

Assessing Human Rights in China: Why the Double Standard?

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China is often singled out as one of worst human rights violators in the world today. Since 1990, there have been eleven attempts to censure China before the U.N. Commission on Human Rights in Geneva, although each has failed.² Human rights groups regularly issue scathing reports condemning China for widespread human rights violations.³ Every year, the U.S. State Department claims serious abuses, frequently describing the situation as deteriorating.⁴ U.N. bodies and officials, including the Working Group on Arbitrary Detention and the special rapporteurs on religious freedom and education, have also issued critical reports.⁵

On the other hand, the Chinese government regularly issues reports chock-full of statistics showing considerable progress on a wide variety of fronts, and proudly claims that Chinese citizens enjoy more rights than ever before.⁶ While not denying that much remains to be done, the government maintains its critics are biased, human rights are being misused for political purposes, and China is being subject to a double standard.⁷

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² *China Evades Human Rights Censure*, BBC NEWS, April 15, 2004. Between 1982 and 1997, only 22 states were the subject of U.N. resolutions for systematic violations of rights. Ron Wheeler, *The United Nations Commission on Human Rights: 1982-1997: A Study of "Targeted" Resolutions*, 32.1 CAN. J. POL. SCI. 75 (1999). China is among the small handful of most frequently targeted countries for systematic government violations that includes Cuba, Iraq, Myanmar, Iran, Equatorial Guinea and Haiti, all of which were the subject of proposed motions in at least 10 years between 1990 and 2004.

³ See, e.g., Human Rights Defenders (formerly the Lawyers Committee for Human Rights), *Human Rights Defenders in China*, April 1, 2004, at www.humanrightsfirst.org/defenders/hrd_China/hrd_China.htm ("The human rights situation in China continues to be grave. China has secured a prominent position in the international arena.... However, this has not been accompanied by a parallel improvement in human rights."); Amnesty International, AI Report 2003, available at <http://web.amnesty.org/report2003/Chn-summary-eng> ("Serious human rights violations continued and in some respects the situation deteriorated. Tens of thousands of people continued to be arbitrarily detained or imprisoned for peacefully exercising their rights to freedom of expression, association or belief.... Torture and ill-treatment remained widespread.").

⁴ See *infra* 280-283.

⁵ See Philip P. Pan, *U.N. Official Criticizes Education in China*, WASHINGTON POST, Sept. 19, 2003, at A20; Abdelfattah Amor (UN Special Rapporteur of the Commission on Human Rights, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 51st Sess., U.N. Doc. A/51/542 annex 1, (Oct. 23, 1996).

⁶ See, e.g., INFORMATION OFFICE OF THE STATE COUNCIL OF CHINA, PROGRESS IN CHINA'S HUMAN RIGHTS CAUSE IN 2003, available at <http://www.china.org.cn/e-white/20040330/index.htm> (hereafter 2004 WHITE PAPER). China's various "white papers" on human rights and other topics are available at <http://www.china.org.cn/e-white/>.

⁷ See, e.g., *China Evades Human Rights Censure*, BBC NEWS, April 15, 2004 (China's Assistant Foreign Minister, Shen Guofang, accused the U.S. of "double standards").

Many Chinese citizens feel the same way. They too see the human rights policies of Western countries, particularly the U.S., as hypocritical and hegemonic power politics.⁸ Chinese citizens are particularly sensitive about infringements on China's national sovereignty in part because of the decades of bullying by foreign imperial powers. But many also feel that China today is being held to a different standard than other countries. The U.S. and Western powers sit idly by while gross violations of human rights occur in Burundi, Colombia, Nigeria, Uganda, India, Saudi Arabia and countless other countries and yet are quick to criticize China even though most Chinese enjoy more extensive freedoms and a better standard of living than ever before. Behind the double standard, they suspect, lies the desire of the U.S. and other developed countries to contain China and prevent it from emerging as a rival superpower.

The very fact that government leaders and Chinese citizens feel China is being held to a double standard, whether or not it is true, has several negative consequences for human rights. The steady stream of criticism leveled at Beijing has led to testy relations between China and U.N. rights bodies, the U.S. and other countries, and international human rights NGOs. The government is often quick to assume a defensive posture, defending its record at length in the face of criticism rather than exploring constructive ways to improve the current situation. Beijing has also been reluctant to allow visits by inspectors from the U.N. or other countries, and has imposed restrictions on their visits. At times, the reaction has been even more hostile and antithetical to progress on rights issues. In response to the annual U.S. State Department report, which the State Council has denounced as "an amateurish collection of distortions and rumors" driven by "anti-China forces who don't want to see the existence of an increasingly wealthy and developed socialist state,"⁹ China now issues its own critical report on the rights situation in the U.S.¹⁰ In addition, China has cancelled bilateral dialogues on human rights and programs on rule of law in response to the attempts to censure it in Geneva.

Apart from the negative government reaction, the public's support for international reform efforts has also been weakened. Many citizens are suspicious about the motives of NGOs. Even reform-minded academics often find that NGOs lack an adequate understanding of the situation in China, and that their proposals for reform are out of touch with the existing norms or simply infeasible given China's current conditions. Public opinion about America, seen as the leader of Western critics, has undergone a dramatic shift in the last twenty years, from wildly supportive to highly critical.¹¹ Sometime in this century China will emerge as a major economic, political and ultimately military power capable of challenging U.S. hegemony. Instilling a feeling of resentment and hostility in Chinese citizens who believe China is being treated unfairly diminishes the likelihood of a peaceful and cooperative relationship between the superpowers.

The feeling that China is being subject to double standards has led to a growing nationalism.¹² While nationalism may take the form of pride in one's culture and country, in China nationalism is often based on a more negative feeling of resentment. The resentment stems from a general sense that China,

⁸ See *Students' Attitudes Toward Human Rights Surveyed*, BBC SUMMARY OF WORLD BROADCASTS, May 4, 1999. In a survey of 547 students from thirteen universities in China, eighty-two percent claimed that for other countries to initiate anti-China motions before the U.N. Commission on Human Rights constituted interference in China's internal affairs; seventy-one percent believed that the true aim of the United States and other countries in censuring China was to use the human rights issue to attack China and impose sanctions on it, with sixty-nine percent maintaining that this constituted a form of power politics.

⁹ George Gedda, *U.S. Won't Reproach China on Human Rights*, ASSOCIATE PRESS, April 11, 2003, available at 2003 WL 18224125.

¹⁰ See, e.g., INFORMATION OFFICE OF THE STATE COUNCIL OF CHINA, HUMAN RIGHTS RECORD OF THE UNITED STATES IN 2001, available at <http://www.china.org.cn/e-white/20020313/index.htm>.

¹¹ See Zhao Xi, *Jin Shinian Lai Zhongmei Guangxi Diaocha Zhong de Minjian Renzhi* [Public Opinion in Surveys on China-US Relations in the last 10 years], May 22, 2003, Xin Zhoukan [New Weekly Magazine], available at <http://cul.sina.com.cn/s/2003-05-22/34512.html>.

¹² See generally, PETER HAYS GRIES, CHINA'S NEW NATIONALISM: PRIDE, POLITICS AND DIPLOMACY (2004).

this once great civilization, is being denied its rightful place in the world. Ironically, applying a double standard to China feeds a trend to emphasize the distinctiveness of China, and of Asian countries more generally, as evidenced in the debate over Asia values. The growing desire for Asian countries to affirm their unique identities and stake out their own turf within the normative universe of human rights challenges the fundamental pretense of universalism on which the human rights regime is founded.¹³

Is China subject to a double standard? I argue based on comparative empirical studies of rights performance that it is, and offer several explanations why. Part I provides a brief overview of China's official policy on human rights and China's involvement in international human rights regime.

Part II examines how China does relative to other countries, particularly other countries at its income level, in *physical integrity rights*, *civil and political rights*, *social and economic rights* and other indicia of quality of life including poverty, infant mortality, life expectancy, primary school enrollment, government expenditures on education, health and military, *quality of governance* measured in terms of regulatory effectiveness, regulatory quality, rule of law and control of corruption, and *law and order and social stability* as reflected in crime rates and the number of drug users, suicides, divorces and young mothers, *women's rights*, and *cultural or minority rights*. Multi-country statistical studies are used to place China within an overall comparative framework. While China scores well below the average in its lower middle income category on civil and political rights, it outperforms the average country in its income class on virtually all other indicators, supporting the claim that China is subject to a double standard.

These studies are complemented by a more detailed discussion of particular issues in each area to provide a more complete picture of the rights situation in China. To be sure, there are still many people living in relative and absolute poverty, concerns about the rights of laborers, migrant workers, women, and minorities as well as shortcomings in criminal justice and the rule of law, widespread corruption and a host of other good governance issues. The government has acknowledged these shortcomings, and continues to take steps to address them. However, as the more detailed discussion demonstrates, most of these issues are factually, legally, politically, economically and normatively contentious, and defy easy solution, especially for such a large developing country as China. Not surprisingly, and with some considerable justification, the PRC government has expressed impatience with the international human rights community for failing to appreciate the complexity of the issues, for discounting the progress made in improving people's living standards and expanding citizens' freedoms while exaggerating the problems by focusing on the relatively few cases involving political dissidents, and for attempting to impose simplistic solutions that are normatively biased toward liberalism and likely to be counterproductive given China's history and traditions, level of economic development and current legal and political institutions.

Part III considers several reasons why China seems to be held to a higher standard than other countries.¹⁴ Some critics argue the attention paid to China is warranted because, given China's huge population, addressing problems in China will benefit so many people. However, India has a population nearly as large as China. And yet, despite a human rights record that falls short of China's on most indicators, India has not received anywhere near as much critical scrutiny as China.

A second, more likely explanation is that the international human rights community remains biased toward civil and political rights, the area in which China is the weakest, and, conversely, the one

¹³ For other evidence of a growing nationalism that has led to conflicts not only between Asian governments and international rights NGOs but between domestic and international rights groups, see *generally* THE RIGHTS OF ASIANS TODAY: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. (Randall Peerenboom et al. eds., forthcoming 2005).

¹⁴ I do not discuss the possibility of racism as an explanatory factor for the double standards, because racism would not explain why China is subject to such intense criticism and not other Asian or predominantly non-white states. Nevertheless, I do not want to exclude that racism could be a contributing factor.

area where India outperforms both China and other countries at its income level. Third, and related, non-democratic countries are held to higher standards than democratic countries. Accordingly, China is judged more harshly whereas India and other democratic countries with poor rights records tend to be given the benefit of the doubt, receiving the equivalent of a “get-out-jail-free” pass.

Fourth, China is singled out because of its geopolitical importance. China’s status as a member of the Security Council and its increasing economic clout distinguish China from other poorer, less politically powerful countries with weak human rights records. For some, China has assumed the role played by Russia during the Cold War – the evil empire that must be opposed at every turn. There is therefore some support for the popular view that criticism of China for human rights is part of a grand strategy to contain China and prevent it from assuming its rightful place as a world leader, although for the most part criticisms of China are motivated by a genuine commitment to the normative superiority of democracy and rights for everyone.

Fifth, and related, China presents a normative challenge to the human rights regime. Unlike Japan, which during its economically powerful years did not attempt to challenge Western powers, China is likely to take advantage of its growing economic and geopolitical influence to defend and advocate rights policies and normative vision of the world at odds with current rights policies based on secular liberalism even in the face of Western opposition. There are already signs of this approach in China’s support for Asian values. The deeply felt sense among Chinese that theirs is a great civilization increases the likelihood that an economically, politically and militarily powerful China will play a significant role in determining the nature of the international order and human rights regime in the future. Given the deeply entrenched view that even universal rights are contingent on local circumstances, China is unlikely to attempt to impose its own particular solutions to complex issues on other countries. However, rights advocates may fear there is likely to be a general shift in the normative orientation toward a more flexible, contextualized approach, with greater toleration for nonliberal, communitarian or collectivist approaches to rights issues.

Still another reason is that much of the reporting on China by the general media and human rights monitors tends to focus on particular horrific cases of human rights violations. The emphasis on individual cases, especially heart-wrenching cases which are not representative of the system as a whole, creates a mistaken impression of how serious the problems are.¹⁵ In addition, reporting on China suffers from a number of other shortcomings that provides fodder to those out to portray China as a malevolent evil empire, including the failure to place China’s record within a comparative context and in particular to compare China to other countries at a similar level of economic development. Given the importance of wealth to virtually every type of right, measuring the rights performance of a lower-middle income

¹⁵ Media reporting tends to focus on the negative everywhere. Reporters tend to emphasize murders by strangers and violent crime, even though most murder victims know their killers and most crimes are property crimes. As result, the public often exaggerates the seriousness of crime and the likelihood of being a victim of violent crime. Politicians then respond to the public’s misinformed demands to crack down on crime with harsher punishments and other measures to wage war on crime. Sara Sun Beale, *Interdisciplinary Perspectives on Restorative Justice: Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 422 (2003); Philip Pettit, *Is Criminal Justice Politically Feasible?*, 5 BUFF. CRIM. L. REV. 427 (2002).

Nevertheless, the public has a better sense of the situation in its own country than in other far distant countries. In contrast, “normal” negative reporting on events in China will create a more negative impression in the minds of American citizens or others not familiar with China because they lack the counterbalancing positive, less-newsworthy, experiences from every day life. The negative impact is likely to be even greater when the reports tap into long-held stereotypes, often favored by editors eager to peddle papers. Cf. Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26:2 THE FLETCHER F. WORLD AFF. 21, 34-35 (2002) (complaining that western media paid more attention to the ICTY than the ICTR and that coverage of the ICTR was more critical, and arguing that “the most important reason why the ICTR receives a steady stream of critical reporting is the stereotypical, biased, and long-standing negative image and neglect of the African continent in the global media,” complemented by “a mixture of ignorance, misunderstanding, and calculated editorial decision making by the editors of various global media.”).

country such as China against the benchmark of a rich country like the U.S. makes about as much sense as comparing a piano to a duck.¹⁶

On the other hand, the government has largely ceded the public relations battlefield to international NGOs by failing to hold public trials or restricting access to trials, by failing to publish judgments in controversial cases, and by refusing to allow independent monitors access to prisons and other sites to investigate allegations of abuses. The lack of transparency, combined with the egregious nature of some violations, leads people to suspect the worse, and fuels images of China as a repressive totalitarian state.

I. China and the International Human Rights Regime: Engagement and Resistance

China has ratified over twenty human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), and the Convention on the Rights of Child (CRC) along with its two optional protocols. It has signed but not ratified the International Covenant on Civil and Political Rights (ICCPR), and has opposed the International Criminal Court along with the U.S., Israel and a handful of other states.

China has actively participated in the international human rights regime in other ways as well, submitting reports, participating in the drafting of new instruments, engaging in numerous multilateral, regional and bilateral dialogues on rights issues, and hosting a number of important regional and global human rights meetings.¹⁷ Notwithstanding sovereignty concerns, China voted in favor of sanctions against apartheid South Africa. It has also allowed a limited number of visits from international rights monitors, including the Special Rapporteur on Freedom of Religion and Belief, the Working Group on Arbitrary Detention, and the Special Rapporteur on the Right to Education. In participating in the international rights regime, China has, like other countries, sought to promote and protect its own national interests.¹⁸

Domestically, rights are now firmly entrenched in political and legal discourse. The 1982 Constitution sets out the usual litany of civil and political rights as well as some social and economic rights such as free access to medical care. Although claims based directly on the constitution are

¹⁶ Wealth is highly correlated with social and economic rights ($r=.92$), good governance indicators such as government effectiveness ($r=.77$), rule of law ($r=.82$), and control of corruption ($r=.76$); civil and political rights ($r=.62$); women's rights ($r=.93$), and even physical integrity rights though to a lower degree ($r=-.40$). Randall Peerenboom, *Show Me the Money – The Dominance of Wealth in Determining Rights Performance in Asia*, (draft on file with author) [hereinafter *Show Me the Money*] (showing relationship globally and for Asia and other regions, and citing other studies that show wealth is statistically significant for various rights even after controlling for other factors).

¹⁷ 2004 WHITE PAPER, *supra* note 6.

¹⁸ See ANN KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE (1999), Kent's impressively detailed study of China's interactions with U.N. human rights organs shows how China learned over time the rules and how to manipulate them to achieve its ends, and how it used its political and economic power to defeat attempts to censure it. Kent argues that China improved with respect to procedural compliance but showed less progress with respect to substantive compliance. She often treats this as a problem of cognitive learning or lack of internalization of norms. See, e.g., *id.* at 8. However, in many cases there may be a legitimate difference of opinion over the substantive norms and how they are to be interpreted and implemented. In other cases, it may not be cognitive deficiencies as much as a hard-headed calculation of what is in China's interests. Overall, the picture that emerges is of China complying when it can and it is in its interest to do so and resisting otherwise. When not in its interest, China uses whatever techniques are at its disposal to resist, including procedural ploys, political pressure, economic pressure, and normative arguments. Whether China is significantly different in that regard from other countries is doubtful. See also ROSEMARY FOOT, RIGHTS BEYOND BORDERS: THE GLOBAL COMMUNITY AND THE STRUGGLE FOR HUMAN RIGHTS IN CHINA (2000).

generally not justiciable,¹⁹ numerous laws and regulations have been passed to further specify and give legal effect to most rights. In 2004, the Constitution was amended to provide expressly that "the state respects and safeguards human rights," indicating perhaps a greater commitment to effective realization of the rights provided by the Constitution.²⁰

The most recent White Paper announces the government's official position:

China holds that the development of human rights is an important mark of the continuous progress of the civilization of human society, and an important part of the progressive current of world peace and development. Full realization of human rights is the common goal of countries throughout the world as well as an important target for China in her efforts to build a moderately prosperous society in an all-round way, as well as her "peaceful rise" in the world. China will, as always, devote herself to promoting the human rights cause, actively carry out exchanges and cooperation with the international community according to the provisions of the Constitution of China and the need for modernization of the country, and make her contributions to promoting the healthy development of the international human rights cause.²¹

More specifically, the government's official human rights policy rests on several pillars. First, although some and perhaps most rights are universally valued at least to some extent when stated at a high level of abstraction, their interpretation and implementation depends on local circumstances, including the level of economic development, cultural practices and fundamental values that are not the same in all countries.²² This is unimpeachable as a descriptive claim and as a legal claim. International law itself ties some rights to local levels of development. This is most notable in the International Covenant on Social Economic and Cultural Rights, which provides that economic rights be achieved progressively consistent with a country's level of development. Limitation clauses that allow for restriction on rights in certain circumstances also inevitably introduce local factors. In addition, domestic legal doctrines "localize" international law in various ways, including through the principle that international law and domestic laws should be interpreted harmoniously, and general jurisprudential principles that require judges to apply local customs and norms. While the moral relevance of local circumstances is often contested, the real issue is not *whether* local circumstances are normatively relevant but *which* circumstances are relevant in what cases, as implied by the notion of a margin of appreciation afforded countries on rights issues.²³

Second, while rights may be interdependent, they must be prioritized, and the international human rights community and Western countries inappropriately privilege civil and political rights over other rights, including economic, social and cultural rights, and collective rights such as the right of development. In China, given its current level of economic development and huge population, subsistence is the most fundamental right. Moreover, stability is a prerequisite for the enjoyment of all rights. The need to ensure economic development and stability justifies limitations on the exercise of civil and political rights. This view is widely supported by Chinese citizens, and by the majority of citizens in poor developing countries around the world.²⁴

¹⁹ Shen Kui, *Is it the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case,"* 12 PAC. RIM L. & POL'Y J. 199 (2003).

²⁰ See *Academics Hail China's Constitutional Amendment on Human Rights*, BBC MONITORING ASIA PACIFIC, Mar. 16, 2004, available at 2004 WL 72818153.

²¹ 2004 WHITE PAPER, *supra* note 6.

²² See *Human Rights in China*, 34 BEIJING REV., Nov. 4-10, 1991.

²³ See Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates about "Values in Asia"*, 14 IND. INT'L & COMP. L. REV. 1 (2003).

²⁴ For several studies that show the high value assigned to order in China and limited demand for democracy, see RANDALL P. PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 53-56 (2002) [hereinafter called CHINA'S LONG MARCH]. See also the Pew Global Attitudes Project, *What*

Third, the international human rights regime assumes a liberal democratic framework and emphasizes implicitly and in some cases explicitly individual autonomy to a degree not found in other traditions. Greater weight should be placed on the interests of groups within society, of the society as a whole and of the state. Moreover, the emphasis on rights should not obscure the importance of duties and the responsibilities of individuals toward others.²⁵

Fourth, international human rights, and the ability of individuals to raise claims based on such rights or the international community to pressure China to change its ways, are limited by sovereignty. Accordingly, China, like other countries, has made a number of reservations when ratifying rights treaties that prevent the submission of disputes to arbitration or the International Court of Justice,²⁶ or that deny individuals standing to raise complaints under the treaties. China also made a reservation to Article 20 of CAT that would have allowed the Committee to conduct investigations, including visits. However, China has extended an offer to visit to the Special Rapporteur for CAT. Unfortunately, the visit was cancelled in 2003 due to fears that the mission would be compromised by Beijing's unwillingness to allow free access to prisons without advance notice.

China is by no means alone in objecting to the ever-increasing reach of the international human rights regime into domestic affairs. Nor does China object to all attempts to monitor and improve the rights situation in China. Indeed, it would be hypocritical for China to participate in the condemnation and sanctioning of other states for violating human rights and yet assert that the UN and other countries are interfering in China's domestic affairs when they do the same. However, China continues to insist that dialogue on rights issues be carried out on the basis of equality and mutual respect, and that states refrain for coercive intervention except in cases of widespread and systematic violation of rights that characterize failed states torn by ethnic strife and genocide.

Fifth, other states often use human rights as an excuse for strong-arm politics and to interfere in China's domestic affairs. Again, this is undeniably true, as even a cursory glance at the dismal history of U.S. linkage of human rights to MFN, WTO, intellectual property rights, market access and the valuation of Renminbi demonstrates. Time and again the U.S. would threaten to deny China MFN status allegedly because of human rights violations only to back off once China agreed to amend its intellectual property rules or to provide greater market access for foreign companies. In 2004, the U.S. again sponsored a motion to censure China for human rights violations during an election year in which Bush is under severe pressure domestically to "do something" about the rising trade deficit with China and "outsourcing" of jobs.²⁷ In contrast, there was no motion against China in 2002 and 2003, when the need for China's support in the U.S.-led global "war on terror" and in preventing North Korea's development

do Asians think about their lives?, in WHAT THE WORLD THINKS IN 2002 (2000), available at <http://international.ucla.edu/asia/news/02pewpolla.asp> (between 60% and 84% of Indonesians, Indians, Filipinos, Vietnamese and Chinese identify economic difficulties as their number one concern, with 37% of Indonesians, 44% of Indians, 57% of Filipinos, 31% of Vietnamese and 18% of Chinese claiming difficulties in affording adequate food); Yun-han Chuet al., *Halting Progress in Korea and Taiwan*, 12 J. DEMOCRACY 122, 124 (2001) (some 65% of Koreans claim economic development is more important than democracy, while only 1 out of 7 chose democracy); COMISIÓN DE PROMOCIÓN DEL PERÚ, LATINOBAROMETER: PUBLIC OPINION IN LATIN AMERICA, 2002 (2002) (More than twice as many Latin Americans would choose development over democracy, while 50% agreed or strongly agreed with the statement that they would not mind having a non-democratic government if it could solve economic problems).

²⁵ While there is more truth to these points than often allowed by the regime's harshest critics, the question remains whether the limitations on civil and political rights are indeed necessary, proportional or permitted under any reasonable interpretation of international law or even PRC law. For a discussion, see *infra* notes 139-148 and accompanying text.

²⁶ See, e.g., reservations to art. 22 of ICERD, art. 2; 9(1) of CEDAW, and art. 30 of CAT.

²⁷ The U.S. was also upset over the failure of China to make good on certain commitments negotiated the year before, and thus wanted to send the signal that such "backsliding" would not be tolerated.

of nuclear weapons overrode other concerns.²⁸ Nor was there a motion in 1998, another election year when Clinton was running on a platform of constructive engagement in contrast to the Republican position of confrontation and containment, and China signed the ICCPR and ICESCR. While European and Asian countries generally have favored constructive dialogue with China, the U.S. has oscillated between confrontation and engagement depending on domestic politics and changing U.S. interests.

Sixth, many of the countries that criticize China for human rights violations have their own problems with human rights at home. China and other Asian governments are right to point out that Western countries have committed atrocities in other countries in the past and have their own human rights problems. On the other hand, two wrongs do not make a right. That the U.S. or any other country has problems of its own does not justify human rights violations in China or excuse China from meeting its obligations under PRC and international law. Each country must be held accountable for their human rights violations and take the necessary steps to stop such violations.

At the same time, the images of American soldiers abusing Iraqi prisoners played into the hands of PRC propagandists seeking to deflect attention from China's problems by highlighting the violations of others, while fueling a popular backlash against American hypocrisy. Already suspicious of American motives and tired of U.S. moralizing, many Chinese, like others around the world, felt the U.S. forfeited whatever little remaining moral authority it might have once enjoyed to preach to other countries about human rights violations. As with the television evangelist whose flock deserts him after he turns up unexpectedly as the male lead in a video of a drunken orgy in a shady brothel, the U.S. actions have led even some of the most ardent Chinese rights advocates to give up on the U.S. and look elsewhere for models. Although some have praised the U.S. for exposing the problems and promising to hold those responsible accountable, others ask how, in a country with a free press, widespread torture could have gone unreported by the mainstream media for so long despite several reports from human rights agencies and complaints from Iraqis of abuse. Still others ask why Secretary of Defense Rumsfeld and others in the chain of command are still in power, and wonder whether the U.S. will hold senior leaders accountable under standards U.S. officials have claimed apply to other countries, including the newly developed command and responsibility theories developed by the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Skeptics doubt that the U.S. will apply the same standards to the U.S. soldiers that it advocates for others, pointing out that prior to 9-11 the U.S. criticized China for secret trials and other countries for military tribunals and yet has argued such methods are justified when it comes to U.S. national security interests and the war on terror. Early reports are not encouraging. Some of the first soldiers to be held accountable will be tried by military courts under the lesser of two forms of courts-martial, which provides a maximum penalty of one year in prison.²⁹ Rightly or wrongly, these and other shortcomings in the U.S. on human rights issues lead to the feeling that China is subject to a double standard.

²⁸ The U.S. could not sponsor a motion in 2002 when it lost its seat on the Human Rights Commission, although it could and did co-sponsor a number of other resolutions with its allies. While the government expressed disappointment that it was unable to persuade its allies to put forth a motion, it is hard to believe that the U.S. could not have managed to persuade a single friendly state to take the lead had it really wanted to spend the political resources to do so given the close cooperation between the U.S., the E.U. and other Western countries in the past, even allowing that European states have been less keen on such high profile motions since 1995. In any event, that no country was willing to sponsor a motion, even though many regularly vote in favor of U.S.-sponsored motions, suggests some degree of political expediency rather than pure principled commitment on the part of Western allies.

²⁹ For instance, military policeman Specialist Jeremy Sivits was tried under a proceeding known as a special court-martial. The maximum penalties under such a procedure are one year of confinement, a reduction in grade, forfeiture of pay for twelve months and a fine, along with discharge from the army for bad conduct. Military law experts have noted prosecutors could have tried Sivits in a general court-martial, where he would have faced stiffer penalties, including a slightly longer term of confinement and a dishonorable discharge, a more severe form of expulsion than one for bad conduct. See Dexter Filkins, *Guard's abuse trial to be public in Iraq; Arab news organizations will be invited to cover court-martial starting May 19*, INT'L HERALD TRIB., May 11, 2004, at 1.

II. Survey of Rights Performance

Physical Integrity Rights and Derogation of Rights in Times of Emergency

As indicated in Figure 1.1, China received a level-4 ranking on the Political Terror Scale based on both Amnesty International and State Department reports. Level-4 indicates extensive political imprisonment or a recent history of such imprisonment. Unlimited detention, with or without a trial, for political views is accepted and “extended to large numbers.” Execution, political murders, disappearances, brutality and torture are “a common part of life.” Despite its generality, terror affects those who interest themselves in politics or ideas.

This ranking puts China in the unsavory company of such notorious rights violators as Kenya, Nigeria, Pakistan, Russia, India, Sudan and Indonesia. Even North Korea and Cambodia received a better level-3 ranking based on Amnesty International reports. By way of comparison, few countries receive the worst level-5 rating. Examples include Afghanistan, Colombia, with its ongoing war on drug lords, and Nepal, where the government is currently fighting a civil war against Maoist rebels.³⁰

Does China merit such a dismal rating? Unlike in some of the other level-4 countries, there are very few if any politically motivated extrajudicial killings or disappearances in the usual sense. The 2004 U.S. State Department report did note that some dissidents without family members were detained or committed to psychiatric wards, which the report claimed amounted to disappearance.³¹ However, commitment to psychiatric wards is a far cry from the kind of widespread disappearances that plagued Latin American countries where large numbers of people were sent off to prisons to be tortured, many of them ending up dead in unmarked mass graves.

China also imposes more capital punishments than any other nation, and indeed more than the rest of the world combined. While Amnesty International reported 1,639 confirmed death sentences in 2003,³² one NPC delegate suggested the number may be as high as 10,000 per year.³³ Citing due process concerns, the State Department suggests that the executions may in some cases border on extrajudicial killings.³⁴ Whatever the shortcomings in due process, a problem the government acknowledges and is seeking to address,³⁵ describing the executions as extrajudicial killing is a stretch of the normal application of that term as used in judging the rights performance of other countries. One wonders

³⁰ Mark Gibney, Political Terror Scale Scores 1980-2003, available at http://www.unca.edu/politicalscience/faculty-staff/gibney_docs/pts.xls.

³¹ U.S. Department of State, *U.S. State Department Country Reports on Human Rights Practices, China*, released 25 Feb. 2004, available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27768.htm> [hereinafter 2004 State Department Report].

³² Amnesty International, AMNESTY INTERNATIONAL REPORT 2004, CHINA (2004), available at <http://web.amnesty.org/report2004/chn-summary-eng>. The report also refers to an estimate based on unspecified internal Chinese Communist Party documents that 15,000 people were killed on average per year in the four years from 1997-2001, although this figure includes people killed during police operations including pursuit and apprehension. The accuracy of the estimate is hard to evaluate without knowing more about the inputs and assumptions that were relied on in coming up with the final tally, or the source of the numbers.

³³ Robert J. Saiget, *China executes 10 000 people a year: NPC delegate*, AGENCE FRANCE-PRESSE, March 15, 2004, available at 2004 WL 73189726.

³⁴ 2004 State Department Report, *supra* note 31.

³⁵ In response to due process concerns, China's Supreme Court is considering revoking its delegation over final review to lower level courts. John Ruwitch, *China considers move to regulate executions*, Reuters News, March 10, 2004. Whether requiring Supreme Court review would reduce significantly the number of capital sentences is doubtful however. Randall Peerenboom, *Out of the Pan and into the Fire: Well-intentioned but Misguided Recommendations to Eliminate Administrative Detention in China*, 98 NW. U. L. REV. 1 (2004) [hereafter *Administrative Detention*].

whether the State Department would describe the executions of criminals in the U.S. as extrajudicial killing given the various due process failures that have contributed to numerous documented cases of innocent people being executed and to a disproportionately high rate of executions of poor black men, which have led the U.N. Special Rapporteur and even the U.S. Supreme Court itself to describe the process as arbitrary and racially discriminatory.³⁶

Torture remains a serious problem for a variety of reasons, despite being prohibited by PRC law and the considerable efforts to stamp it out.³⁷ The scope of the problem is difficult to quantify however. The Supreme People's Procuracy has acknowledged about 400 cases/year during the 1990s.³⁸ Reports from human rights organizations and the overseas Falungong organization describe torture as widespread and systemic,³⁹ but then Amnesty International also describes torture in the U.S. as widespread and systemic.⁴⁰ While relying on reports from the Falungong organization is likely to present a false impression of the scope of the problem,⁴¹ official reports surely understate the number of cases of torture. In recent years, the government has adopted various measures to address the problem, including tightening the prohibitions against torture, increasing the penalties for abusing detainees, restructuring police departments, requiring prison guards to sit for professional exams every five years, appointing section-level officers based on open-competition, limiting who can be taken to the police station for questioning and the length of the interrogations, firing incompetent police and prosecuting cases of abuse of police powers more aggressively. The government's 2004 Human Rights White Paper notes that in 2003 the procuratorate prosecuted 259 cases of illegal detention, 29 of illegal search, 52 of extorting confessions by torture, and 32 of abusing prisoners or detainees.⁴² Nevertheless, much remains to be done.⁴³

China's poor PTS score may also reflect concerns with arbitrary detention. Human rights organizations have criticized as arbitrary, and called for the elimination of, all forms of administrative detention. In fact, there are several different types of administrative detention, some of which exist in other countries. The various forms include: (i) administrative detention up to 15 days under the Security Administrative Punishments Regulations; (ii) education through labor (ETL) (often referred to as "re-education through labor," which has received most of the attention abroad and within China); (iii) detention for education used to detain prostitutes and their clients; (iv) compulsory drug treatment; (v) forced detention in psychiatric hospitals; (vi) detention of juveniles who commit criminal offenses in juvenile centers or juvenile ETL centers, or of juveniles who are troublemakers whose actions do not rise to the level of criminal offenses in work-study schools; and (vii) stop and question whereby suspects may

³⁶ *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. ESCOR Human Rights Comm., 54th Sess., Agenda Item 10, at 34, U.N. Doc. E/CN.4/1998/68/Add.3 (1998) (citing U.S. Supreme Court opinions). In response, U.S. legislators declared that such monitoring constituted UN harassment. Betsy Pisik, *Human Rights Probes Irr U.S.*, WASH. TIMES, June 29, 1998, at A1.

³⁷ *Administrative Detention*, *supra* note 35.

³⁸ See, e.g., AMNESTY INTERNATIONAL, *TORTURE—A GROWING SCOURGE IN CHINA—TIME FOR ACTION* (2001) [hereinafter TORTURE].

³⁹ *Id.*

⁴⁰ AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: RIGHTS FOR ALL [hereinafter RIGHTS FOR ALL] 17, 19, 26, 43 (1998).

⁴¹ Patsy Rahn, *The Falun Gong: beyond the Headlines*, 17 CULTIC STUD. J.: PSYCHOL. MANIPULATION & SOC'Y (2000).

⁴² 2004 White Paper, *supra* note 6. See also Chan Siu-sin, *Officers to be held to account over deaths of detainees*; New regulations, in force from October 1, aim to protect the legal rights of suspects, SOUTH CHINA MORNING POST, Aug. 4, 2004, at 6.

⁴³ For recommendations, see *Administrative Detention*, *supra* note 37; HUMAN RIGHTS IN CHINA, IMPUNITY FOR TORTURERS CONTINUES DESPITE CHANGES IN THE LAW: REPORT ON IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN THE PEOPLE'S REPUBLIC OF CHINA (2000); TORTURE, *supra* note 39.

be detained for questioning up to 48 hours.⁴⁴ Administrative detention is intended for minor offenses that do not rise to the level of more serious crimes. Accordingly, it is meant to be a lighter form of intervention with a greater emphasis on rehabilitation than the more punitive formal criminal law system. Supporters, most of whom advocate significant reforms, argue that eliminating administrative detention will harm the vast majority of those the reformers are trying to help by pushing many marginal offenders into the harsh and decidedly unfriendly penal system, forcing them to live with hardened criminals, and resulting in their being forever stigmatized as convicts.

One of the main criticisms of the various forms of administrative detention is that the failure to provide prompt judicial review of the detention decision violates international law. Article 9(4) of the International Covenant on Civil and Political Rights provides: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”⁴⁵ Although China has not yet ratified the ICCPR, it has signed it, and is thus obligated not to act in ways that would defeat the object and purpose of the treaty. The U.N. Working Group on Arbitrary Detention has objected to ETL because the decision to deprive someone of personal liberty must be made by an impartial and independent judicial body.⁴⁶ However, in some civil countries, including France and Switzerland, prosecutors rather than judges review the decision to arrest and detain. The European Court of Human Rights has held this to be consistent, in certain circumstances, with Article 5(3) of the European Convention, which requires that a person arrested or detained be brought immediately before a judge empowered to exercise judicial functions.⁴⁷ In China, the decision to detain someone under ETL is supposed to be made by an Administrative Committee consisting of officials from the bureaus of civil affairs, public security, and labor. In practice, however, public security officers dominate the decision-making process.

Although there is no habeas corpus right, detention decisions in China may be challenged through a number of channels, including administrative litigation in a court before a judge, administrative reconsideration, administrative supervision, and through the system of letters and visits whereby disgruntled citizens write letters to or visit judges, government officials, people's congress delegates or virtually anyone else they think may assist them, including Party officials. Critics note that these channels are no substitute for a prompt review, that they are not very effective, that detainees are often ignorant of their rights and not told their rights by authorities, that they lack the financial means to pursue these various legal channels for challenging the decision, and that they may be subject to abuse by the guards or authorities holding them simply for trying to avail themselves of their rights provided under law. The authorities have attempted to respond to some of these concerns by strengthening administrative

⁴⁴ In June 2003, the State Council issued a regulation that put an end to detention for repatriation, which was aimed at migrant workers. One of the more well-known forms of administrative detention — shelter and investigation — was eliminated in conjunction with revisions to the Criminal Procedure Law in 1996, although the revisions to the CPL essentially incorporated the central aspects of shelter and investigation.

⁴⁵ The ICCPR Human Rights Committee has declared that delays in bringing a person detained before a judge should not exceed a few days. *Right to Liberty and Security of Persons (Art. 9) CCPR General Comment 8*, U.N. Office of the High Commissioner for Human Rights, 16th Sess., ¶ 2 (1982). It should be noted that the General Comments and case holdings of the ICCPR Committee are non-binding.

⁴⁶ The Working Group suggested that review by the Administrative Committee would suffice if the Committee provides “safeguards equivalent to those of a court.” However, the Group noted that the Committee did not currently provide such safeguards, and recommended review by a judge, perhaps according to the simplified procedures set out in the CPL.

⁴⁷ *Huber v. Switzerland*, 188 Eur. Ct. H.R. (ser. A) at 18 (1990), para. 43.

reconsideration of public security decisions. Regulations effective January 1, 2003 clarify the rights of detainees and others who disagree with public security decisions to challenge the decision.⁴⁸

While providing detainees the right of habeas corpus is desirable and would bring the legal system more into line with international standards, whether it would result in much relief for those detained is highly questionable. There is no evidence that Chinese judges want to coddle criminals. On the contrary, the vast majority is likely to share the prevailing society-wide belief in the need to be tough on criminals. As in other countries, the review by the custodial judge may be nothing more than a rubber stamp.⁴⁹ Approval of the detention decision is all the more likely in China given the emphasis on social stability, rising crime rates and the high proportion of crimes committed by non-residents.

Human rights groups also object to long pretrial detention under both administrative detention procedures and the criminal law. In general, civil law systems tend to allow longer periods of detention while investigation is being carried out, leading supporters of the inquisitorial system, with its emphasis on truth but long detention periods and limited role for defense counsel, to complain about what they see as a bias toward the adversarial approach or even an American approach on the part of the ICCPR Committee and human rights organizations.⁵⁰ Nevertheless, the Supreme People's Procuracy has criticized public security officers for violating even the generous deadlines for detention in the PRC, citing more than 300,000 cases between 1998 and 2002. Accordingly, on November 12, 2003, the Supreme People's Court, Supreme People's Procuracy and the Ministry of Public Security jointly issued the Notice to Implement Strictly the Criminal Procedure Law and Conscientiously Rectify Excessive Detention. The notice emphasized that procuratorates below the provincial level must obtain permission from the next higher level if they intend to seek an extension. Courts are also encouraged to complete trials on time. Lower level courts must obtain approval from the High People's Court if trials are to be extended for one month. The notice also warns against changing jurisdictions or withdrawing the charges and then rearresting someone and other such techniques to circumvent the rules.

To facilitate implementation of the new rules, the Supreme People's Procuratorate has set up special telephone lines and e-mail sites for filing reports on extended detention by procuratorial organs. More than 25,000 people subject to extended detention were released in 2003.⁵¹ Notwithstanding such changes, detainees may still be legally detained for extended periods under the Criminal Procedure Law (CPL).⁵²

Another major complaint about both administrative detention and the formal criminal process is the lack of due process rights. Administrative detainees are entitled to some due process protections,

⁴⁸ See *Gongan Jiguan Banli Xingzheng Anjian Chengxu Guiding* [Ministry of Public Security Regulations for the Procedures for Administrative Reconsideration Cases Handled by the Public Security] (effective Jan. 1, 2004).

⁴⁹ See *Administrative Detention*, *supra* note 35 (numerous empirical studies show that in England detention is almost always authorized, and that the idea of a custody officer as an independent check has proven chimerical; one study finding that detention was refused in only one case out of 4246; in France, authorization for detention granted routinely unless there is clearly no legal basis for arrest, with the transmission by police to procureur given by phone or fax and characterized as communication of information not requiring a response; in Japan, judges refused prosecutor's request for detention only 110 times out of 77,545; judges also denied the prosecutor's request for an arrest warrant on average only once every 1233 times). The low percentage of refusals does not mean that the process is entirely useless or ineffective. The fact that such a procedure exists may send a signal to prosecutors that arbitrary arrests are unacceptable and thus may lead to a change in norms and behavior, including self-restraint on the part of prosecutors.

⁵⁰ ERIKA FAIRCHILD & HARRY DAMMER, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS* 146, 148 (2d ed. 2000); Jacqueline Hodgson, *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform*, 51.3 INT'L & COMP. L. Q. 781, 807 (2002) (in France, detention for up to two years is possible for those subject to imprisonment or a fine of 25,000FF or more, and up to four years for the most serious offenses).

⁵¹ 2004 White Paper, *supra* note 6.

⁵² For a discussion of deadlines in the PRC, see *Administrative Detention*, *supra* note 35.

though they do not enjoy all of those provided under the CPL. However, in practice, many of the due process rights provided by the CPL are not honored.⁵³

One proposal for reform would do away with administrative detention as such, bringing offenses now subject to administrative detention into the formal criminal process. However, as this would result in a huge influx of cases into an already overburdened criminal justice system, most offenses would be subject to simplified and summary procedures recently introduced into the formal criminal system. Similar to pleabargaining in other countries, these procedures require a confession in exchange for leniency. Unfortunately, like pleabargaining, the need to confess to obtain leniency diminishes significantly the value of the various rights and procedural protections afforded to the criminally accused, as the accused must forego such rights in the rush to cut a deal with the police and prosecutors.

There are undeniably serious due process concerns both in administrative detention and formal criminal cases. However, it is important that one distinguish between arbitrary detention in a procedural and in a substantive sense. Administrative and criminal detentions are rarely arbitrary in the sense that substantive grounds are lacking for arrest and conviction. Nevertheless, human rights reports often depict the detentions as arbitrary because they allegedly involve persons engaging in political activities, usually peacefully, that many would claim are protected by domestic and international law. Such detainees then are characterized as political prisoners of conscience, another key component of the PTS index.

Although human rights organizations regularly highlight the use of administrative detention to detain political dissidents, academic experts have noted that the purpose of administrative detentions has changed over the last two decades, and that ETL and other forms of administrative detention are used primarily to deal with petty criminals.⁵⁴ In fact, only a tiny fraction of those subject to ETL could in any way be considered political prisoners, less than 1% if one excludes Falungong disciples charged with violations under generally applicable criminal laws, and somewhere around 2% even if one includes such cases as political cases.⁵⁵

Similarly, there are at most 500-600 prisoners serving sentences for the now repealed crime of counterrevolution.⁵⁶ While many rights organizations continue to press for their release, whether someone convicted under a valid law at the time should be released if the definition of the crime is changed or the crime is repealed is a controversial and unsettled issue in international law.⁵⁷ In this case, most if not all of those convicted for the crime of counterrevolution would also be guilty under the new crime of endangering the state that replaced the old crime of counterrevolution. In fact, endangering the state may actually be easier to prove as there is no requirement to show subjective intent as in the case of counterrevolution. While counterrevolution was a frequently invoked charge in the politicized Mao era, accounting for almost 60% of the crimes in some years, today endangering the state accounts for less than 0.5% of crimes.⁵⁸

In addition, Amnesty International claims “scores of people” are imprisoned for Tiananmen related activities, although it has apparently identified only 50 of them.⁵⁹ The head of Human Rights in

⁵³ *Id.*

⁵⁴ See Chen Ruihua, *Laodong jiaoyang de lishi kaocha yu fansi* [Survey of and Reflections on the History of ETL], in LIXING YU ZHIXU; ZHONGGUO LAODONG JIAOYANG ZHIDU YANJIU [RATIONALITY AND ORDER: RESEARCH ON CHINA'S EDUCATION THROUGH LABOR SYSTEM] 1, 9, 13 (Chu Huaizhi et al. eds., 2002).

⁵⁵ *Administrative Detention*, *supra* note 35.

⁵⁶ 2004 State Department Report, *supra* note 32.

⁵⁷ [cite]

⁵⁸ Robin Munro, *Judicial Psychiatry in China and Its Political Abuses*, 14 COLUM. J. ASIAN L. 1, 67-68 (2000).

⁵⁹ Amnesty International, *The Shadow of Tiananmen*, WIRE (Amnesty International's monthly magazine), June 2004, available at <http://web.amnesty.org/web/wire.nsf/June2004/China>.

China guesstimated about 130, while acknowledging the true number is unknown.⁶⁰ The U.S. State Department Report, citing unspecified “credible sources”, suggested the number of people still in prison “for their activities during the 1989 Tiananmen demonstrations” may be as high as 2000 people,⁶¹ although that seems highly unlikely as few people were given sentences of 15 years or more and of those, some would have been released on parole. Of course, the government claims that they are not imprisoned for their political views but for violating generally applicable criminal laws such as attempting to overthrow the state or disturbing public order.⁶² Accepting their characterization as political prisoners and the highest of all the guesstimates of their numbers, they would constitute about 0.1% of the total prison population of 2 million, keeping in mind that China’s incarceration rate is much lower than that of many other countries, particularly the U.S. (184 per 100,000 versus 701 for the U.S.).

Simply put, politics is generally not an issue in most criminal cases. To be sure, there are many problems with both administrative detention and the formal criminal system.⁶³ I do not mean to trivialize Falungong or political dissident cases either in terms of the impact on individuals, the potential injustice involved, or their significance in deterring others from engaging in what many would consider to be nothing more than the exercise of their rights as provided under PRC and international law.⁶⁴ However, we need to have some sense of the size of the problem. Taking China’s population of 1.3 billion as the basis, and erring on the high side even according to estimates by human rights groups by assuming 20,000 prisoners of conscience of all stripes in all forms of detention, the total rate would be 0.0015%. 20,000 may seem like a “large number” - and probably overstates the actual number by four to five times even accepting a liberal definition of “political prisoner.” But even assuming 20,000 such prisoners, given the size of the total population, it is difficult to see how China can be described as a country in which execution, political murders, disappearances, brutality and torture “are a common part of life,” as required for a level-4 PTS rating.

Derogation of Rights in Emergencies: Martial Law, Strike Hard at Crime Campaigns and Terrorism

The ICCPR, not yet ratified by China, allows for the declaration of a state of emergency only when the life of the nation is threatened.⁶⁵ Principle 39 of the non-binding Siracusa Principles interprets “threat to the life of the nation” to mean that a danger (i) is present or imminent; (ii) is exceptional; (iii) concerns

⁶⁰ See the testimony of Sharon Hom, head of Human Rights in China, before the Executive Commission on China of US Congress on June 3, 2004, available at <http://www.cecc.gov/pages/hearings/060304/hom.php>.

⁶¹ 2004 State Department Report, *supra* note 32, at 2. Several pages later, the report states Amnesty International has identified 211 person still in prison or on medical parole, and rather unhelpfully “identifies” the credible source for the higher 2000 numbers as “other NGOs.” *Id.* at 11.

⁶² Some protesters burned vehicles and destroyed property, and some assaulted and killed soldiers and police. Therefore it is possible that some could still in prison for such offenses, although most would have been released by now except for those held for the most serious offenses, for which some would have been sentenced to life in prison. It bears noting that Amnesty International is careful not to label all of those in detention for Tiananmen related offenses as prisoners of conscience.

⁶³ The Working Group on Arbitrary Detention in its visit report of 22 December 1997 recommended: (a) Incorporate expressly in the Criminal Procedure Law a provision stating that under the Law a person is presumed innocent until proved guilty by a court or tribunal at the end of a trial; (b) Define the crime of “endangering national security” in precise terms, (c) Incorporate in the criminal law an exception to the effect that the law will not regard as criminal any peaceful activity in the exercise of the fundamental rights guaranteed by the Universal Declaration of Human Rights. See *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, U.N. ESCOR Human Rights Comm., 54th Sess., Agenda Item 8, U.N. Doc. E/CN.4/1998/44/Add.2 (1998). See also *Administrative Detention*, *supra* note 37.

⁶⁴ Of course, the authorities and others who feel the restrictions are justified would see the fact that many others are deterred from such behavior as desirable – one of the main purposes for the punishments is to deter what they see as unacceptable behavior.

⁶⁵ ICCPR, art. 4.

the entire population, and (iv) constitutes a threat to the organized life of the community.⁶⁶ Even then, states cannot derogate from all rights. Derogation is not allowed with respect to the right to life, torture, cruel and unusual punishment, the principle of *nullem crime sine lege*, recognition as a person before the law, or freedom of thought, conscience and religion.⁶⁷

Global practice, however, is considerably different. Countries generally react to threats to security by restricting rights.⁶⁸ The “margin of appreciation” afforded countries is greatest when it comes to national security.⁶⁹ In upholding the British government’s derogation of due process rights as necessary to control civil strife in Northern Ireland, the ECHR stated:

It falls in the first place to each Contracting State, with its responsibility for “the life of [its] nation,” to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) [of the European Human Rights Convention] leaves those authorities a wide margin of appreciation.... It is certainly not the Court’s function to substitute for the British Government’s assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism.⁷⁰

The Court also noted that it must not base its decision on twenty-twenty hindsight, but must consider the government’s decisions and actions in light of the circumstances at the time.

A wide margin of appreciation does not mean unlimited discretion, of course. China declared martial law in parts of the country in 1989. Critics argue that the peaceful student demonstrations were not an adequate ground to declare martial law. But even if martial law was justified, critics argue that decision to use force to clear the square in Tiananmen was not justified, and that excessive force was used. The disclosure of recent documents revealed differences of opinion among government leaders, although the final decision was made after lengthy discussion in which all sides had an opportunity to present their views.⁷¹ The announcement was then made by Li Peng, as Premier and head of the State Council, in accordance with constitutional requirements. Today, public opinion remains divided in China about Tiananmen, in contrast to the near universal condemnation abroad. Some Chinese citizens see the government’s response as perhaps excessively brutal but necessary to regain control and ensure an extended period of stability that has lasted until today, allowing China to progress economically while

⁶⁶ *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 7 HUM. RTS. Q. 3, 1 (1985).

⁶⁷ ICCPR, art. 4.

⁶⁸ See Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 460 (2003) (noting that Lincoln suspended habeas corpus during Civil War, approved by Congress; 2200 people were prosecuted under Espionage and Sedition Acts, with more than 1000 convicted during WWI; the right of habeas corpus was suspended and martial law imposed in Hawaii after Pearl Harbor; during the McCarthy era, the Supreme Court in *Am. Communications Ass’n. v. Douds*, 339 U.S. 382, 388-89 (1950) permitted regulations requiring labor unions to sign an oath swearing they were not members of Communist Party and did not believe in the overthrow of the United States).

⁶⁹ HOWARD CHARLES YUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996).

⁷⁰ *Ireland v. United Kingdom*, 25 Eur. Ct. H.R., (ser. A) (1978), para. 207, 214.

⁷¹ *TIANANMEN PAPERS* (Andy Nathan et al. eds., 2001).

keeping the lid on social unrest from those who have lost out in the transition to a market economy.⁷² They note that the students and other demonstrators had been repeatedly warned to leave the square and yet refused to do so despite being fully aware that martial law had been declared and military troops were prepared to clear the square by force if necessary. Others, led by those who participated in the demonstrations or lost loved ones, continue to call for justice and a reversal the government's verdict on Tiananmen as political turmoil that disrupted social order and economic development. However, the government has refused to reconsider its official position.⁷³

A second area of concern has been the cyclical campaigns to "strike hard" at crime (*yanda*) which, although not involving a formal declaration of emergency, have led to human rights abuses and the curtailment of rights for the criminally accused. Government officials and court leaders always take care to emphasize that the strike-hard campaign must be in accordance with law. Nevertheless, the endless campaigns no doubt put pressure on police to make additional arrests, on prosecutors to prosecute more often and charge more serious crimes, and on judges to convict and issue heavier sentences within the range permitted by law. Goaded on by a public widely supportive of the war on crime, police, prosecutors and judges, in their zeal to strike hard at crime, exceed the limits imposed by law in some cases.⁷⁴

A third area of concern is that the "war on terrorism" may be undermining progress on rights in China as elsewhere. China beefed up its anti-terrorism laws by amending the Criminal Law in 2001. Beijing has identified the East Turkestan Islamic Movement (ETIM) as a terrorist organization, citing more than 200 violent incidents in Xinjiang between 1990 and 2001, which resulted in 166 deaths and injuries to 440 people.⁷⁵ In a move much criticized by human rights groups, the U.S. supported the designation of ETIM as a terrorist organization, with the UN Security Council following suit.⁷⁶ In December 2003, Beijing added to the list the East Turkestan Liberation Organization (ETLO), the East Turkestan Information Center (ETIC) and the World Uighur Youth Congress (WUYC), as well as eleven individuals. ETIC and WUYC are based in Germany. All four groups openly advocate for East Turkestan independence, although they generally do not endorse violence, at least publicly.⁷⁷ However, ETLO members have been involved in bombings and shootouts, according to the U.S. State Department Counterterrorism Office.

⁷² See Richard Spencer, *Tiananmen: Victory for Capitalism*, THE SPECTATOR, June 12, 2004, available at <http://www.spectator.co.uk/article.php?table=old§ion=current&issue=2004-06-12&id=4707&searchText>.

⁷³ Although the government's refusal is primarily driven by domestic political concerns, one complication is that reversing the official verdict might give rise to issues of civil and criminal liability for former state leaders such as Li Peng and strengthen the hand of those who are trying to have them tried abroad under the U.S. Alien Tort Claims Act or controversial international laws providing for universal criminal jurisdiction. See Jacques DeLisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DePaul L. Rev. 473 (2002).

⁷⁴ For similar complaints in the United States, see RIGHTS FOR ALL, *supra* note 40 (claiming that the war on crime has contributed to more aggressive policing).

⁷⁵ Information Office of the State Council of China, *'East Turkistan' Terrorist Forces Cannot Get Away with Impunity*, 45.5 BEIJING REVIEW, Jan. 31, 2002, at 15.

⁷⁶ Colin Mackerras, *Why Terrorism Bypasses China's Far West*, ASIA TIMES (Online), April 23, 2004, at <http://www.atimes.com/atimes/China/FD23Ad03.html>.

⁷⁷ THE U.S. STATE DEPARTMENT COUNTERTERRORISM OFFICE, PATTERNS OF GLOBAL TERRORISM 2001, May 2002, at 17 (describing ETLO as a cause for concern, along with the East Turkestan Islamic Party, which was founded in the early 1980s with the goal of establishing an independent state of Eastern Turkestan, advocates armed struggle and is oriented towards religious extremism and pan-Islamism). See also David S. Cloud and Ian Johnson, *Friend or Foe, In Post-9/11 World, Chinese Dissidents Pose U.S. Dilemma - Uighur Nationalists Have Peaceful, Violent Wings; Deciding Who Is a Threat - 'Omar Is Not a Bomb Thrower'*, WALL ST. J., Aug. 3, 2004, at A1 (ETIM member acknowledges links to Osama bin Laden and use of violent means to overthrow PRC government).

Human rights groups have accused China of taking advantage of the recent global concern with terrorism to restrict the rights of Uighars and Tibetans. While it is clear that there have been a number of arrests in recent years, the details are often murky, with even the basic facts frequently contested.⁷⁸

For instance, Uighar Shaheer Ali was tried and convicted Nov. 12, 2002, and sentenced to death in March 2003 for "manufacturing and stockpiling illegal weapons and explosives," separatism, and "organizing and leading a terrorist organization," namely ETIM and the East Turkistan Islamic Party of Allah.⁷⁹ The court claimed Ali's organization took part in a beating, smashing and looting incident in Yining on February 5 1997. However, Amnesty International claims that independent eyewitnesses report the incident was a peaceful demonstration calling for equal treatment for Uighars, which became violent after security forces used tear gas and water cannons to disperse the protesters.⁸⁰ In an interview, Ali claimed he was a member of the Eastern Turkistan Islamic Reform Party, which he described as a nonmilitant organization. He also claimed he was repeatedly tortured while in custody.

Wang Bingzhang, a U.S. based dissident, was sentenced to life imprisonment by a Shenzhen court after being convicted of espionage and leading a terrorist group. The Guangdong High Court upheld the judgment. The Shenzhen court's judgment and the official press reported in detail the evidence against Wang.⁸¹ The judgment includes a lengthy review of the evidence, including witness testimony, documents from the National Security Bureau and Wang's own publications and internet writings, to show that Wang received payments for providing military secrets to Taiwan intelligence organs, advocated terrorism through publications and on the internet, plotted to blow up the PRC embassy in Thailand, planned an explosion in China on the national day holiday and so on.⁸²

The case attracted the interest of the international community when Wang was apparently abducted from Vietnam along with Zhang Qi and Yue Wu, both of whom were later released by PRC authorities. Beijing apparently claims PRC security officers rescued Wang after he was kidnapped. The U.N. Commissioner on Human Rights stated that his disappearance, arrest and imprisonment violated international standards. Wang has gone on a hunger strike to protest extended periods of solitary confinement and political education sessions three times a day.⁸³

In a case that has led to considerable criticism abroad, Tibetan Lobsang Dondrub was executed for a series of bombings in Sichuan in 2002, while Buddhist teacher Tenzin Deleg was sentenced to death with a two year reprieve.⁸⁴ The court found Lobsang Dondrub guilty of incitement to split the country and

⁷⁸ See, e.g. *Ethnic tension rising in Southern Xinjiang, says official*, AGENCE FRANCE PRESS, Aug. 2, 2004, 2004 WL 88218144 (reporting increase in ethnic and religious tensions in southern Xinjiang and the arrests of 75 people, including eight for endangering the state and others for "illegal religious activities" as well as other offenses, but unable to confirm the number of people arrested or the charges for most of them).

⁷⁹ Amnesty International China: Further Information on Fear of Forcible Return, ASA 17/037/2003, Oct. 24 2003, available at <http://web.amnesty.org/library/Index/ENGASA170372003?open&of=ENG-393>. See also *Executed Uyghur Refugee Left Behind Tapes Detailing Chinese Torture*, RADIO FREE ASIA, Oct. 23, 2003, available at <http://www.rfa.org/front/article.html?service=eng&encoding=10&id=118780>.

⁸⁰ Amnesty International, *No justice for the victims of the 1997 crackdown in Gulja*, ASA 17/011/2003, Feb. 4, 2003 (also citing unconfirmed reports that police fired into the crowd, and reports of torture and deaths in detention in relation to the incident).

⁸¹ *Wang Bingzhang Convicted of Terrorist Activities and Espionage*, XINHUANET, Feb. 20, 2003.

⁸² The court's judgment is available at <http://www.cdip.org/wbz/panjueshu.htm>. See also *Hunger strike helps improve conditions for jailed Chinese dissident - report*, AGENCE FRANCE PRESSE, Jan. 27, 2004.

⁸³ *US Resident Jailed in China Threatens Hunger Strike*, BBC MONITORING INTERNATIONAL REPORTS, Dec. 11, 2003.

⁸⁴ Congressional-Executive Committee on China, *The Execution of Dobsang Dondrub and Tenzin Deleg: The Law, the Courts and the Debate on Legality*, released on Feb. 10, 2003, available at <http://www.cecc.gov/pages/news/lobsang.php>.

illegal possession of firearms and ammunitions, and Tenzig Deleg guilty of incitement to separatism, for acts that the authorities have described as “terrorism.” PRC authorities claim that both defendants confessed to the crimes. However, Tenzig Deleg denies having confessed and reportedly shouted his innocence at trial before being silenced. Lobsang Dondrub reportedly also refused to confess. Longsang Dondrub was executed immediately after the Sichuan High Court upheld the Intermediate Court’s verdict, even though Beijing officials had promised a U.S. government delegation that the Supreme Court would review the case. Other due process concerns included allegations that the defendants were not allowed to choose their own counsel and that they were tortured during the investigations. Critics of the decision note that Tenzig Deleg has a history of social activism, including renovating temples and establishing charitable organizations for orphans and the elderly, and is a staunch supporter of the Dalai Lama, but that he has no record of political protest. A government’s spokesperson responded to foreign criticism by claiming that the case was handled according to law and that courts in any other country would punish criminals who undermine state security and engage in terrorism.

Civil and Political Rights

During the Mao era, Chinese citizens were afraid to discuss political issues with their family members, much less in public with foreigners. Today, political discussion is commonplace whenever friends and colleagues meet socially, while visitors are often surprised at how readily even first-time acquaintances are to criticize the government, disparage top leaders or call for faster political reforms. Academics regularly publish works critical of the government and calling for greater democratization and political reforms. Legal scholars and government officials continue to press for constitutional reforms including greater judicial independence. The media, forced to respond to consumers’ interest as a result of market reforms, are ever more critical and free-wheeling.

At the same time, the government continues to impose – in some cases ruthlessly and with little regard for legal niceties or international opinion – severe limitations on civil and political freedoms when the exercise of such rights is deemed by the government to threaten the regime and social stability. The lines of what is permissible and what is not are clear and fixed in some areas, but vague and fluid in others. As important as the subject matter is the time, place and manner of expression. What may be tolerated in some circumstances may be subject to greater restriction when there are certain aggravating factors present such as attempts to organize across regions or to hook up with foreign organizations.

Accordingly, China receives a very low score on civil and political rights – ranking in the lowest 10% of all countries on the World Bank’s voice and accountability index. The voice and accountability scale incorporates a number of indicators measuring various aspects of the political process, civil liberties and political rights, including the right to participate in the selection of government representatives and the independence of the media.⁸⁵ As Figure 2.1 demonstrates, China scores poorly relative to many countries in Asia and elsewhere, and even does poorly relative to its level of economic development, as Table 6.1 shows.⁸⁶

A closer examination of law and practice with respect to discrete civil and political rights reveals that the government is faced with difficult issues in several areas. First, however, a methodological note of caution: obtaining reliable, comprehensive information about many civil and political rights cases is difficult. Reports from human rights organizations and foreign government entities often provide a wealth of valuable information, frequently obtained under difficult circumstances that prevent more in-depth investigation. Nevertheless, the reports generally suffer from a cursory or one-sided presentation of facts, the lack of citation to sources, reliance on hearsay evidence and unconfirmed information, and no or

⁸⁵ The following data is obtained from Daniel Kaufmann et al., *Governance Matters III: Governance Indicators from 1996-2002*, [hereinafter called *WB Good Governance*], and is available at <http://info.worldbank.org/governance/kkz2002/>.

⁸⁶ East Asian countries with a Confucian heritage generally outperform the average country on good governance indicators except for civil and political rights. See *Show Me the Money*, *supra* note 16.

little legal analysis, with citations to relevant PRC or international law as rare as a snowman in the tropics. Most reports dismiss summarily the arguments of the government and prosecutors about violations of PRC law, underestimate the complexity of the legal issues involved, and assume an expansive and liberal interpretation of civil and political rights that is often contested as a matter of international law. They rarely attempt to place the individual cases selected within a broader comparative, historical, economic or political context or include any statistical analysis that would give any indication of the representativeness of the cases. In short, many of the reports are more advocacy for a particular viewpoint than impartial legal analysis of the merits of the decision.

On the other hand, although Supreme Court regulations require that most trials be open to the public and that courts publish judgments, politically sensitive cases are often not open to the public on the ground that they involve state secrets and issues of national security, or are limited to a few observers. Nor are court judgments and documents submitted by the procuracy and defense counsel readily accessible or in some cases accessible at all. The facts as reported in the judgments when available are often dramatically at odds with the facts as reported by human rights organizations or defense counsel, or subject to very different interpretations. Several cases involve serious due process concerns, including allegations of torture and forced confessions, that undermine the credibility of the prosecutors' claims and the courts' judgments. As a result, it is at times all but impossible to verify the facts and to assess the merits of the court's judgment as a matter of international and domestic law.

Nevertheless, enough information can be pieced together from various sources for enough contested cases, and there are sufficient cases where the facts are not contested, to obtain a reasonably accurate view of where the limits of freedom exist in practice, even if the factual or legal details in some cases may be unclear or disputed. Given the size and diversity of China, reliance on a small number of select cases inevitably gives rise to questions about representativeness. Accordingly, I provide summary results of several cases for each type of right and for particular issues to establish the boundaries in practice today.

Freedom of Thought: State Sponsorship of Ideological Orthodoxy and Restrictions on Religious Freedom

The government unapologetically endorses socialism, including in the preamble to the Constitution adherence to the four cardinal principles: the leading role of the Party, adherence to socialism, the dictatorship of the proletariat and adherence to Marxism-Leninism-Mao Zedong thought, now buttressed by the "Three Represents." The Three Represents are Jiang Zemin's attempt to update socialism in accordance with today's market economy by shifting the focus away from the proletariat to the "advanced productive forces," including the private sector and entrepreneurs, in order to develop an "advanced and modern culture" and serve the fundamental interests of the broad majority of citizens. Whereas Jiang's formulation highlights that some will lose out in the transition to the market economy, the Hu and Wen regime, perhaps in an effort to distinguish itself from the Jiang regime, have paid attention to social injustice and the needs of the least well off in society. Significantly, however, the focus of both regimes is on the interests of the majority of the people, whose interests the Party will continue to determine and serve, not on the rights of the individual interpreted as a counter-majoritarian trump on the interests of society as a whole. Although the rhetorical commitment to socialism remains, socialist ideology is now less coherent, more widely contested, and much less of a factor in every day life than previously.⁸⁷

The government has also promoted the development of a socialist spiritual civilization, consisting of attacks on wholesale Westernization and bourgeois liberalism combined with blatant appeals to nationalism, celebration of the importance of culture and art, praise for Confucianism, and exhortation of citizens to ask not what the nation can do for them but what they can do for the nation and their fellow

⁸⁷ See generally CHINA'S LONG MARCH, *supra* note 24, 188-238.

citizens. Party efforts to bring about this new socialist spiritual civilization have been largely ineffectual. While many Chinese respond to the nationalist component of the spiritual civilization plank, few take seriously the emphasis on socialism.

Appeals to Confucianism have also failed to take hold, in part because of the contested nature of Confucianism, which has been interpreted to support both liberal and authoritarian positions. Accordingly, the government is reluctant to appeal to Confucianism given efforts by New Confucians to appeal to parts of the vast Confucian corpus to support democracy and human rights. Conversely, reformers are wary to make too much of Confucianism given that historically Confucianism was undeniably sexist, elitist, and inegalitarian, and failed to provide popular sovereignty or to protect even the most fundamental civil and political liberties such as freedom of thought and speech. Thus, legal reformers wondered whether Jiang's endorsement of rule of virtue (*dezhi*) signified a retreat from rule of law and a return to rule of man (*renzhi*), although official statements are unequivocal that the emphasis on virtuous officials is meant to supplement rule of law rather than to replace. With its Confucian overtones, the rule of virtue policy is another in a long string of campaigns to change the moral character of citizens and officials. Addressed to citizens, it is an attempt to fill the moral and spiritual vacuum that exists with something other than materialism and money-worshipping. Addressed to officials, it is an attempt to reduce corruption and create an honest corps of public servants.

China's educational policies continue to call for mandatory classes in politics and morals. When challenged by the Special Rapporteur on education, the government spokesperson replied that all governments inculcate political and moral values through the education system.⁸⁸ China was no different. A heated dispute also arose over religious education, as China prohibits religious schools and teaches atheism in school.⁸⁹

Mindful of a long history of religious movements toppling dynasties, growing problems with "cults" around the world, and the rise of fundamental Islam in recent years, China imposes both content and time, place and manner restrictions on religious beliefs and practices.⁹⁰ Freedom of religion is confined to five recognized religions - Buddhism, Taoism, Islam, Catholicism and Protestantism - and registered places of worship. All religious groups are required to register with State Administration of Religious Affairs. Proselytizing by foreigners is not allowed, although in practice individual foreign citizens need not hide their faith, and foreigners may preach in registered churches or at the invitation of registered social groups.⁹¹ Mormons and Jews are also allowed to practice.

The government claims that there are more than 100,000 venues for religious activities, with a clergy of about 300,000, over 3,000 national and local religious organizations, plus 74 religious colleges and schools. Each religion publishes its own scriptures or classics, books and magazines, among which the print run of the Bible alone has reached 30 million.⁹² The government provides funding to build and maintain places of worship, supports members of the clergy, offers preferential tax treatment to registered religious groups, and pays for trips to Mecca for some Muslims.

⁸⁸ Comments by the Chinese Government on the Report on the Mission of the Special Rapporteur on the Right to Education to the People's Republic of China, U.N. ESCOR Human Rights Comm., 60th Sess., Agenda Item 10, E/CN.4/2004/G/16, Dec. 11 2003 [hereinafter called Government Comments].

⁸⁹ See *infra* note 237 and accompanying text.

⁹⁰ See generally MARIA HSIA CHANG, FALUN GONG, THE END OF DAYS (2004) [hereinafter called END OF DAYS]; Anne S.Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong*, 13 PAC. RIM L. & POL'Y J. 1, 13-17 (2004); Carol Evans, *Chinese Law and the International Protection of Religious Freedom*, 44 J. CHURCH & ST. 749 (2002). Cf. Theo van Boven, *Advances and Obstacles in Building Understanding and Respect between People of Diverse Religions and Beliefs*, 13 HUM. RTS. Q. 437, 442 (1991) (estimating that in the 1980s, 25 regional or civil wars were based to a significant degree on disputes stemming in part from religious beliefs).

⁹¹ 2004 State Department Report, *supra* note 31.

⁹² 2004 White Paper, *supra* note 6.

In addition to restricting belief to the five authorized religions, the government has imposed content-based restrictions on “cults” and abnormal religious beliefs and practices. The crackdown on Falungong has received the most attention abroad, largely because of the tireless if one-sided efforts of the overseas Falungong organization.⁹³ The government has justified the ban by citing the sect’s increasingly political agenda, organized demonstrations including where more than 10,000 people suddenly surrounded Zhongnanhai (the seat of the government), and the deaths of more than 1600 adherents, including the self-immolation of five people, one of them a 12-year old girl. Senior leaders were apparently divided on how to deal with the sect, with some arguing for prosecution of particular individuals for violation of generally applicable criminal laws rather than an outright ban on the group. Whatever the merits on the substantive issue, the way the crackdown was carried out led to serious due process violations, including torture and deaths while in detention.⁹⁴

The government has also outlawed a number of other sects, claiming their leaders lack theological training, preach the coming of the Apocalypse or Holy War, exploit members for financial gain or commit other violations of generally applicable laws such as rape, assault, and tax fraud. The government has defended the policies by citing similar restrictions on cults in other countries.⁹⁵ Unfortunately, international law provides little useful guidance in distinguishing normal from abnormal religious activities and legitimate groups from cults.⁹⁶

The government’s response to unapproved “house churches” has not been uniform. Some are closed, while others are allowed to operate, depending on their size, relationship to the official church, links to foreign organizations or other organizations and in general their capacity to foment social unrest. Catholic priests aligned with Rome have run into problems because of conflicts over issues where the views of the Pope conflict with government policy, most notably with respect to family planning, birth control and abortion. Authorities have also reportedly forced Catholics in Hebei, where more than half of China’s Catholics are located, to follow the Patriotic Church or face fines, job losses, detention and in some cases removal of children from school.⁹⁷ Leaders of Protestant house churches have also been detained.⁹⁸

Buddhism is increasingly popular in China, and generally accepted by the government, although the government remains concerned that Buddhist beliefs and practices will support a movement for independence in Tibet. Buddhism and politics were fused historically in theocratic Tibet and remain closely aligned today. Tibetan Buddhists outside of the Tibetan Autonomous Region (TAR) enjoy greater freedom, and even in Tibet religious practices are generally accepted provided they do not serve as a base for political opposition.⁹⁹ Accordingly, the government continues to oversee the daily operations of major monasteries, and to insist that Party members and senior government employees adhere to atheism and not support the Dalai Lama. In addition, Tibetan monks and nuns have been sentenced on charges of endangering the state, splitting the motherland and undermining the unity of nationalities.¹⁰⁰ Human rights

⁹³ See Rahn, *supra* note 41.

⁹⁴ For a more extensive discussion, see CHINA’S LONG MARCH, *supra* note 24, 91-101; END OF DAYS, *supra* note 90.

⁹⁵ Evans, *supra* note 90, at 762-763.

⁹⁶ The international human rights regime and national governments have struggled over how to distinguish normal from abnormal religious activities and legitimate groups from “cults.” CHINA’S LONG MARCH, *supra* note 24, at 95-96. Evans, *supra* note 90, at 763-765.

⁹⁷ 2004 State Department Report, *supra* note 31, at 21.

⁹⁸ *Id.*

⁹⁹ See Barry Sautman, “Cultural Genocide” and Tibet, 38 TEXAS INT’L L. J. 173, 208-214 (2003).

¹⁰⁰ 2004 State Department Report, *supra* note 31, at 21. China forbids hate speech. Articles 149 and 250 of the Criminal Law prohibit “incitement of national enmity or discrimination” by any organization or individual.

groups protest that they are being detained for nonviolent political practices. The Tibet Information Network (TIN) estimated that approximately 150 Tibetans were imprisoned on political grounds, 75% of them monks or nuns.¹⁰¹ In a public relations disaster, the authorities replaced the boy recognized by the Dalai Lama to be the 11th reincarnation of the Panchen Lama with their own candidate.

The government has also taken steps to make sure that Islam does not become a source for political instability by prohibiting the teaching of Islam to children under eighteen, preventing preaching by imams whose sermons are considered too fundamentalist, and limiting construction of Mosques in areas of unrest, although the government continues to support the building and renovation of Mosques in other areas.¹⁰² In a case that has come to symbolize government oppressiveness abroad, Rebiya Kadeer, a businesswoman and provincial delegate to Chinese People's Political Consultative Committee whose social activist husband had sought political asylum in the U.S., was sentenced to eight years in March 2000 for providing state intelligence to foreigners. The state secrets were reportedly local newspaper articles discussing the treatment of Uighars. Beijing recently announced a reduction in her sentence, with possible further reductions for good behavior.¹⁰³

Another case that has caught the world's attention involves Uighar historian Tohti Tunyaz, who was sentenced to eleven years for inciting separatism and illegally acquiring state secrets after returning from Ph.D. studies at University of Tokyo. The state secrets appear to be fifty year old documents obtained for research purposes from a librarian in Xinjiang. Tohti is also accused of writing and publishing *The Inside Story of the Silk Road*, which allegedly advocates "ethnic separatism." However, Japanese scholars have denied that Tohti ever published such a book. In 2001, U.N. Human Rights Committee declared that Tohti was arbitrarily detained, and that the sentence violated the right to freedom of thought and speech.¹⁰⁴

Freedom of Speech: Criticism of the Government

The 1991 Human Rights White Paper noted that according to the Constitution, citizens have the right to criticize and make suggestions regarding any government entity or official and the right to expose any government entity or official for violation of law or dereliction of duty.¹⁰⁵ In fact, a wide range of political speech, including criticism of the government, is allowed. Nevertheless, there are limits.

One clear line in the sand is advocating the overthrow of the CCP or the government, whether by violent or nonviolent means, even if the actual threat is minimal to non-existent, although again aggravating circumstances are usually required. For instance, Luo Yongzhong was sentenced for three years for inciting subversion for publishing on the internet articles calling for the overthrow of the Party and criticizing the Three Represents and the government's handling of Tiananmen incident.¹⁰⁶ Similarly, Wang Zechen was sentenced to six years for subversion for attempting to establish a Liaoning branch of the banned China Democratic Party, attacking the Party as a dictatorship, and advocating the end of the single party system and the establishment of a multiparty system with separation of powers.¹⁰⁷ Wang did

¹⁰¹ 2004 State Department Report, *supra* note 32, at 21.

¹⁰² *Id.*, at 22.

¹⁰³ *Rare Sentence Reduction for Leading Uighur Activist in China*, AGENCE FRANCE PRESSE, Mar. 3, 2004, 2004 WL 72209995.

¹⁰⁴ *Japan Ignores Tokyo Univ. Student Jailed in China*, KYODO NEWS INTERNATIONAL, INC. ASIAN POLITICAL NEWS, Sep. 23, 2002, 2002 WL 23806790.

¹⁰⁵ Information Office of the State Council of China, *The Chinese People Have Gained Extensive Political Rights*, in 1991 WHITE PAPER: HUMAN RIGHTS IN CHINA (1991), available at <http://www.china.org.cn/e-white/7/7-II.htm>.

¹⁰⁶ Changchun Intermediate Court, Luo Yongzhong Inciting Subversion Case, Changchun Intermediate Court Judgment, Oct. 14, 2003, available at <http://171.64.233.179/articles/luo/luo001.htm>.

¹⁰⁷ Anshan Intermediate Court, Wang Zechen Subversion Case, Anshan Intermediate Court Judgment, Sep. 4, 2002, available at <http://www.bignews.org/200202904.txt>.

not contest the facts but argued the acts were legal. He Depu was also sentenced to eight years in prison for collaborating with the banned China Democracy Party, posting essays on the internet that incite subversion, and signing an open letter calling for political reforms. According to his wife, He shouted calls for democracy and criticisms of the one-party system at his hearing.¹⁰⁸

Another controversial case raises the issue of how clear and present the danger to the state must be, and shows that the government, wary of student activism, closely monitors attempts to establish student organizations for political purposes. In 2003, Yang Zili, Xu Wei, Jin Haike, Zhang Honghai, four of the eight members of a group of students and recent graduates called the New Youth Study Group, received eight to ten years for subversion. According to the judgment of the Beijing Intermediate Court,¹⁰⁹ the purpose of the group, which was never registered, was to “actively explore ways of improving society.” The articles of the group and related documents included ideas for expanding the size and influence of the group through publications and internet postings, as well as rules on membership and dues. Apparently, the group planned on setting up branches in Xian and Tianjin, though there does not appear to be any evidence that branches were actually set up. The court judgment relied heavily on the testimony of other members of the group, one of whom was cooperating with the Ministry of National Security, and two others who, under repeated questioning from security officers and the threat of criminal prosecution for their own involvement, signed damaging statements claiming that the group opposed socialism and sought to overthrow the Party and establish a liberal democracy. The reports accused Zhang Honghai of wholesale rejection of the Party, Yang Zili of advocating liberalism and opposing single party socialism, Xu Wei of advocating an uprising by farmers and the use of violence if necessary to change the system, and Jin Haike of describing the political system as authoritarian and advocating the overthrow of the Party. The court also cited articles written by the defendants, some posted on the web and others not published, which showed that they were not happy with the current political situation and allegedly demonstrated their intent to overthrow the government. However, the court did not discuss in detail the content of the publications or cite passages to support these conclusions, other than to note that publications by Yang Zili described democracy in China as fake democracy, and called for an end to “old man politics.”

Defense counsel for Xu Wei pointed out on appeal four of the founders were Party members, and that the members voluntarily terminated the group.¹¹⁰ He portrayed the members as patriotic citizens whose only goal was to improve society. He also noted that group raised just a couple hundred RMB in dues, and lacked the wherewithal to overthrow the state. The defendants and their lawyers also contested the evidence by the procuracy, claiming statements were taken out of context and the meaning twisted, and that the witness testimony was given under pressure, inconsistent and inaccurate. The defendants further objected that the court refused to consider exculpatory evidence. Two of those who wrote reports along with other members of the group were not allowed to testify on appeal. Citing inconsistency with other evidence, the Beijing High Court also refused to recognize letters from the three members who had written reports, two of which were in the possession of the Intermediate Court during the first trial, denying that the group ever sought to overthrow the Party or the government.¹¹¹ After repeating the

¹⁰⁸ See, e.g., *Reporters Without Borders Concerned about Health of Cyberdissident He Depu*, REPORTERS WITHOUT BORDERS, Mar. 2, 2004 (reporting He, in ill health, might not be able to survive the eight-year jail term).

¹⁰⁹ Beijing First Intermediate Court, *Judgment of the Yang Zili, Xu Wei, Jin Haike, Zhang Honghai case*, Beijing, 28 May 2003, available at <http://www.peacehall.com/news/gb/china/2004/01/200401311031.shtml>.

¹¹⁰ His statement is available at <http://www.peacehall.com/news/gb/china/2003/11/200311120832.shtml>.

¹¹¹ Philip Pan, *A Study Group Is Crushed in China's Grip*, WASHINGTON POST, April 23, 2004, at A01. According to the news report, the four defendants claimed that they were physically and psychologically abused while in detention. Other due process concerns involved the lengthy detention before trial. The defendants were detained on March 13, 2001, and formally arrested on

Intermediate Court's evidence and findings in full, the High Court summarily dismissed the defendants' arguments that there was insufficient evidence of subjective intent to overthrow the government or insufficient objective acts. The courts did not expressly address the issue of advocacy of violent versus nonviolent proposals to change the government. Nor did the courts address the issue of the likelihood that the defendant's acts would lead to overthrow of the government.

Agitating for a reversal of the Tiananmen verdict may also land one in trouble. The leader of the Tiananmen Mothers Ding Zilin along with two other members of the group were detained, although they were subsequently released.¹¹² Social activist Hu Jia was also detained, and then released shortly after, for planning a demonstration to commemorate Tiananmen.¹¹³ In some cases, however, the punishment may be more serious, particularly if there are other allegations or aggravating circumstances.¹¹⁴ Three years after being detained, Huang Qi was finally sentenced to five years for inciting subversion for managing a website where he posted articles on Tiananmen, Falungong and the banned China Democratic Party.¹¹⁵ The Intermediate Court decision is interesting for two reasons. First, it expressly rejects the argument raised by Huang Qi that his actions were protected by the right of free speech, arguing that the right does not extend to defamation or spreading rumors to incite subversion and undermine state interests or national security. Second, the court rejected the prosecutor's charge of trying to "split the nation" by posting articles calling for Xinjiang independence on the ground that the articles were posted by others on Huang's site.

Although the media regularly carries exposés on corruption, the government has imposed limits on stories involving high-level officials, for which approval must be obtained. Li Zhi, a government official in Sichuan, was sentenced to eight years for subversion after posting an article on the internet and in chatroom discussions exposing corruption at high levels of the government, and for contacting foreign dissidents.¹¹⁶ An Jun, who founded an anti-corruption NGO that attracted more than 300 people, was also sentenced to four years for exposing corruption.¹¹⁷

Individuals who have reported classified information about SARS and AIDS have also been detained for revealing state secrets and other charges. Wan Yanhai, head of the Beijing-based AIDS Institute, was detained for revealing state secrets when he posted information about HIV deaths on his website, although he was released one month later.¹¹⁸ Henan health official Ma Shiwen was also detained

April 20, 2001. The intermediate court met three times to decide the case on September 28, 2001, April 4, 2003 and May 28, 2003. The defendants were in custody therefore from March 2001 until May 2003.

¹¹² Apparently they were sent T-shirts from Hong Kong with the logo "Tiananmen Mothers". More seriously from the government's perspective, the Human Rights Commission had received a videotape of their testimony regarding their efforts to have the government reassess Tiananmen. *China releases three arrested members of "Tiananmen Mothers"*, AGENCE FRANCE PRESS, April 2, 2004, 2004 WL 74808742.

¹¹³ Hu is known for his work on AIDS issues and the environment, as well as his support for the release of the "Stainless Steel Mouse" for internet violations. *Aids activist released after hunger strike*, SOUTH CHINA MORNING POST, April 6, 2004, 2004 WL 75172723.

¹¹⁴ See 2004 State Department Report, *supra* note 32 (a petition signed by 192 people calling for political reforms and a reassessment of Tiananmen led to the arrest on subversion charges of six of the signatories).

¹¹⁵ Chengdu Intermediate Court, The Judgment of Huang Qi Case, Feb. 23, 2003, available at <http://www.peacehall.com/news/gb/china/2003/05/200305171038.shtml>. Huang's appeal apparently was also rejected. Amnesty International, *Continuing abuses under a new leadership – a summary of human rights concerns*, ASA 17/035/2003, Oct. 1, 2003, at 8.

¹¹⁶ Yang Ming (of Voice of America), *Sichuan Government Official Li Zhen Sentenced to Eight Years for Exposing Corruption on Internet*, Dec. 11, 2003, at <http://www.epochtimes.com/gb/3/12/11/n427422.htm>; BBC, *Sichuan Interneter Li Zhi Arrested*, Sept. 24, 2003, at <http://www.peacehall.com/news/gb/china/2003/09/200309242141.shtml>.

¹¹⁷ Bignews.com, *Well-known Anti-Corruption Activist An Jun Sentenced to Four Years This Morning for Subversion*, April 19, 2000, at <http://www.bignews.org/20000419.txt>.

¹¹⁸ Murie Dickie, *China frees Aids official*, FINANCIAL TIMES (USA Edition), Oct. 20, 2003, at 5.

for revealing state secrets, though he too was subsequently released without standing trial.¹¹⁹ Acknowledging the scope of the AIDS problem, the government has recently adopted new policies on AIDS, including the provision of free medical treatment and testing, and a long-term plan for treatment and prevention.¹²⁰ AIDS victims may also be able to use the legal system to fight discrimination in employment and elsewhere. In a recent case, a person infected with Hepatitis B won an administrative litigation suit when he was denied a post as a civil servant because of his disease.¹²¹

Freedom of the Press

Chinese citizens now have greater access to a wider variety of information and cultural products due to changes in technology including the internet and satellite television; markets reforms that have forced newspapers, television stations and book publishers to respond to consumer demands; and the rise of a small number of independent publishers and an even smaller underground press. Nevertheless, the government continues to maintain tight controls on what gets published.

The list of sensitive topics that are off limits or require prior approval varies from time to time, and is enforced with varying degrees of strictness. Topics in the last two years include the government's handling of SARS; prosecution of successful business people like Zhou Zhengyi and Yang Bin on corruption charges; financial information such as speculation about the appreciation of the Renminbi or the selling of stocks by government agencies; and exposés about former government officials who go into business or become lobbyists.¹²² Oftentimes, the media will be allowed to discuss a topic until the government or the courts have taken a final position, as in the "BMW case," where a rich and well-connected plaintiff crashed into a crowd after a dispute; the Liu Yong case, where a former NPC delegate depicted as a mafia boss was sentenced to death; and the Sun Zhigang case, where a college student was beaten to death while in administrative detention. All three cases were widely debated on the internet and covered in the press, leading to a central level investigation in the BMW case, a highly unusual retrial by the Supreme Court in the Liu Yong case, and the elimination of detention and repatriation in the Sun case. Discussion of popular books may also be restricted, such as *The Chinese Peasant Report* detailing the plight of farmers today, or the *Heart of Girls*, which described the sexual awakening of a teenager and was considered pornographic. Other books and magazines may also be subject to censorship, removed from shelves or confiscated at customs. However, the widespread if illegal practice of selling "book numbers" and leasing out publication numbers for magazines allows many publications to slip past the censor. Banning books now often simply results in increased demand, with books reportedly banned still readily available even in major Beijing bookstores or in small street stalls. In one interesting case that shows how efforts to implement rule of law are paying dividends even in politically sensitive cases, a

¹¹⁹ *Id.*

¹²⁰ 2004 White Paper, *supra* note 6; see also THE CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, DEFUSING CHINA'S TIME BOMB: SUSTAINING THE MOMENTUM OF CHINA'S HIV/AIDS RESPONSE, A REPORT OF THE CSIS HIV/AIDS DELEGATION TO CHINA, APRIL 13-18, 2004 (Bates Gill et al. eds.), available at http://csis.org/china/040617_China_AIDS_Timebomb.pdf.

¹²¹ Wuhu Intermediate Court, the Judgment of Song Yue case, available at <http://www.yecao.net/Html/20044324116-1.Html>. While the plaintiff won the suit in that the court quashed the act to deny him employment, the court could not order the defendant to provide a job as the post had already been filled.

¹²² See generally 2004 State Department Report, *supra* note 32, 15-16; China Information Center, *The Chinese Authorities Issue "Ten Forbiddens" for the Media*, April 22, 2004, at <http://www.cicus.org/news/newsdetail.php?id=2159>.

lawyer won an administrative litigation suit in Beijing High Court challenging Custom's confiscation of a book on the Yanan period published by Chinese University of Hong Kong.¹²³

However, in other cases, exceeding the bounds of permissible coverage has resulted in confiscation of publications, closure of the paper or arrests. In 2001, authorities confiscated an edition of the Securities Market Weekly containing an article about Li Peng getting rich.¹²⁴ Recently editors of the widely popular muckraking Nanfang Zhoumo were arrested on embezzlement and bribery charges.¹²⁵ According to one report, 39 reporters were imprisoned in 2000.¹²⁶ Foreign reports have also been harassed or detained for covering sensitive stories such as the plight of North Korea refugees or Falungong protests.¹²⁷

The government has clearly struggled over how to manage the potential risks caused by increasing numbers of Internet users. The government regularly blocks sites, regulates internet cafes, holds servers and internet companies responsible for content published on their sites, and prosecutes individuals who post articles that the authorities find go too far in criticizing the government or that reveal information deemed to be state secrets. All of the top ten sites for the topics Tibet, Taiwan and "equality" were blocked, as were eight of the top-ten sites for democracy and Chinese dissidents, and six of the top-ten sites for "freedom China" and "justice China".¹²⁸ A much lower percentage of the top-100 sites were blocked for these topics: 20 to 45 % with the exception of Tibet at 60%. Similarly, 20-25% of the top-100 URLs were blocked for "hunger China", "famine China", and "Aids China". Interestingly, the authorities blocked a lower percentage of Chinese URLs for these topics.

Several foreign news URLs are also regularly blocked, including BBC, CNN, Time Magazine and PBS, although other foreign news sites are available. Recently, new regulations were issued to limit chatrooms. The rules prohibit websites from running news forums about any subject that has not already been covered by mainstream state-run media.¹²⁹

The arrests of Liu Di, Du Daobin and others for internet postings have been the subject of much public debate. Liu Di, the Stainless Steel Mouse, is a student at Beijing Normal University. She was detained and then released months later for operating a popular Web site and posting satirical articles about the Party, as well as articles calling for the release of Huang Qi.¹³⁰ Her arrest led to two online petitions signed by over 3000 people.

Du Daobin was arrested for posting twenty-eight articles on the internet, including some that opposed limitations on democracy and civil liberties in Hong Kong, and for receiving funding from foreign organizations.¹³¹ His arrest led to a petition, signed by over one hundred writers, editors, lawyers, philosophers, liberal economists and activists, calling for a judicial interpretation to clarify the crime of subversion. Citing the non-binding and decidedly liberal Johannesburg Principles, the petition argued that seeking change through peaceful means should not constitute incitement of subversion, and that the

¹²³ Case report available at http://www.szonline.net/Channel/2003/200306/20030603/Preview_20030603_1.html.

¹²⁴ HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2003, CHINA AND TIBET, April 1, 2004, at 2.

¹²⁵ Elaine Kurtenbach, *Chinese Experts Urge Retrial of Editors*, ASSOCIATED PRESS, April 9, 2004.

¹²⁶ State Department Report, *supra* note 31, at 15 (citing Committee to Protect Journalists).

¹²⁷ *Id.*

¹²⁸ Jonathan Zittrain & Benjamin Edelman, Internet Filtering in China, Harvard Law School Research Paper No. 62 (2003), available at http://ssrn.com/abstract_id=399920 (ironically, this site was not accessible when I tried from Beijing on April 19, 2004).

¹²⁹ Peter Morris, *China cracks down on chat rooms on eve of NPC*, ASIA TIMES (Online), Mar. 3, 2004, at <http://www.atimes.com/atimes/China/FC04Ad03.html>.

¹³⁰ Philip P. Pan, *China Releases 3 Internet Writers, but Convicts 1 Other*, WASHINGTON POST FOREIGN SERVICE, Dec. 1, 2003, at A14.

¹³¹ *Security Official Confirms Chinese Man Arrested for Internet "Subversion"*, BBC MONITORING ASIA PACIFIC, Feb. 17, 2004.

government should not rely on subversion charges to restrict critical discussion of government shortcomings, maintain the reputation of the ruling regime, enforce ideological controls or even prevent instability. After the petition, Du was convicted of inciting subversion, but his three-year sentence was commuted to four years probation.¹³²

Although China has passed a number of regulations regarding internet activities, convictions for posting articles on the internet are generally based on generally applicable criminal law provisions. Posting on the internet, which reaches a diffused and unidentified audience, serves therefore as a triggering or aggravating factor: the same speech that would be tolerated in a different forum even though in violation of the criminal law results in arrest and detention when posted on the internet. Sentences are usually in the two to four year range.

Pornography

Although the government periodically supports campaigns to attack pornography, pornography is readily available in books, magazines, DVDs and on the internet. Suggesting a less than wholehearted commitment, China blocks just 13% of the 752 sites generated by a search for “free adult sex,” whereas commercial filters used by Saudi Arabia and other countries block 70-90%.¹³³ The government’s approach is to focus on producers and distributor rather than users. Thus, a court fined and sentenced to three years defendants who operated a pornographic website containing pornographic pictures, novels, and movies. The defendants had set up web advertisement for foreign advertisers and received commission payments. The court found that posting pornographic material online was criminal and that obtaining income from foreign advertisers was considered “spreading pornography for profit.”¹³⁴

In contrast, the government has decriminalized watching pornographic movies in one’s own home. In a much publicized case, a Shanxi couple was awarded damages after police stormed into their bedroom while they were watching an adult movie, and a scuffle broke out between the husband and police, resulting in injuries to the husband.¹³⁵

Freedom of Assembly

As of 2002, there were more than 133,000 social organizations, including 111,000 private nonprofit corporations. Although all social groups are legally required to register, there are also reportedly as many as one to two million unregistered “NGOs.”¹³⁶ Social organizations are subject to various degrees of supervision and control, with the government again imposing both content and time, place and manner restrictions. Some groups are not allowed to register, including the China Democratic Party and Falungong. The founders of the China Democratic Party Xu Wenli, Wang Youcai, Qin Yongmin were sentenced on subversion charges in 1998 to 13, 12 and 11 years. Wang and Xu have since been released on medical parole and are in the U.S.

The government requires prior approval of all demonstrations. Approval is not possible in some cases, such as Falungong protests, and is difficult to obtain in other cases, such as for protests of

¹³² *Internet Dissident Found Guilty of Subversion, but Given Probation*, AGENCE FRANCE PRESSE, June 11, 2004, 2004 WL 82445473.

¹³³ Zittrain & Edelman, *supra* note 128.

¹³⁴ An excerpt of the court’s judgment is available at http://www.chinalawedu.com/news/2004_1/4010810372387.htm.

¹³⁵ *Couple Watching Porno DVD Case Continues*, XINHUA NEWS AGENCY, Dec. 22, 2002, at http://news.xinhuanet.com/newscenter/2002-12/22/content_666765.htm.

¹³⁶ 2004 State Department Report, *supra* note 31, at 19.

government takings and relocations, treatment of HIV patients, and labor disputes. In practice, however, there were almost 60,000 demonstrations involving more than three million people last year, many of them not approved.¹³⁷ In most cases, the protesters are allowed to demonstrate provided the demonstration is peaceful, orderly, limited in size and for a limited duration. The government often responds to labor demonstrations by pumping in funds to pay off the protestors, although authorities have also arrested a number of the leaders, particularly when the demonstrations were cross-regional. China ratified the ICESCR with a reservation that provisions regarding unions and strikes be interpreted consistently with PRC laws.¹³⁸ Labor unions remain tightly controlled and marginally effective, often serving as a bridge between workers and the state or management. Many foreign investors have opposed the formation of strong unions within their companies. The right to strike is not recognized in PRC law, although work slowdowns and strikes do occur.

Assessing Restrictions on Civil and Political Rights

The government does not tolerate much dissent in public fora and imposes numerous restrictions on the exercise of civil and political rights. Are such restrictions consistent with international law? More importantly, are they justified? Unfortunately, international law is less determinative on many more issues than often assumed. Human rights groups and activists within China often invoke liberal principles or interpretations that are not accepted as a matter of international law.¹³⁹ For instance, the Johannesburg Principles cited by the petitioners in the Du case have not been adopted in whole by any country with the possible exception of Peru. Incorporating the contemporary U.S. standard,¹⁴⁰ Principle 6 states that expression may be punished as a threat to national security or public order only if a government can demonstrate that: (i) the expression is intended to incite imminent violence; (ii) it is likely to incite such violence; and (iii) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. However, in general, national security restrictions require a showing of a more serious potential harm but a lesser degree of imminence and likelihood than restrictions for public order. Although the distinction between violence and nonviolence is an important factor to consider, clearly nonviolent acts, such as injecting a virus into a country's national defense computer system, may endanger the state. Similarly, while a clear and present danger is more threatening than a vague and distant danger, a state need not wait until the last minute to take steps to protect national security or public order.¹⁴¹ Countries differ over whether violence must be likely and imminent even for public order restrictions. Some countries require only that the speech will likely lead to a violation of law or breach of

¹³⁷ Josephine Ma, *Three Million Took Part in Surging Protests Last Year; Beijing is Warned that the Rise in Social Unrest is Now a Conspicuous Problem*, SOUTH CHINA MORNING POST, June 8, 2004, at 5 (citing Ministry of Public Security Statistics and noting that a significant number of the protests had turned violent). See also Murray Scot Tanner, *Protests now flourish in China Shades of Tianmen*, INTERNATIONAL HERALD TRIBUNE, June 2, 2004 (according to police records, the number of demonstrations increased from 8,700 to 32,000 from 1993 to 1999, and then to 40,000 in 2000), 2004 WL 77529936.

¹³⁸ See United Nations Treaties Collection, Declarations and Reservations, available at http://www.unhchr.ch/html/menu3/b/treaty4_asp.htm.

¹³⁹ Sautman, *supra* note 99, 177-196 (discussing the lack of a basis in international law for the concepts of "cultural genocide" and "ethnocide" on which the Tibetan émigré ideology is based and arguing that claims of cultural genocide and ethnocide are inapposite legally and empirically).

¹⁴⁰ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁴¹ Cf. *Dennis v. U.S.*, 341 U.S. 494, 501 (1951) (rejecting "any principle of government helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy"). On the expansion of self-defense from imminent attack to preemption, see W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L., 82 (2003).

the peace, while others (often former British colonies) require an even lesser showing that the comments are likely to excite ill-will or contempt of the government.¹⁴²

Rather than a bright line test based on violence or nonviolence, restrictions on rights are subject to a balancing test. The ICCPR Human Rights Committee, the ECHR and other bodies apply a three-part test. To be valid, the restriction must (i) be prescribed by law; (ii) serve a legitimate purpose; and (iii) be necessary (in a democratic society). While this analysis is intended to be conducted on a case-by-case basis in light of the particular circumstances at the time, a general application to the restrictions on civil and political rights in China is also instructive. A case-by-case approach tends to “skew” the results toward greater civil and political rights, as it is always difficult to see how the actions or words of a particular individual could possibly constitute a threat to the much powerful state or have much of an impact on a society of 1.3 billion people. Conversely, a wider perspective that considers the range of threats from a variety of different sources tends to support more conservative solutions. A broader approach will usually reflect a more utilitarian concern for aggregate social benefits whereas a case-by-case approach fits more easily with a more moral absolutist or deontological approach that sees rights as trumps of social interests. Not surprisingly, China and other Asian countries that have adopted a more restrictive interpretation of civil and political rights generally defend their positions not by arguing the specifics of individual cases but by pointing to larger empirical trends, and in particular the records of other developing countries that have adopted a restrictive approach to rights as opposed to those that adopted a more liberal approach to civil and political rights. Thus, they point out that the East Asian countries that have succeeded in maintaining stability and social order, achieving economic growth, reducing poverty and improving people’s living standards, have adopted a restrictive approach to civil and political rights, whereas other countries in East Asia and elsewhere that adopted a more liberal approach, at least during their period of rapid economic development, have generally not managed to achieve political stability, economic growth or the same level of achievement on other measures of rights and human wellbeing. Conversely, rights advocates make their cases by focusing on particular cases.

Neither approach is entirely satisfactory. The latter tends to underestimate the importance of stability and social order to economic growth and the protection of human rights. The former runs the danger of justifying any all restrictions in the name of political stability, social order and economic growth. Many people believe, for instance, that democracy is not appropriate for China at this stage and that given the potential for instability, the government is justified in limiting certain civil and political rights in the name of social order (and, because social chaos would undermine economic growth, in the name of development). Yet, they also believe that the government unduly restricts civil and political rights. We need to move beyond these general arguments and consider specific instances of restrictions, while bearing in mind that developing countries such as China face a number of threats to social order and political stability – which may result in horrific human rights consequences – that wealthy, politically stable countries do not face, and thus are likely to reach a different balance. Moreover, not everyone assigns the same value to civil and political freedoms relative to social order. Social order ranks much higher in the normative hierarchy of most Asians than it does in the normative hierarchy of Westerners.¹⁴³

As for the first prong of the three-part test, the Constitution, laws, and administrative regulations provide ample grounds for restricting pornography, religious practices, demonstrations, criticism of the government and the Party, and to justify confiscation of property, fines, administrative detention and criminal punishments. Whether the laws are clear enough to prevent citizens from unexpectedly running afoul of the law is however an issue in some cases given the broad and vaguely stated provisions on state secrets, subversion and endangering the state. However, it is unlikely that most people convicted in the

¹⁴² See UNITED NATIONS HIGH COMMISSIONER, FREEDOM OF EXPRESSION MANUAL (1993) (part 2) §6 art. 19, available at <http://www.article19.org/docimages/811.htm>.

¹⁴³ See Peerenboom, *supra* note 24, at 24, note 74 (citing numerous surveys and polls).

cases discussed earlier were unaware that they were crossing the line given previous convictions for similar behavior, though many clearly felt that their actions should not have been considered illegal. Nevertheless, a judicial interpretation of subversion and related charges, and a more restrictive definition of “state secrets”, would go a long way toward clarifying the scope of impermissible activities and expanding the scope of legitimate activities without detriment to state interests.

A separate but related issue is whether the procuratorate laid out with sufficient detail the alleged acts constituting the offense or the precise threat to national security. The danger of relying on broad allegations of subversion or endangering the state are readily apparent in this era of heightened sensitivity to terrorism. Yet in several of the cases, there was little analysis of specific statements in the articles alleged to be evidence of subversion.

The restrictions generally serve a legitimate purpose on their face, such as national security, public order and morality. However, in some cases involving criticism of government policies on AIDS, the number of capital punishment cases, or exposure of corruption, the restrictions appear only to serve the interest of the ruling party or to protect the reputation of particular officials rather than to protect national security or the interests of the nation. The tendency of governments around the world to rely on broad state secret laws and vague references to national security to cover up government mistakes has been exacerbated after 9-11, and should be resisted in China and elsewhere.¹⁴⁴ Moreover, by invoking a broad state secret law, the government prevents defendants from relying on the truth of their criticisms or statements as a defense: the mere disclosure of the information is sufficient to find wrongdoing.

The final prong is usually the most crucial. The requirement of “necessity” as interpreted by the ECHR and other bodies does not mean the restriction is “indispensable”, although it must be more than merely “reasonable” or “desirable”.¹⁴⁵ As noted, the ECHR affords countries a margin of appreciation in deciding what is necessary, with the widest margin in the areas of national security and morality. In addition to being necessary, the restriction must also be proportionate, while some jurisdictions such as the U.S. apply a higher “least restrictive” standard for limitations of fundamental rights.

The UDHR and other international documents require the restrictions to be necessary *for democratic order*, even though democracy is not required under the ICCPR. Some of the arguments for free speech in a democracy may not apply in a socialist state, although many of the same arguments would apply. For example, the argument that political speech, including criticism of the government, deserves special protection in a democracy given the need for citizens to elect their leaders may be weakened. In most cases, however, the difference will be between liberal and nonliberal positions. Thus, the liberal emphasis in other countries on autonomy, individualism and self-development will lead to different outcomes than in China.¹⁴⁶

But even accepting such differences, are the restrictions imposed by China necessary? To some extent, the response turns on assessments of how stable China is. Ironically, the argument of many liberal critics that China is very unstable tends to undercut their opposition to restrictions on civil and political rights.¹⁴⁷ China clearly faces a number of threats to stability, including increasing rural poverty, rising urban employment, a weak social security system and rapidly aging population that has pushed pensioners into the streets to protest for retirement benefits, and a looming banking crisis that could put an end to the economic miracle, leading to further unemployment and more unrest. The desire for greater autonomy if not independence among many Tibetans and Xinjiangese, the rise of Islamic fundamentalism in the region, and the difficulty of separating Buddhism and politics in Tibet also present risks that cannot be dismissed, even if they should not be exaggerated.

¹⁴⁴ Thomas Blanton, *National Security and Open Government in the United States: Beyond the Balancing Test*, in NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE 59 (2003).

¹⁴⁵ See YOUROW, *supra* note 69.

¹⁴⁶ See Joseph Chan, *Moral Autonomy, Civil Liberties, and Confucianism*, 52.3 PHILOSOPHY EAST & WEST 281 (2002).

¹⁴⁷ See generally GORDON G. CHANG, THE COMING COLLAPSE OF CHINA (1st ed. 2001).

More generally, authoritarian regimes are particularly stable in the \$3000 to \$4000 per capita (PPP) range, more so than any other range except where per capita income is less than \$1000.¹⁴⁸ However, the likelihood of a transition to democracy increases when per capita income is between \$4000 and \$6000, with the tipping point at which a regime is more likely to be democratic than authoritarian being \$4115. China is currently at \$4020. Thus, China is just beginning to outgrow a highly stable period for authoritarian regimes, and like to become increasingly unstable as pressure for political reforms grow.

Another test applied by some courts is to multiply the probability or likelihood by the degree of harm to calculate the expected danger or threat.¹⁴⁹ With one-fifth of the world's population, almost of half of whom are living on less than \$2/day, and a history of chaos as recent as the Cultural Revolution, the consequences of instability for China, the region and the world would be severe. Adopting this measure virtually assures a wide margin of deference to restrictions in the name of public order.

In practice, the balance reached by the government seems to be that individuals are generally free to pursue their own interests, engage in religious beliefs or criticize the government as they like, provided their acts are not combined with any of the aggravating circumstances discussed above that increase the likelihood of unrest. While acknowledging the possibility of instability, many of the decisions fail to provide any discussion of how the particular acts in question will lead to instability or endanger the state. A more considered analysis of the nexus between the acts and disruptions of the public order or harm to the state would expand greatly the range of civil and political rights without harming national security of state interests. It is difficult to see how such a case-specific analysis could justify the tight limitations on discussion of issues of legitimate public concern such as constitutional reform, medical crises, corruption, government takings and rising income gaps. After all, these issues are widely discussed anyway. Moreover, whatever the outcomes on the substantive merits, the many due process violations even under China's own laws are clearly inconsistent with the efforts to implement rule of law and should be rectified.

Social and Economic Rights: Poverty, Health and Education

China defends its human rights record by pointing to a stunning rise in wealth that has lifted over 150 million out of poverty in less than a decade and improved the quality of life of hundreds of millions more. With a 2001 GDP per capita (PPP) of \$4020, China falls into the lower middle income country. An official average annual growth rate of 8.2% from 1975-2001 and 8.8% from 1999 to 2001 has resulted in steady progress in the UNDP's HDI Index from 0.52 in 1975 to 0.72 in 2001. The Index measures life expectancy at birth, adult literacy and school enrollments and standard of living. As Figure 3.1 indicates, China does much better relative to other countries on the HDI index than it did for the index for civil and political rights. As expected given the high correlation between wealth and social and economic rights ($r=.92$),¹⁵⁰ China outperforms low income India on all measures, including infant mortality, life expectancy and primary school enrollment, as indicated in Table 2.1. Most notably, China's high score on the UNDP poverty index (26) relative to its already relatively high HDI ranking (104) indicates that China has done quite well on tackling extreme poverty given limited resources.¹⁵¹ Thus, although nearly

¹⁴⁸ Adam Prezowski and Fernando Limongi, *Modernization: Theories and Facts*, 49.2 WORLD POL. 155, 161 (1997).

¹⁴⁹ See Blanton, *supra* note 144.

¹⁵⁰ *Show Me the Money*, *supra* note 16.

¹⁵¹ The Human Poverty Index – 1 (HPI-1) quantifies poverty in terms of life expectancy, access to food and water, and education as measured by literacy rates.

half of the Chinese population lives on less than \$2 per day, the actual standard of living in China, as measured by the HPI, exceeds countries with higher income such as Iran and South Africa.¹⁵²

To be sure, economic growth in China has not benefited all equally. There is wide regional variation, and a growing income gap. The Eastern coastal region is much wealthier than the rest of the country, and rural areas are poorer than cities,¹⁵³ although the number of poor urbanites has also grown dramatically. According to the UNDP, in 1998, the share of national income or consumption of the poorest 10% was 2.4%, and 5.9% for the poorest 20%, whereas the share of the richest 20% is 46.6%, and 30.4% for the richest 10%.¹⁵⁴ By 2003, the share of the top 20% had risen to 51%.¹⁵⁵ Meanwhile, 16% live on less than \$1/day, while 4.6% live below the national poverty line.¹⁵⁶ One-fourth of the population, or over 300 million people, lacks sustained access to an adequate water source; while 9% of the population is undernourished, with ten percent of children under five underweight for their age. The rapid growth has also taken its toll on the environment. China's growth has been fueled by energy consumption three times less efficient than the world's average.¹⁵⁷

Even with increases in the income gap in recent years, China is still roughly on par with the U.S., and other Asian countries such as Hong Kong, Singapore, the Philippines and Malaysia, and considerably more egalitarian than Zimbabwe, South Africa, Chile or Nicaragua, as indicated in Table 3.1. Moreover, the process of modernization inevitably involves a period of urbanization where rural residents are moved into cities and rural incomes lag behind urban incomes. In a country as large as China, the process will take several generations to reach a stable equilibrium. Rising urban income equality is also inevitable, and up to some point desirable, in transition economies because wage liberalization and market determination of wages creates incentives for efficiencies in companies. Privatization and foreign investment also lead to higher wages and greater wealth for some.¹⁵⁸ In the meantime, the government has responded to growing inequality both in the countryside and cities by issuing a steady stream of

¹⁵² Like other socialist countries, China was more successful than the average country at its income level in alleviating poverty and improving human development even before economic reforms. However, like other socialist countries, China was not able to sustain the growth that is necessary if not sufficient to maintain improvement in human development. Thus, while economic reforms and the transition to a market economy have resulted in a deterioration on some measures such as income equality or led to worse conditions for some people and created new marginalized groups, on the whole economic reforms have led to improvements for the vast majority of Chinese citizens on virtually all main human rights indicators. Moreover, while one can always question whether the government is using the increased wealth in the most effective way to address the many problems that still exist, China continues to outperform the average country in its income bracket on most indicators.

¹⁵³ Allen T. Cheng, *Rich Poor Gap Among the Worst, Study Finds*; with City Earnings Triple Rural Incomes, Mainland is on a Par with Zimbabwe, SOUTH CHINA MORNING POST, Feb. 26, 2004, at 7 (CASS poll finds urban incomes 2.8 times rural incomes, although the actual gap is even greater if medical, education and other subsidies for urban workers is included).

¹⁵⁴ United Nations Development Programme, *Human Development Indicators 2003*, in HUMAN DEVELOPMENT REPORT 2003, MILLÉNIUM DEVELOPMENT GOALS: A COMPACT AMONG NATIONS TO END POVERTY [hereinafter called HUMAN DEVELOPMENT REPORT 2003], available at http://hdr.undp.org/reports/global/2003/indicator/cty_f_CHN.html. (citing survey data from 1998). Unfortunately, data reported varies by year depending on availability, with the year not clearly indicated in some cases. According to the World Bank, the Gini coefficient in 2002 was 40.3 (see Introduction, Table 7). However, the official PRC press has reported higher numbers of 42.4 in 1996 and 45.6 to 45.8 from 1998 to 2000. How Wide Is the Gap of China's Individual Income?, People's Daily Online (English), Aug. 31, 2001, at http://fpeng.peopledaily.com.cn/200108/31/eng20010831_78962.html.

¹⁵⁵ China's Reforms Cause Dramatic Widening Gap Between Rich and Poor, AGENCE FRANCE-PRESSE, Mar. 9, 2003, 2003 WL 2747580.

¹⁵⁶ See Jonathan Watts, *China admits first rise in poverty since 1978*, THE GUARDIAN, July 20, 2004, 2004 WL 85579874 (noting that more than 800,000 farmers slipped below the national poverty line in 2003).

¹⁵⁷ Jiang Wen-ran, *Perilous Prosperity Shafts China's Heartland*, TAIPEI TIMES, Apr. 20, 2004, at 9.

¹⁵⁸ WORLD BANK, WORLD DEVELOPMENT REPORT: FROM PLAN TO MARKET 66 (1996).

legislation to improve social welfare, strengthen job training and creation programs, ease restrictions on migrant workers and enhance their rights to education and medical treatment, reduce the tax burden on farmers, stimulate growth in Western and central regions, tighten labor safety rules especially in the mining industry, and improve environmental protection. Perhaps more importantly, the government has given substance to the commitments and promise of these new regulations by increasing spending. For instance, the government spent some 70 billion yuan in 2003, an increase of almost 20% over 2002, on the "three-stage guarantee" for laid-off workers that provides a basic living allowance, unemployment insurance, and then a subsistence allowance if the person is still not able to find work. The government also allocated an additional 4.7 billion yuan to subsidize job creation.¹⁵⁹ There were 29.33 million retirees from enterprises covered by welfare, and an increase of 41% over 2002. Nearly 60 million people have been covered by the rural old-age insurance scheme, with close to 1.4 million farmers receiving pensions.¹⁶⁰ Although these increased expenditures will not put an end to the problems, and benefit different groups disproportionately, with former SOE employees better taken care of than others,¹⁶¹ they do demonstrate the commitment of the new leadership to pay attention to social justice issues.

Chinese citizens have on the whole also enjoyed greater access to medical care, better health and longer lives. In 2001, life expectancy reached 70.6, double that in 1949.¹⁶² The population with access to essential drugs reached 80-94%; 77-79% of one-year olds are immunized against TB, measles and other illnesses. In 2000, health care was available to 86% of pregnant women, and maternal mortality had dropped to 53 per 100,000 from 61.9 per 100,000 in 1995, although in some rural areas the rate can be as high as 400/100,000.¹⁶³ The percentage of women giving birth in hospitals was 72.9%, up 15 percentage points from 1995. Efforts to encourage breastfeeding also paid dividends, with 54% of urban mothers and 72% of rural mothers breastfeeding for four months. All are significant improvements.

However, China is poor: only \$205/capita is spent on health. Public health expenditure is 2.0% of GDP, while private health expenditure is 3.4% of GDP. There are still problems with Hepatitis-B, tuberculosis and lack of potable water, as well as new medical issues such as an upsurge in AIDS, sexually transmitted diseases, obesity, death by traffic accidents and mental illness. Medical treatment in the countryside in particular leaves much to be desired. Access to medical care has deteriorated for those without the personal or family resources, and adequate facilities are not available in some areas even for those who could afford to pay for treatment. Moreover, with longer life spans and China's one-child policies changing demographics, China is facing the problems associated with aging, including more people suffering from chronic ailments, a lengthening of the course of diseases, and constant increases in medical and pharmaceutical costs, all of which have an enormous impact on health-care facilities and services.¹⁶⁴

¹⁵⁹ STATE COUNCIL OF CHINA, 2004 GOVERNMENT WORK REPORT, released on Mar. 5, 2004.

¹⁶⁰ 2004 White Paper, *supra* note 6.

¹⁶¹ Dorothy Solinger, *Path Dependency Re-examined: Chinese Welfare Policy in the Transition to Unemployment*, COMP. POL. (forthcoming 2005).

¹⁶² HUMAN DEVELOPMENT REPORT, 2003, *supra* note 154. The 2004 White Paper, *supra* note 6, claims that there were 108.95 million people around China covered by medical insurance, an increase of 14.95 million as compared with the figure at the end of 2002.

¹⁶³ See China's Report to the ICESCR (International Covenant on Economic, Social and Cultural Rights) Committee of the Office of the United Nations High Commissioner for Human Rights), 34th Sess., E/1990/5/add.59, Mar. 4, 2004.

¹⁶⁴ *Id.*; see generally RICH JACKSON & NEIL HOWE (of The Center for Strategic and International Studies), THE GRAYING OF THE MIDDLE KINGDOM: THE DEMOGRAPHICS AND ECONOMICS OF RETIREMENT POLICY IN CHINA (2004), available at <http://csis.org/gai/GrayingKingdom.pdf> (noting that while other countries became affluent societies before they had an aging problem, China remains a low-income country).

PRC law provides for nine years of compulsory education. According to the UNDP, public education expenses for 1998 to 2000 amount to 2.1% of GDP, of which 37.4% was for primary education, 32.2% for secondary, and 15.6% for tertiary.¹⁶⁵ According to official sources, the ratio of education expenditure to GDP has increased five years in a row, from 2.5% in 1997 to 3.41% in 2002.¹⁶⁶ In 2001, adult literacy was 85.8%, up from 78.3% in 1990. Youth literacy is even higher, at 97.9%.¹⁶⁷ The government has proudly noted that according to statistics published by UNESCO in 2003, China made the most progress in eliminating illiteracy in the past decade among the 40 countries surveyed.¹⁶⁸

However, illiteracy rates are higher among women, minorities and in rural areas. As recent as 1999, as many as 100 million women, mainly in rural areas, were illiterate.¹⁶⁹ In response, the government initiated Project Hope to assist children in poor districts and the Spring Buds Scheme to promote girls' enrolment or return to school to complete their primary education. According to the Ministry of Education, the proportion of females receiving education at all levels has risen and the overall educational level of women has improved. From 1990 to 2000, the illiteracy rate among women has decreased from 32% to 13.5%, and the total population of female illiteracy decreased from 159 million to 62 million.¹⁷⁰ Less than 5% of young and middle aged women are illiterate, despite higher overall rates of female illiteracy.¹⁷¹ In 2000 the primary school enrollment rate of female students reached 99.1%. Even in the economically less-developed western regions, the rate of school enrollment of female students reached 95%. At present, the proportion of female students in China's primary schools is 47.2% and that in colleges and universities is 43.95%. In general, 97% of the primary school graduates go to junior high school, 58.3% of the junior high school students make it to senior high school, while 15% go on to college.¹⁷²

Despite such achievements, the U.N. Special Rapporteur (SR) on the Right to Education issued a critical report that challenged some of the data and offered a number of recommendations for improvement.¹⁷³ The SR noted that many public schools had begun to charge tuition and impose other fees, which the poor are not able to afford. She recommended that all fees be eliminated and that the budgetary allocation for education be increased to the "internationally recommended" minimum of 6% though it bears noting that few countries actually meet that level.¹⁷⁴ She also noted ongoing problems with gender equality and with education for minorities, including the lack of bilingual education. In addition, she recommended a clarification of the rights of young unmarried people to sex education and family-planning services and to self-protection against sexually transmitted diseases and AIDS.

The government responded with a scathing critique, accusing the SR of being politically biased, distorting the facts and discounting China's achievements.¹⁷⁵ Beijing complained that the SR ignored

¹⁶⁵ HUMAN DEVELOPMENT REPORT 2003, *supra* note 154.

¹⁶⁶ Government Comments, *supra* note 88.

¹⁶⁷ *Id.* China in its report to the ICESCR Committee cited census data for 2000 showing adult literacy at 91.3% and literacy for those under forty at 95.2%.

¹⁶⁸ 2004 White Paper, *supra* note 6.

¹⁶⁹ Committee on the Elimination of Discrimination Against Women of Office of the United Nations High Commissioner for Human Rights, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: China, 20th Sess., 03/02/99, A/54/38 (1999) [hereinafter called CEDAW Committee Report], para.257 (Concluding Observations/Comments) (citing statement from China's representative).

¹⁷⁰ *Id.*

¹⁷¹ 2004 White Paper, *supra* note 6.

¹⁷² Government Comments, *supra* note 88.

¹⁷³ The Right to Education, Report Submitted by the Special Rapporteur, Katarina Tomaševski, U.N. ESCOR Human Rights Comm., 60th Sess, Agenda Item 10, E/CN.4/2004/45/Add.1, Nov. 21, 2003 [hereinafter called Right to Education].

¹⁷⁴ See *Show Me the Money*, *supra* note 16 (of countries in study, only Malaysia met the 6% level).

¹⁷⁵ Government Comments, *supra* note 88.

information provided by the government, relying instead on materials from overseas sources and organizations. The government pointedly observed that although the SR did not visit Tibet, she nevertheless made “biased and irresponsible comments” on education in Tibet.

To some extent, the difference lies in the government's approach of citing regulations and general statistics, and the approach of the SR and other human rights organizations that highlights individual cases or relies on accounts about how the laws are implemented in practice by oftentimes disgruntled parties. For instance, on the issue of school fees, the government noted that the State Council has issued regulations requiring that schools charge only a single fee and that fees be waived for indigent students. However, as with other types of laws, local governments often ignore or modify central regulations.

In other cases, the difference seems to be more one of spin or interpretation, or due to the tendency of human rights advocates to hold up idealistic standards that cannot be achieved given China's current level of development and regional variations. The SR for example accused China of backing away from its commitment to universal nine-year compulsory education. The government acknowledges that nearly 10% of the population lives in regions where universal education can only be provided at the primary level or even only up to the third or fourth year of primary school. Moreover, while the national dropout rate in 2000 was 0.55% for primary schools, and 3.21% at the junior middle school level, the dropout rate in some rural areas is high. In light of significant regional disparities, the government has adopted a pragmatic approach that involves different plans in different regions and seeks to “promoting compulsory education progressively” by realizing six-year universal compulsory education first. However, the government adamantly denied that it was backing away from universal nine-year compulsory education as a long-term goal.¹⁷⁶

The influx of migrant workers and the rise of laid-off urban workers have led to concerns about social order, aggressive begging, the rise of slum towns and increased crimes in urban areas. Until June 2003, authorities relied on a system of administrative detention known as detention and repatriation to both serve humanitarian purposes and protect social order in urban areas by providing relief, education, and resettlement to vagrants who had made their way into the cities, city residents who roam the streets begging, and other persons sleeping in streets who had no means of livelihood. According to one report, upwards of two million people were subject to detention and repatriation a year, of which five to twenty percent were children.¹⁷⁷ In June 2003, the State Council repealed the 1982 regulation and issued new regulations that maintained the social welfare function, but removed the compulsory detention component.¹⁷⁸ The new provisional rules require relief centers to provide food and shelter to those in need, send them to hospitals for medical treatment if necessary, contact their relatives, and arrange for transportation back to their homes. Relief is offered on a voluntary basis: the authorities are not allowed to force anyone to go to a relief center, and relief centers are not allowed to hold anyone against their will or prevent them from leaving the center whenever they wish. The centers are to be funded by the local government at the county level and above on an as-needed basis. Reflecting widespread concerns about abuse in the past, the regulations strictly prohibit relief centers from seeking payment from those who seek assistance or their families. Nor may they require those seeking relief to work in exchange for room

¹⁷⁶ *Id.*

¹⁷⁷ HUMAN RIGHTS IN CHINA, NOT WELCOME AT THE PARTY: BEHIND THE “CLEAN-UP” OF CHINA'S CITIES—A REPORT ON ADMINISTRATIVE DETENTION UNDER “CUSTODY AND REPATRIATION” (1999).

¹⁷⁸ See Chengshi Shenghuo Wuzhao de Liuliang Qitao Renyuan Jiuzhu Guangli Banfa [State Council Administrative Measures for Assistance to Indigent Vagrants and Beggars in Urban Areas] (2003); Chengshi Shenghuo Wuzhao de Liuliang Qitao Renyuan Jiuzhu Guangli Banfa Shishi Xize [Ministry of Civil Affairs Detailed Implementing Rules for the Administrative Measures for Assistance to Indigent Vagrants and Beggars in Urban Areas] (2003).

and board or other assistance. In addition, the regulations provide for sanctions, including criminal punishment, for those who beat, defraud, sexually abuse, or otherwise mistreat relief recipients, or who cause others to mistreat them.

However, early signs suggest that there will be some type of retrenchment. Noting that the repeal of detention has led to increased crime and abuse of the relief centers by people who were not in fact indigent, the Ministry of Public Security issued the “Notice Regarding the Strengthening of Current Social Order Management in Accordance with Law.” The Notice calls on public security to redouble efforts in attacking a variety of deviant behavior, including interfering with traffic when begging, disturbing the public order by aggressive begging in public places, soliciting for prostitution in public places, and interfering with government activities when petitioning officials for relief.¹⁷⁹ Clearly worried about the financial and social order impact of the national regulations, several local governments have also rushed to pass regulations that attempt to shift some of the financial burden to others and to clarify many of the difficult operational issues resulting from the new policy, including imposing limits on stays in the centers.¹⁸⁰

The Constitution provides for citizens’ right to work, rest, education, scientific research and cultural activities, material assistance from the State and society when aged, ill or having lost the ability to work, and ownership of lawful property. Constitutional rights are generally not directly justiciable in China without implementing legislation. Moreover, like elsewhere, many economic rights because of their aspirational nature, vagueness, or policy implications with respect to distribution of resources are not considered to be justiciable. Nevertheless, there have been a number of cases that have arisen in relation to some of these rights, particularly the right to education. In fact, the first case to directly invoke the constitution as a basis for a claim absent implementing legislation involved the right to education.¹⁸¹ One subsequent case involved a student who successfully sued her school for damages for failing to inform her about her college entrance exam scores in time to apply to university, while in another education case a student sued the school and various individuals for allowing someone else to appropriate her name and score to enter university.¹⁸²

In still another case that combined the right to education with a discrimination claim, three students from Qingdao sued the Ministry of Education for its admissions policy that allowed Beijing residents to enter universities in Beijing with lower scores than applicants from outside Beijing.¹⁸³ The plaintiffs filed the suit directly with the Supreme Court. Although the Supreme Court has the discretionary power to hear important cases in the first instance, it opted not to exercise the power, rejecting the case on jurisdictional grounds and advising the plaintiffs to file in Intermediate Court. Facing a number of serious legal obstacles, including that the Administrative Litigation Law permits challenges to the legality of specific administrative acts but not generally applicable administrative regulations, the students withdrew the case. The students claimed a moral victory in that their suit called

¹⁷⁹ Ministry of Public Security, Doc. No. 52. The Notice also calls on public security officers to punish activities of hooliganism that disrupt public order despite exhortations to halt such activities, such as panhandling; camping in the open; provoking disturbances; and inciting crowds to fight in or around such public places as offices, schools, hospitals, public squares, movie theaters, and famous scenic spots.

¹⁸⁰ For details, see *Administrative Detention*, *supra* note 35.

¹⁸¹ See Supreme Court Reply, No. 25, Aug. 15, 2001.

¹⁸² WANG LEI, XUANZI XIANFA [TO CHOOSE CONSTITUTIONAL LAW] 61-67 (2003).

¹⁸³ For details, see Yu Meisun, ‘Cong Jiaoyubu Dang Beigao de Liangan, Kan Zhaosheng Zhidu Chuangxin de Poqixing’ [On the Exigency of Renovating the College Recruiting System, Judging From the Two Cases Where the Ministry of Education is the Defendant], Epochtimes.com, 23 April 2004, available at <http://www.epochtimes.com/gb/4/4/23/n519496.htm> (also reporting another case where a student who did not meet the requirements to take the graduate student exam but was nevertheless permitted to do so, was rejected by the Chinese Academy of Social Sciences even though others who did not meet the minimal score were admitted; after losing in administrative reconsideration and in both the Beijing Intermediate and High Courts, the student took his case to the Supreme Court, where it is pending).

attention to the unfairness of the current policy, and has led the Ministry of Education to reconsider, although not yet change, the policy.

Good Governance and Rule of Law

Critics are often quick to attribute any failure in governance - whether the belated response to SARS, widespread corruption, or shortcomings in the implementation of rule of law - to China's political system, while downplaying similar problems in democratic states. However, China outperforms other countries in its income category on core good governance indicators, as indicated in Tables 4.1 and 5.1. "Political stability and absence of violence" combines several indicators that measure the likelihood that the government will be overthrown or destabilized by unconstitutional or violent means, including terrorism. It is included as a good governance measure because political instability and violence not only affect the ability of the ruling regime to govern but deprive citizens of the ability to peacefully select and replace those in power. "Government effectiveness" measures the provision of public services, the quality of the bureaucracy, the competence and independence of civil servants and the credibility of the government's policy commitments. Whereas government effectiveness focuses on the institutional inputs required to implement policies effectively, "regulatory quality" focuses on the policies themselves. It includes measures of market-unfriendly policies such as price controls or inadequate bank supervision, as well as perceptions of excessive regulation of foreign trade and business development. "Rule of law" measures the extent to which people have confidence in and abide by the rules of society, how fair and predictable the rules are, and how well property rights are protected. The indicators include perceptions of incidence of crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts. "Control of corruption" measures perceptions of corruption, the effects of corruption on business, and "grand corruption" in the political arena.

China beats the average for lower middle income countries in political stability, government effectiveness, rule of law and control of corruption. It is about average for regulatory quality, which is biased toward neo-liberal economic principles, and falls far short on voice and accountability, which measures civil and political rights.

To be sure, there are still many problems with the legal system and in governance.¹⁸⁴ However, there has been remarkable improvement in both in the relatively short time since reforms began in 1978. Moreover, as rule of law is highly correlated with wealth, we can expect that the legal system will continue to improve as China becomes richer.¹⁸⁵ Many of the shortcomings in the legal system are the type of systemic problems faced by developing countries,¹⁸⁶ and will require time and additional resources to overcome.¹⁸⁷

¹⁸⁴ For a discussion of the theoretical and practical issues relating to the conceptualization and implementation of rule of law in China, see CHINA'S LONG MARCH, *supra* note 24.

¹⁸⁵ See *Show Me the Money*, *supra* note 16. For a discussion of the relationship between economic growth and rule of law generally and in China, including a survey of the numerous and consistent empirical studies that show rule of law is associated with economic growth, as well as the argument that there is a push and pull relationship between growth and rule of law, with growth stimulating demand for rule of law and the establishment of rule of law contributing to economic growth, see CHINA'S LONG MARCH, *supra* note 24 at 450-512.

¹⁸⁶ See RANDALL PEERENBOOM, *Varieties of Rule of Law*, in ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S 1, 25 (2004) [hereinafter called ASIAN DISCOURSES] (noting problems in Indonesia, India, Thailand and the Philippines with respect to access to justice, inefficient and expensive courts, and judicial competence and corruption).

¹⁸⁷ For a discussion of the different thick conceptions of rule of law in China, and the extent to which ideological and political factors will hinder the development of rule of law, see CHINA'S LONG MARCH, *supra* note 24, at 10-12, 24-25 n. 30, 55-102, 166-238.

Law and Order

Chinese leaders as well as leaders of other Asian states such as Lee Kuan Yew have often been critical of the high crime rates, rampant drug use and social disorder in economically advanced Western liberal democracies. Rather, they champion family and communitarian values, social stability and law and order. Tables 6.1 and 7.1 demonstrate that there are significant differences in crime rates and other indicators of social order.

Crimes rates must be used with caution because of differences in the way crimes are defined, the willingness of rape victims to come forward and other factors that affect the data reported, wide fluctuations from year to year, as well as differences in the level of economic development, demographic variables such as the percentage of rural population and youths, and other conditions that affect crime rates. Notwithstanding such qualifications, the results are striking: Asian countries, especially in the higher income brackets, tend to have much lower crime rates relative to their level of economic development, industrialization and urbanization. For instance, the total crime rates for high income countries France and the U.S. are twice to six times the rates in Japan, Singapore and Hong Kong. The much higher crime rates hold across the board for property offenses such as theft and burglary, violent crimes such as rape and murder (which are generally considered to suffer from fewer problems in reporting and data collection) and drug offenses. The U.S. suffers from particularly high levels of violent crime, especially rape.

The lower income countries such as China, the Philippines, Indonesia, India and Vietnam have lower crime rates than the wealthier countries. Data collection is particularly problematic in low income countries, making comparisons more difficult. However, it would appear that crime and social disorder is a greater problem in India, the Philippines and Indonesia than in China, Vietnam and Thailand. In short, despite a rising crime rate, China still does relatively well in maintaining social order. Walking the streets of Beijing alone late at night does not fill one with the sense of trepidation that comes from a similar stroll through the streets of New York or Los Angeles. A 2002 nationwide survey of 100,000 people found that 80 percent felt safe due to the strike-hard campaign.¹⁸⁸

Countries vary widely in how they deal with criminals. The U.S. has the dubious distinction of the highest rate of incarceration in the world, as well as some of the most severe punishments. In contrast, France and Japan have low rates of incarceration relative to their crime rates, and tend to place more emphasis on noncustodial sanctions and in Japan's case on rehabilitation. In general, however, Asian states with the exception of Japan rely on heavy punishments. China is no exception. In 2001, 25% of verdicts in criminal cases resulted in a sentence of more than five years (including life imprisonment and the death penalty). This number is already down from the high thirties and low forties in previous years.¹⁸⁹ China also carried out more capital punishments in a three month period in 2001 than were carried out globally in three years.¹⁹⁰

Although there are now more than 40,000 protests a year, violent clashes between protesters and the police are still relatively rare. The authorities often attempt to defuse potentially destabilizing protests by throwing money at the problem, while pressuring or arresting key leaders. Police have also sought to develop less confrontational and brutal methods for dealing with protests as the number of protests has

¹⁸⁸ *Highlights of Major Beijing-Based Newspapers*, XINHUA NEWS AGENCY, Oct. 30, 2002, LEXIS, Nexis Library, Xinhua File.

¹⁸⁹ FALÜ CHUBAN SHE [LAW PUBLISHING HOUSE], ZHONGGUO FALÜ NIAN JIAN (2002) [2002 CHINA LAW YEARBOOK], at 144; *cf. id.* at 145 (claiming 31 percent of those convicted received a sentence over five years). In the past, the percentage of punishments over five years was even higher. See HAROLD TANNER, STRIKE HARD: ANTI-CRIME CAMPAIGNS AND CHINESE CRIMINAL JUSTICE, 1979-1985, at 98-99 (1999) (noting that during the first strike-hard campaign from 1983 until 1988, 38 percent received a punishment of five years or more).

¹⁹⁰ Amnesty International, *China: 'Striking Harder' Than Ever Before*, July 6, 2001, available at <http://web.amnesty.org/library/Index/engASA170222001>.

grown and the tactics have changed to include larger scale, cross-industry and cross-regional demonstrations, which are often fronted by strategically placed elders, women and children.¹⁹¹ More generally, the government has allowed a steady rise in the number of social organizations, and yet still sought to ensure some accountability through registration requirements, as noted above.

Other indicators of social order such as suicide, divorce and young mother rates produce more mixed results, less clearly tied to levels of wealth, as indicated in Table 7.1. Suicide rates are very high in Japan, followed by France, and then a cluster of countries including China, South Korea, and Hong Kong, followed by the U.S. and India. Thailand and the Philippines, perhaps because of religious influences, have very low rates. However, other reports have indicated a much higher rate for China, particularly among rural women.¹⁹² The high rate of suicide among Chinese women reflects their low economic and social status, the high incidence of violence and limits on their ability to escape and pursue a more desirable life.¹⁹³

Divorce rates have been growing in China, more than doubling in fifteen years from 0.9% in 1985 to 1.9% in 1999.¹⁹⁴ Nevertheless, China still has a much lower rate than other countries, including the U.S. and South Korea. Again, there is wide regional variation, with coastal and more developed areas experiencing a higher rate of divorce. According to the People's Court Daily, nearly a quarter of marriages end in divorce in the coastal provinces.¹⁹⁵

Births to young mothers is not a problem in China due to family planning regulations that encourage later marriages and limit births. Of course, China's one-child policies, relaxed recently, have been much criticized both for violating the right to procreate and also for the coercive manner in which they have been carried out.

Women's Rights

China, proud of its record on women's rights relative to other countries, hosted the Fourth World Conference on Women in 1995. Judged by the standards of the UNDP Gender-related Development Index,¹⁹⁶ China does reasonably well relative to its income. Again, as the index is highly correlated with wealth ($r=.93$), a country's performance should be judged in comparison to other countries in its income class. Thus, while China scores much lower on the GDI than high income countries such as the U.S. (.94), Japan (.93), Singapore (.88), and much higher than low income countries such as India (.57), Zimbabwe (.49) and Egypt (.63), China's score (.72) is comparable to other lower middle income countries such as Iran (.70), the Philippines (.75) and Romania (.77), as indicated in Table 9.1.

Despite steady and significant progress in improving women's lives, a number of serious problems remain, as acknowledged by the government. There is still a gap between male and female literacy rates

¹⁹¹ See TANNER, *supra* note 189.

¹⁹² 2004 State Department Report, *supra* note 31.

¹⁹³ About 500 Chinese women commit suicide a day, a rate that the World Bank estimates to be five times the global average. Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, 59th Sess., Agenda Item 12 (a), E/CN.4/2003/75/Add.1, Feb. 27, 2003, para 12.

¹⁹⁴ See National Population and Family Planning Commission of China, statistics available at <http://www.npfpc.gov.cn/data/sfpcdatamar3.htm>, based on the 2000 Yearbook of China Statistics, published by the State Statistics Bureau.

¹⁹⁵ Zhang Hong, *It is Difficult not to be Confused about Extramarital Affairs*, RENMIN FAYUAN BAO [PEOPLE'S COURT DAILY] (internet edition), Nov. 26, 2000.

¹⁹⁶ The GDI is a composite indicator that measures the average achievement of a population in the same dimensions as the HDI while adjusting for gender inequalities in the level of achievement in the three basic aspects of human development. It uses the same variables as the HDI, disaggregated by gender. See <http://hdr.undp.org/reports/global/2003/faq.html#31>.

especially in some rural areas and among some minorities, although female literacy rates are rising and the difference among young males and females is very small overall. With women holding just 5% of ministerial positions in 2000 and constituting 22% of the NPC, the proportion of women in political positions, especially at high levels, is low. However, while the numbers of women in minister positions is low relative to other countries, the number of female legislators is high, as indicated in Table 9.1.

Although economic reforms have greatly improved the lives of many women, the transition from a centrally planned economy to market economy has also led to increased poverty for some citizens, including a disproportionate number of women. Women have been laid off in greater numbers than men and have had a harder time find new jobs. They also suffer from gender segregation of the labor market, with an over-concentration in the low-paying service sector. Nevertheless, compared to other countries, including many other wealthy countries, Chinese women enjoy higher rates of employment, better jobs, and a higher ratio of female to male income earned.¹⁹⁷ Indeed, as indicated in Table 9.1, the female to male income ratio in China is higher than in the U.S., and much higher than in India, Iran, Chile and Singapore.¹⁹⁸

Violence against women is a major issue, including domestic violence and marital rape, sexual violence while in custody, sexual harassment in the workplace, trafficking of women and forced prostitution. A 2000 survey by the All China Women's Federation (ACWF) found violence occurs in 30% of Chinese households, with 80% involving spousal abuse.¹⁹⁹ Although more common in rural areas, domestic violence occurs throughout China and at all socioeconomic levels.

China's population policies have been criticized for their effects on women, including forced abortions and sterilization, and female infanticide.²⁰⁰ Genetic testing that determines the sex of the fetus, while prohibited, has become a lucrative underground business, contributing to abortions of female fetuses and an unusually high ratio of males to females. The male/female imbalance may contribute to kidnapping and trafficking of women, many of whom end up forced into marriage with males in poor villages.

While the problems are clear, the solutions are either not clear or difficult to implement. The task of devising and implementing effective solutions is complicated by several factors. As the CEDAW Committee recognized, China's size and diversity pose special challenges to the realization of equality between women and men.²⁰¹ Differences in the experiences of urban and rural women require different solutions. The general conflict in the international human rights movement between women's rights, often interpreted in light of the experiences of women in western developed countries, and the cultural and religious beliefs and practices of minority groups in non-western developing countries further complicates policy-making and undermines efforts to implement state policies aimed at promoting the rights of women. As is true elsewhere, progress on promoting women's rights is hindered by deeply embedded traditional views about the proper role of women in the family, in society, and in relation to men. The CEDAW Committee has observed that "the persistence of prejudice and stereotypical attitudes concerning the role of women and men in the family and in society, based on views of male superiority and the subordination of women, constitutes a serious impediment to the full implementation of the

¹⁹⁷ As of 2001, women constituted 39% of the non-agricultural work force, according to the UNDP Human Development Report 2003, available at http://hdr.undp.org/reports/global/2003/indicator/cty_f_CHN.html. See also ZHU LING, *Poverty Alleviation During the Transition in Rural China* in POVERTY, INCOME DISTRIBUTION, AND WELL-BEING IN ASIA DURING THE TRANSITION 111 (Aiguo Lu & Manuel F Montes eds., 2002) (studies in 1988 and 1995 show that differences in male and female poverty are not substantial, and that relative female poverty has not increased significantly in 1990s).

¹⁹⁸ In general, socialism has a positive impact on women's status and earning power.

¹⁹⁹ Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, *supra* note 194, at para. 8.

²⁰⁰ CEDAW Committee Report, *supra* note 169, paras. 299-301.

²⁰¹ *Id.* paras. 276, 278.

Convention.”²⁰² The Committee also noted the government has focused on the protection of women rather than their empowerment by perpetuating the identification of women with children and through numerous labor regulations that protect women.²⁰³

General recommendations to improve the lot of women include adopting a more empowerment-oriented approach, encouraging a national dialogue on attitudes toward women and adopting a comprehensive public campaign to change traditional attitudes.²⁰⁴ A number of more target reforms have also been proposed for each of the specific issues.

For example, in response to lower literacy rates for women, the CEDAW Committee has recommended that the government abolish school fees and allocate adequate resources to ensure universal literacy and primary education, something easier than done in most developing countries.²⁰⁵ The Committee also recommended revision of textbooks and the curriculum to eliminate gender stereotypes and to include the achievement of gender equality as a societal goal, reflecting the importance of consciousness-raising and the rather optimistic belief that if only those responsible for the problems understood the negative consequences for women they would change their behavior.²⁰⁶ The Committee on the Rights of the Child suggested that local leaders be invited to take a more active role in supporting the efforts to prevent and eliminate discrimination against the girls and to provide guidance to communities, although it is not clear to what extent the mostly male leaders support the goals of reform.²⁰⁷

In response to the low levels of women in top positions of government, the CEDAW Committee recommended affirmative action and reservation of a specified number of seats for women delegates in people’s congresses.²⁰⁸ The Committee also called for more gender-balance in the composition of village committees. However, the Committee ducked the controversial issue of whether to impose affirmative action quotas on the open, competitive process of democratic elections at the village level. Nor is it clear that China is legally or morally obligated to support the long terms prospects of women by sacrificing the short term interests of villagers, both male and female, by forcing them to settle for less qualified village leaders.

Concerned about the consequences of women's loss of employment, or of interrupted employment, on women's rights to housing, health care and social security, the CEDAW Committee urged the government “to analyse, from a gender perspective, the effects of its economic policies, and to take steps to mitigate and counteract their negative effects on women. In addition to enforcing existing labour laws, the Committee invites the Government to increase women's means of redress against discrimination and inequality at work, including by promoting the recognition of women's right to participate in workers' organizations and their right to strike.”²⁰⁹ The Committee also recommended more participation of women in government policy-making for rural areas and for small businesses and other income-generating projects.²¹⁰

²⁰² *Id.*, paras. 277.

²⁰³ *Id.*, para. 280.

²⁰⁴ *Id.*, para 281.

²⁰⁵ *Id.*, para. 185.

²⁰⁶ *Id.*

²⁰⁷ Concluding observations of the Committee on the Rights of the Child: China, U.N. Convention on the Rights of Child, 12th Sess., 07/06/96. CRC/C/15/Add.56 (1996), para. 34.

²⁰⁸ CEDAW Committee Report, *supra* note 169, para. 293. The Committee recommending using the talent bank of the All China Women's Federation to increase the percentage of women in all public bodies.

²⁰⁹ *Id.*, para. 298.

²¹⁰ *Id.*, para. 303.

The CEDAW Committee responded to the high rate of suicide by recommending that the government pay urgent attention to the issue, research the causes of the high rates, provide better mental health services and ensure that women have equal enjoyment of land rights independent of their marital status.²¹¹ However, as most of the problems occur in poor rural areas, adequate mental health services are not likely to be available for some time. Adequate medical health care of any type will only be available when China reaches a much higher stage of wealth, at which point women will have more options and be less inclined to commit suicide in the first place. Attempts to address the land rights of women through the amended Marriage Law and other regulations have run into resistance at the local level, where the rules conflict with social norms.

Efforts to combat violence against women have included public campaigns aimed at changing traditional values, the establishment of government and non-government bodies devoted to domestic violence and related issues, the tightening of provisions in the criminal law relating to various forms of violence against women, amendment of the Marriage Law to make reference to domestic violence and the passage of local regulations addressing in greater detail domestic violence issues.²¹² Nevertheless, a great deal remains to be done to change deeply entrenched attitudes, particularly in rural areas. Further efforts are needed to establish hotlines, shelters and support networks for battered women, and to improve the legal framework. Future legal reforms are expected to include a standalone law on domestic violence that clarifies the issues of spousal rape and psychological abuse and strengthens remedies for victims of spousal abuse, sexual harassment in the workplace and human trafficking.²¹³ As demonstrated by the experiences of many other countries, having laws against domestic violence, sexual harassment and human trafficking on the books does not ensure that they will be enforced by the police and the judiciary if the laws are radically at odds with social norms and practices.

Prostitution has become widespread with the transition to a market economy. The CEDAW Committee recommended that prostitution be decriminalized,²¹⁴ although prostitution itself is technically not a crime under the current PRC criminal law. Only pimps and brothel owners are subject to criminal sanctions. Prostitutes are subject to administrative detention and fines. Imposing fines however usually results in the women going back to work as prostitutes to earn the money to pay the fines. Ironically, many human rights organizations and advocates, including former Human Rights Commissioner Mary Robinson, have called for the elimination of administrative detention.²¹⁵ The most likely result of eliminating "Detention and Education," the form of administrative detention used to detain prostitutes, would be to subject prostitutes to criminal punishments.²¹⁶ The Committee is on more solid ground in calling for greater attention to health services for prostitutes and for measures to facilitate rehabilitation and reintegration of prostitutes into society. At present, the recidivism rate for prostitutes is extremely high. According to one PRC legal scholar, a 30% recidivism rate for prostitutes subject to Detention and Education would be considered a success.²¹⁷ Part of the problem is that it is difficult to rehabilitate those who do not believe they have done anything wrong. According to one study, 88% of prostitutes detained

²¹¹ *Id.*

²¹² See Ronald Keith et al., *The Making of a Chinese NGO: The Research and Intervention Project on Domestic Violence*, 50:6 Probs. Post-Communism 38 (2003).

²¹³ Cedaw Committee report, *supra* note 169; The Committee on the Elimination of Discrimination Against Women in its concluding observations, paras. 251-336 (calling on the government to enhance services for survivors of domestic violence, including domestic workers, with a view to their empowerment and rehabilitation, including through psychological counseling, legal aid, temporary shelter and appropriate health services, and recommending that the Government monitor the links between the presence of migrant women, prostitution and trafficking in women).

²¹⁴ See *id.*, para. 289.

²¹⁵ See *Administrative Detention*, *supra* note 35.

²¹⁶ See *id.*

²¹⁷ See Sarah Biddulph, *The Rule of Law and Administrative Detention in China*, 20 UCLA PAC. BASIN L.J. n. 92 (2004).

in Jiangsu in 1985 to 1986 did not regard their behavior as criminal.²¹⁸ While lengthy detention is not likely to be effective in achieving the goal of education and rehabilitation, as the current high rates of recidivism indicate, administrative detention for a short period to conduct health checks would seem justified given the exploding rate of sexually transmitted diseases and HIV/AIDS. In the long run, economic growth will result in greater economic opportunities for women, although prostitution is likely to remain a permanent part of society, as it is elsewhere.

The CEDAW committee recognized “that population growth is a genuine and severe problem and that legitimate concern and that considerable progress has been made in providing family planning services.”²¹⁹ Nevertheless, the manner in which population growth is controlled leaves much to be desired. Despite laws that prohibit forced abortions and sterilization, local officials whose career prospects turn on meeting family planning targets often turn a blind eye or encourage the practices. Changing demographics however have resulted in a relaxation of the one-child policy, and market reforms and greater wealth have decreased the impact of economic disincentives for those who want more than one child.

The failure to use adequate birth control leads to many abortions. The CEDAW Committee has noted “with concern that only 14 per cent of men use contraceptives, thus making contraception and family planning overwhelmingly a woman's responsibility. In the light of the fact that vasectomy is far less intrusive and costly than tubal ligation, targeting mainly women for sterilization may amount to discrimination.”²²⁰ The Committee recommended consciousness-raising and education to encourage more men to take responsibility for birth control.

The Committee also recognized that male children are still expected to support the elderly, particularly in the countryside, contributing to the preference for boys. The Committee encouraged the government to address the linkages between economic security in old age and family planning, and to take all appropriate measures to eliminate son preference by expanding educational and employment opportunities for women in rural areas, and by enforcing laws against sex-selective abortion, female infanticide and abandonment of children.²²¹ However, as developing country, China is hard pressed to provide an adequate welfare net for urban residents, much less for the many hundred of millions more living in rural areas.

The Committee further noted that PRC laws provide insufficient legal safeguards for women's rights and remedies for violations of those rights.²²² Since the first round of recommendations from the Committee in 1999, the government has carried out extensive publicity campaigns to increase awareness among women of their legal rights and to educate government officials and the general public about women's issues. The government has also passed a number of laws and amended others to clarify issues and improve legal remedies, enhanced access to the justice system by expanding legal aid, and overseen the build-up of a network of governmental and non-governmental entities devoted to the promotion of women's rights. However, legal aid centers remain underfunded, the legal system continues to suffer from the systemic problems mentioned above and women's groups have had little impact on changing deeply held attitudes, particularly in rural areas.

²¹⁸ TANNER, *supra* note 189, at 149. In part, this may reflect the broad definition of prostitution, which includes sex-related occupations such as hostessing, nude dancing, and those who work in massage parlors or saunas where the range of service goes beyond certain ill-defined limits. But it may also simply reflect the view among many people who have limited economic prospects that prostitution is a job that pays well and puts food on the table.

²¹⁹ CEDAW Committee Report, *supra* note 169, para. 299.

²²⁰ *Id.*

²²¹ *Id.*, at para. 301.

²²² *Id.*, para. 284.

Cultural and Minority Rights

The study of cultural rights is complicated by the fact that China is a large country, with 55 different ethnic groups constituting approximately 9% of the population. The legal regime is complex, with numerous autonomous zones,²²³ preferential policies and a wide range of local regulations. Accordingly, different minority groups or even members of the same minority group are subject to different rules depending on where they are located. In addition, international law and domestic law are not clear on many points relating to the rights of minorities. Moreover, many issues are not resolved through the formal legal system.²²⁴ There are also different values at stake, and sharply divergent views among Hans and ethnic groups on many issues.

The government claims that it has greatly improved the living standards of minorities, affords them considerable political autonomy and opportunities to participate in national and local government, offers preferential treatment in education, employment and family practices, and protects cultural sites and practices, including religious practices so long as they are non-political. On the other hand, the SR on Racism and Racial Discrimination expressed concerns in his 2002 report that Tibetans in the TAR suffer various forms of systematic and institutional discrimination in the fields of employment, health care, education, housing and public representation.²²⁵

There is no doubt that China's minority regions are wealthier than in the past, and that the standard of living has improved for the vast majority of individuals. However, minority regions, located on the fringes and largely rural, are generally still poorer than the Han dominated Eastern region. In response, the government listed poverty relief for ethnic minorities with relatively small populations as a focus of the state's development-oriented poverty reduction program, adopting special policies to help 630,000 members of 22 ethnic-minority groups each with a population less than 100,000.²²⁶ In 2003, 400 million yuan was earmarked as development funds for ethnic minorities, while another 600 million yuan was channeled to ethnic minorities to develop trade and local businesses as part of preferential policies.²²⁷

Critics claims that economic policies have disproportionately benefited Hans living and working in minority areas, that some projects favored Hans, especially for technical and senior positions, and that

²²³ As of 1998, there were five autonomous regions, 30 autonomous prefectures and 120 autonomous counties, and 1,256 ethnic townships. Among the 55 ethnic minorities, 44 have their own autonomous areas, with a population of 75 percent of the total of the ethnic minorities and an area of 64 percent of the area of the whole country. INFORMATION OFFICE OF THE STATE COUNCIL OF CHINA, *Regional Autonomy for Ethnic Minority*, in NATIONAL MINORITIES POLICY AND ITS PRACTICE (June 2000), available at <http://www.china.org.cn/e-white/4/4.3.htm>.

²²⁴ One reason the legal system has not played a major role in struggles over cultural rights is that individuals in special autonomous presumably realize that to challenge local regulations at odds with generally applicable laws would be pointless because the NPC presumably has already reviewed any such deviations and given its approval. Judges therefore will simply follow the local regulations.

A more common scenario is where generally applicable laws and regulations conflict with non-codified local customs. For example, some acts considered to be serious crimes under PRC law may not be considered serious crimes or crimes at all in some localities. Areas of conflict include property rights and disputes over access to land, grazing rights, and inheritance rights; marriage laws and disputes over dowries, arranged marriages and bigamy; and criminal law, including what constitutes rape and what counts as mitigating circumstances in homicides. Outcomes in such cases differ widely, from strict application of the law to wide deference to local customs. See generally Liang Zhiping, Xiangtu Shehui zhong de Falu yu Zhishi [On Law and Order in Rural Societies], Parts I and 2 available at http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=1351 and http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=1352 (posted on Nov. 19, 2001).

²²⁵ See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, Report by Mr. Maurice Glèlè Ahanhanzo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. ESC Human Rights Commission, 58th Sess., Provisional Agenda Item 6, E/CN.4/2002/24 (2002).

²²⁶ 2004 White Paper, *supra* note 6.

²²⁷ *Id.*

minorities have less access to credit and financing.²²⁸ The government counters that minorities hold the majority of positions in local governments, that all 55 ethnic groups are represented in the NPC, with minority candidates constituting 14% of NPC delegates even though they represent only 9% of the population, and that minorities hold key Party posts. Nevertheless, minorities tend to have more positions in government, whereas Hans continue to have relatively higher positions in the Party, which remains the ultimate authority.²²⁹ In addition, there are relatively few minority persons in the most powerful positions of government or the Party. Critics also allege that development has upset traditional living patterns and led to relocation. Such complaints are perhaps inevitable in the march toward economic development and modernization. However, allegations of genocide based on an influx of Hans into Tibet and Xinjiang and the destruction of cultural practices are overstated.²³⁰ Hans tend to congregate in the large cities, which generally tend to be more well off than rural areas.²³¹ Being on average more educated, they also tend to have higher paying jobs, and thus can afford better housing.

In terms of education, illiteracy has been greatly reduced among minorities, but remains significantly higher than the national average in some minority areas. According to government statistics, 32.5% of the population in the TAR was illiterate in 2001,²³² although the rate for young and middle age people is less than 3%.²³³ Enrollment for children in the TAR is 86% (compared to 93% nationally). Illiteracy among young and middle-aged Uighars in Xinjiang is less than 2%.²³⁴

Native language and bilingual education has also been a concern of rights groups, with the Committee on the Elimination of Racial Discrimination recommending that children in all minority regions have the right to develop their own language and culture.²³⁵ However, this goal is difficult to

²²⁸ See 2004 State Department Report, *supra* note 31, at 45 (citing complaints that of 38,000 people hired to work on the Qinghai-Tibet railroad, only 6000 were Tibetans).

²²⁹ See MacKerras, *supra* note 79.

²³⁰ See Sautman, *supra* note 99, at 177 (noting that even the Dalai Lama no longer claims genocide as defined in international law, that cultural genocide and ethnocide are not crimes defined by and grounded in international law, and that “inclusion of the concept of ‘cultural genocide’ as stock in trade of the Tibetan émigré ideology is meant to be provocative and incitory, rather than an intellectually appropriate conceptual framework for assessing PRC policy as it affects culture in Tibet. Designed to bolster the legitimacy of the émigré ethno-territorial movement, much of the émigré discourse on cultural genocide is a systematic misreading of the effects of the cultural transformation that attends social and economic change in Tibet.”).

²³¹ MacKerras, *supra* note 797; see also Andrew Martin Fischer, Urban Fault Lines in Shangri-La: Population and Economic Foundations of Inter-Ethnic Conflict in the Tibetan Areas of Western China, available at <http://www.crisisstates.com/download/wp/wp42.pdf> (arguing that concerns about social exclusion and Tibetans being overrun by Hans reflects an urban-centric viewpoint as Hans concentrate in cities, and that within cities “the critical factors generating exclusion and fuelling conflict are the differentials between groups, such as urbanisation rates and education levels, rather than base line characteristics, such as population shares or poverty levels.”). On the whole, Hans tend to be better educated and have higher skill levels, and thus are able to capture the best opportunities and highest salaries in managerial and technical positions. However, higher educated Tibetans are able to take advantage of expanding opportunities, with Tibetans claiming over 70% of staff and workers in state-owned units, including cadres, in the TAR. Tibetans with at least a secondary school education level are generally able to compete with Hans. But at the lower end of the economic spectrum, Hans in urban areas, attracted by subsidies, are outcompeting Tibetans because of higher education and better skills. *Id.*

²³² INFORMATION OFFICE OF THE STATE COUNCIL OF CHINA, Tibet’s Modernization Achievements, TIBET’S MARCH TOWARD MODERNIZATION (2001), available at <http://www.china.org.cn/e-white/20011108/3.htm>.

²³³ Government Comments, *supra* note 88.

²³⁴ INFORMATION OFFICE OF THE STATE COUNCIL OF CHINA, Progress in Education, Science and Technology, Cultural and Health Work, in HISTORY AND DEVELOPMENT OF XINJIANG (2003), available at <http://www.china.org.cn/e-white/20030526/6.htm>.

²³⁵ Report of the Committee on the Elimination of Racial Discrimination: China, 56th Sess., Supp. No. 18, 09/08/2001, A/56/18, paras.231-255.

achieve given that there are over 25 different languages used in China, with many minorities spread out around the country or living in predominantly Han areas. The Education Law and other laws provide that schools with a majority of ethnic students may use the oral and written languages of the ethnic group. Tibetan is the main language in 60% of middle schools in Tibet.²³⁶ There are also Tibetan curriculum high schools, although most offer classes in Chinese as well. Minority students, who benefit from affirmative action in entering colleges, are able to take the national entrance exam in their own language. On the other hand, while Tibetan and other minority languages may be used in courts and official business within the particular minority region, Chinese is often a requirement for economic and social advancement both within the region and the rest of the country. Thus the desire to promote Tibetan culture by emphasizing Tibetan language in schools is at odds with the need to learn Chinese to succeed in the broader society. Accordingly, Tibetan parents favor bilingual education for their children even at the primary school level, as is also true for Tibetans living in India.²³⁷

In a controversial move, the SR on Education recommended that China allow religious education. This drew a sharp retort from Beijing, which claimed that while people enjoy freedom of religion, and parents are free to instruct their children in religious beliefs at home during non-school hours, China adopts the policy of separating education from religion. Accordingly, the Compulsory Education Law provides that no organizations or individuals may use religion to interfere with public education. In keeping with this policy, authorities closed down Ngaba Kirti Monastic School in Sichuan, which was established using private funds and sought to provide traditional monastic education to rural Tibetans.²³⁸ Anyone below the age is also not allowed into Mosques or other places of worship, although in practice this policy may be relaxed in areas where unrest is not an issue.

Summary: Rights Performance by Area within a Comparative Context

Although Chinese citizens enjoy greater rights to participate in governance and more freedoms than ever before, the authorities continue to impose severe limitations on civil and political rights whenever the expression of such rights is perceived to threaten the regime or social stability. In terms of *subject matter*, calls for democracy and the overthrow of the Party or government; advocacy of independence and greater autonomy for Xinjiang, Tibet and Taiwan; religious practice outside officially sanctioned bounds by “cults” or in house churches; labor activism; and exposés of corruption at high levels are subject to restraints depending on the circumstances. The authorities are particularly likely to intervene when *the manner* of exercising such rights involves social organization especially across regions, large scale and well-coordinated demonstrations, exposure to a wide and unidentified audience through the mass media and internet, and links to foreign entities. In contrast, individuals, academics and government officials generally are allowed to express virtually any view in private or even publicly to a limited and defined audience.²³⁹

China’s level-4 PTS rating seems to overstate the degree of “political terror” and to be the result of reporting practices by the foreign media and human rights organizations that focus on egregious individual cases that are not representative of the system as a whole.²⁴⁰ While imprisonment of political

²³⁶ See also Sautman, *supra* note 99, at 221, 225 (in 1996, Tibetan was main language in 96% of TAR primary schools, and that virtually all Tibetans in the TAR speak Tibet and over 90% of Tibetans outside of the TAR speak Tibet, while only about 5% of Tibetans in the TAR speak Mandarin).

²³⁷ *Id.*, at 222-223.

²³⁸ 2004 State Department Report, *supra* note 31. However, other reports suggest that schools run by religious organizations are tolerated in some cases.

²³⁹ However, a handful of liberal academics have been fired from their university posts.

²⁴⁰ Tom Grunfeld, *Human Rights and the People’s Republic of China*, 9 *Touro Int’l L. Rev.* 71, 72 (2001) (arguing that reporting on China in general and human rights in particular emphasizes the negative and is so unrealistic and skewed that many Americans’ conceptions of what China is like today are profoundly distorted).

dissidents and physical abuse of detainees in prisons and administrative detention centers are deplorable and merit attention, the reality is that only a tiny fraction of the prison population could possibly be described as political prisoners. Unfortunately, the egregious cases latched onto by the media often create a distorted picture abroad, feeding into the stereotypical image of China as a repressive, authoritarian police state – an image constantly reinforced by the repeated playing of the now graying footage of an individual citizen blocking the path of a tank more than fifteen years ago in Tiananmen. Visitors coming to China for the first time often express surprise when they don't see machine-gun toting soldiers in military fatigues on every corner or find ominous-looking public security agents in black trenchcoats lurking about suspiciously in alleyways and internet cafes. The power of horrific, individual cases to drive human rights policies toward China should not be understated.²⁴¹

The overwhelming majority of criminal law and administrative detention cases are not political. While crime disrupts social order, criminals do not directly challenge the Party's right to rule. What makes criminal cases special and distinguishes criminal law from other areas of law is that there is little support for criminal law reforms on the part of the public because the vast majority of the citizenry sees such reforms as harming rather than furthering their interests. Consistent with the general pattern elsewhere, modernization, industrialization, urbanization and the turn to capitalism have led to spiraling crime rates.²⁴² The government has responded to the fears of the public and citizens' demand to crack down on crime by doing just that. The crackdown has taken the form of much publicized campaigns to "strike hard" at crime. China's weak legal institutions have been unable to stand up to the combined pressure coming from an angry public demanding heavy punishments to deter criminals, and a political regime seeking to shore up its legitimacy by pandering to the public's appetite for vengeance. Cultural preferences for social stability, a tendency to favor the interest of the group over the individual, and the lack of a strong tradition of individual rights further undermine significant efforts in recent years to strengthen the criminal justice system and better protect the rights of the accused.

Assessing the performance of any criminal justice system is a problematic exercise. People attach different weights to competing values, such as the rights of individual suspects and the importance of assuring that no innocent person is wrongly convicted, versus social order and the freedom and interests of individuals who may be victims of crime, even violent crime, if suspects are not detained or are acquitted on "technicalities" such as the exclusion of tainted evidence. They also disagree about the purposes of the criminal justice system and the relative weights assigned to deterrence, rehabilitation, retribution, vengeance, education, and incapacitation. And they disagree about the causes of crime and hence the relative effectiveness of different approaches to dealing with it. Nevertheless, there is some evidence that China's policies have been successful in curtailing crime. Despite the increase in crime rates over the last several decades, China still has much lower murder, rape and burglary rates than the United States, France, and Germany, though the murder and rape rates are now higher than for Singapore and Japan.²⁴³ It also has lower murder, rape and burglary rates than the Philippines and Romania, both of which are like China lower middle income countries.

To be sure, there are still numerous shortcomings in criminal justice and administrative detention systems, and many possible reforms that would strengthen the protection of the rights of the accused while making the systems more just and fair.

Taking a somewhat broader perspective, China's legal system scores higher on the World Bank's rule of law index than the average country in its income class.²⁴⁴ Again, there are many

²⁴¹ Pettit, *supra* note 15.

²⁴² See *Administrative Detention*, *supra* note 35.

²⁴³ *Id.*

²⁴⁴ To be sure, we are now at a point where generalizations about the legal system are likely to conceal as much as they reveal. While we cannot avoid referring to the legal system at a whole in some cases for comparative purposes, for most purposes we need to disaggregate the legal system, especially when it comes to a discussion of the courts. What parties can expect from courts differs widely depending on:

shortcomings, and the government is expending considerable energy and resources to address them, often in conjunction with foreign government and development agencies.

Analysis of social and economic rights is hindered by the basic problem encountered in most legal systems: social and economic rights are generally not justiciable. Accordingly, we are forced to fall back on general laws, policies and statistics, supplemented by a few cases on rather narrow issues. Unfortunately, the statistics and facts are often unreliable and/or contested. Even the proper standards for measurement are heavily contested: scholars disagree over the utility and significance of different measures of poverty, for instance. Moreover, country-wide data often masks wide regional variation. In addition, there is a conflict between the starry-eyed utopianism of human rights activists who expect wonders despite the reality of limited resources and those who would set more realistic standards consistent with China's level of development and priorities for government spending.

Notwithstanding such qualifications, China does well both absolutely and relative to its income level in housing, feeding and clothing its vast population. It also does well relative to income level in education and access to medical care. However, China is a relatively poor country, with wide regional disparities and a rapidly growing income gap not only between rural and urban areas but within cities as well. The new leadership of Hu and Wen has shown sensitivity to issues of social justice, implementing a number of policies to ease the hardships those who have lost out in the transition to a more competitive capitalist economic system. In so doing, they are able to draw on a rich tradition of "people as the basis" stretching back to Mencius that require leaders to ensure the material and spiritual wellbeing of the people. While such traditions are grounded in a nonliberal paternalistic worldview, they nonetheless provide a normative basis for social, economic, cultural and collective rights claims today.

Women's rights also present a mixed picture, as is generally true everywhere. China has made undeniable progress in improving women's lives. Nevertheless, the government's representative acknowledged in his report to the CEDAW Committee in 1999 that despite the tremendous amount of work done to promote women's full participation in development, many women in rural areas live in poverty, millions are still illiterate, and in the transition from a planned economy to a market economy large numbers of women workers had been laid off and are experiencing difficulties finding new employment.²⁴⁵ The participation of women in political life is still low, especially at higher levels of government; domestic violence occurs frequently across economic classes but especially in rural areas; and trafficking in women and female infanticide remain problems. The spokesperson emphasized, however, that the government is determined to continue its efforts, and welcomed the support of the international community. Yet further progress is likely to be slow. 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.

China has made considerable efforts to improve the lives of its many ethnic minorities through a series of policies to stimulate economic growth and a complicated regulatory framework that establishes special autonomous zones for Tibet, Xinjiang and other ethnic regions and provides preferential treatment in employment, education and family planning to minorities. Nevertheless, as in other countries, ethnic divisions, often based on religious identities, have led to tensions between the Hans and other ethnic groups and calls for greater autonomy and even secession. Conflicting views about the affects of government policies, conflicting interpretations of the facts, and normative differences result in widely different assessments of China's record on cultural rights by Hans and members of the various minority groups. Due in part to efforts to improve the living conditions of minorities and in part to tight controls,

(i) level of court; (ii) location; and (iii) the type of issue before the court, which determines the division within the court that will hear the case. On the whole, higher level courts are better than lower level courts; courts located in major cities and in the East tend to be better than courts in rural areas and in the middle and Western regions; and judges handling commercial cases, including foreign investment and intellectual property cases, and criminal cases, tend to be more qualified than judges handling enforcement actions or smaller claims.

²⁴⁵ CEDAW committee Report, *supra* note 169, para 257.

China has managed for the most part to avoid large-scale ethnic conflicts. However, sporadic bombings and other acts of violence have occurred. The government has responded with force, and by tightening control on possible sources of dissent.

More recently, the government has had to deal with the no-win situation of North Korean refugees. Neither government leaders nor most Chinese want a massive influx of poor North Korean seeking greater economic opportunities. Nor does the government want to complicate further an already complicated relationship with North Korea at a time when Kim Jong-Il is developing nuclear weapons. However, refugees continue to flood across the boarder, often seeking asylum in embassies in Beijing or slipping into local communities, where many women end up in prostitution or being trafficked as brides to poor areas.

Causes of Rights Problems and General Constraints on Improved Performance

Economic factors go a long way toward explaining both the improvements in rights performance in recent decades and the continuing problems, many of which are directly or indirectly related to poverty and lack of resources. Ongoing deficiencies in access to food, clean water, medical care and education are most directly related to China's relatively low level of economic development, although a weak tax system and policies that fail to redistribute resources from China's increasingly wealthy high-income earners exacerbate the problems. Economic growth is therefore necessary but not sufficient to sustain improvements in social and economic rights and other indicators of human wellbeing. Wealth, or the lack thereof, also contributes to ethnic tensions and even a higher incidence of violations of personal integrity and civil and political rights: economically well-off people generally do not take to the streets to protest, favoring less confrontational channels for advancing their interests that do not threaten social stability or challenge the state to the same degree. Indeed, China's nouveau riche tend to be politically conservative and supportive of the regime, if only out of fear that demands for faster political reforms will lead to political instability and social chaos, thus undermining their steady incomes and threatening their comfortable lifestyles. In contrast, most protests are the result of economic injustices, often by people who have little to lose. Pensioners are the most likely to protest, largely because many of them are desperate and need their retirement funds to survive, although they also take the streets because of a genuine sense of grievance that the state has violated the previous social contract whereby they would work for low wages in exchange for life time employment and cradle to grave social welfare. Many other main areas of conflict are also fundamentally economic in nature, including the problems associated with laid off workers and labor activism, government takings and relocation, migrant workers, and urban crime - the majority of which is committed by migrant workers with little money in their pockets.

Population size is relevant in several ways. First, China's huge population is directly tied to quality of life as reflected in social and economic measures because limited resources are spread thin over large numbers. Second, as elsewhere, population size is a proxy for ethnic diversity, which leads to conflicts between minority groups and the government, between minorities and the majority Hans, and among minorities.²⁴⁶ Such conflicts may result in restrictions on civil and political rights, especially in Xinjiang and Tibet, and complicate the issue of cultural rights. Third, the sheer size of the population results in a "large" number of violations of physical integrity rights and civil and political rights, though proportionally the number is small. Fourth, and more substantively, the size of the population makes control more difficult, instability more likely and the expected danger value calculated by the multiplying the likelihood of instability by the consequences of chaos higher. In a country the size of China, even the most radical anti-government movements and bizarre cults may attract a significant number of followers, especially now that the internet has eliminated the barrier of communication across distance.

²⁴⁶ See, e.g., Fischer, *supra* note 231 (discussion conflicts between Tibetans and the state, Hans, and Muslims).

Political, ideological and cultural factors also explain some of the results, particularly with respect to the tight limitations on civil and political rights.²⁴⁷ China's leaders make no apology for not being liberals. Clearly statist socialism influences the general view of human rights and as well as the outcome in particular cases. Liberal democracies are frequently characterized by a neutral state in which the normative agenda for society is determined by the people through elections and a limited state with an expansive private sphere and robust civil society independent of the state. In contrast, China's statist socialism is defined by single party rule, elections at only the lowest level of government and at present a nomenklatura system of appointments whereby the highest level personnel in all government organs including the courts are chosen or approved by the Party. Rather than a neutral state, the Party in its role as vanguard sets the normative agenda for society, as in the four cardinal principles. In addition, there is a smaller private sphere and a correspondingly larger role for the state in supervising and guiding social activities.

Political views in China are not limited to either support for statist socialism or liberal democracy.²⁴⁸ There is also considerable support for *neo- or soft authoritarianism*, and for various forms of *communitarianism*. Neo-authoritarians prefer single party rule to genuine democracy. They would either do away with elections, or were that not politically feasible, limit elections to lower levels of government. If forced to hold national elections, they would attempt to control the outcome by imposing limits on the opposition party or through their monopoly on major media channels. Like the statist socialists, they reject the neutral state and favor a large role for the government in controlling social activities. Nevertheless, they would tolerate a somewhat smaller role for the government and a correspondingly larger civil society, albeit one still subject to restrictions and characterized by corporatism.

In contrast, communitarians favor genuine multiparty democratic elections at all levels of government, though not necessarily right at the moment. Given their fear of chaos, urban distrust of the allegedly ignorant rural masses and lack of requisite institutions, many are willing to postpone elections for the moment and to accept a gradual step-by-step process where elections are permitted at successively higher levels of government. Like the statist socialists and neo-authoritarians, they believe state leaders should determine the normative agenda for society, and hence allow a larger role for the state in managing social activities than in a liberal democratic state. However, they prefer a somewhat more expansive civil society. Although some groups, particularly commercial associations, might find close relationships with the government helpful, other more social or spiritual groups might not. The latter would be permitted to go their own way, subject to concerns about social order, public morality and specific harms to members of the group or society at large.

In terms of rights, liberal democrats favor a liberal understanding of rights that gives priority to civil and political rights over economic, social, cultural and collective or group rights. Rights are often conceived of in deontological terms as distinct from and normatively superior to interests.²⁴⁹ Rights are considered to be prior to the good (and interests) both in the sense that rights "trump" the good/interests and in that rights are based not on utility, interests or consequences but on moral principles whose justification is derived independently of the good.²⁵⁰ To protect individuals and minorities against the

²⁴⁷ Cultural factors are evident in women's issues, including domestic violence, the rights of the child, female infanticide and the preference for male children, the reliance on the family to pick up the slack left by a poor state welfare system, and in preferences for group over individual interests across a range of issues.

²⁴⁸ For a more extensive discussion of the views of statist socialists, neo-authoritarians, communitarians and liberal democrats regarding politics, the economy, rights, and rule of law, see CHINA'S LONG MARCH, *supra* note 24. I also include polling data that demonstrates the existence and strength of these viewpoints on a number of issues.

²⁴⁹ Randall P. Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31S TAN. J. INT'L L. 359 (1995).

²⁵⁰ JOHN RAWLS, A THEORY OF JUSTICE (1st ed. 1971); RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY (1st ed. 1977).

tyranny of the majority, rights impose limits on the interests of others, the good of society and the will of the majority. Substantively, freedom is privileged over order, individual autonomy takes precedence over social solidarity and harmony, and freedom of thought and the right to think win out over the need for common ground and right thinking on important social issues.²⁵¹ In addition, rights are emphasized rather than duties or virtues.

In contrast, communitarians endorse a communitarian or collectivist interpretation of human rights that emphasizes the indivisibility of rights. Greater emphasis is placed on collective rights and the need for economic growth, even if at the expense of individual civil and political rights. Rather than a deontological conception of rights as antimajoritarian trumps on the social good, rights are more often conceived of in utilitarian or pragmatic terms as another type of interest to be weighed against other interests, including the interests of groups and society as a whole. Accordingly, stability is privileged over freedom; social solidarity and harmony are as important, if not more so, than autonomy and freedom of thought; and the right to think is limited by the need for common ground and consensus on important social issues. Communitarians, neo-authoritarians and statist socialists also pay more attention than liberal democrats to the development of moral character and virtues and the need to be aware of one's duties to other individuals, one's family, members of the community and the nation.

Like communitarians, neo-authoritarians and statist socialists conceive of rights in utilitarian or pragmatic terms. However, they have a more state-centered view than communitarians. Statist socialists in particular are likely to conceive of rights as positivist grants of the state and useful tools for strengthening the nation and the ruling regime. They are also more likely than neo-authoritarians to invoke state sovereignty, "Asian Values" and the threat of cultural imperialism to prevent other countries from interfering in their internal affairs while overseeing the destruction of the communities and traditional cultures and value systems that they were allegedly defending. Nevertheless, communitarians and neo-authoritarians in China are also likely to object to strong-arm politics and the use of rights to impose culture-specific values on China or to extract trade concessions in the form of greater access to Chinese markets. Moreover, like communitarians, neo-authoritarians and statist socialists privilege order over freedom. They go even farther than communitarians, however, in tilting the scales toward social solidarity and harmony rather than autonomy, and are willing to impose more limits on freedom of thought and speech. While neo-authoritarians would restrict the right of citizens to criticize the government, statist socialists prefer broader restrictions, drawing a clear line at public attacks on the ruling party or challenges to single party socialism. Despite the changes in society over the last twenty years that have greatly reduced the effectiveness of "thought work", they continue to emphasize its importance to ensure common ground and consensus on important social issues defined by the Party.

On some issues, there are clear preferences among the majority of citizens, notwithstanding the general differences among the various camps. There is for example, a clear preference for stability and economic growth, even if that means postponing democracy and tolerating for the time being greater restrictions on civil and political rights. Conversely, there is little support for political dissidents or for liberal democrats who push for liberal interpretations on many rights issues or for immediate democratization.

Similarly, there is wide support for the war on crime. Polls in 1995, 1996, and 1997 found that social stability and crime topped the concerns of urban residents.²⁵² Public support for the government's periodic strike-hard campaigns has been strong. One poll of 1000 residents in Guangzhou found that 81

²⁵¹ Randall P. Peerenboom, *Confucian Harmony and Freedom of Thought: Right Thinking Versus the Right to Think*, in *CONFUCIANISM AND HUMAN RIGHTS* 234 (William Theodore de Bary & Tu Weiming eds., 1998).

²⁵² See U.S. Embassy Beijing, *Beijing Environment, Science and Technology Update*, Nov. 3, 2000, at <http://www.usembassy-china.org.cn/sandt/estnews1103.htm>. Interestingly, in 2000, a poll of 3000 urban residents in ten cities found that social stability and crime ranked fourth, behind environmental issues, unemployment, and children's education. *Id.*

percent felt social order had improved in 2001, with some 73 percent believing the strike-hard campaign contributed significantly to the improvement.²⁵³ The *People's Daily* reported that 80 percent of Beijing citizens believed conditions have improved as result of the campaign in December 2001.²⁵⁴

There clearly is widespread public support for heavy punishments, including the death penalty. In a 1995 survey of 5006 citizens, less than 1 percent believed that the death penalty should be abolished.²⁵⁵ On the contrary, more than 22 percent believed that there were too few death sentences.²⁵⁶ Although public opinion polls about crime may sometimes be misleading in that the questions fail to distinguish between serious crime and petty crime, in China the public's support for heavy punishments runs the gamut from violent crimes to property and economic crimes to drug use and morality crimes.²⁵⁷ In the Guangzhou poll, almost two-thirds remained seriously concerned about theft and robbery and hoped that the government would take additional steps to deal with these crimes.²⁵⁸ Meanwhile, a 1997 survey of 1200 Beijing residents found that 90 percent believed drugs would become a major menace to morality and the nation if effective measures are not taken, and urged the government to impose heavier punishments.²⁵⁹ Where there is such a clear majority preference, reforms that go against the tide are not likely to be passed into law; even if they do become law, there is a good chance that the laws will not be implemented in practice.

Institutional factors also inhibit the protection and advancement of rights. Although China has various official and quasi-official human rights research centers, there is no national human rights commission or ombudsmen for the promotion of human rights. Nor is there an Asian regional system comparable to that in Europe, the Americas or Africa that could serve as a source for rights promotion or the development of jurisprudence. Of course, given its sovereignty concerns, China is not likely to accept the jurisdiction of a regional court over issues arising in China or between China and other member states.

China's domestic legal remains relatively weak, although greatly improved in many ways over the last twenty years. Courts are able to handle most cases competently and independently. Party organs rarely intervene in individual cases.²⁶⁰ Nevertheless, the judiciary still lacks the authority to decide many controversial political cases and cases with a major social consequences independently, as suggested by the long delays before a verdict is issued in some of the civil and political rights cases discussed previously.

Even when courts do decide cases independently, they are obligated to apply nonliberal laws that require social organizations to register, that require prior authorization to demonstrate and give the authorities broad grounds to deny applicants permits, and that define state secrets, endangering the state and disturbing the public order broadly. The lack of a constitutional review body arguably also impedes

²⁵³ See *PRC Survey: Most Guangzhou Residents Satisfied with Public Order*, FBIS-CHI, Dec. 14, 2001 [hereinafter called *PRC Survey*]. The approval rate was some 35 percent higher than the year before. *Id.*

²⁵⁴ *Beijing Succeeds in Crackdown on Crimes*, PEOPLE'S DAILY ONLINE, Dec. 1, 2001, at http://english.peopledaily.com.cn/200112/01/eng20011201_85738.shtml.

²⁵⁵ Hu Yunteng, *Application of Death Penalty in Chinese Judicial Practice*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 255 (Chen Jianfu et al. eds., 2002).

²⁵⁶ *Id.*; see also Amnesty International, *The Death Penalty in China: Breaking Records, Breaking Rules*, ASA 17/038/1997, Aug. 1, 1997, available at <http://www.web.amnesty.org/ai.nsf/Index/ASA170381997>.

²⁵⁷ See BØRGE BAKKEN, *THE EXEMPLARY SOCIETY: HUMAN IMPROVEMENT, SOCIAL CONTROL AND THE DANGERS OF MODERNITY IN CHINA* 395 (2000); (survey of 15,000 people showed that nearly 60 percent thought the state's handling of criminals was too lenient, while only 2 percent thought it was too strict).

²⁵⁸ See *PRC Survey*, *supra* note 253.

²⁵⁹ See *Residents Eager for Drug Fight*, XINHUA NEWS AGENCY, Aug. 18, 1997.

²⁶⁰ While Party intervention has declined, judges continue to receive pressure from a variety of other sources, including local government officials, people's congresses and members of society who have an interest in the case and connections within the court. See CHINA'S LONG MARCH, *supra* note 24.

the protection of rights, although such a body would most likely not be all that liberal and effective given the current circumstances.

Due process violations continue to be a problem in run of the mill criminal cases as well as politically sensitive cases. Criminal lawyers have been harassed, with more than 400 being detained since 1997.²⁶¹ Recent regulations and reforms have attempted to strengthen the position of criminal defense lawyers.²⁶² However, the persisting influence of the inquisitorial approach with its limited role for defense counsel, the public's desire to strike hard at crime and problems within the legal profession itself suggest that criminal lawyers will be fighting an uphill battle for some time to come.

III. Why China Is Held to Double Standards

Notwithstanding many problems, China does fairly well relative to income level on most human rights measures, with the exception of civil and political rights. There has been improvement over the last twenty years in every category, albeit more limited in the area of civil and political liberties. Unlike in many countries, most citizens are happy with their lives, optimistic about the future, and relatively satisfied with the government on the whole, largely because the government has been successful at maintaining stability and improving the living standards of most people.²⁶³ Nevertheless, virtually every year the U.S. and its allies mount a high-profile campaign to censure China in Geneva, although every time, including in 2004, the motion is defeated. Why?

Bang for the Buck: China's Large Size Justifies All the Attention

Critics claim that improving the rights situation in China would benefit one-fifth of the world's people, and thus focusing resources on China is justified. However, India also received a level-4 PTS rating, and suffers from much more severe problems with poverty than China, with twice as many people living on less than \$1/day and twice the rate of infant mortality, while its good governance rankings, with the exception of voice and accountability, are similar to those of China.²⁶⁴

²⁶¹ 2004 State Department Report, *supra* note 31, at 10 (citing the All China Lawyers Association). The lawyer for Du Daobin apparently had his license to practice cancelled as a result of his efforts, although there the details of the case are unclear. The sentencing of well-known Beijing defense lawyer Zhang Jiangzhong to two years for fabricating evidence in a corruption case led to a petition signed by 600 people in protest. Shanghai housing advocate Zheng Enchong was also sentenced to three years for revealing state secrets. Zheng faxed an article from an internal publication for government officials to an overseas human rights organization, noting on the fax the source. The court's judgment states that Zheng confessed, and that he knowingly sent the internal document to foreign organizations in part to enlist support in his struggle to get the local justice bureau to renew his license to practice. The court does not discuss why Zheng would have encountered problems renewing his license.

²⁶² See, e.g., Zuigao Renmin Jianchayuan Guanyu Yinfa Guangyu Renmin Jianchayuan Baozheng Lushi zai Xingshi Susong zhong Yifa Zhiye de Guiding de Tongzhi [Regulations to Guarantee the Lawful Practice of Lawyers in Criminal Cases, Supreme People's Procuracy], Feb. 10, 2004.

²⁶³ Some 65% of Chinese are optimistic about the future and think their lives will improve in the next five years, compared to only 8% who anticipate being worse off. In addition, 51% are satisfied with their household income, 82% are satisfied with their family life, and 63% are satisfied with their job. Almost half of Chinese and almost 70% of Vietnamese are satisfied with the government, whereas between 75% and 92% of citizens are dissatisfied with the government in democratic Japan, South Korea, India, Indonesia and the Philippines. *What do Asians think about their lives?*, *supra* note 24.

²⁶⁴ India is a low income country, while China is a lower middle income country. Hence, a worse record is to be expected. Like China, India actually does better relative to the average country in its income class on most good governance indicators. Whereas China scores poorly on civil and political rights (voice and accountability), India scores highly. However, China does much better in terms of political stability.

Moreover, while India and China both received level-4 PTS ratings, violations of physical integrity rights in India appear to be much more severe.²⁶⁵ In 2001 and 2002, security forces killed an average of 1600 militants a year. Some of those killings occurred in “fake encounters,” where the security forces summarily executed suspected militants and civilians offering no resistance. The bodies of many of those killed showed signs of torture and bore multiple bullet wounds. Estimates of unexplained disappearances in Kashmir and Jammu alone range from nearly 4000 according to government sources up to 8000 according to NGOs. Security forces reportedly used civilians as human shields while patrolling and in searching for landmines. Military and paramilitary troops also engaged in abduction, torture, rape and arbitrary detention. Death in custody for both suspected militants and ordinary criminals is common. In 2001, there were over 1300 deaths in custody nationwide. The U.N. Special Rapporteur on Torture has claimed that security forces systematically tortured suspected militants to coerce confessions and to obtain information. The authorities also tortured detainees to extort money or as summary punishments. Rape while in custody is common. Prison officials reportedly also use prisoners as personal servants and have sold female prisoners to brothels. Yet few members of the security force are ever held accountable. Antiterrorism and national security laws have been used to detain people for long periods of time, without judicial review, while permitting the use of testimony obtained under duress.²⁶⁶ In addition, thousands of ordinary criminal suspects remain in detention without charge in violation of law. India’s legal system, plagued by corruption and lack of resources, is overburdened and unable to try civil or criminal cases in a timely manner. As of July 2002, there were 13 million cases pending in lower courts, and 3.5 million cases in high courts. Some 75% of detainees were unconvicted prisoners waiting completion of trial. In Jammu and Kashmir, the judicial system barely functions due to threats against judges and witnesses and tolerance of the government’s heavy-handed crackdown on terrorists.

The U.S. State Department also notes “occasional” limits on freedom of the press and freedom of movement,²⁶⁷ as well as “harassment and arrest of human rights monitors;”²⁶⁸ extensive societal violence

²⁶⁵ The following is drawn from the 2003 U.S. State Department Country Reports on Human Rights Practice – India, released on Feb. 25, 2004.

²⁶⁶ The report claims that there were no political detainees. *Id.* at 11. However, the report also notes that several people were arrested for expressing support for the banned LTTE terrorist group, even though the Supreme Court has held that mere moral support for a terrorist organization does not constitute an offense under the Prevention on Terrorism Act. *Id.* at 10.

²⁶⁷ Restrictions on freedom of speech and the press include the use of criminal defamation laws against journalists and the occasional beating, detaining and harassing of journalists, which has resulted in some self-censorship. The government has also sought to influence the media by threatening to revoke state advertising. In addition, the government bans books, including Salman Rushdie’s *Satanic Verses*, and films, and prohibits objectionable content on satellite channels, notably tobacco and alcohol advertisements that are deemed morally inappropriate. The government also limits access to the Internet, and has arrested people on conspiracy charges for posting articles. The government restricts academic freedom, most notably by regulating academic partnerships between Indian and western universities in line with Hindutva philosophy which advocates a higher profile for Hindu cultural norms in public education. Some advocates of Hindutva oppose conversion from Hinduism and believe all Indian citizens should adhere to Hindu values, including resisting changes to the caste system. Religious tension between Hindus, Muslims and Christians threatens the secular foundation of the state, and has led to violence, including bombings, rioting and murders. Accordingly, the Religious Institutions (Prevention of Misuse Act) prohibits the use of any religious site for political purposes. Foreign Christian missionaries, who must obtain permits, have not been allowed access to northeastern states because of concerns about political stability. Although freedom of assembly is generally respected, permits are required to demonstrate, separatist groups are routinely denied permits and police have used force to maintain control, including firing on protesters. *Id.*

²⁶⁸ Human rights organizations were not allowed to move about freely in Jammu and Kashmir due to fear of attacks by security forces and militants. Several individuals who have documented abuses in these areas, including lawyers and journalists, have been attacked and in some cases killed. The government investigation of the 2002 killing of human rights lawyer Naveleen Kumar has yet to produce any results. The government also refused a visa to the Secretary General of AI after AI issued a critical report regarding the government handling of the religious-based violence in Gujarat.

against women;²⁶⁹ legal and societal discrimination against women; forced prostitution; child prostitution and female infanticide; discrimination against persons with disabilities; serious discrimination and violence against indigenous people and scheduled castes and tribes;²⁷⁰ widespread intercaste and communal violence; religiously motivated violence against Muslims and Christians; widespread exploitations of indentured, bonded, and child labor; and trafficking in women and children.”²⁷¹

Despite such problems, which are at least as serious as the problems in China, the U.S. and its Western allies never once sponsored a motion to censure India for rights violations during the period 1990 to 2004 when China was subject to 11 motions.²⁷² Nor has U.S. State Department cited India as a country of political concern, as it has China, for “egregious, systematic ongoing abuses of rights of religious freedom,” even though the Commission on International Religious Freedom, an independent nine-member advisory body established by Congress, urged them to do so, citing among other serious problems fatal attacks against Muslims and Hindus and the government’s failure to address adequately the killing of as many as 2000 people in Gujarat in 2002.²⁷³

Population size may matter, but apparently not when it comes to even-handed treatment of rights violations. Even if, as critics allege, China merits additional attention because of its size, there is no excuse for distortions of the factual record or for failures to provide a balanced view that presents China’s rights performance within a comparative context. If anything, the extra attention and resources spent on China should lead to more careful study, a better understanding of the local context and the issues, and ultimately more nuanced and higher quality reports.

Emphasis on civil and political rights violations and bias against non-democracies

A more likely explanation than pure size for all the attention paid to China is that there is some truth to Beijing’s complaint that the human rights regime is biased toward liberal democracy and does not want to see a non-liberal democratic regime succeed. The bias of the human rights regime and the media against non-liberal democratic regimes is long standing.²⁷⁴ U.N. resolutions for systematic government violations of human rights have overwhelmingly been against a handful of non-democratic developing countries with poor civil and political rights records, even though they may do relatively better on other human

The government refused to allow visits by the U.N. Special Rapporteurs on Torture and Extrajudicial Killings in 2002. *Id.*

²⁶⁹ Domestic violence is widespread, with 56% of *women* claiming that domestic violence is justified. Upper caste gangs engaged in mass rapes of lower caste women as part of a strategy of intimidation, and gang rapes were used as punishment for adultery or as coercion or revenge in rural property disputes. However, police routinely refuse to arrest rapists, while the courts fully adjudicate just 10% of rape cases, leading to a culture of impunity for rapists. Dowry disputes remain common. Although banned, Sati – the burning of widows on the funeral pyre – continues in some areas. *Id.*

²⁷⁰ Dalits or “untouchables”, the lowest caste, make up the majority of bonded labor, face segregation in housing and marriage, and tend to be malnourished, poor and illiterate. Brahmins, the highest caste, make up 78% of the judiciary and 50% of the parliament, even though they constitute just 3.5% of the population. *Id.*

²⁷¹ *Id.* at 1.

²⁷² See Wheeler, *supra* note 2. As Wheeler’s study ended in 1997, I have updated the results through 2004.

²⁷³ Press briefing, Religious Freedom Commission Cites Countries of Particular Concern, at Foreign Press Center by U.S. Commission on International Religious Freedom (Feb. 18, 2004).

²⁷⁴ Jay Ovsiovitch, *A Distorted Image? Factors Influencing the U.S. Media’s Coverage of Human Rights*, in 4 POLICY STUDIES AND DEVELOPING NATIONS 85, 91, 93 (1996) (finding bias against communist regimes and that the presence of a bureau in the country leads to more reports of human rights violations).

rights measures and indicators of wellbeing, including physical integrity violations.²⁷⁵ A study of the U.N. Human Rights Commission from 1982-1997 found that “most draft resolutions which target governments for systematic human rights violations are introduced by Western states and place a heavy emphasis on civil and political rights which are lacking in many Third World states.”²⁷⁶ The report also acknowledged the legitimacy of complaints of bias on the part of China and other developed countries:

It is true, as some Third World states complain, that Western states are seldom targeted in Commission resolutions and that none has been targeted for domestic human rights violations of any kind. That the Commission has been unable to pass even a single resolution addressing human rights conditions in Western states reduces its credibility as a representative of human rights for the entire international community and gives rise to criticisms, such as China’s, that developed states ‘have made every effort to attack developing countries with so-called human rights abuses while turning a blind eye to their own inglorious human rights record. In fact, they have turned the Commission into a “court” where they put developing countries on trial.’²⁷⁷

Much of the reporting on China continues to be framed by the narrative of “good dissidents” battling the “evil oppressive state” in a noble quest for democracy. Indeed, the Western press still treats each passing of June 4 as a major event, while within China the broad public has already moved on, and the day is often passed without notice, like any other day. Moreover, in reporting on the annual roundup of dissidents and Tiananmen Mothers, the Western press usually applies the same distorting lens of a broad-based struggle for democracy as in the first round. In 1989, the press, reflecting their own concerns rather than the actual concerns of the demonstrators, managed to take the incoherent and conflicting demands of students which merged with popular dissatisfaction over inflation and corruption and transform the hodgepodge into a movement for democracy. Today, the calls for reversal of the government’s verdict on Tiananmen and justice for those who lost relatives are portrayed as a popular uprising for democracy. However, supporters of a reversal on Tiananmen, who already appear to constitute a minority of the citizenry, do not necessarily support democracy. In any event, whatever the views about democracy among those who believe Tiananmen should be revisited, support for dissidents, liberals and democracies is limited among the broader public. The main focus of most people remains on

²⁷⁵ In 2002, China, which received a 4 on the PTS scale, was targeted for criticism for systematic violations in Geneva while only Afghanistan among the eight countries with the worst PTS rating of 5 was targeted. The democratic or semi-democratic states of Israel, Liberia and Colombia, all of which had a PTS rating of 5, were not targeted for systematic violations, although Israel was subject to criticism with respect to the human rights situation in occupied Palestine. Indeed, China was one of only four countries with a level-4 rating to be targeted for systematic government violations. Even though there were 22 countries with a level-4 rating, half of them democracies or semi-democracies, all four targeted countries were non-democracies, with the possible exception of Iran which arguably might be classified as a semi-democracy. Three out of the four countries with a PTS rating of 3 or 2 that were subject to a motion for systematic government violations were non-democracies, the exception being Cambodia, which also arguably may be classified as a semi-democracy. If Iran and Cambodia are considered non-democracies, then all of the motions for systematic government violations in 2002 were against non-democracies, even though many democracies or semi-democracies had worse or equally poor records with respect to personal integrity violations.

²⁷⁶ Wheeler, *supra* note 2, at 86, 101. Observing that only 22 governments have been the subject of resolutions for systematic rights violations, the report pointed out that “only a few offenders have been designated in resolutions for any type of human rights violations, generally those states with insufficient political clout to mobilize regional opposition to their passage...” *Id.* at 98. Among the notable absentees on the list of countries targeted by resolutions for systematic rights violations is the U.S. ally Saudi Arabia. Less explicable is the absence of Cambodia during the Pol Pot years. See also Jack Donnelly, *Human Rights at the United Nations: 1955-1985: The Question of Bias*, 32.3 INT’L STUD. Q. 275, 288 (1988) (“certain countries are singled out, for partisan purposes, to the exclusion of others, no less reprehensible regimes.”).

²⁷⁷ Wheeler, *supra* note 2, at 99 (citing *China Accuses Developed Nations of “Confrontation” at UN Human Rights Forum*, XINHUA NEWS AGENCY, March 16, 1997; BBC, SUMMARY OF WORLD BROADCASTS, Mar. 18, 1997).

improving one's standard of living, which is entirely understandable in a country in which 46% of the populace lives on less than \$2/day.

Human rights NGOs have historically targeted civil and political rights violations, and continue to devote the lion's share of resources to such issues.²⁷⁸ Reports of dissidents being arrested, newspaper editors being sacked, prisoners being tortured – these might seem to be the kind of stories one can sink one's teeth into, as opposed to dry statistics about increases in Gini coefficients and the wage differentials between men and women sorted by industrial sector. But one should just as easily be able to relate to stories of children living in shacks without water, of families so poor that they cannot afford to take dear-old grannie to the hospital, or of gray-haired pensioners forced to take to the streets in protest over not being paid their retirements benefits.²⁷⁹ The emotive appeal of the issue alone cannot explain the difference in coverage.

Perhaps part of the fascination with civil and political rights is that they seem to be real rights – legal entitlements enforceable in courts. There is the drama of a court case, where the lonely individual goes up David-like against the all powerful state, aided only by his side-kick, the high-minded lawyer out to ensure justice despite the odds. Since most countries, including China, continue to treat most social and economic rights as non-justiciable, advocates are forced to fall back on statistics and to make policy arguments about how resources are to be allocated. They must work through the legislative and administrative channels, which requires more consensus-building than social activist litigation and is at odds with the confrontational and accusatory style of many human rights NGOs.

Civil and political rights issues might also seem easier to solve. While the distinction between civil and political rights as negative rights and social and economic rights as positive rights is easily overstated, there is still something to the distinction. The latter arguably do require more resources and involve larger scale resource allocation decisions, even allowing that it is not cheap to run a democracy and establish a functional judiciary that meets the requirements of rule of law, as evidenced by the empirical studies that show a high correlation between wealth, democracy, civil and political rights and rule of law. Emphasizing social and economic rights leads directly to questions about globalization, global inequality and who benefits from neoliberal trade policies. Perhaps we in developed countries just prefer to blame evil governments for depriving people of civil and political rights rather than to think about our own normative culpability and responsibility for children dying of hunger while we worry about whether to order the cheesecake or tiramisu for dessert.

Whatever the reasons for the greater attention paid to civil and political rights and democracy, the nature of the reports regarding rights issues tends to skew the picture. Most reports focus on individual civil and political rights cases, often either ignoring or paying short shrift to China's accomplishments in raising living standards, improving the legal system and negotiating the difficult transition to a market economy without major chaos. Discussions of human rights in China rarely provide a comparative framework that would put China's record as a lower middle income transitional country in perspective. Given the correlation between wealth and all types of rights, holding China to the standards of wealthy countries such as the U.S. simply leads to the foregone conclusion that China's rights performance falls far short of that of the U.S.²⁸⁰ Perhaps this allows Americans to feel morally superior, and to avoid the

²⁷⁸ See generally U.N. ESCOR, Comm'n on Econ., Soc. & Cult. Rts., 7th Sess., Supp. 2, at 82, U.N. Doc. E/1993/22E/C.12/1992/2, (1993) (criticizing emphasis on civil and political rights at expense of economic, social and cultural rights). Amnesty International and other INGOs traditionally excluded economic rights from their mandate. See Makua Mutua, *The Ideology of Human Rights*, 36 *Fa. J. Int'l. L.* 589, n. 70 (1996) (noting that while Human Rights Watch is the only major human rights NGP to pay some attention to economic and social rights, it only devoted five out of 517 pages to such rights).

²⁷⁹ To give credit where credit is due, the general media does often cover such stories of economic hardship.

²⁸⁰ The U.S. State Department reports for China as well as other countries invariably start with a paragraph describing the nature of the political regime, as if that were the most significant

uncomfortable fact that the U.S. fares poorly relative to other countries in its income class on a number of human rights measures. But it misses the crucial point that when placed in a comparative perspective, China outperforms the average country in its income class on all major human rights indicators except civil and political rights.

Notwithstanding China's overall steady progress across a range of human rights indicators, State Department reports in 1999, 2000 and 2001 claimed that the human rights situation deteriorated or worsened.²⁸¹ Every year the reports have painted a dismal picture, with reports from 1995 to 2001 claiming "widespread" violations, and reports from 2002 to 2004 claiming "numerous" and "serious" abuses. In 1998, the election year in which the Clinton administration decided to forego a motion to censure in favor of constructive engagement, the report began with a positive statement that progress had been made, but then immediately qualified that claim by noting that serious problems remained and China continued to commit widespread human rights abuses.²⁸² The only other year to begin with a positive statement was 1994, another election year.²⁸³ In addition, brief positive statements are sometimes

determinant for rights in the country. To be sure, the reports only discuss civil and political rights, in itself a clear indicator of bias. However, since empirical studies have repeatedly demonstrated that wealth is a more important factor than regime type even with respect to civil and political rights, beginning with a statement of the country's GDP and a comparison to the average country in its income class would go a long way toward placing a country's performance within a more meaningful comparative context, and presumably better serve the legislative intent behind the reports by allowing U.S. congresspeople to assess the rights performance of the country in question.

²⁸¹ See U.S. State Department Country reports on Human Rights Practices for 1999, released on Feb. 23, 2000; U.S. State Department Country reports on Human Rights Practices for 2000, released on Feb. 23, 2001; U.S. State Department Country reports on Human Rights Practices for 2000, released on Mar. 4, 2001. See also Hom, *supra* note 4:

"Although there have been areas of improvement -- increased average living standards, access to information, greater government participation in the international human rights regime -- the human rights situation is generally worsening in other respects for the vast majority of China people.... [T]he human rights situation has overall deteriorated seriously and is marked by growing social inequalities and poverty; massive unemployment; and environmental degradation reaching crisis dimensions; severe restrictions on freedom of expression, including crack-downs on ethnic minorities, religious groups (Falun Gong, underground churches), independent political parties or unions, independent media; use of torture and mistreatment of prisoners, arbitrary detentions and arrests. Lawyers taking on cases that are politically sensitive may find themselves intimidated or themselves the target of prosecution."

Whereas claims of steady deterioration in "human rights" are usually based on increased violations in some areas of civil and political rights only, Hom suggests a broader deterioration. There may be ups and downs with respect to some issues and new problems may arise from time to time, as is true everywhere. Nevertheless, claims of deterioration across the board for the vast majority of Chinese citizens are not consistent with the empirical evidence showing steady improvement overall in the last twenty-five years in all main categories, albeit more limited and less consistent progress on civil and political rights. Despite problems with unemployment, growing income differentials and even environmental degradation, the vast majority of Chinese citizens are far better off as a result of economic reforms during the last two decades. As demonstrated, infant mortality rates are down, education enrolments are up, people are living longer and poverty has been reduced. Moreover, the international human rights regime has not yet recognized a right to a particular distribution of wealth. Nor have the rights to employment or to particular environmental standards become justiciable in most countries. Perhaps more importantly, what is the proposed solution? No doubt Chinese leaders would prefer full employment, a clean environment and zero poverty. However, the transition from a poor, underdeveloped country with an economy dominated by rural agriculture and state-owned enterprises to a modern, affluent, industrialized society with a large urban population and a market-based economy is always accompanied by growing unemployment, widening income differentials and environmental degradation. See also KENNETH CHRISTIE AND DENNY ROY, *THE POLITICS OF HUMAN RIGHTS IN EAST ASIA* 219, 232 (2001) (noting that while serious problems remain, "the CCP can truthfully claim that the average Chinese is better off than before the establishment of the CCP regime, and indeed the total human rights situation (that is, including socioeconomic as well as civil/political rights) today is the best in China's history").

²⁸² U.S. State Department's Country Reports on Human Rights Practices for 1997, released on Feb. 3, 1998.

²⁸³ Oversight of the State Department's country reports on human rights practices for 1993 and U.S. human rights policy, released on Feb. 1, 1994.

included in the introductory section, including praise for legal reforms, rising living standards, public sector reforms, expansion of the private sector, or government decisions to release dissidents and allow visits from the Dalai Lama and U.N. rights monitors. The 2001 State Department report even noted that many Chinese now have more individual choice, greater access to information, and expanded economic opportunity.²⁸⁴ However, the few clipped phrases of faint praise are buried in a long and much more detailed litany of problems and violations.

Although most obvious in the area of civil and political rights, the bias against non-liberal democratic regimes is also evident in discussions of rule of law and good governance. As noted, China outperforms the average in its income class on rule of law and good governance. Yet mentioning rule of law in relation to China often meets with wide-eyed disbelief and derision. Some knowledgeable legal commentators even argue that China lacks a legal system.²⁸⁵ One of the main reasons China's efforts to implement rule of law are so summarily dismissed is that commentators conflate rule of law with liberal democracy. For the same reason, many liberal human rights critics claim that Singapore lacks rule of law, even though Singapore's legal system is routinely ranked among the best – if not the best – in the world.²⁸⁶ To be sure, the U.S. has long enjoyed a reputation as a country in which the rule of law reigns supreme despite the upholding of slavery laws, regulations that discriminated against women and denied them the right to vote, sedition laws that imposed severe limitations on free speech and rulings that led to the interment behind barbed wire of American citizens of Japanese dissent. However, the rise of the human rights movement and the preference for democracy and a liberal interpretation of rights distorts the historical lesson that rule of law and liberal democracy need not go hand in hand.

The bias against nondemocratic regimes is also reflected in the application of intellectual property related trade sanctions. Throughout the 1990s and still today, China and Russia have been guilty of widespread and roughly comparable intellectual property violations.²⁸⁷ Yet while China was designated a Priority Foreign Country four times, Russia never made the list.²⁸⁸ Members of the U.S. congress defended the differential treatment on the ground that the U.S. needed to cut the fledgling democracy in Russia some slack.²⁸⁹

²⁸⁴ U.S. State Department's Country Reports on Human Rights Practices for 2000, released on Feb. 23, 2001.

²⁸⁵ For a discussion, see CHINA'S LONG MARCH, *supra* note 24; see also Randall Peerenboom, *The X-Files: Past and Present Portrayals of China's Alien "Legal System,"* 2 GLOBAL STUD. L. REV. 37 (2003).

²⁸⁶ For a discussion of rule of law in Singapore, see Thio Li-ann, *Rule of law within a non-liberal "communitarian" democracy: the Singapore experience,* in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 184.

²⁸⁷ Russia software piracy rate was actually slightly higher than China's in 2003 (93% to 92%). See USTR 2004 "Special 301" Decisions on Intellectual Property: *IIPA's 2003 Estimated Trade Losses Due to Copyright Piracy and Piracy Levels In-Country*, available at http://www.iipa.com/pdf/IIPA_USTR_2004_Special_301_DECISIONS_FINAL_050304.pdf.

²⁸⁸ Russia was put on the Priority Watch List. But only a Priority Foreign Country designation allows after investigation for the imposition of sanctions. Martin Kostadinov Dimitrov, *Administrative Decentralization, Legal Fragmentation, and the Rule of Law in Transitional Economies: The Enforcement of Intellectual Property Rights (IPR) Laws in China, Russia, Taiwan, and the Czech Republic 87-90* (2004) (Ph.D. dissertation, Department of Political Science, Stanford University) (on file with the Stanford University Library).

²⁸⁹ *Id.* Less noble concerns over economic self-interest may also have played a role: intellectual property violations in China cost U.S. companies more than similar violations in Russia, and American businesses stand to gain more from access to Chinese markets than to Russian markets. The USTR estimates copyrights violations in China result in losses of US\$2.5 billion per year, as compared to \$1.1 billion in Russia. These numbers rely on the absurd assumption that people in a low-income country such as China would actually pay full price for products they now purchase at a tenth or twentieth of the full price. See USTR 2004 "Special 301" Decisions, *supra* note 287.

Human Rights as Power Politics: A Grand Strategy of Containment?

A popular view among Chinese citizens is that other countries are holding China to a double standard and being excessively critical of China on human rights issues as part of a grand strategy of containment. There is no doubt that in some cases concerns about China's growing power leads to the demonization of China as a godless regime that brutally oppresses its people. For some critics, China has now taken over for the Soviet Union as the evil empire whose opposition helps define and affirm their own identity. For these new cold war warriors, China must be prevented from becoming so powerful as to challenge American supremacy. China's ascendance should be fought at every juncture: economically, politically, and militarily. Chinese concerns about containment are not then purely a figment of their collective imagination.

Nevertheless, the underlying logic of the popular view that criticism on human rights issues is part of a grand strategy of containment is not immediately apparent: how will criticizing China on rights issues serve the purpose of containing China and prevent China from emerging as a superpower?

The direct affect on China of criticism of its record on rights seems to be minimal. To be sure, the U.S. has linked trade benefits such as MFN status and access to WTO to human rights violations. However, concerns over human rights violations did not prevent China from obtaining MFN status or from joining the WTO. Moreover, sanctions have been too limited to have much of an impact on China's economy, and thus to have much of a long term affect in slowing down China's rise to power. Further, attempts to impose sanctions are offset by other efforts to assist China in revamping its economic system and achieving growth.

U.S. support for Taiwan reflects to some extent concerns about China's human rights record, and what would happen if Taiwan were to come under direct rule by Beijing. But to argue that the U.S. support for Taiwan is ultimately based on the U.S.'s own geopolitical interests seems somewhat of a stretch. While a friendly and armed Taiwan may be useful geopolitically to the U.S., Taiwan is not so important to U.S. security interests that the U.S. would risk confrontation with China for that reason alone. A genuine concern about the rights of people in Taiwan were the island to come under direct rule by Beijing is at least part of the explanation for U.S. policies. Having made promises to Taiwan in the past, the U.S. must also worry about the message it would send to other countries if it failed to live up to its commitments.

The U.S. and E.U. have also supported an arms embargo and limitations on sale of dual use technology in part by citing China's poor record on human rights. Such limitations fit more easily with a containment strategy, and it is true that some politicians use human rights violations as an excuse to justify the embargo. However, the E.U. was prepared to terminate the embargo until the Bush regime pressured Tony Blair to reverse course and oppose the change on the ground that such arms could be used against the U.S. if the U.S. ever found itself defending Taiwan against a PRC attack. But by themselves, the limitations do not seem sufficient to support a strong link between human rights criticisms and a strategy to keep China in its place.

One seemingly far-fetched conspiracy theory is that the criticism of China for civil and political rights violations will lead to significant policy changes, which will in turn lead to chaos, thus setting China back for years. Advocates of containment may believe that a democratic China would pose less of a threat, and might believe the economic growth will lead to a demand for civil and political rights, which will in turn lead to a demand for democracy and regime change. However, the notion that even China's harshest critics would wish for chaos to stall China's march toward power is hard to take seriously given the negative consequences for everyone if China becomes unstable.

Another possibility is that criticizing China on human rights deprives China of legitimacy and "soft power" on the international level, thus making it more difficult for China to persuade others to join it in pursuing policies that serve China's interests. China has spent time and political resources fending off motions to censure. However, China has also managed to pursue a number of bilateral and multilateral relationships, including a stronger alliance with Russia and a stronger ASEAN. Indeed, the charm

offensive of the Hu and Wen regime is widely perceived to be more effective in winning over allies in the Asian region than Bush's war on terror driven, "either you are with me or against me" policies. Notwithstanding such diplomatic successes, the demonization of China may have impeded China's international influence to some extent.

The views of Chinese government leaders and the majority of citizens on a number of issues differ from those held by government leaders and the majority of citizens in the U.S. and Western Europe. China's positions may be seen as threatening the normative and intellectual hegemony of liberal democracy and liberal rights. Although China has criticized the human rights movement for being biased toward liberalism and begun to strike back at the U.S. by issuing its own critical report of human rights in the U.S., it has done so mainly as a defensive measure, on the theory that the best defense is a good offense. It did not, for example, rush to join Singapore and Malaysia at the forefront of the debates over Asian values, even though many of its positions were compatible with the Asian values platform.²⁹⁰ Rather, China has sought to portray itself as a responsible member of the international community through increased participation in the international human rights regime. One day, when China is economically on par with the U.S. and Western Europe, there may very well be a battle for the hearts and minds of the global public based on differing ideologies and competing conceptions and interpretations of rights. Chinese citizens have tremendous pride in Chinese civilization. Some day Chinese citizens may very well support their government's efforts to champion a rights policy that is less liberal and more collectivist or communitarian, offers states a wider margin of appreciation on contested issues, and rejects a neo-Kantian deontic justification for rights in favor a more pragmatic approach. But that day remains far off, and, given the rapid evolution of human rights norms and practices in the last fifty years and possible changes geopolitical circumstances, who knows who will be advocating what positions by then. It is unlikely that critics are attacking China today as a pre-emptive strike for a battle that might come several decades down the road or might never occur.

Generally, countries gain little by making a major issue of human rights violations in other countries – which is why they rarely do it. Why then do the U.S. and to a lesser extent European countries risk upsetting economic relations with China by constantly raising human rights issues? The most likely explanation is that most Americans and Europeans genuinely believe democracy and liberal rights are best for everyone, including Chinese. The spread of democracy and freedom has been part of American political culture for a long time, and central aspects of the foreign policies of presidents from Wilson to Carter to Ronald Reagan and now to Bush, who has an almost messianic devotion to spreading our way of life around the globe.²⁹¹ European countries are equally committed to a world of democracy, human rights and rule of law.

To be sure, the zeal of some politicians particularly in the U.S. for exporting liberal democracy is not necessarily shared to the same degree by the broad public. Despite a moral streak in American political culture, there is little public support for a moral crusade abroad in the name of human rights.²⁹² For most Americans, promoting democracy and human rights trails protecting U.S. jobs, safeguarding the interests of U.S. businesses abroad, securing adequate supplies of energy, and defending the security of our allies. The commitment to democracy and rights for everyone is broad but shallow. As a result, American human rights policy is inconsistent and incoherent. Despite all of the political grandstanding, harsh criticisms of China's record and calls for sanctions cannot obtain the support of the majority when confronted with the costs in terms of U.S. business interests and other foreign policy objectives. In the end, U.S. actions fall short of the high-minded rhetoric, and human rights concerns take a back seat to the

²⁹⁰ See Peerenboom, *supra* note 23.

²⁹¹ Hurst Hannum, *Bellum Americanum*, 27.1 FLETCHER F. OF WORLD AFF. 29 (2003).

²⁹² Ole Hosti, *Public Opinion on Human Rights in American Foreign Policy*, 131-174, in *THE UNITED STATES AND HUMAN RIGHTS: LOOKING INWARD AND OUTWARD* (David Forsythe, ed., 2000).

war on terrorism, the need to secure China's cooperation in resolving the Korean peninsula crisis, and increased opportunities for American companies to do business in China. But linking human rights criticisms with issues of outsourcing and the budget deficit appears to many Chinese as nothing more than a cynical manipulation of human rights to further U.S. economic and geopolitical interests.

Government's Own Shortcomings

Although reporting on China may reflect a bias against non-liberal democratic regimes, the PRC government has itself to blame for much of the bad press. While the government has acknowledged and been reasonably open with respect to problems in areas other than civil and political rights, it continues to hide behind broad claims of state secrets and national security to prevent public debate in many politically sensitive civil and political rights cases. If government leaders believe that the regime's general positions on human rights issues as well as the outcomes in specific cases are defensible, then they should permit all but the rare politically sensitive case that genuinely involves state secrets to be tried in public, with the defendant afforded all of the due process protection afforded by PRC and international law.²⁹³ The international community would then have a better sense of the facts and the relevant issues, legal and otherwise.

Given the potential for instability and other circumstances including majoritarian value preferences that fall within a reasonable margin of appreciation, the government in all likelihood will impose more restrictions on civil and political rights than do economically advanced, politically stable Western liberal democracies. Undoubtedly, there would still be disagreements over the outcomes of particular cases, the wisdom of particular policies and the legality under international law of certain acts, just as there are debates over these issues in other countries. The government could then address these concerns through its White Papers on human rights. Academics and citizens could also debate the issues. As heads of an emerging superpower and responsible member of the international community, Chinese leaders should have the courage of their convictions, be willing to subject their decisions and actions to international and domestic scrutiny, and revise their policies as appropriate. The lines for what is permitted and what is not should be clarified, and the rules should be enforced consistently, fairly and in a transparent manner, without recourse to torture or coerced confessions or harassment of defense counsel.

IV. Conclusion: The Benefits of Avoiding a Double Standard

To recognize that China is being held to a double standard is not to justify human rights violations or to diminish the urgency of addressing the problems. On the contrary, acknowledging that China is subject to a double standard clears the way for a more effective engagement with China on human rights issues. Apart from the inherent desirability of greater fairness, a more even-handed and accurate assessment of China's human rights situation within a broader comparative perspective will soften the aggressive defensiveness of the government and allow all sides to work together in a more cooperative fashion to achieve feasible solutions consistent with China's level of economic development and contingent circumstances.

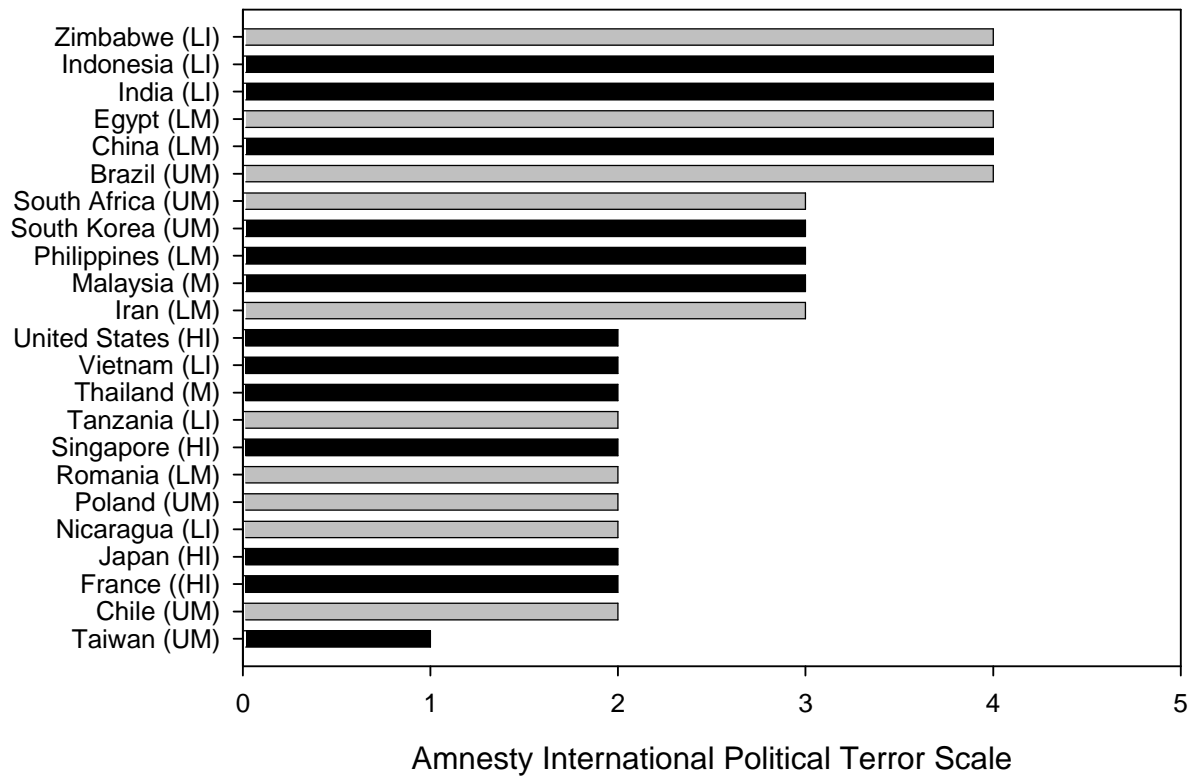
Acknowledging the areas in which China has made considerable progress also highlights the areas where progress has been slower. Government leaders have reached out to the foreign community for assistance on many rights issues. However, there has been greater reluctance to accept the advice of foreign parties when it comes to civil and political rights. Government leaders might be more willing to revisit sensitive issues regarding free speech, religious freedoms and the rights of minorities if they felt their concerns were taken more seriously, and the difficulties that many countries face on these issues acknowledged. Even if the balance drawn between individual liberties and stability, national security and

²⁹³ The government should also disclose as much information as possible and hold parts of the trial open even when state secrets and national security issues are involved.

state interests remains contested, a more balanced approach would help clarify the areas of genuine disagreement.

A more balanced approach on human rights issues would facilitate cooperation on other issues from nuclear proliferation to international terrorism to environmental degradation. It would help take the aggressive edge off of a growing politics of resentment and nationalism, and thus may contribute to a less confrontational relationship between China and Western powers as they attempt to negotiate a new balance of power in keeping with China's growing economic, political and military influence.

Figure 1.1: Physical Integrity Rights 2002

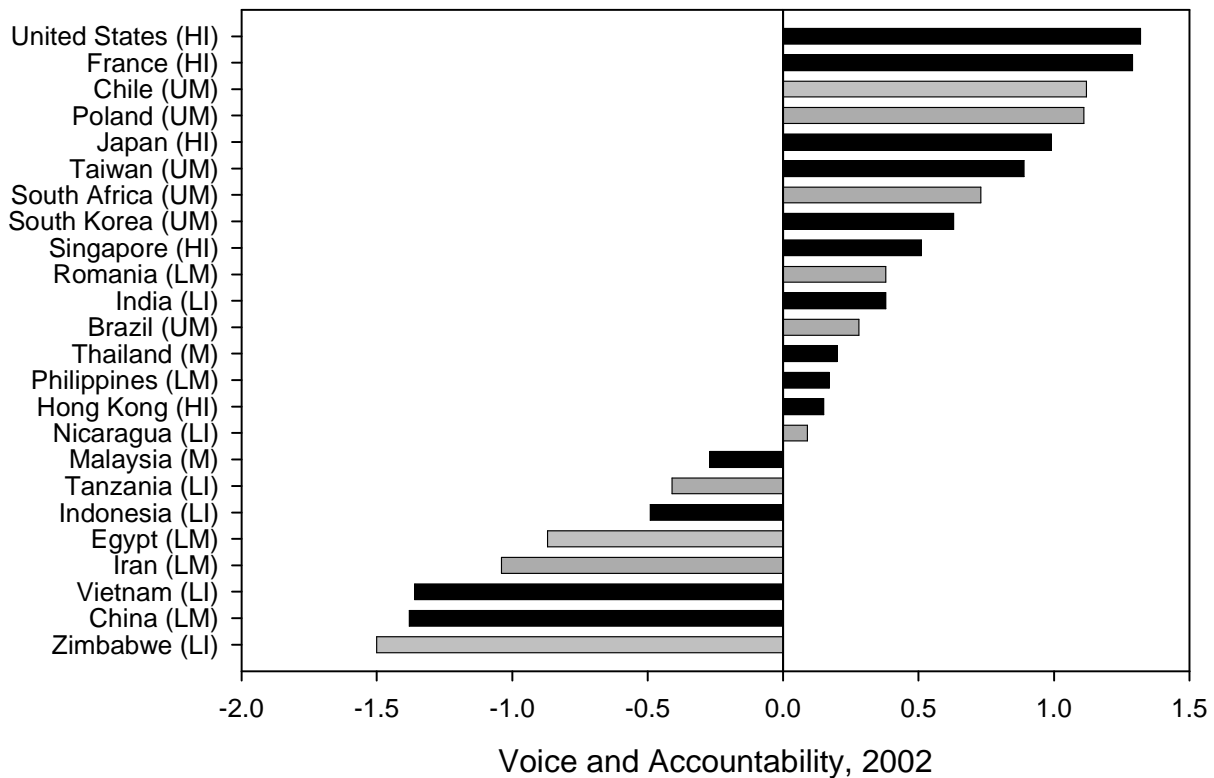


Source:

Gibney M., *Political Terror Scale Scores*. Online. Available HTTP:
 <http://www.unca.edu/politicalscience/faculty-staff/gibney_docs/pts.xls> (accessed 15 April 2004).

LI refers to lower income countries; LM to lower middle income; M to middle income; UM to upper middle income; HI to high income.

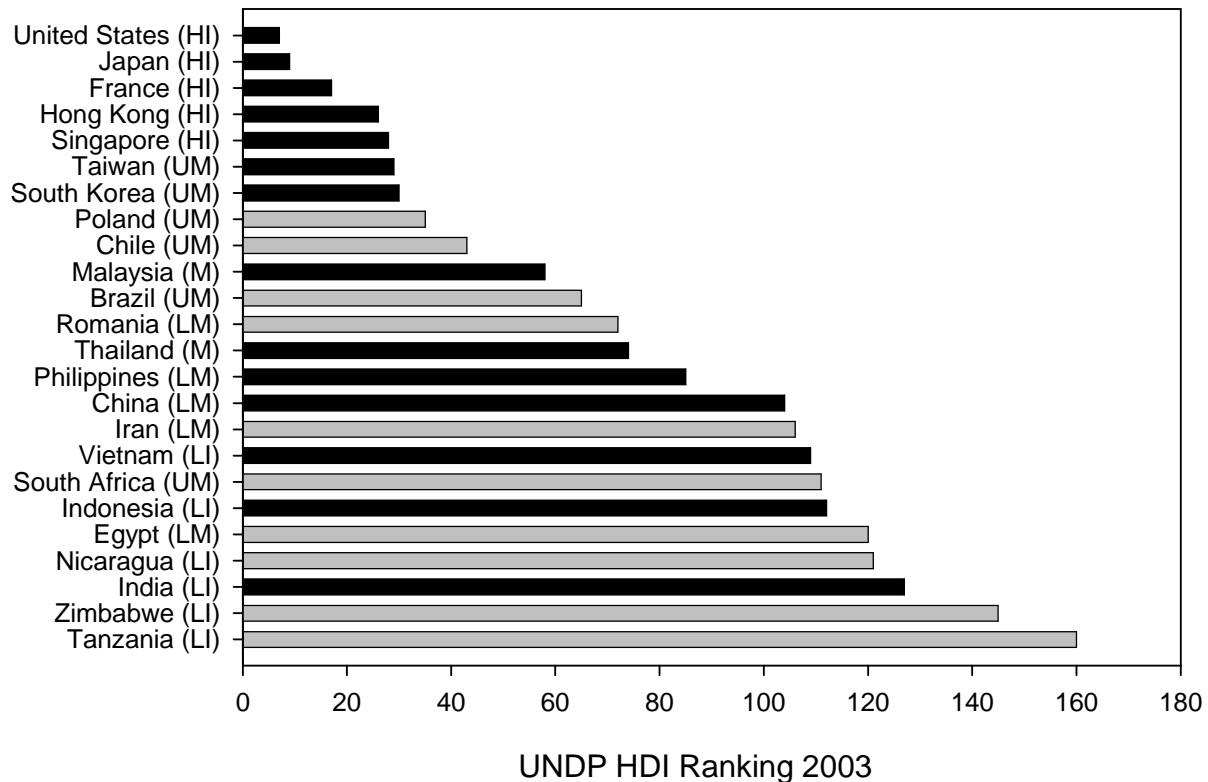
Figure 2.1 Civil and Political Rights: Voice and Accountability, 2002



Source:

World Bank (2003) *Governance Matters III: Governance Indicators for 1996-2002*. Online. Available HTTP: <<http://www.worldbank.org/wbi/governance/govdata2002>> (accessed 15 April 2004).

Figure 3.1 Social Economic Rights: UNDP HDI Ranking, 2003



Source:

United Nations Development Programme (2003) *Human Development Indicators*. Online. Available HTTP: <<http://hdr.undp.org/reports/global/2003/indicator/index.html>> (accessed 15 April 2004).

Table 1.1: Poverty Index

Country and Human Development Indicator Rank	Human poverty index (HPI-1)		Population below income poverty line (%)			HPI-1 rank minus income poverty rank
	Rank	Value (%)	\$1 a day 1990-2001	\$2 a day 1990-2001	National poverty line 1987-2000	
26 Hong Kong (HI)	..	..	..	..	..	..
30 South Korea (UM)	..	..	<2	<2	..	..
58 Malaysia (M)	..	..	<2	9.3	..	..
43 Chile (UM)	3	4.1	<2	8.7	17.0	1
28 Singapore (HI)	6	6.3	..	..	..	..
65 Brazil (UM)	18	11.4	9.9	23.7	..	-8
74 Thailand (M)	24	12.9	<2	32.5	13.1	16
104 China (LM)	26	14.2	16.1	47.3	4.6	-13
85 Philippines (LM)	28	14.8	14.6	46.4	36.8	-6
106 Iran (LM)	31	16.4	<2	7.3	..	21
112 Indonesia (LI)	33	17.9	7.2	55.4	27.1	7
109 Vietnam (LI)	39	19.9	17.7	63.7	..	-4
121 Nicaragua (LI)	44	24.3	82.3	94.5	47.9	-34
120 Egypt (LM)	47	30.5	3.1	43.9	16.7	20
111 South Africa (UM)	49	31.7	<2	14.5	..	34
127 India (LI)	53	33.1	34.7	79.9	28.6	-9
59 Tanzania (LI)	59	36.2	19.9	59.7	41.6	6
145 Zimbabwe (LI)	90	52.0	36.0	64.2	34.9	14

Source:

HPI rank is determined on the basis of the HPI-1 values. The HPI value is a composite score based on standard of living measurements including life expectancy (probability of death before age 40, education level (adult illiteracy rate), access to water (population without sustainable access to water), and access to food (children under-weight for age). The aggregation rule is specified in Technical Rule 1 of the UNDP 2003 report

Column 3-5: World Bank. 2003. World Development Indicators 2003. CD-ROM. Washington, DC.. The final column is calculated on the basis of ranking data in columns 1 and PPP\$1 data in column 3. A positive final column figure indicates that the country performs better in income poverty than in human poverty, a negative the opposite.

Table 2.1: Infant Mortality, Life Expectancy, and Primary School Enrollment

Infant mortality rate (per 1,000 live births) 2001		Life expectancy at birth (years) 2001		Net Primary School Enrollment Rate (% eligible age children) 2001	
Hong Kong (HI)	3	Japan (HI)	81.3	Japan (HI)	100
Japan (HI)	3	Hong Kong (HI)	79.7	France (HI)	100
Singapore (HI)	3	France (HI)	78.7	Hong Kong (HI)	99
France (HI)	4	Singapore (HI)	77.8	Taiwan (UM)	99
South Korea (UM)	5	United States (HI)	76.9	South Korea (UM)	99
Taiwan (UM)	6	Chile (UM)	75.8	Poland (UM)	98
United States (HI)	7	Taiwan (UM)	75.6	Malaysia (M)	98
Poland (UM)	8	South Korea (UM)	75.2	Brazil (UM)	97
Malaysia (M)	8	Poland (UM)	73.6	United States (HI)	95
Chile (UM)	10	Malaysia (M)	72.8	Vietnam (LI)	95
Romania (LM)	19	China (LM)	70.6	Singapore (HI)	94
Thailand (M)	24	Romania (LM)	70.5	Romania (LM)	93
Philippines (LM)	29	Iran (LM)	69.8	Philippines (LM)	93
Vietnam (LI)	30	Philippines (LM)	69.5	China (LM)	93
Brazil (UM)	31	Nicaragua (LI)	69.1	Egypt (LM)	93
China (LM)	31	Thailand (M)	68.9	Indonesia (LI)	92
Indonesia (LI)	33	Vietnam (LI)	68.6	Chile (UM)	89
Iran (LM)	35	Egypt (LM)	68.3	South Africa (UM)	89
Egypt (LM)	35	Brazil (UM)	67.8	India (LI)	86
Nicaragua (LI)	36	Indonesia (LI)	66.2	Thailand (M)	85
South Africa (UM)	56	India (LI)	63.3	Nicaragua (LI)	81
India (LI)	67	South Africa (UM)	50.9	Zimbabwe (LI)	80
Zimbabwe (LI)	76	Tanzania (LI)	44	Iran (LM)	74
Tanzania (LI)	104	Zimbabwe (LI)	35.4	Tanzania (LI)	47

Source:

Column 1: UNICEF (United Nations Children's Fund). 2003. *The State of the World's Children 2003*. New York: Oxford University Press.

Column 2: UN (United Nations). 2003. *World Population Prospects 1950-2050: The 2002 Revision*. Database. Department of Economic and Social Affairs, Population Division. New York.

Column 3: UNESCO Institute for Statistics (United Nations Educational, Scientific and Cultural Organization). 2003. *Correspondence on adult and youth literacy rates*. January. Montreal.

Taiwan data is based on statistics compiled by the Taiwan Statistics Bureau, *available at* <http://www.dgbas.gov.tw/dgbas03/bs2/92chy/catalog.htm>.

Table 3.1: Income Inequality

Country and Human Development Indicator Rank	Share of Income or Consumption (%) 1990-2001		Richest 20% to Poorest 20% 1990-2001	Gini Index (%) 1990-2001
	Poorest 20%	Richest 20%		
9 Japan (HI)	10.6	35.7	3.4	24.9
72 Romania (LM)	8.2	38.4	4.7	30.3
112 Indonesia (LI)	8.4	43.3	5.2	30.3
30 South Korea (UM)	7.9	37.5	4.7	31.6
35 Poland (UM)	7.8	39.7	5.1	31.6
17 France (HI)	7.2	40.2	5.6	32.7
29 Taiwan (UM)	6.7	41.1	6.2	34.5
120 Egypt (LM)	8.6	43.6	5.1	34.4
109 Vietnam (LI)	8.0	44.5	5.6	36.1
127 India (LI)	8.1	46.1	5.7	37.8
160 Tanzania (LI)	6.8	45.5	6.7	38.2
104 China (LM)	5.9	46.6	8.0	40.3
7 United States (HI)	5.2	46.4	9.0	40.8
28 Singapore (HI)	5.0	49.0	9.7	42.5
106 Iran (LM)	5.1	49.9	9.7	43.0
74 Thailand (M)	6.1	50.0	8.3	43.2
26 Hong Kong (HI)	5.3	50.7	9.7	43.4
85 Philippines (LM)	5.4	52.3	9.7	46.1
58 Malaysia (M)	4.4	54.3	12.4	49.2
145 Zimbabwe (LI)	4.6	55.7	12.0	56.8
43 Chile (UM)	3.2	61.3	19.3	57.5
111 South Africa (UM)	2.0	66.5	33.6	59.3
121 Nicaragua (LI)	2.3	63.6	27.9	60.3
65 Brazil (UM)	2.2	64.1	29.7	60.7

Source:

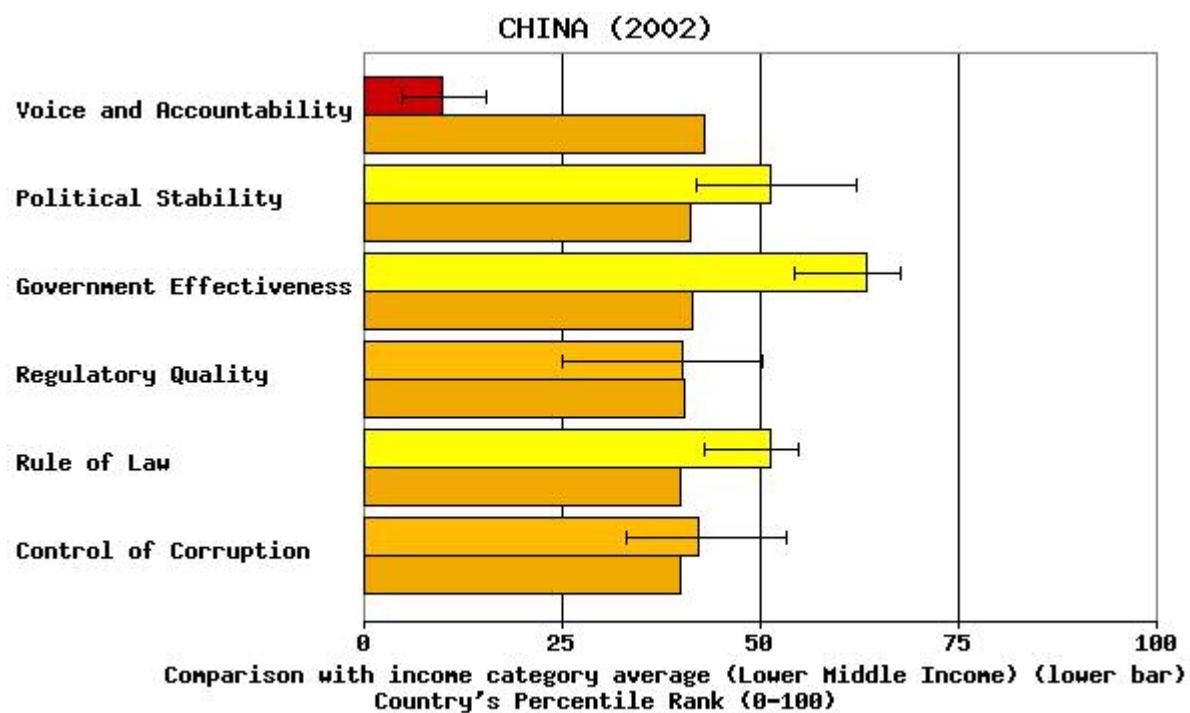
World Bank. 2003. World Development Indicators 2003. CD-ROM. Washington, DC; For Taiwan data see Report on The Survey of Family Income and Expenditure in Taiwan Area, Republic of China, available at <http://www129.tpg.gov.tw/mbas/doc4/eng/conte91.htm>. Taiwan HDI rank is an estimate.

Table 4.1: Quality of Governance (Percentile Rank, 2002)

Country and Human Development Indicator Rank	Voice and Accountability	Political Stability	Government Effectiveness	Regulatory Quality	Rule of Law	Control of Corruption
7 United States (HI)	90.9	56.2	91.2	91.2	91.8	92.3
9 Japan (HI)	79.3	90.3	84.5	78.9	88.7	85.1
17 France (HI)	88.4	70.8	90.7	85.6	87.6	89.2
26 Hong Kong (HI)	53.5	85.4	88.7	90.7	86.6	90.2
28 Singapore (HI)	65.7	91.9	100.0	99.5	93.3	99.5
29 Taiwan (UM)	74.2	70.3	82.5	80.9	80.9	77.3
30 South Korea (UM)	67.7	60.5	79.4	76.3	77.8	66.5
35 Poland (UM)	83.3	69.7	71.1	71.1	70.6	69.1
43 Chile (UM)	84.3	85.9	86.6	90.2	87.1	90.7
58 Malaysia (M)	42.4	61.6	80.9	68.6	69.6	68.0
65 Brazil (UM)	58.1	48.1	50.0	63.4	50.0	56.7
74 Thailand (M)	57.1	62.7	64.9	65.5	62.4	53.6
72 Romania (LM)	61.1	58.4	46.4	55.7	54.1	45.4
85 Philippines (LM)	54.0	29.7	55.7	57.7	38.1	37.6
104 China (LM)	10.1	51.4	63.4	40.2	51.5	42.3
106 Iran (LM)	18.2	25.9	39.2	8.2	33.5	44.3
109 Vietnam (LI)	10.6	61.1	48.5	25.3	44.8	33.0
111 South Africa (UM)	70.7	42.7	69.1	69.1	59.8	67.5
112 Indonesia (LI)	34.8	12.4	34.0	26.3	23.2	6.7
127 India (LI)	60.6	22.2	54.1	43.8	57.2	49.5
120 Egypt (LM)	22.2	34.1	46.9	38.1	57.7	47.9
121 Nicaragua (LI)	52.0	47.6	17.5	39.7	32.0	39.7
145 Zimbabwe (LI)	7.1	8.6	22.2	4.1	5.7	6.2
160 Tanzania (LI)	37.9	35.7	36.1	33.5	38.7	15.5

Source: World Bank, Governance Matters III: Governance Indicators for 1996-2002 (2003), at <http://www.worldbank.org/wbi/governance/govdata2002>.

Table 5.1 Quality of Governance: China



Source: D. Kaufmann, A. Kraay and M. Mastruzzi, 2003: Governance Matters III: Governance Indicators for 1996-2002 (<http://www.worldbank.org/ubi/governance/pubs/govmatters3.html>)

Table 6.1: Crime Statistics (rate per 100,000) 1997-2002

Country and Human Development Indicator							
Rank		Total Crime	Murder	Rape	Theft	Drug Offense	Incarceration
7	United States (HI)	4160.51	5.61	31.77	3804.58	539.92	701
9	Japan (HI)	2300.77	1.1	1.85	1871.13	21.68	54
17	France (HI)	6932.26	4.07	17.63	4224.57	182.19	93
26	Hong Kong (HI)	1085.64	1.03	1.41	623.16	36.77	184
28	Singapore (HI)	703.84	0.8	2.81	415.5	85.08	388
29	Taiwan (UM)	2179.03	5.13	10.16	1473.03	111.13	250
30	South Korea (UM)	1664.06	2.18	4.29	386.31	8.97	125
35	Poland (UM)	3634.84	3.15	6.09	1727.46	93.65	211
43	Chile (UM)	1496.92	4.54	9.97	705.66	16.68	204
58	Malaysia (M)	729.71	2.1	5.78	581.43	78.95	161
65	Brazil (UM)	927.41	22.98	8.5	-	46.29	160
72	Romania (LM)	2207.05	7.44	8.34	1028.33	2.04	199
74	Thailand (M)	245.53	8.07	6.17	90	438.13	401
85	Philippines (LM)	-	7.85	4.21	10.21	14.53	94
104	China (LM)	133.82	2.16	-	87.75	3.92	184
106	Iran (LM)	-	-	-	-	-	226
109	Vietnam (LI)	83.56	1.08	-	31.41	11.26	71
111	South Africa (UM)	8176.04	114.84	121.13	3565.81	111.85	402
112	Indonesia (LI)	63.48	0.8	0.73	45.26	3.77	38
120	Egypt (LM)	-	-	-	-	-	121
121	Nicaragua (LI)	1372.27	24.03	26.03	579.97	22.79	143
127	India (LI)	671.2	3.93	1.6	44.01	2.25	29
145	Zimbabwe (LI)	6560.61	10.15	38.38	1958.11	57.03	160
160	Tanzania (LI)	1647.98	7.95	10.05	194.11	13.39	120

Source:

Column 1-5: Interpol, International Crime Statistics: Country Report, at <http://www.interpol.int/Public/Statistics/ICS/>; Column 6: International Center for Prison Studies, School of Law at King's College of the University of London, World Prison Brief, at <http://www.prisonstudies.org/>. Some Taiwan, U.S. and Singapore data came from compilations by national statistic offices. Taiwan HDI rank is an estimate.

Table 7.1: Social Order. Divorce Rates, Suicide Rates, Young Mothers

Country and Human Development Indicator Rank	Divorce Rate (per 1,000) 1996-2000	Suicide Rates (per 100,000) 1991-2002	Births by Mothers Between Age 15-19 (per 1000 population 1995 to 2000)
7 United States (HI)	4.19	10.85	9.14
9 Japan (HI)	1.98	25.3	0.70
17 France (HI)	1.98	17.75	1.58
26 Hong Kong (HI)	1.95	13.25	1.08
28 Singapore (HI)	1.20	9.45	1.07
29 Taiwan (UM)	-	13.59	0.50
30 South Korea (UM)	2.52	13.55	0.63
35 Poland (UM)	1.09	15.4	4.12
43 Chile (UM)	0.42	5.8	10.19
58 Malaysia (M)	-	-	4.06
65 Brazil (UM)	0.60	4.2	19.05
72 Romania (LM)	1.40	12.35	7.93
74 Thailand (M)	-	4	12.41
85 Philippines (LM)	-	2.1	11.80
104 China (LM)	1.9	13.9	0.97
106 Iran (LM)	0.81	0.2	13.86
109 Vietnam (LI)	-	-	6.52
111 South Africa (UM)	0.83	-	21.34
112 Indonesia (LI)	-	-	15.10
120 Egypt (LM)	1.17	0.05	14.36
121 Nicaragua (LI)	-	3.45	45.06
127 India (LI)	-	10.65	12.52
145 Zimbabwe (LI)	-	7.9	31.34
160 Tanzania (LI)	-	-	39.37

Source:

Column 1: United Nations, Demographic Yearbook 2000, 590 (2002); Column 2: World Health Organization, Suicide Rates (Table), at http://www.who.int/mental_health/prevention/suicide/suiciderates/en/; Column 3: United Nations Population Division, World Population Prospects: The 2002 Revision Population Database, at <http://esa.un.org/unpp/>; Taiwan HDI rank is an estimate. China's divorce rate is for 1999, and is from the State Commission on Population and Family Planning: <http://www.sfpc.gov.cn>, based on the 2000 Yearbook of China Statistics, published by the State Statistics Bureau.

Table 8.1 Women's Rights and Wellbeing

HDI Rank	Country	Gender-related Development Index	Female Literacy (2001)		Female to Male Ratio	Earned Income Estimates (PPP US\$) (2001)		Female to Male %	P
			Female	Male		Female	Male		
7	United States	0.94	N/A	N/A		26,389	42,540	62%	
9	Japan	0.93	N/A	N/A		15,617	35,061	45%	
17	France	0.92	N/A	N/A		18,607	29,657	63%	
28	Singapore	0.88	88.7	96.4	0.92	14,992	30,262	50%	
30	South Korea	0.87	96.6	99.2	0.97	9,529	20,578	46%	
35	Poland	0.84	99.7	99.8	1.00	7,253	11,777	62%	
43	Chile	0.82	95.7	96.1	1.00	5,055	13,409	38%	
58	Malaysia	0.78	84.0	91.7	0.92	5,557	11,845	47%	
72	Romania	0.77	97.4	99.1	0.99	4,313	7,416	58%	
65	Brazil	0.77	87.2	87.4	1.00	4,391	10,410	42%	
74	Thailand	0.77	94.1	97.3	0.97	4,875	7,975	61%	
85	Philippines	0.75	95.0	95.3	1.00	2,838	4,829	59%	
104	China	0.72	78.7	92.5	0.85	3,169	4,825	66%	
106	Iran	0.70	70.2	83.8	0.84	2,599	9,301	28%	
109	Vietnam	0.69	90.9	94.5	0.96	1,696	2,447	69%	
111	South Africa	0.68	85.0	86.3	0.99	7,047	15,712	45%	
112	Indonesia	0.68	82.6	92.1	0.90	1,987	3,893	51%	
120	Egypt	0.63	44.8	67.2	0.67	1,970	5,075	39%	
127	India	0.57	46.4	69.0	0.67	1,531	4,070	38%	
145	Zimbabwe	0.49	85.5	93.3	0.92	1,667	2,905	57%	
160	Tanzania	0.40	67.9	84.5	0.80	432	610	71%	
121	Nicaragua	0.64	67.1	66.5	1.00	1,494	3,415	44%	

- a. Because of the lack of gender-disaggregated income data, female and male earned income are crudely estimated as the ratio of the female non-agricultural wage to the male non-agricultural wage, the female and male shares of the economic total the total female and male population and GDP per capita (PPP US\$) (see technical note 1). Unless otherwise specified, estimates are based on the most recent year available during 1991-2000.
- b. Data were provided by states based on their definition of national executive and may therefore include women serving as vice ministers and those holding other ministerial positions, including parliamentary secretaries.
- c. Data are as of 1 March 2003. The percentage was calculated using as a reference the number of total seats currently in the National People's Congress.