**China, Taiwan and International Human Rights: A Tale of Two Constitutions**

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China’s twentieth-century constitutions have been, among other things, the products of decades of grappling with the question of how much China should or must borrow from “foreign” or “Western” legal models. During most of the era that shaped China’s two mid-century constitutions, international legal discourse did not much use the term human rights. Yet, two ideas crucial to human rights were prominent during China’s protracted revolutionary period: (1) international legal norms mattered for domestic legal orders (as a possibly relevant standard for evaluation or source of content) and (2) constitutions properly, and perhaps necessarily, included promises that the people governed by them would have a set of rights, the content of which overlapped significantly with modern international human rights law. The one hundredth anniversary of the revolution that punctuated China’s fraught initial encounter with the West—and that, by toppling the Qing dyansty, created the formal need for a post-imperial, and China’s first “modern,” constitution—is an apt occasion to look back on the human rights-related constitutional developments (and non-developments) that have followed.

The stories of human rights and the constitutional orders of the Republic of China and the People’s Republic of China since the late 1940s are intriguingly parallel and tellingly different. Their trajectories primarily track changes in the PRC’s and Taiwan’s domestic political regimes and international circumstances—changes that are themselves interrelated. In the ROC and in the PRC, there have been three distinctive (if not, in terms of beginning and ending dates, fully distinct) phases in the arc of constitutional law and human rights. In both cases the first, long period runs from the later 1940s through much of the 1970s. The second, more transitional phase begins in the later part of the 1970s and runs through the late 1980s. A third, major era began in the late 1980s to early 1990s and continues today.

**The Early Decades: Empty Promises, Authoritarian Politics and the Cold War**

For the Republic of China, the first phase began in earnest with the adoption of the Republic of China constitution on the mainland in 1947. This ROC constitution contained a list of citizen rights that closely tracked much of the then-nascent regime of international human rights law, particularly its civil and political liberties provisions. It was, on paper, a liberal and democratic constitution that resembled the foreign, largely Western models on which it drew and which were a major source of the civil an political rights side of the human rights norms that would soon be entrenched in the Universal Declaration of Human Rights and, later, the International Covenant of Civil and Political Rights.[[1]](#footnote-1) The ROC constitution also included provisions provisions (although few cast as citizen rights and most phrased as state commitments and obligations) that resonated with the rights embodied in provisions of the UDHR that would form the foundation for the International Covenant of Economic, Social and Cultural Rights, and that reflected also elements of Sun Yat-sen’s political thought, European-style social democracy and the preferences of the then-fast-growing group of socialist and post-colonial states.[[2]](#footnote-2)

The ROC in this period also presented itself as poised to engage fully in the newly created post-war international legal order, signing onto the UN Charter and its relatively sparse provisions obliging states to protect human rights,[[3]](#footnote-3) taking a seat at the UN and as a permanent member of the Security Council, dispatching a jurist to serve on the International Court of Justice, and joining in the near-unanimous General Assembly vote in favor of the Universal Declaration of Human Rights.

The reality, of course, was that the human rights promises of the ROC constitution immediately proved hollow. Civil War and the Chinese Communist Party’s victory and foundation of the People’s Republic soon made the ROC constitution and its human rights-related provisions irrelevant for people living on the mainland. On Taiwan, the impressively human rights-consistent constitutional provisions were honored only in the breach. The February 28th Incident (1947) and the subsequent White Terror—which would today be described as serious violations of human (and surely ROC constitutional) rights—made the practical weakness of constitutional protections abundantly clear. The perceived threat from across the Strait provided a rationale—eagerly seized by the authoritarian KMT regime—for suspending formally the operation of constitutional restrictions, including those with human rights content, for the duration of an “emergency” that was to last for four decades.

Throughout the Chiang Kai-shek and into the Chiang Ching-kuo presidencies, the ROC government’s human rights record in Taiwan remained poor and the constitutional provisions had correspondingly limited purchase.[[4]](#footnote-4) Dissidents and regime critics were prosecuted, killed or exiled. The lack of protection for constitutionally pledged human rights is reflected in the still-evocative lexicon of the era: Green Island (an off-shore prison for political offenders), the 1979 Kaohsiung Incident (a violently repressed pro-democracy and pro-human rights mass action), the Jiang Nan incident (the state-linked assassination by a criminal gang of a journalist-critic of the ruling family who was living in California), and so on. During this period, Taiwan’s constitutional court—and its regular courts as well—did (and could do) little to check the regime’s violation of the constitutional rights that had been largely formally suspended and of human rights that the international legal regime declared universally applicable.[[5]](#footnote-5)

In terms of Taiwan’s domestic political order, the desuetude of constitutional provisions pledging protection of citizens’ rights (which tracked many human rights) was partly a feature of the political character of the regime: authoritarian rule through a Leninist-style party-state structure committed to monopolizing political space; a mainlander-dominated ruling group resented (and worse) by a potentially restive and threatening majority Taiwanese population; and a government ostensibly temporarily exile and facing an assertedly exigent and existential threat from hostile regime that regarded it as the illegitimate remnant of an unfinished civil war.

Part of what helped to make this sustainable for several decades was Taiwan’s international position during this period. To be sure, Taiwan was relatively weak vis-à-vis the mainland, but it enjoyed the crucial support of the United States, which had extended its security perimeter to the Taiwan Strait during the Korean War. U.S. policy during these initial decades of the Cold War cared little for the human rights records of its allies. Anticommunism was the coin of the realm. It mattered relatively little to Washington if its ally were—as British Foreign Secretary Bevin said of Tito—“a scoundrel,” so long as he was “our” scoundrel.[[6]](#footnote-6)

In the PRC, the first long chapter in the story of the constitution and human rights began with the formal revocation of the ROC constitution, along with other laws of the ousted Nationalist regime. Filling the legal vacuum, even in the formal sense, took some time. Adopted five years after the founding of the new regime, the PRC’s first constitution closely followed the Soviet model, specifically the USSR’s then-in-effect charter, often referred to as the Stalin Constitution.[[7]](#footnote-7) Because the Soviets had borrowed heavily from the language of liberal and democratic rights provisions in the constitutions of the West and had added a robust list of social and economic rights, the PRC’s first constitution did so too, albeit more indirectly. As a result, the 1954 PRC constitution contained a list of rights that closely resembled much of the emerging inventory of international human rights legal norms.[[8]](#footnote-8) The principal differences lay in the relatively heavy emphasis on the dependence of rights on the fulfillment of duties to the state and to protect collective interests, and a set of ideological obligations imposed on citizens in other parts of the document.[[9]](#footnote-9)

The PRC’s constitution followed this superficially international norm-tracking path even though the regime—unlike its early Soviet mentor—was systematically excluded from the United Nations and many other international institutions that were central to the then-developing international human rights legal regime. The potential irony here was limited by Mao-era China’s sharp rejection of such norms as reflecting “bourgeois” international law and as serving as a dangerous pretext for American and other “imperialist” efforts to infringe on the sovereignty of China and other socialist or newly independent states. In this area, China’s intransigence and rhetoric soon became sharper than the Soviet Union’s.[[10]](#footnote-10)

Like the ROC constitution, the original PRC constitution proved to be a notoriously empty set of promises. The rejection of purportedly “universal” (but, in Chinese communist discourse, merely Western and capitalist) international human rights and the broader characterization of international law as divided into “bourgeois” and “socialist” realms (with, at most, a thin regime of “general” international law bridging the two), the international human rights regime was rendered, in principle, irrelevant to PRC constitutional principles.[[11]](#footnote-11)

The Sino-Soviet split widened this divide as China denounced Khrushchev and de-Stalinization. China’s Mao-era domestic politics dealt far more devastating blows. The Anti-Rightist Campaign of the later 1950s savaged, among others, the legally trained and other intellectuals who were comparatively favorably disposed toward constitutional governance and international or foreign legal norms. Worse still, the Cultural Revolution of the later 1960s and early 1970s rejected violently the argument that constitutional (or other legal or human) rights had anything other than a class character, that rights could be allowed to restrain the righteous actions of the state or the party or the masses against “class enemies” (who were increasingly defined in terms of political viewpoint), or that China should have a legal system and the protections it might provide for citizens’ legal rights.

A quarter-century after the founding of the PRC and two decades after the adoption of the PRC’s first constitution, a second PRC constitution was adopted and reflected the attitude toward international human rights-like rights that had come to characterize Mao-era China. Often called the “Cultural Revolution constitution” or the “Gang of Four constitution” (after Mao’s wife and three radical leaders who wielded great political power during the Chairman’s final years and in the immediate aftermath of his death), the PRC’s 1975 constitution severely truncated its predecessor’s provisions on individual rights, emphasized duties and collective interests, denied the rights of those deemed enemies of the people, and embraced rights of mass action (rather than individual liberties) that had marked the Cultural Revolution and its chaotic and oppressive politics (particularly the so-called “four big freedoms” of speaking out freely, airing views fully, holding great debates, and writing big character posters).[[12]](#footnote-12) The PRC’s second constitution was short-lived. After the death of Mao and the fall of the Gang of Four, a third charter in 1978 restored many of the individual rights provisions (and other features, including citizen duties) of the 1954 original.[[13]](#footnote-13) That constitution—which contained some of the radical revolutionary rhetoric of its predecessor--also would not last long; it was superseded by a fourth constitution promulgated in 1982 (and still in effect today with relatively modest amendments).

Although tumultuous, the PRC’s internal political order was consistently hard-authoritarian, in many respects Leninist and arguably totalitarian during its first three decades. That period was punctuated by moments of institutional breakdown, but of a highly ideological and violent sort. Near the end of the 1970s, the Reform Era began to soften the authoritarian legacy, but only slowly and as a secondary or instrumental goal of a regime overwhelmingly focused on pursuing economic growth while maintaining political stability. None of these varieties of authoritarian rule was conducive to implementation of the legal rights (or the international human rights they partly paralleled) that were set forth in the PRC constitutions throughout most of this era. As in the ROC on Taiwan, only more so, the domestic political regime doomed constitutional rights provisions to practical irrelevance.

As on the Taiwan side of the Strait, for the mainland too, international position mattered. Although the PRC’s relationship with the outside world shifted considerably over its early decades, it was never conducive to acceptance or promotion of human rights, including those reflected in the PRC’s constitutions. Despite occasional rhetoric to the contrary, the PRC did not face a meaningful threat of external intervention or great pressure to alter its political order. U.S. and ROC aims to reverse the revolution in China were never more than fanciful, at least given the protection that Soviet backing gave the Beijing regime in its early years. By the early 1970s, rapprochement with the United States might have appeared to increase potential leverage on human rights issues, but in practice it did not. The Nixon-Kissinger calculus in China policy was one rooted in Cold War rivalry with the Soviet Union and realpolitik. The PRC’s human rights-disregarding (and constitutional right-marginalizing) internal order was of no greater concern to the U.S. than the ROC’s had been since the beginning of the Postwar era. The Helsinki process, which pressed human rights reform in the Soviet Bloc, had no contemporary China-focused peer.

**The Transitional Period: Constitutions and Human Rights, Political Reforms and International Contexts**

Beginning in the latter part of the 1970s and over most of the ensuing decade, the long-standing structures of disregard for pledged constitutional and emerging human rights, strongly authoritarian domestic political orders and international indifference to domestic orders began to erode on both sides of the Strait.

In Taiwan, significant domestic pressure began to build—with limited and uneven accommodation from the regime—for political changes that would bring political reality more into line with constitutional promises of democracy and liberal rights and with international human rights standards. One of the defining moments of the period—the Kaohsiung Incident of 1979—tellingly combined invocations of human rights norms and calls for political change that would do more to implement democratic principles (and accompanying civil liberties). Protesters timed their principal action—which the regime violently suppressed—for international human rights day. The prosecutions that followed targeted prominent leaders of the forces for democratic change and did much to expose the civil liberties and human rights shortcomings of a politicized judicial process. Notably, the Kaohsiung Incident trials also brought to prominence the defense lawyer Chen Shui-bian, who would later become the democratically elected, first non-KMT president of the ROC.

The entanglement of the protest movement that spawned the Kaohsiung Incident and popular calls for democracy with rising Taiwanese identity and resentment of authoritarian rule by a mainlander-dominated regime portended a movement with considerable force and durability. Despite the repression evident at Kaohsiung, the ROC regime also began to accommodate the powerful, mounting pressures for political reform. Denials of constitutionally promised civil liberties, including media freedom, began to soften. The *dangwai* or “outside the party” group was allowed to organized politically and, later, to form a full-fledged opposition political party.[[14]](#footnote-14)

Although domestic factors provided much of the impetus behind such changes, Taiwan’s deteriorating external circumstances—and particularly its standing with the United States—mattered as well. The Kaohsiung Incident and the Jiang Nan Incident (which involved acts on American soil against a naturalized U.S. citizen journalist) tarnished the Chiang regime’s image with its indispensible patron. More broadly, the “free pass” that the Cold War had granted to staunchly anti-communist allies was expiring during a period marked by U.S.-Soviet détente, American popular discontent with a long war in Indochina that had been framed in anti-communist terms, and a rising salience of human rights concerns in U.S. foreign policy. The shift was especially acute for the ROC. Kissinger’s and Nixon’s trips to China in the early 1970s had opened the door to the U.S.’s rapprochement and normalization of relations with the PRC and severing of formal diplomatic ties with the ROC (at Beijing’s insistence). These developments (especially when not viewed with the benefit of hindsight) portended a severe deterioration in Taiwan’s security.

Taipei faced sharply reduced standing (compared to Beijing’s) in Washington.[[15]](#footnote-15) The problem became all the more acute as China launched its Reform Era at the end of 1978 and began to present a more appealing image abroad and one less strongly and defiantly at odds with international human rights law and the modestly enhanced individual rights provisions of the PRC’s Reform-Era constitutional provisions. Although the Taiwan Relations Act gave the ROC some reassurance by establishing weaker, less formal versions of the security and diplomatic ties it had previously enjoyed with the U.S., it also incorporated a stern warning that the Taiwan’s poor human rights record was a source of concern and potentially further diminished support in Carter-Era Washington.[[16]](#footnote-16) By most accounts, concern with redressing the erosion of U.S. support and concomitant deterioration of Taiwan’s security were significant factors in Chiang Ching-kuo’s late-in-life moves to bring ROC politics more nearly in line with the ROC constitution’s promises and international human rights and related norms.[[17]](#footnote-17)

During the same period, broadly analogous changes were occurring on the PRC side. The early Reform Era brought formal constitutional change, including the telling and necessary (if far from sufficient) adoption of new constitutions (including especially the 1982 version) that reestablished the notional list of individual political, civil, social and economic rights that the Cultural Revolution-era charter had officially scrapped, while also restoring the familiar list of citizen duties.[[18]](#footnote-18) More practically, the Reform Era began with tolerance, unprecedented in the PRC era, for public discourse favoring democracy and human rights. Although the Democracy Wall Movement of 1978-79 was short-lived, the ideas expressed by Wei Jingsheng (author, among other works, of the human rights-advocating essay “The Fifth Modernization”) marked a significant political-intellectual turning point that helped plant seeds for later developments.[[19]](#footnote-19) Much the same can be said about new, more democratic electoral laws introduced around the same time and under which unprecedentedly contestatory local people’s congress elections were held in 1980.[[20]](#footnote-20) Reforms to the legal system and many social and economic policies began to narrow slightly the cavernous gap between the rights that the PRC constitution promised to citizens and the reality they lived.

As on the Taiwan side, domestic forces favoring political and policy change largely drove this development. From Deng Xiaoping and other top leaders who had been toppled during Mao’s later years to ordinary citizens who had suffered through the traumas of the Cultural Revolution and Maosim more broadly, there was a broad consensus for change that would, among other things, move the PRC closer to its ostensible constitutional and human rights ideals (not least by moving it away from the politics and policies of the immediately preceding era).

Yet, on the mainland side as on the Taiwan side, international context mattered. Although the Reform Era PRC was, from the beginning, highly and increasingly secure from foreign intervention or coercion, the Post-Mao opening to the outside world brought more subtle and measured forms of international pressure and influence to improve China’s human rights practices and, somewhat incidentally, partial implementation of constitutional promises concerning citizen rights. To take one important and highly concrete example, China ardently sought most favored nation trading privileges with the U.S. as part of the deal to normalize diplomatic relations. But, under U.S. trade law, those (and other) benefits were linked to a trading partner’s human rights conditions (partly by the Jackson-Vanik amendment to the principal U.S. trade statute, which had initially targeted Soviet restrictions on Jewish emigration).

More broadly, when the PRC had taken the Chinese seat at the UN earlier in the decade, it began a deepening interaction with human rights-related institutions of the international order that demanded or generated greater contact (and subjection to international scrutiny) than Beijing previously had been willing to undertake. More diffusely but probably most profoundly, the early Reform Era leadership’s choice of an economic strategy that depended on much wider and deeper economic integration with the outside world opened the door to much-increased influence by foreign norms and ideas, including those that favored human rights and many of the rights promised by China’s own formal legal rules.

**Greater, and Disparate, Engagement: Constitutional Change, Human Rights and Foreign Policy**

Beginning near the end of the 1980s, Taiwan and Mainland China became much more deeply engaged with international human rights norms, with constitutional change a significant part of the process. This shift has been much more obvious, extensive and transformative in the ROC than in the PRC.

In Taiwan, the story has been one of bringing political and legal reality much more fully into line with the text of the original—and only modestly amended—ROC constitution of 1947. Martial law and the state of emergency that had underpinned it formally ended in 1987, making formally operative the international human rights-consistent provisions setting forth the rights and liberties of ROC citizens. The ROC greatly improved its human rights record and accelerated the pace of democratization.

The Legislative Yuan and National Assembly—last elected on the mainland and serving an open-ended term pending the end of martial law—were made subject to election by a local, Taiwanese electorate. So too was the presidency of the ROC, with the first direct election of the head of state occurring in 1996 and recurring every four years since then. With these developments, democratic institutions and procedures set forth in the ROC constitution were finally put into practice.[[21]](#footnote-21) They extended, of course, only to a small fraction of the territory for which the constitution had been crafted. In keeping with the constitutional revision providing for election of leaders by a Taiwan-only electorate, the ROC’s constitutional reach was interpreted during this period to be limited limit the current scope of the ROC’s effective jurisdiction / exercise of sovereignty (that is, to Taiwan and adjacent islands).

To be sure, democracy holds a complicated place among human rights generally and in the international human rights regime more specifically. Despite much talk of a democratic entitlement, a right to democracy has not securely joined the pantheon of human rights.[[22]](#footnote-22) Democracy is, however, widely and plausibly seen as an important guarantor of human rights protections. This is likely no less true in Taiwan than in other human rights-regarding constitutional democracies. In the ROC case, moreover, democratization and increased protection for individual constitutional rights that tracked international human rights have gone hand in hand. Taiwan’s constitutional court—the Grand Justices of the Judicial Yuan—were an important institutional link. Long supine under authoritarian rule, the constitutional court began to issue rulings in the early 1990s that helped transform Taiwan’s polity into a democratic one offering much more robust protections for human rights. [[23]](#footnote-23) The grand justices set forth interpretations of the constitution that demanded or paved the way for new, local elections for the ROC’s legislative and representative bodies and that recognized greater constitutional protections for criminal suspects and defendants, speech and assembly rights of those who sought to engage in public demonstrations or express dissident, previously heretical, political views, and rights of citizens to determine their domicile, to be free from intrusive government registration requirements and so on. Democratization and constitutional rights emerged in tandem from the newly activist court.[[24]](#footnote-24) Beyond the constitutional court, Taiwan’s ordinary courts also became much more active and effective protectors of citizens’ rights, including those set forth in the ROC constitution.

Outside the courts as well, the political link between human rights and constitutionalism was prominent. For example, in the Guidelines for National Unification President Lee Teng-hui pointedly, and cleverly, made improvement of human rights conditions on the mainland a precondition for progress toward the reunification that the ROC constitution retained as a principle. Among the planks considered in President Chen Shui-bian’s bid for constitutional “replacement” or “reform” was a provision that would have explicitly brought “human rights” into the ROC constitution.[[25]](#footnote-25)

In recent years, ROC leaders have routinely cited Taiwan’s legal-political transformation as evidence of Taiwan’s commitment to, and fulfillment of, international human rights standards. Such statements have become a regular feature of presidential inaugural addresses and many other official statements.[[26]](#footnote-26) Under President Ma Ying-jeou, who came to office in 2008, the ROC made the obligations of the two principal international human rights covenants a part of domestic law—the most Taiwan could do on this front, given that Beijing’s opposition prevents the ROC from becoming a formal party to the UN-based multinational treaties.[[27]](#footnote-27)

As this suggests, Taiwan’s external context has mattered during this period as well. Again, greater constitutional protection for rights that track international human rights norms has largely come amid the impact of broad forces and trends at home—rising levels of economic development, per capita income and education, rising senses of identity and nationalism, path-dependent evolution from initial liberalizing reforms, and so on. But the influence of the outside world and, strikingly, Taiwan’s efforts to play to outside audiences have been significant factors. If Chiang Ching-kuo launched, or acquiesced, in the first steps toward greater constitutionalism, protection for human rights and democratization partly due to a perceived need to protect Taiwan’s security by playing to international norms to offset an increasingly adverse “hard power” balance, his successors have faced no less compelling and often more demanding imperatives of the same general type.[[28]](#footnote-28)

With the collapse of the Soviet Union and the beginning of the post-Cold War era, concern with states’—and, more importantly for Taiwan, questionable or disputed states’—internal orders have mattered more for international status. European Union states’ guidelines for recognizing the new states that emerged from the former Soviet Bloc included such factors as the candidate states’ patterns of democracy, human rights and conformity to some aspects of international law. U.S. policy and practice was in some respects similar and, more broadly, democracy and human rights waxed anew as criteria for U.S. foreign policymaking in the post-Cold War years. With formal independence and full-fledged, internationally accepted statehood beyond Taiwan’s reach, scoring high on these other metrics has mattered all the more for Taiwan’s international status and, in turn, its security.[[29]](#footnote-29)

With the ongoing, increasingly dramatic rise of China as an economic and military power, Taiwan has had to lean ever more heavily on such “soft power” appeals. With human rights conditions broadly (if unevenly and incompletely) improving on the mainland and foreign memories of the crackdown on democracy protests at Tiananmen in 1989 fading, Taiwan also has had to achieve—and tout—an ever higher level of human rights and democratic-constitutional accomplishment to maintain international appreciation of a cross-Strait “gap” on internationally salient normative issues.[[30]](#footnote-30) From Lee Teng-hui’s Guidelines for National Unification through Ma Ying-jeou’s holding the ROC up as a model for constitutional governance, democracy and human rights for the mainland, this has been a recurring and important theme for Taiwan’s top leaders. A large portion of the great deal that Taiwanese official sources have had to say about Taiwan’s accomplishments in protecting constitutional and human rights and democracy has targeted external audiences (including especially the ROC’s indispensable supporter, the United States).

On the PRC side, there has been a broadly analogous, though far less transformative set of changes. Measured against the very low baselines of constitutional rights-protection in earlier periods, developments since the beginning of the 1990s—and especially in the early 2000s—have been intriguing, even striking.[[31]](#footnote-31) Although the citizens’ rights provisions have remained largely untouched since the current constitution was adopted in 1982, there has been considerable growth of courts, the pool of lawyers, rates of litigation, citizens’ rights consciousness, incipient collective action suits, administrative litigation suits against citizen rights-violating state actors, and the *xinfang* process (whereby citizens make more informal complaints to officials that sometimes raise legal, even constitutional rights in a quest for redress). These diverse legal developments have created more space for protection, or at least invocation, of rights and interests that resonate with constitutional rights provisions and international human rights.

Some changes in policy and official rhetoric have moved in the same general direction. During Hu Jintao’s early years in power, the constitution and constitutionalism gained a new pride of place. Later, especially in Hu’s political report to the 17th Party Congress (delivered at the midpoint in Hu’s rule), “law” (including the constitution) received unprecedented emphasis as a feature of the Party’s approach to ruling China. The Hu era’s signature ideological trope—a “harmonious society”—provided a rationale for those who sought greater protection of citizen rights, including constitutional ones, as a means for avoiding social discontent and resulting threats to order.

More concretely and more specifically, Chinese courts began to experiment with enforcing constitutional rights provisions.[[32]](#footnote-32) In the famous 2005 case of Qi Yuling, the Supreme People’s Court ruled that the constitutional right to education was one that courts could directly enforce even in the absence of legislation (which has generally been regarded in PRC legal thinking as necessary to make constitutional provisions operative). Other courts somewhat less boldly looked to constitutional provisions as interstitial sources of law. Supreme People’s Court President Xiao Yang lamented that China had only reached the stage of having a “Reform Constitution” and looked forward to a day when China would achieve a “constitutionalist” regime under which (among other things) constitutional provisions could effectively constrain the government.[[33]](#footnote-33)

One of the relatively few major amendments to the 1982 constitution, adopted in 2004, proclaimed that the state respects and “respects and safeguards human rights.”[[34]](#footnote-34) Relatively orthodox reformist intellectuals whose views could reach and influence China’s top leaders advocated for reforms to implement constitutional structures and rules more fully. Dissident and near-dissident intellectuals went a good deal further, with one of the most celebrated examples being “Charter 08”—a detailed document, loosely inspired by the Soviet-era Czechoslovak pro-human rights Charter 77 and pointedly issued on the anniversary of the adoption of the Universal Declaration of Human Rights, that set forth a blueprint for a liberal-democratic constitutional order that its authors (including Nobel Peace laureate Liu Xiaobo) and proponents called for China to adopt and implement over time.[[35]](#footnote-35)

To be sure, the fate of these constitutionalist and pro-human rights gambits has been relatively grim so far. The Qi Yuling decision was quietly cancelled and its breakthrough has not been replicated. Xiao Yang was succeeded by the much less liberal and less pro-rule-of-law Wang Shengjun. Xiao and the Court vice president most closely associated with the Qi Yuling decision have faced allegations of criminal behavior. The leaders of Charter 08 have been silenced and some, including Liu, convicted and imprisoned. And the new human rights provision in the constitution has been, at best, a symbolic gesture.

Nonetheless, the pattern of Reform-Era law and politics (and politics about law) has been that defeated gambits promoting law, rights and constitutionalism sometimes reemerge from their enforced dormancy. Baselines do shift. And, during the Reform Era, they have done so in part due to the impact of long-term trends that at least faintly resemble the developments that have underpinned the radical transformation in Taiwan: rising affluence, a growing middle class, higher levels of education, a vastly expanded cadre of legal professionals (including many with a strong socialization to rule of law values) and extensive exposure to foreign ideas and ideals about law and governance. Lawyers and the legally educated have begun to enter the ranks of the top leadership and other positions of power that were previously the province of economists or, more often, engineers. (This trajectory toward lawyer-leaders is common in many countries and has gone quite far in Taiwan, where the most recent past president, current president, and both major candidates in the 2012 presidential election are all lawyers).

Thus, in the PRC as in the ROC, domestic forces and the changes they helped foster in the political order are much of the story of the turn toward a less hollow constitutionalism and more regard for human rights (albeit of a still highly constrained sort in the PRC’s case).[[36]](#footnote-36) On this front, the PRC story is relatively complex. The “international effect,” though present, is more modest than has been the case for the ROC. The international opprobrium that the PRC regime faced after the Tiananmen Incident in 1989 focused greatly on human rights issues. The extrajudicial killings at Tiananmen, the prior imposition of martial law and formal suspension of the often-ignored (even in more normal times) constitutional and other legal rights of citizens, the summary procedure accorded those accused of having taken part in the protests, and so on, were the centerpiece of the diffuse international indictment of the “butchers of Beijing” (in a phrase that was popular at the time). NGOs’ reports measured the regime’s behavior against international human rights standards, specifically the customary international rules on civil and political rights. The PRC faced censure efforts before a key UN human rights body, and so on. China came far closer than it had before, or has since, to losing its most-favored nation trading rights with the United States—and, in turn, facing serious damage to China’s export-led growth strategy—under the provisions in the U.S. trade laws that conditioned such privileges on human rights performance.

Tellingly, Beijing finally accepted the idea of “universal” human rights at the beginning of the 1990s as it sought to rehabilitate its image abroad post-Tiananmen and reinvigorate and deepen its Reform-Era economic development strategy, which depended on extensive engagement with—and thus acceptance by—the outside world.[[37]](#footnote-37) One key element of that strategy—joining the WTO, finally achieved in 2001—required acquiescence by the United States, which would have to cease imposing human rights conditions on China’s enjoyment of normal trading relations. The requisite U.S. support would be facilitated by China’s pledged adherence to international human rights norms and it also came with enhanced congressionally mandated monitoring of Chinese human rights conditions.

Such Chinese foreign monitoring has reinforced China’s engagement with international human rights norms, including responses to the U.S. State Department reports on Chinese human rights conditions and tit-for-tat critiques of U.S. human rights shortcomings. The PRC’s increasing interaction with international human rights norms has extended to: singing on to most of the major UN human rights instruments, including the International Covenant on Economic, Social and Cultural Rights (which China has ratified) and the International Covenant on Civil and Political Rights (which China has signed but not ratified); adding the “human rights” amendment to the constitution and adopting human rights “white papers” and a human rights “action plan”; and seeking, and winning, a seat as an inaugural member of the UN Human Rights Council.[[38]](#footnote-38)

Yet, for all this pressure and engagement and formal acceptance, the PRC has remained relatively (compared to the ROC) impervious to international influence on its internal order. Sprouts of constitutional review and more robust and liberal constitutional and legal rights have withered or at best failed to thrive. Relatively thin, even merely rhetorical, embraces of international human rights norms in policies, laws and the constitution has been all that the PRC has deemed necessary, wise or tolerable in the face of considerable international pressure and criticism.

Simply, the PRC has been in a secure and increasingly strong position vis-à-vis the outside world. It has not depended for its security on conforming to international norms. With the very limited exception of the modest and short-lived semi-pariah status that followed its worst excesses in 1989, the PRC has not had to pay a great price, economically or in terms of international status, for low conformity to international human rights norms of for flouting the rights promised to its citizens under its own constitution.

Indeed, as the PRC has become more powerful, influential and self-confident in addressing the outside world in recent years, there are signs that China may be becoming significantly less pliant (and compliant)—something which could bring another inflection point and the advent of a fourth, qualitatively different phase. Chinese analyses and arguments have long flirted with varieties of human rights relativism and have long embraced sovereignty as a shield against ostensibly human rights-driven foreign scrutiny or intervention, but these have become more assertive and arguably more coherent in recent years: talk has grown of a “China Model” of economic development with authoritarian politics; Beijing has become more sharply critical (especially after the Global Financial Crisis) of the apparent short-comings of the Post-Cold-War-triumphant American model of lightly regulated market capitalism, liberal democracy and rights-centered rule of law; and the PRC seemingly has sought to become less of a regime-taker (or rejecter) and more of a regime shaper, including through the WTO (where it has resisted “mission creep” into human rights concerns) and the UN system (where China pointedly pursued and won a seat on the Human Rights Council and where it has used its Security Council veto power to impede human rights-motivated sanctions against Sudan, Syria, and others).[[39]](#footnote-39)

**One—or Two—Patterns on Two Sides of the Strait**

The arc of constitutional government and human rights has been broadly similar in the ROC and the PRC. Both began their postwar constitutional orders with a cavernous gap between the liberal, democratic and human rights-protecting constitution on paper and the reality of a harsh authoritarian political regime. Both underwent transitions beginning in the later 1970s and 1980s. From the end of the 1980s on, both systems moved toward greater engagement with international human rights norms and greater implementation of constitutions that had not changed fundamentally from the original, late 1940s versions.

But, while the trend lines have moved in the same direction, they have not been of the same magnitude. Protection of internationally recognized human rights (particularly of the civil and political variety) and implementation of constitutional promises of individual rights (and a democratic political order to underpin them) have gone much farther under the ROC in Taiwan than they have under the PRC on the mainland. These divergent outcomes have emerged from very different contexts. Domestically, Taiwan’s social and economic conditions (ranging from overall levels of development to patterns of politically salient identity) were relatively conducive to a political transformation that favored the more sweeping change in human and constitutional rights protection that has occurred in the ROC. Internationally, Taiwan’s weak, and the PRC’s strong, positions meant profoundly different (and arguably still diverging) levels of vulnerability to those foreign and international pressures and influence that generally have favored human rights and internal political orders that resembled what the ROC and PRC constitutions have long promised.

1. ROC Constitution (1947), arts. 7-17, 22 [↑](#footnote-ref-1)
2. ROC Constitution (1947), preamble, arts. 1, 15, 21, 142-167 [↑](#footnote-ref-2)
3. UN Charter, arts. 55-56. [↑](#footnote-ref-3)
4. {Cite to report / documentation on ROC human rights record} [↑](#footnote-ref-4)
5. {Cite} [↑](#footnote-ref-5)
6. See generally, John Lewis Gaddis, *The Cold War* (2006). [↑](#footnote-ref-6)
7. See generally Jerome A. Cohen, “China’s Changing Constitution,” China Quarterly no. 76 (178): 794-842. [↑](#footnote-ref-7)
8. PRC Constitution (1954), arts. 85-90 (civil and political rights), 91-96 (economic, social and cultural rights) [↑](#footnote-ref-8)
9. PRC Constitution (1954), arts. 100-103, 14-19. [↑](#footnote-ref-9)
10. Hungdah Chiu, “Communist China’s Attitude Toward International Law,” *American Journal of International Law*, vol. 60, 245-267 (1966); see also Jerome A. Cohen and Hungdah Chiu, *People’s China and International Law*, at 161-172, 607-610 (1974). [↑](#footnote-ref-10)
11. Chiu, “Communist China and International Law”; Cohen and Chiu, *People’s China and International Law,* 23-64. [↑](#footnote-ref-11)
12. Cohen, “China’s Changing Constitution”; Chin Kim, “The 1975 Constitution of the People’s Republic of China,” *Hastings International and Comparative Law Review* vol. 1 (1977-78): 1-27; PRC Constitution (1975), pmbl, arts. 1, 9-14. [↑](#footnote-ref-12)
13. PRC Constitution (1978), pmbl., arts.2, 44-59. [↑](#footnote-ref-13)
14. See generally, Shelley Rigger, *Politics in Taiwan* (1999); Hung-mao Tien, *The Great Transition* (189); Alan M. Wachman, *Taiwan: National Identity and Democratization* (1994). [↑](#footnote-ref-14)
15. See Richard C. Bush, *At Cross Purposes: U.S.-Taiwan Relations Since 1942* (2004), chs. 5-7. [↑](#footnote-ref-15)
16. Taiwan Relations Act, sec. 2(3).. [↑](#footnote-ref-16)
17. Andrew J. Nathan and Helena S.V. Ho, “Chiang Ching-kuo’s Decision for Political Reform” in *Chiang Ching-kuo’s Leadership in the Democratic Development of the Republic of China on Taiwan* (Shao Chaun Leng. Ed. 1993); see also International Committee for Human Rights in Taiwan, “Taiwan Ends Martial Law after 38 Years,” *Taiwan Communique*  (Sept 1987), available at www.**taiwan**dc.org/twcom/tc31-int.pdf [↑](#footnote-ref-17)
18. PRC Constitution (1982), arts. 33-50, 51-56 [↑](#footnote-ref-18)
19. James D. Seymour, *The Fifth Modernization: China’s Human Rights Movement, 1978-1979* (1980). [↑](#footnote-ref-19)
20. Andrew J. Nathan, *Chinese Democracy*, chapter 10 (1986); Jacques deLisle, “What’s Happened to Democracy in China? Elections, Law and Political Reform,” *Foreign Policy Research Institute E-Note,*(Apr. 2010), available at http://www.fpri.org/enotes/201004.delisle.democracyinchina.html. [↑](#footnote-ref-20)
21. ROC Constitution, chs. III-VI, as amended. [↑](#footnote-ref-21)
22. See, for example, Thomas M. Franck, “The Emerging Right to Democratic Governance,” *American Journal of International Law,* vol. 86: 46-91 (1992). [↑](#footnote-ref-22)
23. {Cite}; Jiunn-rong Yeh and Wen-chen Chang, “The Emergence of East Asian Constitutionalism,” *American Journal of Comparative Law,* 59:805 (2011); Wen-chen Chang, “The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison,” *North Carolina Journal of International Law and Commercial Regulation* 36:593 (2011);see also Thomas Ginsburg, Judicial *Review in New Democracies: Constitutional Courts in Asian Cases* ch. 7 (2003). [↑](#footnote-ref-23)
24. Judicial Yuan, ROC, Judicial Interpretations Nos. \_\_, \_\_\_, \_\_\_, \_\_\_. [↑](#footnote-ref-24)
25. ROC Guidelines for National Unification; Jacques deLisle, “Reforming / Replacing the ROC Constitution: Implications for Taiwan’s State(-like) Status and U.S. Policy,” *Woodrow Wilson International Center Asia Program Special Report* 12-18 (November 2004). [↑](#footnote-ref-25)
26. Chen Shui-bian Inaugural Address, 2004; Ma Ying-jeou Inaugural Address, 2008. {Fuller, and additional, cites.} [↑](#footnote-ref-26)
27. “President Ma Signs Instruments of Ratification on UN Human Rights Covenants,” available at <http://www.kmt.org.tw/english/page.aspx?type=article&mnum=112&anum=6258>; “Legislature Ratifies UN Rights Treaties,” *Taipei Times*, Apr. 1, 2009. [↑](#footnote-ref-27)
28. Nathan and Ho; Jacques deLisle, “International Contexts and Domestic Pushback” in *Democratization in Greater China* 185-211 (Larry Diamond and Bruce Gilley, eds. 2008). [↑](#footnote-ref-28)
29. Jacques deLisle, “The Chinese Puzzle of Taiwans Status,” *Orbis,* vol. 44, no. 1, 35-62 (2000). [↑](#footnote-ref-29)
30. Jacques deLisle, “Soft Power in a Hard Place: China, Taiwan, Cross-Strait Competition and U.S. Policy,” *Orbis* vol. 54 no. 4, 493-524 (2010). [↑](#footnote-ref-30)
31. See generally, Jacques deLisle, “Legalization without Democratization in China Under Hu Jintao” in *China’s Changing Political Landscape: Prospects for Democracy* 185-211 (Cheng Li, ed. 2008) [↑](#footnote-ref-31)
32. See, e.g, Shen Kui, “Is it the Beginning of the Era of the Rule of the Constitution? Reinterpreting China’s First Constitutional Case” *Pacific Rim Law and Policy Journal* 12: 199 (2003). See generally Mo Jihong, “The Constitutional Law of the People’s Republic of China and Its Development,” *Columbia Journal of Asian Law* vol 23: 137 (2009). [↑](#footnote-ref-32)
33. Xiao Yang, “Basic Theoretical Issues in China’s Constitutional Reform: From ‘A Reform Constitution’ to a ‘Constitutionalist [Constitutional Governance] Constitution’,” *Zhongguo Shehui Kesue*, Feb 2003: 4-17. [↑](#footnote-ref-33)
34. PRC Constitution, art. 33(3) (as amended, 2004). [↑](#footnote-ref-34)
35. Charter ’08, available at <http://www.2008xianzhang.info/chinese.htm>; English translation: Perry Link, “China’s Charter 08, *New York Review of Books*, January 15, 2009. [↑](#footnote-ref-35)
36. See generally, Li Cheng, ed. *China’s Changing Political Landscape: Prospects for Democracy* (2008); Bruce Gilley, *China’s Democratic Future* (2004); Randall Peerenboom, *China Modernizes* (2007). [↑](#footnote-ref-36)
37. On China’s shift in—or to—engagement with the international human rights regime, see Ann Kent, *China, The United Nations and Human Rights* (1999). [↑](#footnote-ref-37)
38. For a critique of practice, see Sophie Richardson and Human Rights Watch, *Promise Unfulfilled: An Assessment of China’s National Human Rights Action Plan* (2011). [↑](#footnote-ref-38)
39. See generally, Jacques deLisle, “Law and China’s Development Model,” in *In Search of China’s Development Model: Beyond the Beijing Consensus* (Philip Hsu, Yushan Wu and Suisheng Zhao, eds. forthcoming, 2011); Jacques deLisle, “China and the WTO: Evolving Agendas of Economic Openness, Domestic Reform and Challenges of the Post-Accession Era*”* in *China under Hu Jintao: Opportunities, Dangers and Dilemmas,* 229-292 (co-edited with T.J. Cheng and Deborah Brown, 2006)

    [↑](#footnote-ref-39)