homogenous populations and a public that broadly supported the imposed political reform goals of constitutionalism, democracy and rule of law. In contrast to Germany and Japan, many states today are weak or failed states, often torn by ethnic conflict. In some cases, as in Somalia and Iraq, significant segments of the population remain armed and loyal to militia groups headed by local warlords, often organized along ethnic lines. Neighbouring countries may also have a stake in the outcome and continue to support militia groups competing for power. In addition, many of the states today are beginning from a much lower level of economic and institutional development. They lack the educational and technological bases of Germany and Japan. Nor is there a broad social consensus on the goals of constitutionalism, democracy and human rights, much less on more specific issues such as the proper form of power sharing or the rights of women, laborers or criminals. Nevertheless, the international community all too often seeks to impose with missionary zeal an overly specific liberal democratic thick conception of rule of law that emphasizes - in addition to the basic requirements of a thin rule of law - general elections, neo liberal economic policies and a liberal interpretation across a range of specific human rights issues.

Criminal law, for instance, is often an area where the international human rights community's liberal positions are at odds with local values and norms for punishment.

By insisting too strenuously on a particular conception of criminal justice, the international rights community may undermine efforts to establish rule of law and a legal system that enjoys the support of the populace.

The experiences of former Soviet republics offer a cautionary tale.

Because the criminal law system was often a tool of repression for the previous authoritarian regime, criminal law reform was high on the rule of law agenda of the international community.

Accordingly, one of the first orders of business was to rewrite the criminal law in a way that incorporated the most liberal, forward-leaning ideas of the human rights community,

including prohibitions on capital punishment,

short detention periods, early entrance by and a large role for lawyers, exclusion of tainted evidence,

shorter prison terms, greater reliance on non-custodial sanctions

and so on. Although citizens in the former Soviet republics generally appreciated the need to reform the former repressive system, they were fearful of the rise in crime that typically follows in the wake of regime change and more generally accompanies modernization. Time and again the general public grew weary of the liberal criminal laws and demanded law and order from the government. Government officials usually responded with a war on crime and a retreat from the liberal laws in favor of increasingly harsher laws that shifted the balance away from the rights of the accused toward the interests of society in maintaining order. In Hungary, for instance, where polls showed two-thirds of Hungarians were willing to sacrifice personal freedoms for greater public safety, laws were passed to restrict civil liberties to those who obeyed the law, to crack down on white collar crime, to toughen the penalties for recidivists and to allow more discretion to judges in sentencing, which resulted in heavier punishments. Bulgaria, where more than one-quarter of the population was willing to sacrifice democracy in favor of a strong leader who promised to fight corruption, adopted similar measures and, in addition, reinstated capital punishment and abolished pretrial discovery for criminal suspects where 70

their guilt was clear. When government leaders refused to placate the public, they often were voted out of office and replaced by others such as Vladimir Putin, who had fewer qualms about

cracking down on criminals. Legal reforms, even many seemingly technical reforms aimed at implementing a thin rule of law, are inherently political. They involve contested and controversial normative issues about the proper distribution of resources and the proper balance between efficiency and justice, social stability and individual rights and substantive justice and procedural justice. The majority of citizens in different societies may come to different conclusions on such issues. Individual reforms will involve both costs and benefits. The task of balancing the costs and benefits of reforms is best left to the domestic political process. Foreign pressure to accept contested reforms circumvents the domestic political process, and undermines the legitimacy of the law

among important local constituencies. As a result, implementation suffers, and

the gap between law on the books and actual practice

widens.

Although participants in the new law and development movement claim that they have learned their lessons from earlier law and development movements and now appreciate the need to be more sensitive to context and to empower locals rather than providing top-down, one-size-fits-all solutions, all too often international actors engaged in rule of law rescue efforts lack the local knowledge to tailor solutions to local circumstances or simply are normatively committed to a competing agenda.

To be successful, the international community must be more tolerant of diversity, particularly on the types of contested issues that divide the human rights community more generally.
To be sure, the proper scope of tolerance of diversity and the limits of a margin of appreciation will no doubt be contested both internationally and locally. In some cases, the international rights community may prefer to attempt to impose liberal norms and practices even if that reduces the legitimacy of, and support for, reform efforts among a significant and perhaps powerful local constituency. At a
minimum, there is a need to recognize that forcing through controversial
provisions on criminal rights or the rights of women or laborers
in the face of local opposition has serious costs and to consider alternative means to the same ends that may be more acceptable to the local population.
B. Thin Rule of Law as the Basis for Reform in Failing and Developing States
In light of the difficulties in obtaining consensus on a thick conception of rule of law, some international agencies have focused more on the institutional changes required to implement a thin rule of law. Critics complain that the narrow focus on institution building and
the technical aspects of a
thin rule of law ignores the normatively important issues of democracy and rights.
Accordingly, the trend among international agencies has been
to adopt a more holistic approach to reform that emphasizes the full set of operating principles of a Western liberal democracy, including transparency, a free press, channels for participation and interest-group representation.
However, the focus on a narrow thin rule of law agenda
is often an advantage. While in failed states international actors may have a freer hand in imposing democracy and a liberal rights agenda, in nonliberal but thriving developing states such as China or Vietnam government leaders may resist the broader liberal democratic rule of law agenda.
By couching their proposals in terms of technical assistance, international actors may be allowed to participate in legal reforms.
Moreover, apart from
assuming support for controversial liberal values and institutions, the holistic approach overlooks the limited capacity of governments in failed states. By attempting to change too much at once, this approach runs the risk of undermining the long term possibilities for reform. As noted, rule of law does not necessarily coincide with democracy, much less liberal democracy. A more incremental, context-specific approach that accomodates nondemocratic forms of government, non-transparent corporatist arrangements between government and businesses, a different role for civil society and the press than in liberal
societies or differences with respect to criminal justice, the rights of women, gender issues and so on may be preferable in some instances.
Human rights organizations often accuse international agencies and actors that cooperate with authoritarian states of contributing to a stronger regime better able to withstand demands for political reforms. It is true

However,
a democratic government is no guarantee that useful reforms will be implemented. The public good nature of legal reforms is often a barrier to reforms in
democracies. Even though reforms would be welfare enhancing overall, the benefits may be widely dispersed, leading to collective action problems. Individual beneficiaries of reforms may not have the incentive to become politically active, while those with a vested interest in maintaining the status quo will be motivated to lobby to block proposed reforms or to undermine reforms at the implementation stage. In democratic Latin America and Africa, reform efforts have largely been 71

undermined by patronage systems in which state leaders divert state assets into the hands of a few, and elites block reform efforts aimed at benefiting the majority of citizens. Conversely, authoritarian regimes may in some cases be better positioned to push through controversial reforms. In East Asian states including Singapore, South Korea, Taiwan and China, government leaders have largely carried out reforms, including efforts to strengthen institutions and investment in education and human resources, which have benefited the broad populace. Of course, much will depend on the nature of the authoritarian regime. In any event,
the choice facing reformers is not authoritarianism or democracy but authoritarianism with rule of law or without it. Authoritarianism is not the result of legal reforms to implement rule of law. On the contrary, the ruling regime would be even more authoritarian in the absence of legal reforms.

100%	MATCHING BLOCK 119/130	W

Where legal rules are applied with principled consistency to both the state and its citizens, as required by

a thin

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rule of law, they generally restrain rather than expand the arbitrary exercise of state power.

C. Challenges to the Establishment of Thin Rule of Law Even setting aside substantive differences in normative views and other contingent circumstances
that lead to different thick conceptions of rule of law, creating the institutions necessary to ensure a thin rule of law in failed, transitional or politically stable but economically developing states
is no easy task. In the wake of regime change
in failed and transitional states in particular,
the legal system is often weak or non-existent.

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To gain some feel for the enormity of the challenge, there were no East Timorese lawyers with experience as judges or prosecutors because none had been appointed to such positions under Indonesian rule. The exodus of prison guards and the burning of prisons forced the U.N.'s International Force for East Timor to rely on U.N. civil police officers to run overcrowded, makeshift detention centers and to release individuals accused of serious crimes to make room for those charged with grave violations of humanitarian law.

Similar institutional problems exist in Kosovo, Rwanda and Sierra Leone. Building prisons; training police, prosecutors, lawyers and judges; creating an administrative law system and a functional legislature; raising legal consciousness; and expanding access to justice
through the creation of legal aid centers cannot be accomplished overnight. Nor can the international community afford to focus on judicial reforms while refusing to get involved in the "dirty work" of working with police and prison guards. The diversity of experiences in nation-building in recent years demonstrates that there is no single approach to reconstruction or any recipe capable of guaranteeing success. However, nation-building
in failed states, at a
minimum, requires time, money, manpower and local knowledge. A Rand study found that "while staying long does not guarantee success, leaving early ensures failure." The report pointed out that no effort at "forced democratization" has succeeded in less than five years, although it also noted that democratization without ongoing long-term support from Western powers is not likely to succeed. Unfortunately, the U.N., the international rights community, and state powers generally, lack the political will, resources, know-how and local knowledge to succeed in reconstructing failed states and creating functional legal systems capable of implementing rule of law. American altruism reached its limits in Somalia when American soldiers were killed, well before the heavy lifting started. Nor was the United States willing to risk American lives by engaging in a ground attack in Kosovo, preferring the safety of high altitude aerial raids. The U.N. has withdrawn
peacekeeping forces and other personnel when some peacekeepers have been killed or U.N. offices attacked in Somalia, Rwanda, East Timor and Iraq. Americans and the international community now appear to lack the political will to stay the course in Iraq, especially since many saw the war as an illegal act of aggression in the first place. American

citizens were balking at the huge price tag for the rebuilding of Iraq even before congressional reports criticized the Bush administration for overstating the threat of weapons of mass destruction in the rush to war. Appalled by the deaths of American soldiers and the beheading of civilians, the majority of American citizens now feel the war was a mistake. Outside the United Stated,
opposition to the war in Iraq has already led to the downfall of the government in Spain and the withdrawal of troops by Spain, the Philippines, and others despite intensive
efforts by the United States
to hold the line. Reconstruction efforts are also failing or encountering difficulties in other countries because of lack of funds and political will. With the economy sputtering, the opium trade growing and security breaking down outside Kabul as warlords contended for power and U.S. and Pakistani forces battled the Taliban and other insurgents, Afghan President Hamid Karzai was forced to make the rounds of foreign capital appealing for additional funding and support in June 2004. Having fallen off the international radar screen as new crises have arisen in Liberia, Sudan and elsewhere, the former Yugoslavian republics, Haiti, Somalia, East Timor and Sierra Leone continue to struggle to maintain law and order, overcome ethnic conflicts and stimulate economic growth while at the same time creating the institutional infrastructure for rule of law, democracy and human rights. 72
Emblematic of the difficulty
of
maintaining international support for post-regime change reconstruction efforts, the prosecution of war crimes in the FYR, Rwanda and elsewhere is being undermined by the failure of states to make good on their financial promises. The ICTR and ICTY are in financial trouble because member states have failed to pay their dues, with
the
ICTR having only received one quarter of its budget for 2004 and 2005. The President of the ICTY has warned that the Tribunal's ability to complete the remaining cases by the 2010 deadline is being hindered by the failure of member states to pay up as well as the failure to extradite some
of those indicted. The lack of funding has resulted in a recruitment freeze and staffing shortages. The Sierra Leone court was supposed to be funded through voluntary donations from states and nongovernmental organizations rather than by the U.N. However, when the contributions failed to materialize, the budget had to be slashed from $30 million for the first year and $84 million for the next two years
to $16.8 million
for the first year and $57 million for the next three years. As a result, the court was forced to reduce the number of staff, establish only one trial chamber instead of two and prosecute just 20 defendants. The Sierra Leone Truth and Reconciliation Commission, meant to complement the special court, was postponed because only $1.2 million of an expected $10 million budget was pledged. Even assuming adequate resources, steadfast political will and a willing local populace, the lack of know-how and local knowledge often undermines efforts to rebuild states and implement rule of law.

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The U.N. was ill prepared to assume responsibilities for running

Kosovo and East Timor. In his article How Not to Run a Country: Lessons from Kosovo and East Timor, de Mello described the U.N. approach as benevolent despotism. In some cases, the errors may be avoidable. For instance, the U.N. administrators decided to retain Serbian laws to avoid a legal vacuum. The decision, taken without adequate consultation with local authorities or public debate, angered the populace, who saw Serbian law as a symbol of their repression. In other cases, the problems may be virtually insurmountable. International agencies often lack the necessary linguistic skills to effectively train police, lawyers and judges, much less adequate knowledge of local laws and the legal culture to provide effective training. Even if they have the necessary local knowledge and legal skills, there may not be time to devise a coherent reform plan tailored to local circumstances. The highly bureaucratic U.N. machinery takes time to get up and running. Decision-making in the context of multilateral consortiums is equally slow and may be hindered by differences among donors. As a result, there is a tendency to pull a
standard menu of lowest common denominator reforms off the shelf and thus to impose one-size-fits-all solutions, with laws for developing countries modeled on those from developed countries

and lawyers and judges trained in much the same way as their counterparts are trained in countries with advanced legal systems. More fundamentally, the international community lacks the ability to overcome deeply seated ethnic animosity. Ethnic conflicts continue to exist in Rwanda, East Timor and Afghanistan. In Kosovo, which has received more than twenty-five times the funding and fifty times as many troops as Afghanistan, ethnic violence in March 2004 left 19 dead, almost 1,000 wounded and 4,100
displaced and resulted in the destruction of over 500 houses and 27 churches and monasteries. Serbian police officers refused to work with Albanian police officers accused of participating in or passively watching the ethnic violence. In Bosnia and Herzegovina, the constitution resulting from the Dayton Peace Agreement was intended to accommodate the interests of the main ethnic groups or "constituent peoples"– the Bosniaks, Croats and Serbs. The constitution created a federalist structure organized along ethnic lines with a weak centralized government and two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. Each of the three groups is represented equally in all of the major central organs and retains a veto over legislation that would be destructive of the legitimate vital interests of their ethnic group. The complicated constitutional balancing act has not prevented ethnic violence.
In Iraq, the U.S.-brokered constitution creates an uneasy balance among Shiites and Sunnis. Already Kurds have threatened to withdraw support for the interim regime over what they believe to be inadequate autonomy and protection of their interests.
How to balance protection of individual rights with claims of self-determination and minority or group rights is one of the general fault lines that divides the human rights regime. While there may be no perfect solutions, solutions imposed by international trustees are likely to lack legitimacy, alienate the local populace and diminish the good will and cooperation needed to succeed in the complicated task of nation-building.
D.
Rule of Law and Transitional Justice As order is being restored, the new regime will face transitional justice issues that add to the difficulties of nation-building and present challenges

95%	MATCHING BLOCK 125/130	W

for rule of law and the protection of human rights. The

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rule of law and the protection of human rights. The

literature on transitional justice is vast, and many of the normative, legal and practical issues are beyond the scope of this 73
Article.
However, I list in a rather brief and summary fashion
some of the concerns that arise about transitional justice from a rule of law perspective.
A first worry is that rule of law principles may not be applicable to moments of constitutional crisis. In the extreme, revolutions and coups may give rise to a new regime that simply replaces the previous constitution and legal regime with a new one, without any regard
for
the existing legal mechanisms for constitutional change. In other cases, the courts may be asked to decide on the constitutionality of revolutions, coups or changes to the constitution that are pushed through by an authoritarian leader without following proper procedures for amending the constitution. For instance, in the Philippines, the court had to decide on the legality of President Marcos' amendment
to
the constitution, which

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was ratified by a show of people's assemblies, a procedure not in conformity with the constitution at the time.

A few years later, the court again had to decide a similar issue

88% MATCHING BLOCK 127/130 W

when Cory Aquino became President and replaced the Marcos-era constitution with her Freedom Constitution, again without complying with the rules in place at the time.

A strict interpretation of the laws would most likely have resulted in

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a constitutional crisis. In the first case, Marcos may very well have replaced the judges, as happened in Malaysia in 1986 when the court dared to oppose Mahathir. In the Aquino case, the court would have incurred the wrath of the people, compromising its legitimacy and authority and undermining its efforts to emerge as a political force in the new regime. In both cases, what the court did do was simply bow to political reality

and find the constitutional amendments constitutional even though they clearly did not comply with the stipulated procedures for constitutional amendment.

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To be sure, that these acts, especially by Marcos, could be challenged in court suggests that rule of law is a powerful motivating ideal, one which even dictators cannot dismiss without tarnishing their legitimacy.

However, they also show the limits of law. Second,
ongoing civil war, terrorist attacks on government officials, and
the killing of police and suicide bombings prevent the government from functioning and render rule of law impossible. The first order of business is therefore to ensure security. However, the need to restore law and order frequently contributes to physical integrity violations and other human rights abuses as the government resorts to force and violence to quell dissent and ensure stability. During this period, states of emergency and derogation of some rights may be necessary. Courts may be prevented from reviewing declarations of states of emergency by law or may simply
be
too weak to challenge executive decisions. Even if they have the authority, they may not want to oppose decisions widely supported by the public worried about the breakdown in law and order and the rise of organized and violent crime that often accompanies regime change.
Third,
the requirements of transitional justice and a thin rule of law are often at odds. Holding former leaders accountable may require setting aside laws that legitimated their actions
and
ignoring amnesty agreements entered into as a condition for relinquishing power. To secure a ceasefire in the brutal civil war in Sierra Leone, the 1999 Lome Agreement called for power sharing between the Revolutionary United Front and the Kababah government and provided an immediate and absolute pardon to RUF leader Foday Sankoh, who had been captured and sentenced to death for his role in the civil war. The agreement also granted complete amnesty to all combatants up to
the time of the signing of the agreement. The United States, the United Kingdom
and the other states supported the agreement. In response to criticisms by human rights organizations that the agreement sheltered war criminals, the U.N. representative who signed it accused human rights groups of being sanctimonious for not acknowledging that without the agreement the war would have continued, resulting in more

civilian deaths. By the time the Sierra Leone special court was established several years later, the political winds had shifted in favor of a policy of "no impunity." As a result, the agreement between the government and Sierra Leone to establish the special court prevents anyone from relying on the "absolute and free pardon" of the 1999 Lome Peace Agreement with respect to such crimes. Domestic courts in Argentina, Chile, El Salvador and Honduras have also restricted the scope of amnesties by holding them inapplicable to serious human rights violations and by requiring a case-by-case determination of their validity.In some cases, government leaders may grant themselves amnesties. In other cases, some form of amnesty will be a condition for ceasefire or for stepping down and clearing the way for a transition to democracy. For the international community to simply disregard amnesties, particularly of the second type, is difficult to square with thin rule of law principles. Of course setting aside amnesties in some circumstances may be justified regardless of the cost to rule of law. Those who advocate prohibiting or ignoring amnesties sometimes claim that authoritarian leaders would have relinquished power anyway or
would have
been forced from power: "leaders leave kicking and screaming because their time was up." However, it is striking that virtually every transition in
the
last several decades has involved some form of amnesty. Moreover, should the practice of setting aside amnesties become widespread, authoritarian leaders will take note and adjust accordingly, clinging to power rather than putting their faith in some non-enforceable guarantee that they will not be prosecuted and end up in prison for the rest of their
74
lives or perhaps executed. Nor will they risk travel to other countries where they might be extradited, although, as the example of Milosevic demonstrates, no place may be safe if superpowers are committed and use their economic leverage to buy extradition. Most problematically, overriding an amnesty negotiated to secure the departure of an authoritarian leader and
to
facilitate transition to a more democratic order deprives citizens of the state in question of the right to determine their own future. The
international community claims for itself the right to override domestic agreements and to impose the costs for the decision on the citizens of that state, including perhaps plunging the nation back into a state of brutish civil war characterized by unspeakable violence and massive human rights violations. Fourth, the insistence on no impunity raises questions about the purpose or purposes of punishment for which appeal to rule of law provides little guidance. Advocates of punishment for anyone who commits war crimes or crimes against humanity often appeal to a variety of rationales, including retribution, deterrence, vengeance, facilitation of truth-finding and reconciliation and an educative function in clarifying the norms for society and distinguishing the new regime from the previous regime. Critics have taken issue with each of these justifications. In particular, the notion that criminal punishment will serve as much of a deterrent in such cases is not credible given the nature of the crime, the psychology of mass violence and the low likelihood of ever being punished. Indeed, the best way to ensure that one is not prosecuted for war crimes is to make sure that one wins the war, as victors continue to be
judged less harshly or generally to remain beyond the reach of law. But that may only exacerbate the tendency to do what it takes to win the war, leading to more human rights abuses. Fifth, issues of fairness and selective application of the laws arise when only a few individuals, often not high level government officials or the worst offenders, are prosecuted even though large numbers of people are involved in genocide, ethnic violence or the perpetuation of authoritarian regimes. Whatever the substantive merits of a policy of "no impunity," the reality is that relatively few people are ever prosecuted either in domestic or international courts for their participation in mass societal violence, war crimes or abuses under authoritarian regimes. Sixth, the choice of forum raises important procedural and substantive justice issues. Apart from already discussed concerns about victor's justice and a variety of thin rule of law shortcomings, trials in far away international courts decrease the legitimacy of the process in the eyes of many local citizens, fail to provide the requisite sense of vengeance and justice and undermine the authority of the domestic legal system. Rwandans objected to the ICTR because they wanted capital punishment and resented their oppressors being sent to prisons that by local standards are relatively "cushy." On the other hand, trials in domestic courts frequently fall even shorter of minimal rule of law requirements. Shortcomings include lack of access to habeas review of the detention decision, long pretrial detentions, lack of qualified interpreters, lack of adequate time to prepare defense and in many cases lack of qualified public defenders, lack of access to prosecution evidence, inability to secure attendance of witnesses and allow for cross-examination, serious
doubts about the partiality of defense counsel, prosecutors and judges, trials in absentia, and poor prison conditions. War crimes prosecutions in the first fourteen months of
United Nations Mission in Kosovo (

UNMIK) administration in local Kosovo courts involved several instances of overcharging, including for genocide. An Organization of Security and Co-operation in Europe (
OSCE) report concluded that the genocide charges were "in light of the trial evidence, inflated, not grounded by serious legal consideration and solid analysis." Other problems included vague and overly broad pleadings; the failure to secure Serbian defense witnesses, in part due to safety concerns in transporting Serbs to Kosovo courts; problems with the credibility of witnesses many of whom were the victims of crimes or may have been influenced by media reports; the absence of appropriate findings on the nature of the defendant's criminal liability, particularly in relation to joint criminal activity and command responsibility charges; the failure to distinguish factual from legal issues; the failure to cite legal authority for holdings; and incorrect findings on lesser included offenses. The March 2004 ethnic riots put further pressure on an already weak and overloaded legal system, exacerbating concerns about access to the courts by minorities, bias on the part of Kosovar Albanian judges against Serbs, judicial
independence and political pressure on the courts, lengthy and inappropriate pretrial detention and prison overcrowding.
In Rwanda, after the regime change there were only five judges and fifty lawyers, few of whom had any criminal law experience. With the domestic courts disposing of cases at a rate of only 300 a year and a pool of over 127,000 cases as of January 1998, it would have taken over 400 years to work through the backlog. The government attempted to introduce a plea-bargaining system but the system did not work as planned, in part because leaders of the genocide threatened anyone who would confess and implicate others, and everyone was housed in the same jails. In the end, many persons were tried in Gacaca "courts" originally meant to handle minor civil disputes among members of the local community. The courts were given jurisdiction over 75
intentional and unintentional homicides, assaults and property crimes. Trials before these courts fell far short of international standards of due process. Judges were local leaders with only a few months of legal training, and defendants did not even have the benefit of legal counsel. Even when trials are held, there is often at best a slim possibility of obtaining a just verdict. In Kosovo, local courts with a majority of local judges reached a guilty verdict in eight of nine war crimes cases, dropping the prosecution in just one case. In contrast, panels with a majority of international judges acquitted in seven cases, found two defendants guilty and two more guilty but on lesser charges.The Supreme Court, with a majority of international judges, reversed eight out of eleven verdicts. Problems with bias in Croatian, Serbian and Montenegrin courts are so severe that the ICTY refuses to transfer cases involving even mid- to lower-level defendants to them for fear that they could not obtain a trial that meets the basic requirements of fairness and rule of law. With trials in domestic courts raising the specter of kangaroo justice, and prosecutions in far off criminal tribunals suffering from legitimacy and other concerns, a middle path has been to use hybrid or mixed courts in which international judges sit with domestic judges in local courts. Hybrid courts have their advantages but do not resolve all rule of law concerns.Mixed panels may encounter problems resulting from a clash of legal cultures or systems given the different background of the judges. The lack of adequate translators may also compromise justice. More fundamentally, the legitimacy of such courts depends in large part on whether foreign or domestic judges make up the majority on the panels. To avoid bias, the U.N. created the Kosovo War and Ethnic Crimes Court with both locals and international judges, only to scrap the court
shortly thereafter and rely on international judges in district courts. Simply providing for international judges to sit on district courts did not solve the problems however as there were not enough international judges for all courts, thus leaving some courts with all Kosovar Albanian judges. Moreover, each panel consisted of two professional judges and three lay judges, with each judge having a single vote.
As a result, the
presence of one international judge was not enough to ensure impartiality. Faced with different results in similar cases, UNMIK passed regulations providing defendants the right to petition for international prosecutors and a majority of international judges. While the international community is likely to feel more assured when the cases are heard by a majority of foreign judges, local citizens may feel just
the
opposite. Whether the high cost of international and mixed panels is justified has also been questioned given the shortage of resources available for the creation of the domestic legal system and the establishment of basic social services in failed states. The ICTR budget for 2004 and 2005 alone was $212 million. As of July 2004, the ICTR had completed just twenty-two prosecutions. The ICTY has enjoyed a larger budget but has still managed to complete just seventeen trials involving thirty-five defendants, with seventeen more defendants pleading guilty. Part of the
budget
goes to salaries for foreigners that are astronomically high by local standards, adding to the tension between the international rule of law relief workers and the local populace.
Such shortcomings suggest that in some circumstances a legal approach centered on individual prosecutions may not be the best approach and that greater or

at
least equal emphasis should be placed on finding a political solution, social healing and reconciliation. The
recent emphasis on "rule of law" may lead to excessive reliance on individual trials in courts that preclude exploration of more overtly political or social mechanisms for dealing with mass crimes.
Finally, courts emerging out of an authoritarian past may be eager to secure legitimacy and authority within the new regime by

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taking an activist approach on a wide range of issues, including many social and economic issues for which judges do not necessarily possess the required expertise. The result may be overreaching, ideologically-driven decisions that have negative social, economic and political consequences. In Eastern Europe, courts decided cases based on neo-liberal economic dogma that did not always fit the times and conditions.In the Philippines, a recurring complaint is that the courts interfere too much in "economic decision- making" by second-guessing government

policymakers. In their effort to gain authority with the new polity, the courts may pander to the public, resulting in inconsistent and unprincipled decisions as the court seeks to keep up with rapidly changing public opinion. More generally, the expanding role of the courts in transitional states raises questions about the preferred form of constitutional review and whether relying too heavily on the
judiciary may hinder the development of political processes needed to consolidate and sustain democracy. Courts are increasingly being called on to decide controversial issues that plunge the judiciary into the middle of political disputes. In Russia, the judiciary faced the issue of Chechnya's claim to independence; in Egypt, courts have decided cases involving Sharia principles that determine the nature of public life; in South Africa, courts have decided on the legality of amnesty provisions and even the constitutionality of the constitution. Whatever the long-term impact on the development of democratic institutions, these decisions by the highest court are driven more by policy considerations than by law. They highlight the differences in social, 76
economic, political and normative beliefs that support competing thick conceptions of rule of law in a society. As a result, parties on all sides of the issue will invoke "rule of law" to support their preferred outcome and to criticize the courts if the court's decision does not comport with their preferences, leading to doubts about the meaning and value of rule of law. In sum, efforts by the U.N. and other development agencies to stimulate economic growth, establish democracy and implement rule of law have not been particularly successful in poor but stable countries. The likelihood of success in failed states or states with ongoing
ethnic conflicts, particularly in which some of the parties may remain heavily armed and continue to receive military and financial support from other countries, is even slimmer. Nevertheless, the international community cannot simply give in to despair and do nothing. We have learned some lessons from the old law and development movement
began in the 1960s and from recent efforts at nation-building. But we should not delude ourselves as to the difficulty of nation-building or the likelihood of success. We need to realize the limits of our political will, resources and knowledge and make sure that we do not make matters worse while trying to do good. The recent experience with a diverse range of transitional experiences demonstrates that there is no single solution and no perfect solution. Accordingly, we should be wary of the growing trend to press for univocal solutions by codifying hard and fast rules against amnesties or head of state liability, by empowering courts to set aside the judgments of truth and reconciliation commissions and by promoting a narrow liberal democratic version of rule of law. While singular solutions with courts as the final backdrop may seem to serve the rule of law values of predictability and certainty, the rules will give way to practical concerns, political considerations and the need to adopt a more pragmatic approach to facilitate a transfer of power and ultimately rule of law. Transitional states are characterized by uncertainty and unpredictability. The legal system must be sufficiently flexible to accommodate unexpected twists and turns on the road to rule of law. Tough choices between imperfect alternatives will have to be made, and deviations from both rule of law and current human rights standards will be necessary. An overly restrictive legal regime will only undermine respect for rule of law as the laws are set aside to further other important social goals or to accommodate reality, while an overly restrictive political agenda that insists on liberal democracy may thwart efforts to establish even a thin rule of law. VII. Rule of Law and Terrorism Terrorism, perhaps even more so than conventional war, remains largely outside the framework of rule of law. Just as it has proven impossible to define aggression, so has it proven impossible to come up with a generally accepted definition of terrorism, and for many of

the same reasons. The international community has repeatedly failed to reach agreement on a general definition of terrorism because of the inability to define legitimate struggles for power. Nelson Mandela was once identified by the State Department as a terrorist before he won the Nobel Prize and became the President of South Africa; fellow Nobel Prize winner Yasir Arafat
was a hero to some and a
terrorist to others. Although not all terrorists are freedom fighters or likely to win a Nobel Prize, there is some truth to the assertion that one person's freedom fighter is another
person's terrorist. As a result, while there are treaties that outlaw specific acts, there is no general anti-terrorism treaty. The lack of a general definition allows for a politicized use of the rhetoric and law of terrorism, partial compliance with U.N. resolutions aimed at countering terrorism and inconsistencies in practice - all of which are inimical to rule of law. Terrorism is also largely beyond rule of law in the practical sense that law is powerless to prevent terrorism. International and domestic laws may provide a basis for punishing terrorists, holding states that promote terrorism liable, or
may
make terrorism more difficult by hindering the flow of funds to support terrorists and authorizing wiretapping and intelligence gathering techniques. However, no law can deter suicide bombers. Addressing terrorism requires a broader approach than recourse to law or even military force. The starting point must be greater efforts at understanding terrorists. All too often people confuse attempts to explain why terrorists resort to violence against innocent civilians with justification or apology for terrorism.
Hyper nationalism under
the guise of patriotism hindered discussion of U.S. foreign policies and actions that might explain why the United States was attacked. To be sure, many people find it hard to believe that others may not share our values,
may
see modernity as a threat rather than a blessing or
may
take issue with attempts to impose liberal democracy and a liberal interpretation of human rights on them. It is much easier to dismiss suicide bombers as deluded religious fanatics. But dismissing suicide bombers as religious fanatics or irrational fails to appreciate that many Americans and Europeans were willing to embark on missions that would almost inevitably result in their death during WWII to fight for a cause they believed in: their way of life. Indeed, self- sacrifice in the name of the higher good has been celebrated throughout history. True, the methods and causes differ. But the willingness to give one's life in the name of something that one believes in is the same. 77
Demonizing groups as terrorists provides victims psychological comfort and captures the reprehensible nature of killing innocent civilians for political purposes. However, it does not address the justness of the overall cause, take into account that civilian lives are often lost on both sides of a conflict or help address the root causes of terrorism. Terrorism is largely a function of failed states, wide disparities in power and wealth, and fundamental ideological differences. When people are deprived of economic, political, legal and military channels to press their claims to a deeply held way of life, terrorism is regrettably likely to appeal to some as the only option, especially since it is sometimes effective. As John F. Kennedy said in 1961, "Those who make peaceful evolution impossible, make violent revolution inevitable." Today, Islamic fundamentalists believe, reasonably enough, that their way of life is being threatened by globalization and the forces of modernity and
by
an international legal, political and military order whose endorsement of secular liberal democracy is largely incompatible with their preferred way of life. It matters little whether the threat is in the form of carrots - foreign aid and assistance aimed at "consciousness-raising," the promotion of liberal democratic values and the building of institutions, including legal institutions, necessary to implement democracy and protect rights - or sticks, including censure, sanctions and regime-changing humanitarian intervention in extreme cases. The United States is held directly responsible because of particular policies in the Middle East and indirectly responsible as the symbol of an encroaching, otherwise faceless, modernity. Attacks on other states that have joined the
United States
in the war in Iraq and the beheading of citizens from such states demonstrate however that objection is not just to U.S. foreign policy but
to
the broader set of forces that are threatening the ability of the terrorists to pursue their chosen way of life.
A more holistic approach that addresses the root causes of terrorism is needed. Addressing economic imbalances may alleviate some of the appeal of terrorism. However, terrorism is not always only or primarily motivated by concerns about economic injustice. In the

case of Islamic fundamentalism, it is about a way of life that is radically at odds with the way of life envisioned under the current human rights regime. In the end, the international community must decide what the limits of tolerance are, what lifeforms fall outside the margin of appreciation and how imperialistic we will be in imposing a particular conception of the good on others who do not share that view. Dressing up these contested normative judgments in the garb of allegedly universal human rights or pointing out that terrorism violates humanitarian laws will do nothing to persuade terrorists committed to different norms and goals that the international legal regime is legitimate or to dissuade them from relying on terrorism in the face of asymmetrical military, economic and political power. On the other hand, the highly instrumental use of law as a tool to draw politically motivated and normatively contested distinctions as to who is and who is not a terrorist and the blatant manipulation of the legal system to serve the interests of powerful states further delegitimates international law in the eyes of the terrorists. The attacks on the United States have led to a series of actions and assertions that have challenged the international legal framework and rule of law both internationally and domestically. While terrorism had previously been treated as a crime, after 9/11 President Bush escalated the rhetoric by declaring a war on terrorism, with significant legal consequences for those detained. Similarly, while prior to 9/11 the dominant view was that terrorist acts by private organizations did not constitute an armed attack, there is now wide acceptance that armed
conflict need not be limited to states. President Bush's simplistic assertion that states are either with the United States or against the United States
followed by the attacks on Afghanistan and Iraq have also raised the issue of the proper standard for holding states liable for terrorists within their territory. Even if the Bush Administration's theory of "harboring" terrorists as a justification for an armed response is not accepted, there is likely to be some shift from the prior standard of effective control. While a lower standard still may not justify regime change and occupation, it might legitimate more targeted use of force within a country calculated to undermine a state's efforts to support terrorists or justify sanctions or
damage claims. U.N. Resolution 1368 called on all states to work together to bring justice to the perpetrators, organizers and sponsors of the terrorist attacks on the United States and affirmed the right of self-defense. Resolution 1373 imposed a number of binding obligations on states and prohibited active and passive support for terrorism. Accordingly, some commentators have argued that whereas prior to 9/11 terrorism generally was not considered a universal crime, these resolutions suggest "a sea change in opinio juris" on the issue, and demonstrate that a state's obligation to
try or extradite terrorists (the principle of aut dedere, aut judicare) is now part of customary international law. Even before 9/11, military responses such as the U.S. bombings of Libya in response to a bombing of a nightclub in Berlin and the missile attacks of Afghanistan and Sudan in 1998 in response to the bombings of U.S. embassies, while nominally justified on the basis of self-defense, smacked of retaliation, calling into question the ban on reprisals. After 9/11 the distinction between reprisals and self-defense has been all but obliterated for terrorists. The concept of self-defense has not only been stretched backward to legitimate 78
reprisals; it has also been pushed forward to permit countries to strike out at vague potential threats barely visible on the distant horizon, threats that just might but then again might not - materialize one day. The failure to discover weapons of mass destruction in Iraq may take some wind out of the sails of the doctrine of preemptive self-defense in the short term. At a minimum, it is likely to result in a higher standard of evidentiary proof to demonstrate that there is in fact a threat, a more transparent review process and a more public debate of the evidence, even allowing that security concerns will limit the amount of information made available to the broad public. Nevertheless, it is much too early to write off preemptive self-defense. Many level-headed commentators have
long argued that the previous standard requiring an imminent attack is no longer viable in this age of more powerful weapons, rogue states and terrorists. The rules regarding jus in bello also appear to be changing, although there seems to be considerably more opposition to changes in this area than regarding jus ad bellum. The rights of unlawful combatants, the use of military tribunals and the right of states to declare a state of
emergency and derogate from civil and political rights are all being contested. The passage of anti-terrorist laws such as the Patriot Act has also raised constitutional and domestic law issues regarding separation of powers, the rights of foreigners and the extent to which civil and political liberties can and should be restricted in the name of fighting terrorism. Other issues now in
play include collective punishment, torture, hostage taking, riot control with live ammunition and assassinations. Supporters argue that such changes facilitate the struggle against terrorism and peace among nations and that terrorism requires suspension of normal rules.When asked about long detentions of suspected terrorists without being charged or brought before
a

judge, U.S. Deputy Assistant Attorney General John Yoo responded, “Does it make sense to ever release them if you think they are going to continue to be dangerous even though you can’t convict them of a crime?”Vice President Cheney, sounding more like one of the dictators long criticized by the United States than one of the leaders of the “Free World,” stated: “These people are criminals illegally entering into the United States, killing our citizens. They do not deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process.” Detractors argue that many of the changes are detrimental to U.S. interests, rule of law and geopolitical stability. Treating terrorism as war could legitimate some attacks by non-state actors on the United States such as the 9/11 bombings of the Pentagon or the attack on the U.S.S. Cole. Broad rules against harboring and supporting terrorists will impede states, including the
United States,
from supporting groups such as the Contras and the Northern Alliance, which may
frustrate global democracy promotion and antiterrorism efforts. U.S. soldiers will be more vulnerable if the United States fails to provide Taliban or Iraqi soldiers POW status or allows “torture light.” The use of military tribunals will legitimate the use of such tribunals by other countries, prevent extradition of prisoners to the U.S. and create rifts in the united front against terrorism. The reliance on force will lead to excessive military responses and undermine non-military efforts to deal with terrorism. The broad rhetoric of war on terrorism will be used as an excuse by Russia, China and other countries to justify a harsh crackdown on separatist groups, and thus contribute to widespread human rights violations. Doctrines of preemptive self-defense and unilateral actions without Security Council will undermine the U.N. and result in “unrestrained use of violence by client regimes acting in the name of counterterrorism . . . . Once the frame of order is broken, we can reasonably anticipate increasingly norm-less violence, pitiless blows followed by monstrous retaliation in a descending spiral of hardly imaginable depths.” Conversely, upholding existing norms regarding due process and civil liberties, even during a time of crisis, will demonstrate commitment to rule of law, serve an educative function in isolating terrorists and distinguish their unjust means from our just and venerable methods, while promoting the development of laws and norms regarding terrorism.
The controversies over the various changes in the law and the actions taken to combat terrorism demonstrate the conceptual and practical limits of rule of law. Surely it is worrisome when both sides appeal to rule of law to justify their actions. To be sure, rule of law is not just an empty slogan whose invocation can rationalize any measure to combat terrorism. At
a
minimum, rule of law requires fair trials and that the rules be applied equally to all. The rules for trials in military tribunals fall far short of the minimal requirements necessary to ensure a fair trial and thus
short of
the minimal requirements of rule of law. However, appeal to rule of law will not resolve many, indeed most, of the issues regarding what the laws for dealing with terrorists should be. Nor will invoking the mantra of
rule
of law resolve debates about whether rule of law, including the right to fair trials, should be set aside in times of emergency. Significantly,
while both sides invoke rule of law rhetoric, at the end of the day most issues turn on other considerations such as: Which laws will best serve American interests? Will the proposed changes be effective in countering terrorism, or will they lead to more terrorism? Is there an absolute right not to be tortured or a deontic obligation on states not
to torture 79
regardless of the consequences? Should self-avowed terrorists who openly pledge to continue the righteous war against satanic Western powers be released for lack of evidence to convict for a crime? Whatever the outcome on these issues, the response to terrorism once again demonstrates the role of power politics in the international order and how international rule of law on matters of high politics remains a distant aspiration. There can be little doubt that the United States has manipulated both the rhetoric of war on terrorism and the rhetoric of rule of law to serve its own interests. At a minimum, the reaction to terrorism demonstrates the point made by critics of universalism and an increasingly juridified and rigid international legal system that rights are dependent on a variety of contingent circumstances. Less charitably, the rush to pass anti-terrorism legislation even in Western liberal democracies demonstrates once again the hypocrisy in the attempts to export democracy, rule of law and human rights while failing to live up to such standards at home. Terrorism existed long before 9/11, and yet Western powers including the United States were content to treat it as a crime rather than an occasion for a global war with no foreseeable endpoint. Prior to 9/11, the United States State Department and Western rights organizations regularly criticized countries for cracking down on terrorists, insurgents and others who threatened the social order, firmly opposed the use of military courts and ever so self-

righteously denounced derogation of civil and political rights and deviations from the rule of law. In 2000, then-Secretary of State Madeleine Albright preached perseverance in the face of terrorism, rising crime and a breakdown in social order in Uzbekistan:
The
United States will not support any and all measures taken in the name of fighting drugs and terrorism or restoring stability. One of the most dangerous temptations for a government facing violent threats is to respond in heavy -handed ways that violate the rights of innocent citizens. Terrorism is a criminal act and should be treated accordingly - and that means applying the rule of law fairly and consistently. We have found, through experience around the world, that the best way to defeat terrorist threats is to increase law enforcement capabilities while at the same time promoting democracy and human rights. These sage words of caution and moral exhortation were delivered just one year before the U.S. declared a war on terrorism, arrested up to 5,000 suspected terrorists, many of whom have ended up being detained incommunicado for years without access to a lawyer or even the chance to notify their families, and authorized the use of military tribunals where defendants without the right to a lawyer of their choice or even
the right
to know the charges against them would be tried in closed proceedings before military personnel with the normal rules of evidence suspended and no right of appeal whatsoever of a guilty verdict that could be based on a lower standard of proof than the usual "beyond reasonable doubt." In criticizing other countries for derogating from human rights in the face of terrorism and insurgent groups vowing to topple the government, Western governments prior to 9/11 often claimed that the life of the nation was not at stake. The restrictions were perceived as required to keep the ruling regime in power but not as constituting a threat to the state as such. Yet surely the threats faced by many countries are more serious than the threats currently faced by the United States. After all, it stretches credulity to suggest that isolated acts of terrorism, deplorable as they may be, could bring the United States, with the strongest military in history, to its knees - although the terrorists may succeed in causing a major change in the nature of the state if the government's repressive policies to combat terrorism erode the very liberties they are supposed to protect. In contrast, many states, weakened by ethnic strife, economic crisis and insurgent movements whose express purpose is to overthrow the government, do confront challenges that could result in the collapse of the state. Ironically, before 9/11, some Asian states that had been criticized by the United States for excessive reliance on draconian national security laws had amended or repealed the laws or limited their use, often as a result of a transition to democracy. However, the United States is now pressuring these same states to reinstate, or to apply more aggressively, national security laws, often dangling the bait of a bilateral trade agreement, despite protests by citizens in these countries that such laws will turn back the clock on democratization, empower the military and lead to violations of civil liberties.
Apparently, rights are a luxury. Stable, wealthy Euro-America can afford to preach to developing countries struggling with terrorists about the value of civil and political rights and the importance of rule of law. But when faced with threats, much cherished rights go out the
window. If there is anything universal, it would seem to be disregard for rights whenever there are real or perceived threats to stability and social order. VIII. American Exceptionalism and Rule of Law A final reason for the recent popularity of rule of law lies in its utility in challenging American exceptionalism, which threatens the universality of the human rights movement and the legitimacy of the international legal order based on the principle of the legal equality of all states. 80
The United States has not ratified CEDAW, ICSECR, or the Convention on the Rights of the Child. Indeed, the United States is the only state other than Somalia not to ratify the Convention on the Rights of the Child. When the United States ratified the ICCPR, it attached a reservation that would prevent it from having any domestic effect. Similarly, when the United States finally ratified the 1948 Genocide Convention in 1988, it attached a reservation to address opponents' fears that
the
Convention would be used to press claims of genocide against Native and African Americans. Although apologists for the United States often claim that United States laws are more protective of individual rights than international rights instruments, the
United States is at odds with the international human rights movement on a range of issues such as the death penalty and hate speech. The United States had the dubious distinction of being the major opponent to an eighteen- year old age limit on child solders, insisting on an exception to allow sixteen-year old volunteers. The United States, which maintains the largest stockpile of
anti-personnel

mines in the world and exported over 5.6 million mines to thirty-eight countries between 1960 and 1992, also continues to oppose the land mine ban. The United States has also withdrawn support for the Kyoto protocol, rejected the Comprehensive Test Ban Treaty in 1999 and refused to support the Biological and Toxic Weapons Convention and Draft Protocol on the grounds that it did not protect important bio-defense and industrial information and would not be effective in detecting cheating.
In the last twenty-five years, the United States has been involved in some forty military actions, including wars in Iraq, Afghanistan
and
Yugoslavia; regime-changing invasions in Grenada, Panama and Haiti; military assistance to rebel groups in Angola, El Salvador and Nicaragua; and missile attacks on Lebanon, Libya, Yemen and Sudan. Under the Bush administration, the United States no longer intervenes only for self-defense or balance of power. Rather, the United States now is engaged in the messianic mission to liberate and save the world from evil. Little wonder the United States
has opposed any attempt to define aggression and
has
actively sought to undermine the ICC, as discussed previously. Rule of law may seem like the answer to American exceptionalism. After all, all states are supposed to play by the same rules and be treated equally.There is no doubt that rule of law provides a rhetorical basis for challenging American exceptionalism, and in some instances the United States may modify its behavior to placate international or domestic critics. However, the preceding discussion of the U.S.-led war on terrorism should caution against placing too much faith in the ability of rule of law to deter the United States or any other superpower when significant interests are at stake. Appealing to rule of law has had, and is likely to continue to have, limited impact on U.S. actions.
Despite their differences, both President
Bush and Senator John Kerry
repeatedly made clear that the United States will not be bound by the views of the Security Council or other nations when it comes to protecting U.S. interests. Carl Schmitt argued that at the heart of rule of law is the power to make decisions and decide what the law will be in times of emergency. It is the power to determine when the normal rules apply and when they don't, and to define who is the enemy, the aggressor or a terrorist, and then to legitimate these discretionary and essentially political decisions by cloaking them in the language of law. Now, the United States and other Western powers are able to impose their way of life on the rest and to make it appear natural, inevitable and legitimate by writing their
normative preferences into human rights instruments and the laws of war and changing or setting aside those laws when doing so suits their needs. However, the excessively self-interested and narrowly parochial way in which
the United States
flaunts its power while at the same time promoting the allegedly universal values of secular liberalism, democracy, free markets and rule of law undermines their normative appeal and the moral authority of the United States as a role model. On the one side, rule of law is undermined by U.S. power,
which is exercised in a way where might triumps right when it comes to serving the United States' own interests. On the other side, the United States uses its might along with other Western powers to push a normative agenda on others that is contested and often counterproductive in its specificity, and in any event fails to address the underlying economic and systemic issues that contribute to widespread misery and poverty. When elections and civil and political rights fail to produce economic growth and stability, the regime loses legitimacy and people lose faith in
democracy, in some cases throwing their support behind more authoritarian leaders and in others simply becoming apathetic and turning their backs on politics.
The failure of international rule of law to restrain U.S. power or at least to cabin it within an institutionalized context of normal politics demonstrates the limits of rule of law and that while the enduring value of rule of law lies in ensuring predictability and certainty during normal times, ultimately the value of rule of law depends on the rules and who is determining them. We would be living in a very different world if, for example, Confucian communitarian rather than Western liberals ruled the world, as seemed to be a possibility for a moment when Japan and the Asian Tigers were ascending economically and might yet be the case if China continues its march toward becoming a world power. The relationship between rule of law and human rights is 81
therefore in the end a contingent one: the international legal system and rule of law rhetoric will serve whatever norms the dominant powers codify in law as rights.
Further Reading ➢ Alston, Phillip (ed.), (1992), The United Nations and Human Rights: A Critical Appraisal, Oxford: Clarendon Press. ➢ Bachr, Peter R, (1999), Human Rights: Universality in Practice, New York: Palgrave. ➢ Baxi, Upendra, (2002), The Future of Human Rights, New Delhi: Oxford University Press. ➢ Bhagwati, P.N., (1987), Dimensions of Human Rights, Madurai: Society for Community Organization Trust. 82

Hit and source - focused comparison, Side by Side

Submitted text As student entered the text in the submitted document.

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1/130 **SUBMITTED TEXT** 16 WORDS **83%** **MATCHING TEXT** 16 WORDS

of Rights (1791) • Declaration of the rights of man and of the citizen (1789) • The

of the Declaration of the Rights of Man and of the Citizen of 1789: "The

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2/130 **SUBMITTED TEXT** 12 WORDS **100%** **MATCHING TEXT** 12 WORDS

Documents asserting individual rights, such as the Magna Carta (1215), the

documents asserting individual rights, such as the Magna Carta (1215), the

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3/130 **SUBMITTED TEXT** 29 WORDS **64%** **MATCHING TEXT** 29 WORDS

the French Declaration of the Rights of Man and of the Citizen (1789) and the US Bill of Rights (1791) are the written precursors to many of today's human rights

the French Declaration on the Rights of Man and Citizen (1789) and the US Constitution and Bill of Right (1791) are the written precursors to many of today's human rights

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4/130 **SUBMITTED TEXT** 11 WORDS **95%** **MATCHING TEXT** 11 WORDS

mankind's demand for a life in which the inherent dignity

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5/130 **SUBMITTED TEXT** 32 WORDS **46%** **MATCHING TEXT** 32 WORDS

Bill of Rights (1791) • Declaration of the rights of man and of the citizen (1789) • The first Geneva Convention (1864) • The United Nations (1945) • The Universal Declaration of Human Rights (1948) •

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6/130 **SUBMITTED TEXT** 14 WORDS **96%** **MATCHING TEXT** 14 WORDS

by lawful judgment of his peers, or by the law of the land.

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7/130	SUBMITTED TEXT	14 WORDS	84%	MATCHING TEXT	14 WORDS

by lawful judgment of his peers, or by the law of the land.

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8/130	SUBMITTED TEXT	39 WORDS	92%	MATCHING TEXT	39 WORDS

of the Universal Declaration of Human Rights contains the triad: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." 8

of the Universal Declaration of Human Rights transcribed the words, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood,” 1

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9/130	SUBMITTED TEXT	29 WORDS	100%	MATCHING TEXT	29 WORDS

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." 8

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10/130	SUBMITTED TEXT	12 WORDS	87%	MATCHING TEXT	12 WORDS

any person of life, liberty or property without due process of law.

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11/130	SUBMITTED TEXT	13 WORDS	87%	MATCHING TEXT	13 WORDS

of feudalism, the Declaration of the Rights of Man and of the Citizen (

of the Declaration of the Rights of Man and of the Citizen

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12/130	SUBMITTED TEXT	23 WORDS	58%	MATCHING TEXT	23 WORDS

for the obligation to extend care without discrimination to wounded and sick military personnel and respect for and marking of medical personnel transports and

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13/130	SUBMITTED TEXT	11 WORDS	100%	MATCHING TEXT	11 WORDS

All human beings are born free and equal in dignity and rights:"

All human beings are born free and equal in dignity and rights.

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14/130	SUBMITTED TEXT	32 WORDS	78%	MATCHING TEXT	32 WORDS

the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people...

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15/130	SUBMITTED TEXT	11 WORDS	100%	MATCHING TEXT	11 WORDS

All human beings are born free and equal in dignity and rights:"

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16/130	SUBMITTED TEXT	19 WORDS	75%	MATCHING TEXT	19 WORDS

Declaration of Human Rights, 1948 (Articles 3 to 21); the international Covenant on Civil and Political Rights, 1966;

Declaration of Human Rights, the Geneva the International Covenant on Civil and Political Rights,

W http://etheses.dur.ac.uk/13099/1/PHD_THESIS_-JOANNA_ROZPEDOWSKI_MAY_2019.pdf?DDD35+

17/130	SUBMITTED TEXT	26 WORDS	89%	MATCHING TEXT	26 WORDS

the rights relating to life, liberty, equality and dignity of the individuals guaranteed by the Constitution or embodied in the International covenants and enforced by courts in India.

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18/130	SUBMITTED TEXT	22 WORDS	58%	MATCHING TEXT	22 WORDS

the Universal Declaration of Human Rights, 1948 (Articles 3 to 21); the international Covenant on Civil and Political Rights, 1966; in

the Universal Declaration of Human Rights, the International Covenant on Economic, and Cultural Rights, the International Covenant on Civil and Political Rights. In

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19/130	SUBMITTED TEXT	13 WORDS	100%	MATCHING TEXT	13 WORDS

in the International Covenant on Economic Social and Cultural Rights, 1966. The

in the International Covenant on Economic, Social, and Cultural Rights. The

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20/130	SUBMITTED TEXT	12 WORDS	95%	MATCHING TEXT	12 WORDS

in the International Covenant on Economic Social and Cultural Rights (ICESCR)

in the International Covenant on Economic, Social, and Cultural Rights. The ICESCR

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21/130	SUBMITTED TEXT	21 WORDS	81%	MATCHING TEXT	21 WORDS

the Universal Declaration of Human Rights, 1948 (Articles 3 to 2l); the international Covenant on Civil and Political Rights, 1966;

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22/130	SUBMITTED TEXT	18 WORDS	83%	MATCHING TEXT	18 WORDS

the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of

the Charter of the Organization of American States the American Declaration on the Rights and Duties of

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23/130	SUBMITTED TEXT	11 WORDS	100%	MATCHING TEXT	11 WORDS

the International Covenant on Economic Social and Cultural Rights (ICESCR)

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24/130	SUBMITTED TEXT	34 WORDS	81%	MATCHING TEXT	34 WORDS

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms,

The States Parties to this Convention undertake to respect the right and freedoms recognized 684 Alter, The New Terrain of International Law, p. 159. 685 Ibid., p. 160. 193 herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms [...]" 686

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25/130	SUBMITTED TEXT	46 WORDS	62%	MATCHING TEXT	46 WORDS

that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights;

SA CHR1909 SILAMBARASAN.pdf (D111142596)

26/130	SUBMITTED TEXT	17 WORDS	73%	MATCHING TEXT	17 WORDS

race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or

SA Gautomi Dutta_Dept. of Law.pdf (D16215033)

27/130	SUBMITTED TEXT	16 WORDS	90%	MATCHING TEXT	16 WORDS

No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or

SA Special Laws on Security in India An Analysis of Judicial Response of AFSPA and PSA.pdf (D163704875)

28/130	SUBMITTED TEXT	16 WORDS	90%	MATCHING TEXT	16 WORDS

No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or

SA Gautomi Dutta_Dept. of Law.pdf (D16215033)

29/130	SUBMITTED TEXT	13 WORDS	84%	MATCHING TEXT	13 WORDS

convicted persons, and shall be subject to separate treatment appropriate to their status

convicted persons and shall be subjected to separate treatment as appropriate to their status

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30/130	SUBMITTED TEXT	19 WORDS	57%	MATCHING TEXT	19 WORDS

Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of

SA Gautomi Dutta_Dept. of Law.pdf (D16215033)

31/130	SUBMITTED TEXT	29 WORDS	100%	MATCHING TEXT	29 WORDS

shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to

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32/130	SUBMITTED TEXT	19 WORDS	63%	MATCHING TEXT	19 WORDS

Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that

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33/130	SUBMITTED TEXT	11 WORDS	100%	MATCHING TEXT	11 WORDS

court may decide without delay on the lawfulness of his

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34/130	SUBMITTED TEXT	16 WORDS	62%	MATCHING TEXT	16 WORDS

be imposed than the one that was applicable at the time the criminal offense was committed.

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35/130	SUBMITTED TEXT	19 WORDS	71%	MATCHING TEXT	19 WORDS

An alien lawfully in the territory of a State Party to this Convention may be expelled from it only

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36/130	SUBMITTED TEXT	16 WORDS	71%	MATCHING TEXT	16 WORDS

orally, in writing, in print, in the form of art, or through any other medium of

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37/130	SUBMITTED TEXT	16 WORDS	79%	MATCHING TEXT	16 WORDS

are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

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38/130	SUBMITTED TEXT	12 WORDS	95%	MATCHING TEXT	12 WORDS

to ensure that any person claiming such remedy shall have his

SA Gautomi Dutta_Dept. of Law.pdf (D16215033)

39/130	SUBMITTED TEXT	30 WORDS	88%	MATCHING TEXT	30 WORDS

competent authority provided for by the legal system of the state; 2. to develop the possibilities of judicial remedy; and 3. to ensure that the competent authorities shall enforce such remedies when granted.

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40/130	SUBMITTED TEXT	16 WORDS	100%	MATCHING TEXT	16 WORDS

strictly required by the exigencies of the situation, provided that such measures are not inconsistent with

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41/130	SUBMITTED TEXT	18 WORDS	89%	MATCHING TEXT	18 WORDS

international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

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42/130	SUBMITTED TEXT	12 WORDS	100%	MATCHING TEXT	12 WORDS

the American Declaration of the Rights and Duties of Man and

the American Declaration of the Rights and Duties of Man and

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43/130	SUBMITTED TEXT	11 WORDS	100%	MATCHING TEXT	11 WORDS

a period of three months from the date of the

a period of three months from the date of the

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44/130	SUBMITTED TEXT	38 WORDS	46%	MATCHING TEXT	38 WORDS

Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons

SA Gautomi Dutta_Dept. of Law.pdf (D16215033)

45/130	SUBMITTED TEXT	11 WORDS	100%	MATCHING TEXT	11 WORDS

the Court finds that there has been a violation of

the Court finds that there has been a violation of

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46/130	SUBMITTED TEXT	17 WORDS	78%	MATCHING TEXT	17 WORDS

of the Court. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the

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47/130	SUBMITTED TEXT	23 WORDS	45%	MATCHING TEXT	23 WORDS

state that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification

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48/130	SUBMITTED TEXT	11 WORDS	100%	MATCHING TEXT	11 WORDS

of the American Declaration of the Rights and Duties of

SA FAIR TRIAL.docx (D140027024)

49/130	SUBMITTED TEXT	21 WORDS	87%	MATCHING TEXT	21 WORDS

pragmatic or overlapping consensus quickly breaks down once one moves beyond feel-good discussions about the desirability of the broad wish-list of

pragmatic or overlapping consensus quickly breaks down once one moves beyond discussions about the desirability of the broad wish-list of

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50/130	SUBMITTED TEXT	19 WORDS	100%	MATCHING TEXT	19 WORDS

rights contained in human rights documents to the difficult issues of the justifications for such rights and how they are

rights contained in human rights documents to the difficult issues of the justifications for such rights and how they are

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51/130	SUBMITTED TEXT	20 WORDS	92%	MATCHING TEXT	20 WORDS

the International Covenant on Civil and Political Rights (ICCPR) nor the International Covenant on Economic, Social and Cultural Rights (ICESCR),

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52/130	SUBMITTED TEXT	14 WORDS	87%	MATCHING TEXT	14 WORDS

Asian values" - or its more recent politically correct offspring "values in Asia" -

Asian values," or its more recent, politically correct reformulation "values in Asia."

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53/130	SUBMITTED TEXT	14 WORDS	89%	MATCHING TEXT	14 WORDS

the compatibility of Confucianism, Buddhism and Islam with liberal democracy and human rights; the

the compatibility of Confucianism, Buddhism, and Islam with democracy and human rights. The

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54/130	SUBMITTED TEXT	15 WORDS	100%	MATCHING TEXT	15 WORDS

whether authoritarian or democratic regimes are better able to achieve sustained economic growth and whether

whether authoritarian or democratic regimes are better able to achieve sustained economic growth and whether

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55/130	SUBMITTED TEXT	15 WORDS	100%	MATCHING TEXT	15 WORDS

Asian versions of capitalism are superior to the varieties of capitalism found in Western liberal democracies.

Asian versions of capitalism are superior to the varieties of capitalism found in Western liberal democracies.

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56/130	SUBMITTED TEXT	13 WORDS	100%	MATCHING TEXT	13 WORDS

of the Convention on the Elimination of All Forms of Discrimination Against Women (

of the 1980 Convention on the Elimination of All Forms of Discrimination Against Women. 57

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57/130	SUBMITTED TEXT	46 WORDS	90%	MATCHING TEXT	46 WORDS

rule of law, like human rights, is an essentially contested concept. It means different things to different people and has served a wide variety of political agendas from Hayekian libertarianism, to Rawlsian social welfare liberalism, to Lee Kuan Yew's soft authoritarianism, to Jiang Zemin's statist socialism,

Rule of law is an essentially contested concept. It means different things to different people, and has served a wide variety of political agendas, from Hayekian libertarianism to Rawlsian social welfare liberalism to Lee Kuan Yew's soft authoritarianism to Jiang Zemin's statist socialism.

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58/130	SUBMITTED TEXT	51 WORDS	100%	MATCHING TEXT	51 WORDS

That is both its strength and its weakness. That people of vastly different political persuasions all want to take advantage of the rhetorical power of rule of law keeps it alive in public discourse, but it also leads to the worry that it has become a meaningless slogan devoid of any determinative content.

That is both its strength and its weakness. That people of vastly different political persuasions all want to take advantage of the rhetorical power of rule of law keeps it alive in public discourse, but it also leads to the worry that it has become a meaningless slogan devoid of any determinative content.

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59/130	SUBMITTED TEXT	56 WORDS	100%	MATCHING TEXT	56 WORDS

At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful, if overly simplistic, notions of a government of laws, the supremacy of the law and equality of all before the law.

At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of laws, the supremacy of the law and equality of all before the law.

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60/130	SUBMITTED TEXT	16 WORDS	80%	MATCHING TEXT	16 WORDS

be general, public, prospective, clear, consistent, capable of being followed, stable, impartially applied and enforced.

be general, public, prospective, clear, consistent, capable of being followed, stable and enforced" 112

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61/130	SUBMITTED TEXT	24 WORDS	100%	MATCHING TEXT	24 WORDS

Moreover, laws must be reasonably acceptable to a majority of the populace or people affected (or at least the key groups affected) by the laws.

Moreover, laws must be reasonably acceptable to a majority of the populace or people affected (or at least the key groups affected) by the laws. 3 2

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62/130	SUBMITTED TEXT	16 WORDS	62%	MATCHING TEXT	16 WORDS

thin conceptions of rule of law into thick ones. Thick conceptions begin with the basic elements

thin versions of rule of law, thick substantive conceptions begin with the basic elements

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63/130	SUBMITTED TEXT	49 WORDS	86%	MATCHING TEXT	49 WORDS

of a thin conception but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, Asian developmental state or other varieties of capitalism), forms of government (democratic, socialist, soft authoritarian, theocratic) or conceptions of human rights (libertarian, classical liberal, social welfare liberal, communitarian, compassionate conservative, "Asian values,"

of a thin conception but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, "Asian developmental state" or other varieties of VARIETIES OF RULE OF LAW 3 capitalism), forms of government (democratic, socialist, soft authoritarian) or conceptions of human rights (libertarian, classical liberal, social welfare liberal, communitarian, " Asian values,"

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64/130	SUBMITTED TEXT	101 WORDS	100%	MATCHING TEXT	101 WORDS

etc.). Thus, a liberal democratic version of rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of "legitimate" government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government and a liberal interpretation of human rights that generally gives priority to civil and political rights over economic, social, cultural and collective or group rights. Liberal democratic rule of law may be further subdivided along the main political fault lines in Europe and America: a libertarian version that emphasizes liberty and property rights, a classical liberal position, a social welfare liberal version, and so on.

etc.). Thus, a liberal democratic version of rule of law incorporates free-market capitalism (subject to qualifications that would allow various degrees of "legitimate" government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government, and a liberal interpretation of human rights that generally gives priority to civil and political rights over economic, social, cultural, and collective or group rights. Liberal democratic rule of law may be further subdivided along the main political fault-lines in Europe and America: a libertarian version that emphasizes liberty and property rights, a classical liberal position, a social welfare liberal version, and so on.

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65/130	SUBMITTED TEXT	14 WORDS	100%	MATCHING TEXT	14 WORDS

The wide variety of political beliefs and conceptions of a just socio-political order

the wide variety of political beliefs and conceptions of a just socio- political order,

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66/130	SUBMITTED TEXT	21 WORDS	67%	MATCHING TEXT	21 WORDS

statist socialist, neo-authoritarian, communitarian and liberal democratic. Statist socialists endorse a state-centered socialist rule of law defined by, inter alia, a

Statist Socialism, Neo-Authoritarian, Communitarian and Liberal Democratic. In contrast to Liberal Democratic rule of law, Jiang Zemin and other Statist Socialists endorse a state-centered socialist rule of law defined by, inter alia, a

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67/130	SUBMITTED TEXT	15 WORDS	100%	MATCHING TEXT	15 WORDS

Party plays a leading role and an interpretation of rights that emphasizes stability, collective rights

Party plays a leading role; and an interpretation of rights that emphasizes stability, collective rights

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68/130	SUBMITTED TEXT	173 WORDS	97%	MATCHING TEXT	173 WORDS

over, individual rights and subsistence as the basic right rather than civil and political rights. There is also support for various forms of rule of law that fall between the statist socialism type and the liberal democratic version. For example, there is some support for a democratic but non-liberal (New Confucian) communitarian variant built on market capitalism, perhaps with a somewhat greater degree of government intervention than in the liberal version; some genuine form of multiparty democracy in which citizens choose their representatives at all levels of government; plus an "Asian values" or communitarian 49 interpretation of rights that attaches relatively greater weight to the interests of the majority and collective rights as opposed to the civil and political rights of individuals. Another variant is a neo-authoritarian or soft authoritarian form of rule of law that, like the communitarian version, rejects a liberal interpretation of rights but, unlike its communitarian cousin, also rejects democracy. Whereas Communitarians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, Neo-Authoritarians permit democracy only at lower levels of government or not at all.

over individual rights, and subsistence as the basic right rather than civil and political rights. There is also support for various forms of rule of law that fall between the Statist Socialism type championed by Jiang Zemin and other central leaders and the Liberal Democratic version. For example, there is some support for a democratic but non-liberal (New Confucian) Communitarian variant built on market capitalism, perhaps with a somewhat greater degree of government intervention than in the liberal version; some genuine form of multiparty democracy in which citizens choose their representatives at all levels of government; plus an "Asian values" or communitarian interpretation of rights that attaches relatively greater weight to the interests of the majority and collective rights as opposed to the civil and political rights of individuals. 3 Another variant is a Neo-authoritarian or Soft Authoritarian form of rule of law that like the Communitarian version rejects a liberal interpretation of rights but unlike its Communitarian cousin also rejects democracy. Whereas Communitarians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, Neo-authoritarians permit democracy only at lower levels of government or not at all. 4

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69/130	SUBMITTED TEXT	104 WORDS	89%	MATCHING TEXT	104 WORDS

the Philippines for what might be called a developmental, redistributive justice model of rule of law. This form, with different variants in each of the countries, emerges out of a fundamental difference between these countries and economically advanced countries: the brutal reality of crushing poverty combined with severe disparities in income. Observing that nearly sixty percent of the nation's material resources are in the hands of some twenty percent of the population in Thailand, Vitit Muntarbhorn warns that this lack of equity "has dire consequences for the Rule of Law and human rights, precisely because the inequity may breed violence, if not disrespect for the law." He asks,

the Philippines and Indonesia for what might be called a developmental, redistributive justice model VARIETIES OF RULE OF LAW 27 of rule of law. This form, with different variants in each of the four countries, emerges out of a fundamental difference between these countries and economically advanced countries: the brutal reality of crushing poverty combined with severe disparities in income. 37 Observing that nearly 60 per cent of the nation's material resources are in the hands of some 20 per cent of the population in Thailand, Muntarbhorn (Chapter 11) warns that this lack of equity "has dire consequences for the rule of law and human rights, precisely because the inequity may breed violence, if not disrespect for the law." He asks, "

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70/130	SUBMITTED TEXT	14 WORDS	100%	MATCHING TEXT	14 WORDS

How can the Rule of Law help to foster equity and social justice?"

How can the rule of law help to foster equity and social justice?"

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71/130	SUBMITTED TEXT	59 WORDS	100%	MATCHING TEXT	59 WORDS

Substantively, the developmental-redistributive model of rule of law has two main planks. The first is an international dimension that highlights the radical disparity between North and South and emphasizes the right of development, debt forgiveness and the obligation of the North/developed countries to aid the South/developing countries. The second plank is a domestic one and reflects the particular circumstances of each state,

Substantively, the developmental redistributive model of rule of law has two main planks. The first is an international dimension that highlights the radical disparity between North and South and emphasizes the right of development, debt forgiveness and the obligation of the North/developed countries to aid the South/developing countries. The second plank is a domestic one and reflects the particular circumstances of each state.

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72/130	SUBMITTED TEXT	32 WORDS	97%	MATCHING TEXT	32 WORDS

In Thailand, concerns for redistributive social justice are found in the government's policies to achieve sustainable development, including rural development. Thus, the government has adopted a series of populist policies, including a universal

In Thailand, concerns for redistributive 28 RANDALL PEERENBOOM social justice are found in the government's policies to achieve sustainable development, including rural development. Thus the government has adopted a series of populist policies, including a universal

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73/130	SUBMITTED TEXT	14 WORDS	100%	MATCHING TEXT	14 WORDS

scheme, a development fund for each village and debt moratorium for farmers.

scheme, a development fund for each village, and debt moratorium for farmers.

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74/130	SUBMITTED TEXT	78 WORDS	93%	MATCHING TEXT	78 WORDS

alternative redistributive conception in the way rule of law is frequently linked to social and political philosophies that promise justice, social welfare and People Power based democracy. Whereas Western countries on the whole have been reluctant to assume obligations to allocate sufficient resources to satisfy economic, social and cultural rights, the 1987 Filipino constitution contained a long list of open-ended "directive principles" that reflect the tendency of the activist drafters of the constitution to codify "new" rights to education, food, environment and health.

alternative redistributive conception in the way rule of law is frequently linked to social and political philosophies that promise justice, social welfare and People Power democracy. Whereas Western countries on the whole have been reluctant to assume obligations to allocate sufficient resources to satisfy economic, social and cultural rights, the 1987 Filipino Constitution contained a long list of open-ended "directive principles" that, as Pangalangan points out (in Chapter 12), reflect the tendency of the activist drafters of the Constitution to codify 'new' rights, e.g. to education, food, environment and health.

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75/130	SUBMITTED TEXT	29 WORDS	81%	MATCHING TEXT	29 WORDS

the Philippines, the Indian constitution codifies both civil and political rights and social and economic rights. However, whereas the former are considered fundamental and justiciable, the latter are considered progressive.

the Philippines, the Indian constitution codifies both first-generation civil and political rights and second-generation rights. However, whereas the former are considered fundamental and justiciable, the latter are considered progressive,

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76/130	SUBMITTED TEXT	18 WORDS	100%	MATCHING TEXT	18 WORDS

The Indian constitution also seeks to redress historical imbalances that have led to the subjugation of some groups,

The Indian constitution also seeks to redress historical imbalances that have led to the subjugation of some groups,

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77/130	SUBMITTED TEXT	13 WORDS	100%	MATCHING TEXT	13 WORDS

practices. It thus outlaws in the name of equality caste-based practices of untouchability.

practices. It thus outlaws in the name of equality caste-based practices of "untouchability."

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78/130	SUBMITTED TEXT	55 WORDS	100%	MATCHING TEXT	55 WORDS

A system of reservations or quotas ensures some representation for disadvantaged groups including the poor. In addition, the constitution enshrines a policy of affirmative action that creates a two-track system obligating the state "to specifically reform the 'dominant'/'majoritarian' 'Hindu' religious traditions in a fast forward mode, while leaving the reform of 'minority' communitarian/religious traditions to slow motion, minuscule change."

a system of reservations or quotas ensures some representation for disadvantaged groups, including the poor. In addition, the constitution enshrines a policy of affirmative action that creates a two-track system obligating the state "to specifically reform the 'dominant'/'majoritarian' 'Hindu' religious traditions in a fast forward mode, while leaving the reform of 'minority' communitarian/religious traditions to slow motion, minuscule change."

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79/130	SUBMITTED TEXT	15 WORDS	100%	MATCHING TEXT	15 WORDS

the constitution creates a number of federal agencies to protect and promote the rights of

the constitution creates a number of federal agencies to protect and promote the rights of "

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80/130	SUBMITTED TEXT	28 WORDS	94%	MATCHING TEXT	28 WORDS

For instance, in China, legal reformers have used a broad conception of rule of law as a means of discussing democracy, separation of powers and various human rights issues

For instance, in China, legal reformers have used a broad conception of rule of law as a means of discussing democracy, separation of powers and human rights issues.

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81/130	SUBMITTED TEXT	17 WORDS	79%	MATCHING TEXT	17 WORDS

rule of law, to criticize whatever law, practice or outcome does not coincide with their own political

rule of law is simply invoked to criticize whatever law, practice or outcome does not coincide with one's own political

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82/130	SUBMITTED TEXT	18 WORDS	92%	MATCHING TEXT	18 WORDS

liberal critics of the government's communitarian policies have invoked rule of law to object to the lack of (

liberal critics of the government's conservative policies have invoked rule of law to object to the lack of "

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83/130	SUBMITTED TEXT	28 WORDS	100%	MATCHING TEXT	28 WORDS

adequate workers' rights legislation, limitations on the right of peaceful demonstration and a regulatory framework that restricts the freedom of the local press. 50 Contrast such complaints with the following.

adequate" workers' rights legislation, limitations on the right of peaceful demonstration, and a regulatory framework that restricts the freedom of the local press. Contrast such complaints with the following.

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84/130	SUBMITTED TEXT	86 WORDS	96%	MATCHING TEXT	86 WORDS

Two government agencies issue conflicting regulations, and there is no effective legal mechanism to sort out the conflict. A suspect is entitled to a lawyer according to law, but in practice the authorities refuse to allow him to contact his lawyer. Your dispute with your insurance company regarding payment for hospital bills incurred as a result of a car accident remains pending in court after seven years due to judicial inefficiency. The rich and powerful are regularly exempted from prosecution of certain laws whereas others are prosecuted in similar circumstances.

Two government agencies issue conflicting regulations, and there is no effective legal mechanism to sort out the conflict. A suspect is entitled to legal counsel according to law, but in practice the authorities refuse to allow him to contact his lawyer. Your dispute with your insurance company regarding payment for hospital bills incurred as a result of a car accident remains pending in court after seven years due to judicial inefficiency The rich and powerful are regularly exempted from prosecution of certain laws whereas others are prosecuted in similar circumstances.

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85/130	SUBMITTED TEXT	21 WORDS	100%	MATCHING TEXT	21 WORDS

Articulating different thick conceptions makes it possible to relate political and economic problems to law, legal institutions and particular conceptions of

Articulating different thick conceptions makes it possible to relate political and economic problems to law, legal institutions and particular conceptions of

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86/130	SUBMITTED TEXT	24 WORDS	100%	MATCHING TEXT	24 WORDS

by highlighting differences in viewpoints across a range of issues, thick theories bring out more clearly what is really at stake in many disputes.

By highlighting differences in viewpoints across a range of issues, thick theories bring out more clearly what is really at stake in many disputes.

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87/130	SUBMITTED TEXT	38 WORDS	100%	MATCHING TEXT	38 WORDS

Limiting the concept of rule of law to the requirements of a thin theory makes it possible to avoid getting mired in never-ending debates about the superiority of the various political theories all contending for the throne of justice.

limiting the concept of rule of law to the requirements of a thin theory makes it possible to avoid getting mired in never-ending debates about the superiority of the various political theories all contending for the throne of justice.

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88/130	SUBMITTED TEXT	30 WORDS	100%	MATCHING TEXT	30 WORDS

by incorporating particular conceptions of the economy, political order or human rights into rule of law, thick conceptions decrease the likelihood that an overlapping consensus will emerge as to its meaning.

By incorporating particular conceptions of the economy, political order or human rights into rule of law, thick conceptions decrease the likelihood that an overlapping consensus will emerge as to its meaning.

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89/130	SUBMITTED TEXT	56 WORDS	85%	MATCHING TEXT	56 WORDS

given the fact of pluralism, thick conceptions must confront the issue of whose good and whose justice. Liberals, socialists, communitarians, neo-authoritarians, soft authoritarians, new conservatives, old conservatives, Buddhists, Daoists, Neo-Confucians, new Confucians and Muslims all differ in their visions of the good life and on what is considered just, and hence what rule of law requires.

Given the fact of pluralism, 11 thick conceptions of rule of law must confront the issue of whose good, whose justice? Liberals, Socialists, Communitarians, Neo-authoritarians, Soft Authoritarians, New Conservatives, Old Conservatives, Buddhists, Daoists, Neo-Confucians and New Confucians all differ in their visions of the good life and on what is considered just, and hence what rule of law requires.

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90/130	SUBMITTED TEXT	27 WORDS	89%	MATCHING TEXT	27 WORDS

heavily politicized debates about “Asian values,” and whether democratic or authoritarian regimes are more likely to ensure social stability and economic growth discussed earlier. It also taps into

heavily politicized, debates about “Asian values,” and whether democratic or authoritarian regimes are more likely to ensure social stability and economic growth. 7 It also taps into

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91/130	SUBMITTED TEXT	27 WORDS	94%	MATCHING TEXT	27 WORDS

post-colonial discourses and conflicts between developed and developing states, and within developing states between the haves and have-nots over issues of distributive justice. In Islamic countries,

post- colonial discourses and conflicts between developed and developing states, and within developing states between the haves and have-nots over issues of distributive justice. In several countries,

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92/130	SUBMITTED TEXT	20 WORDS	97%	MATCHING TEXT	20 WORDS

For all of its rhetorical appeal, rule of law, whether thick or thin, cannot provide much guidance with respect to

For all of its rhetorical appeal, however, rule of law, whether thick or thin, cannot provide much guidance with respect to

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93/130	SUBMITTED TEXT	29 WORDS	100%	MATCHING TEXT	29 WORDS

rule of law are compatible with considerable diversity in institutions, rules and practices. For example, the way powers are distributed and balanced between the executive, legislature and judiciary varies widely

rule of law are compatible with considerable diversity in institutions, rules and practices. For example, the way powers are distributed and balanced between the executive, legislature and judiciary varies widely.

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94/130	SUBMITTED TEXT	78 WORDS	93%	MATCHING TEXT	78 WORDS

Constitutional review is conducted by a variety of entities that enjoy different powers. The nature and degree of judicial independence, as well as the manner in which it is achieved, also vary. In some cases judges are appointed (through a variety of mechanisms), and in some cases they are elected. Nor will appeals to rule of law alone put an end to debates about what type of theory of adjudication is best - strict interpretation, purposive or Dworkin's make- law-the-best-it-can-be approach.

Constitutional review is conducted by a variety of entities that enjoy different powers. The nature and 10 RANDALL PEERENBOOM degree of judicial independence, as well as the manner in which it is achieved, also vary. In some cases judges are appointed (through a variety of mechanisms) and in some cases they are elected. Nor will appeals to rule of law alone put an end to debates about what type of theory of adjudication is best—strict interpretation, purposive, the social activist approach of Indian courts or Dworkin's (liberal, equality-based) make-law-the-best-it-can-be approach. 13

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95/130	SUBMITTED TEXT	69 WORDS	93%	MATCHING TEXT	69 WORDS

Institutional choices are often highly path-dependent: the initial choice of institutions and the way they operate and evolve over time is influenced to a large extent by a host of contingent, context-specific factors. Seemingly similar institutions, sometimes transplanted from one system to another, are likely to function differently from place to place. Thus, to assess the appropriateness and effectiveness of institutions requires an evaluation of their results in the particular context. For

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96/130	SUBMITTED TEXT	91 WORDS	98%	MATCHING TEXT	91 WORDS

The government argues that given the sensitive nature of religion in multiethnic Singapore, issues involving religious harmony are crucial for the survival of the nation, and better left to the executive than to the judiciary or the legislature. The executive's decision is subject to review by the Elected President, and advisory councils composed of bureaucrats or religious and civic leaders are sometimes consulted to further diminish the dangers of a concentration of unchecked powers in the executive's hands. Nevertheless, liberal critics contend such justifications and mechanisms are inadequate and call for a more robust judicial review

The government argues that, given the sensitive nature of religion in multiethnic Singapore, issues involving religious harmony are crucial for the survival of the nation, and better left to the executive than to the judiciary or the legislature. The executive's decision is subject to review by the elected president, and advisory councils composed of bureaucrats or religious and civic leaders are sometimes consulted to further diminish the dangers of a concentration of unchecked powers in the executive's hands. Nevertheless, critics contend that such justifications and mechanisms are inadequate, and call for a more robust judicial review.

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97/130	SUBMITTED TEXT	15 WORDS	100%	MATCHING TEXT	15 WORDS

Cases involving the declaration of national emergency and derogation of rights raise equally difficult issues.

Cases involving the declaration of national emergency and derogation of rights raise equally difficult issues.

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98/130	SUBMITTED TEXT	80 WORDS	92%	MATCHING TEXT	80 WORDS

While the danger of abuse of power is apparent, advocates of different thick conceptions are likely to disagree over when national emergencies should be declared, who has the right to declare them and what type of review, if any, there should be. In Malaysia, the King, the titular head of the executive, acts on the advice of the Cabinet in deciding whether a state of emergency exists. Parliament, not the judiciary, has the power to review the decision and overturn it.

While the dangers of abuse of powers are apparent, advocates of different thick conceptions are likely to disagree about when national emergencies should be declared, who has the right to declare them and what type of review, if any, there should be. In Malaysia, the king, the titular head of the executive, acts on the advice of the cabinet in deciding whether a state of emergency exists. Parliament, not the judiciary, has the power to review the decision and overturn it.

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99/130	SUBMITTED TEXT	39 WORDS	100%	MATCHING TEXT	39 WORDS

Appealing to rule of law will not suffice to sort out these issues. Both sides can appeal to their own particular thick conceptions, and a thin conception does not require all important decisions to be left ultimately to the courts

Appealing to rule of law will not suffice to sort out these issues. Both sides can appeal to their own particular thick conceptions, and a thin conception does not require all important decisions to be left ultimately to the courts.

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100/130	SUBMITTED TEXT	34 WORDS	100%	MATCHING TEXT	34 WORDS

In any event, concluding that a practice or decision is consistent or inconsistent with a thin rule of law or a particular thick conception of rule of law is not the end of normative debate.

In any event, concluding that a practice or decision is consistent or inconsistent with a thin rule of law or a particular thick conception of rule of law is not the end of normative debate.

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101/130	SUBMITTED TEXT	12 WORDS	95%	MATCHING TEXT	12 WORDS

Rule of law is only one of many social values, and

rule of law is only one of many important social values, and

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102/130	SUBMITTED TEXT	37 WORDS	98%	MATCHING TEXT	37 WORDS

the rule of law virtues of predictability and certainty may at times need to give way to higher moral principles, considerations of equity, justified civil disobedience or even mass illegalities and populist movements that seek to overthrow the political system.

the rule of law virtues of predictability and certainty may at times need to give way to higher moral principles and considerations of equity, justified civil disobedience, or even “mass illegalities” and populist movements that seek to overthrow the political system.

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103/130	SUBMITTED TEXT	21 WORDS	100%	MATCHING TEXT	21 WORDS

to elide rule of law with democracy and a liberal version of rights that emphasizes civil and political rights.

to elide rule of law with democracy and a liberal version of rights that emphasizes civil and political rights.

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104/130	SUBMITTED TEXT	15 WORDS	85%	MATCHING TEXT	15 WORDS

a legal system that complies with the requirements of a thin rule of law

a system that complies with the usual requirements of a thin rule of law

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105/130	SUBMITTED TEXT	11 WORDS	90%	MATCHING TEXT	11 WORDS

legal system that meets the standards of rule of law is

legal system that meets the standards of a thin rule of law is

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106/130	SUBMITTED TEXT	17 WORDS	100%	MATCHING TEXT	17 WORDS

Since they are not perfect substitutes, each can support and help overcome the weaknesses of the other.

Since they are not perfect substitutes, each can support and help overcome the weaknesses of the other.

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107/130	SUBMITTED TEXT	18 WORDS	52%	MATCHING TEXT	18 WORDS

meet the standards of a thin rule of law. Moreover, although these mechanisms are to some extent compatible with

meet the standards of a thin rule of law will still diverge to some extent with

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108/130	SUBMITTED TEXT	18 WORDS	61%	MATCHING TEXT	18 WORDS

have legal systems that meet the requirements of a thin rule of law (at least as well as

have legal systems that are generally compliant with the requirements of a thin rule of law with respect to commercial as well as

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109/130	SUBMITTED TEXT	18 WORDS	97%	MATCHING TEXT	18 WORDS

has been described as a semi-democracy, pseudo-democracy, illiberal democracy, limited democracy, mandatory democracy, a “decent, non-democratic regime,” a

has been described as a semi-democracy, pseudo-democracy, illiberal democracy, limited democracy, mandatory democracy, a “decent, non-democratic regime,” and a

W http://ndl.ethernet.edu.et/bitstream/123456789/8421/1/72.pdf

110/130	SUBMITTED TEXT	71 WORDS	96%	MATCHING TEXT	71 WORDS

PAP) and opposition is tamed through the use of defamation suits against political opponents, manipulation of voting procedures, gerrymandering and short campaign times. Given the dominance of the PAP, accountability in Singapore is achieved not so much through elections as through other means such as allocating limited participation rights to the opposition, inviting members of the public to comment on legislation and using shadow cabinets where PAP members are asked to play an opposition role.

PAP and opposition is tamed through the use of defamation suits against political opponents, manipulation of voting procedures, gerrymandering, and short campaign times. 19 Given the dominance of the PAP, accountability in Singapore is achieved not so much through elections as through other means such as allocating limited participation rights to the opposition, inviting members of the public to comment on legislation, and the use of shadow cabinets where PAP members are asked to play an opposition role.

W http://ndl.ethernet.edu.et/bitstream/123456789/8421/1/72.pdf

111/130	SUBMITTED TEXT	70 WORDS	99%	MATCHING TEXT	70 WORDS

is to strengthen the state, ensure stability and facilitate economic growth. Many decisions are left to the state and political actors, primarily the Cabinet headed by the Prime Minister. Civil society is limited and characterized by corporatist relationships between the state, businesses, labor unions and society. Administrative law tends to emphasize government efficiency rather than protection of individual rights. While individual rights are constitutionally guaranteed, they are not interpreted along liberal lines.

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112/130	SUBMITTED TEXT	111 WORDS	97%	MATCHING TEXT	111 WORDS

Lee Kuan Yew and other government officials have invoked Asian values to emphasize group interests over individual interests and to justify limitations on civil and political rights, including limits on free speech, such that citizens are not allowed to attack the integrity of key institutions like the judiciary or the character of elected officials without attracting sanction in the form of contempt of court or libel proceedings. Labor rights are also limited in the name of social stability and economic growth. Rejecting liberal neutrality, the government favors a more paternalistic approach where the state promotes a substantive normative agenda and actively regulates private morality and conduct. The government has appealed to Confucianism to support its paternalistic approach

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113/130	SUBMITTED TEXT	59 WORDS	96%	MATCHING TEXT	59 WORDS

to promote social harmony and consensus rather than adversarial litigation. On the whole, the judiciary tends to follow the government's lead. Although the reason for that seems to be a genuine congruence of views on the part of most judges rather than overt political pressure on the courts, in some cases judges who have challenged the PAP have been reassigned. Despite the

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114/130	SUBMITTED TEXT	22 WORDS	89%	MATCHING TEXT	22 WORDS

Like Singapore, Hong Kong has a well-developed legal system that is largely the product of British colonialism. Until the handover to the

Like Singapore and Malaysia, Hong Kong has a well-developed legal system that is largely the product of British colonialism. Until the handover in 1997, the

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115/130	SUBMITTED TEXT	27 WORDS	96%	MATCHING TEXT	27 WORDS

in 1997, the system was widely considered to be an exemplar of rule of law, notwithstanding the lack of democracy and a restricted scope of individual rights

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116/130	SUBMITTED TEXT	116 WORDS	88%	MATCHING TEXT	116 WORDS

With the change of government, however, has come a different value orientation. Tung Chee-hwa has, on occasion, invoked Asian values, suggesting to some that Hong Kong might be evolving toward a more Singaporean model. Signs of a possible shift include pressure on the media to toe the government's line; 61 limitations on free speech and assembly and, in particular, the requirement that demonstrators obtain prior approval from the authorities; consideration of a bill on religious sects, urged by Beijing, to control Falun Gong, along with the recent conviction of Falun Gong demonstrators; and the brouhaha over regulations, required under Article 23 of the Basic Law, dealing with a variety of potential threats to national security from sedition to disclosure of state secrets,

With the change of government, however, has come a different value orientation. Tung Chee-hwa has on occasion invoked Asian values, suggesting to some that Hong Kong might be evolving toward a more Singaporean model. Signs of a possible shift toward a more soft-authoritarian or collectivist model include pressure on the media to toe the government's line; limitations on free speech and assembly, and in particular the requirement that demonstrators obtain prior approval from the authorities; consideration of a bill on religious sects, urged by Beijing, to control Falungong, along with the recent conviction of Falungong demonstrators; and the recent brouhaha over regulations required under Article 23 of the Basic Law dealing with a variety of potential threats to national security, from sedition to disclosure of state secrets.

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117/130	SUBMITTED TEXT	10 WORDS	100%	MATCHING TEXT	10 WORDS

of the International Criminal Tribunal for the Former Yugoslavia (ICTY),

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118/130	SUBMITTED TEXT	43 WORDS	97%	MATCHING TEXT	43 WORDS

that the instrumental aspects of legal reforms may enhance the efficiency of authoritarian governments. In the absence of democracy and pluralist institutions for public participation in the lawmaking, interpretation and implementation processes, law may come to serve the interests of the state and the ruling elite.

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119/130	SUBMITTED TEXT	18 WORDS	100%	MATCHING TEXT	18 WORDS

Where legal rules are applied with principled consistency to both the state and its citizens, as required by

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120/130	SUBMITTED TEXT	14 WORDS	100%	MATCHING TEXT	14 WORDS

rule of law, they generally restrain rather than expand the arbitrary exercise of state power.

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121/130	SUBMITTED TEXT	24 WORDS	44%	MATCHING TEXT	24 WORDS

Article 15 of the ICTY Statute provides that "[t]he judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of

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122/130	SUBMITTED TEXT	80 WORDS	99%	MATCHING TEXT	80 WORDS

To gain some feel for the enormity of the challenge, there were no East Timorese lawyers with experience as judges or prosecutors because none had been appointed to such positions under Indonesian rule. The exodus of prison guards and the burning of prisons forced the U.N.'s International Force for East Timor to rely on U.N. civil police officers to run overcrowded, makeshift detention centers and to release individuals accused of serious crimes to make room for those charged with grave violations of humanitarian law.

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123/130	SUBMITTED TEXT	10 WORDS	100%	MATCHING TEXT	10 WORDS

The U.N. was ill prepared to assume responsibilities for running

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124/130	SUBMITTED TEXT	11 WORDS	100%	MATCHING TEXT	11 WORDS

rule of law and the protection of human rights. The

rule of law and the protection of human rights, the

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125/130	SUBMITTED TEXT	12 WORDS	95%	MATCHING TEXT	12 WORDS

for rule of law and the protection of human rights. The

for rule of law and the protection of human rights. 639 The

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126/130	SUBMITTED TEXT	19 WORDS	100%	MATCHING TEXT	19 WORDS

was ratified by a show of people's assemblies, a procedure not in conformity with the constitution at the time.

was ratified by a show of people's assemblies, a procedure not in conformity with the constitution at the time (

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127/130	SUBMITTED TEXT	24 WORDS	88%	MATCHING TEXT	24 WORDS

when Cory Aquino became President and replaced the Marcos-era constitution with her Freedom Constitution, again without complying with the rules in place at the time.

when Cory Aquino becomes president and replaces the Marcos-era constitution with her Freedom Constitution, again without complying with the rules in place at the time?

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128/130	SUBMITTED TEXT	72 WORDS	100%	MATCHING TEXT	72 WORDS

a constitutional crisis. In the first case, Marcos may very well have replaced the judges, as happened in Malaysia in 1986 when the court dared to oppose Mahathir. In the Aquino case, the court would have incurred the wrath of the people, compromising its legitimacy and authority and undermining its efforts to emerge as a political force in the new regime. In both cases, what the court did do was simply bow to political reality

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129/130	SUBMITTED TEXT	33 WORDS	100%	MATCHING TEXT	33 WORDS

To be sure, that these acts, especially by Marcos, could be challenged in court suggests that rule of law is a powerful motivating ideal, one which even dictators cannot dismiss without tarnishing their legitimacy.

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130/130	SUBMITTED TEXT	76 WORDS	90%	MATCHING TEXT	76 WORDS

taking an activist approach on a wide range of issues, including many social and economic issues for which judges do not necessarily possess the required expertise. The result may be overreaching, ideologically-driven decisions that have negative social, economic and political consequences. In Eastern Europe, courts decided cases based on neo-liberal economic dogma that did not always fit the times and conditions.In the Philippines, a recurring complaint is that the courts interfere too much in “economic decision- making” by second-guessing government

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