POSITIVE RIGHTS IN THE CONSTITUTION?

Introduction

The concrete application and elucidation of constitutional rights is not self-evident or static. Interpretation of constitutional rights by the courts meets the demands of a rapidly fast moving society by subscribing to the notion that the constitution is a "living document"[1]. It is worth remembering that when the 1957 *Merdeka* constitution was drafted, "life" in article 5 was not contemplated to mean "livelihood".[2] Yet, this is what the constitution provides for today. This understanding is important as the constitution will inevitably find itself hard-pressed to meet current needs. The constitution, it is noted, was drafted at a time when the socio-political structure was rife with racism, sexism and elitism. Constitutional interpretation amplifies the attempt by the courts to ensure the relevancy of the constitution to best serve the society it has been created for.

As the guarantee of rights is a notion that evolves with time, constitutional interpretation of those rights through the machinery of judicial review demands close scrutiny. The constitution legitimizes as well as controls the supervisory jurisdiction of the courts judicial review. It also absolves the judiciary from being accused of excessive intervention. Judicial review of administrative action therefore holds the key to unlocking the vast potential of the rights provisions. In undertaking this task, judges are making the people identify themselves with the constitution. Constitutional scholar BO Nwabueze eloquently states that without this sense of identification, of attachment and involvement, a constitution would remain a remote, artificial object, with no more real existence than the paper it is written on.[3]

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[1] *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29.

[2] See *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261.

[3] BO Nwabueze, *Constitutionalism in the Emergent States*, 1973, C Hurst & Co, London at p 25.

There has however been a serious misconception as to how the constitution has been interpreted. To observe further, the philosophical presupposition of judicial review is that the courts interpret the constitution to enforce negative rights, that is those rights which protect against state interference. As a result, the multi-faceted dimensions of constitutional rights remain in the interstices of Malaysian constitutional discourse. This has in essence stultified the enjoyment of rights. The concern here is for the negative and positive dimension of rights. After scrutinizing both facets of negative and positive rights, this article will highlight the effect of this failure. Then, it will go on to suggest how the true meaning of both rights can be articulated through judicial review and subsequently examine its limitations.

The Notion of Positive Rights

A negative right is the right not to have an object, not to engage in an activity, or to prevent a state of affair.[4] These are rights that deny power, not swords but shields.[5] Positive rights on the other hand call for affirmative action on the part of the state or someone else to provide the goods or services required for a person to exercise that right. Positive rights are those described as the right to obtain, or have an object, to engage in an activity, or to enjoy a desired state of affairs. For example, a right to life is a negative right when it prevents someone from killing another, but access to lifesaving medical resources is a positive rights claim.[6] The positive rights referred to in this article is with reference to socioeconomic rights. This is because most negative rights are civil and political in nature which requires the state to *not* do something in order to enjoy the right. Positive rights on the other hand require some kind of action and these are generally economic and social.[7]

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[4] See D Barak-Erez and R Shapira, 'The Delusion of Symmetric Rights' [1999] OJLS 19.

[5] L Brilmayer, 'Rights, Fairness and Choice of Law' [1989] 98 Yale LJ 1277 at p 1280.

[6] L Shanner, 'The Right to Procreate: When Rights Claims have Gone Wrong' [1995] 40 McGill LJ 823 at p 840.

[7] A Eide, 'Realization of Social and Economic Rights and the Minimum Threshold Approach' [1989] 10 *Human Rights Law Journal* 35 at p 36; EW Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' [1978] 9 Neth Y.B. Int'l L 69 at p 93.

Judicial review in Malaysia does not tread into enforcement of positive rights, those that entail help or subsidy from the state or any other related party. The reason for this is that the Malaysian constitution is expressly enumerated in terms of *negative* rights.[8] Two scholars, Scott and Macklem, see the positing of political and civil rights and the abandonment of social and economic rights in most constitutions as "selective constitutionalization."[9] They argue that as a result, most constitutions implicitly view the values protected by social rights to be illegitimate aspirations of modern governance.[10] Such textual approach serves to marginalize the centrality of rights, the values they seek to vindicate, and most significantly, the persons whose chance to be human and whose place in society is most dependent on these rights.[11]

Enforcement of Positive Rights

A clear example that transcends the frontier of positive and negative rights is the 1996 South African constitution, a celebrated parchment that has constitutionally entrenched social rights among the guaranteed fundamental rights.[12] As a result, the South African constitutional court has the power to require the government to implement the lengthy list of socio-economic rights in the constitution. Scott and Macklem ob-

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[8] In relation to the US constitution which is similarly termed, Judge Posner had this to say: "Our Constitution is a charter of negative rather than positive liberties...the men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure basic governmental services" in *Jackson v City of Joilet*, 715 F.2d 1200,1203 7th Circuit 1983.

[9] C Scott and P Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in A New South African Constitution' [1992] 141 Pa Law J 1 at p 27.

[10] *Ibid.*

[11] *Ibid* at p 39.

[12] Constitution Act 108, 1996 at Ch 2. See *Soobramoney v Minister of Health, Kwa Zulu Natal* 1998 (1) SA 430 (although the government has a duty to provide health services, in this case it was held that there was no discrimination for refusal of treatment), *Government of the RSA and Others v Grootboom and Others* 2001 (1) SA 46 (determination of a minimum obligation to right of access to housing), *Minister of Health v Treatment Action Campaign* (5) SA 703 (order to make Nevirapine available to pregnant women with HIV who gave birth in the public sector).

serve that had the inclusion of positive rights been ignored, the South Africans would be constitutionalizing only part of what it is be a full person. As such, a constitution conferring only civil and political rights projects an image of truncated humanity.[13] For example in *Government of the RSA and Others v Grootboom and Others,*[14] the Constitutional Court held that a society must seek to ensure the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. [15]

Seen this way, the oversimplified distinction between positive and negative rights appears to give rise to incongruity in giving effect to the constitution. It appears that all human rights have negative and positive elements and any denial as such is a false dichotomy. This means that the state not only must *not* interfere with a rights provision but also has a *duty* to exert itself to make those rights possible. Only this way can the enjoyment of rights be facilitated. This discussion must also be related back to the dignity and equality objectives of rights. Surely the courts efforts to give recognition to dignity are much maligned without this consideration for the multidimensional possibilities of rights.

By contrast, the United Kingdom has taken a regressive stand in relation to enumeration of positive rights in the Human Rights Act 1998 [HRA]. It is noted that with the HRA in place, judicial reasoning in the United Kingdom has the kind of familiarity related to constitutional supremacy. According to Jowell, the Act provides a secure foundation for a rights-based approach when dealing with administrative action.[16] A common element of the rights based approach is that the courts should, whenever possible, be interpreting legislation and the exercise of administrative discretion to be in conformity with fundamental rights.[17] Yet, the HRA also conforms to conventional rights entrenchment mindset by omitting provisions for socioeconmic rights. Geraldine Van

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[13] Scott and Macklem, *op cit* at p 29.

[14] *Government of the RSA and Others v Grootboom and Others* 2001 (1) SA 46.

[15] *Ibid* at p 69.

[16] J Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] Pub L 671.

[17] P Craig, *Administrative Law*, 1999, Sweet & Maxwell, London at p 21.

Beuren criticises the HRA for being silent over the rights of the poorer and more vulnerable sections of the community.[18]

In the example of the Indian constitution, the notion of positive rights is linked to the Directive Principles of State Policy enshrined in articles 36 to 53. By virtue of article 37 of the Indian Constitution, these Directive Principles cannot be enforced by the court. However, the general thought is that the Directive Principle serves to inspire legislation.[19] The courts have shown a tendency to interpret the Directive Principle as a fuel for the fundamental rights clauses. The Indian courts seem to say that these provisions create an obligation for the government to take certain steps to achieve the goals and purposes specified. In *Minerva Mills Ltd v Union of India,*[20] Bhagwati J elucidates that the operation of the Directive Principles should not be subservient to the other parts of the constitution even if they are deemed non-justiciable.[21] This is because they nevertheless create a duty on the state to perform obligations. In *Bandhua Mukti Morcha v Union of India,*[22] the Supreme Court illustrated this integration. Bhagwati J found that the right to live with human dignity "derives its life breath from the Directive Principles".[23]

Another Supreme Court case, *Parmanand Katara v Union of India*[24] held that as article 21 protected the right to life, there was as a result to this, a duty on the part of the state to preserve life. MP Jain surmises that whereas fundamental rights are of a negative nature, that is requiring the government not to do anything to infringe a fundamental right guaranteed to the people, the Directive Principles lay down certain *social* obligations on the government to take some affirmative

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[18] GV Beuren, 'Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act' [2002] PL 456. Note the existence of the European Social Charter which is relatively unknown in comparison with the European Convention of Human Rights.

[19] Ireland has a similar bifurcated constitution.

[20] AIR 1980 SC 1789.

[21] *Ibid* at p1848 para 115. Cf *State of Madras v Champakan Dorairajan* AIR 1951 SC 226, an early case which held otherwise.

[22] AIR 1984 SC 802.

[23] *Ibid* at p 811.

[24] AIR 1989 SC 2039.

action in the interest of public good.[25] He says that by virtue of this, the courts have been able to increasingly spell out public duties which the government may be required to discharge.[26] A further illustration can be seen in the case of *Neeraja Chaudhary v State of MP*,[27] where bonded labourers were required to be identified and released. The court then went further by issuing a direction for the state to suitably rehabilitate them. According to the court, without rehabilitation, they would be driven to poverty, hopelessness and despair into serfdom again. Of what use, asks the court, to speak of platitudinous freedom and liberty to a person who could not have one square meal a day and hardly a roof on his head?[28]

In the context of the Malaysian constitution, one must caution. The Malaysian constitution has no textual enumeration of positive rights nor any Directive Principle. It is difficult to see how the reviewing courts can enforce explicit positive rights as exemplified by the Indian and South African model. Still, the dilemma is that by being confined to enforcement of purely negative rights, the courts enforcement of rights is stultified and imperfect. In enforcing negative rights, the courts merely elucidate the extent of administrative transgression but more often than not, fail to give effect to that right. This makes the constitutional guarantee of rights impotent. This constitutional cul-de-sac was discovered by the Federal Court in *R. Rama Chandran v The Industrial Court of Malaysia & Anor.*[29]

Reviewing *Rama Chandran*

In *Rama Chandran*, the appellant had been dismissed from employment purportedly in pursuance of a retrenchment exercise. However, the decision was really a device to cloak a colourable or *male fide* exercise of power, thus avoiding a fair enquiry into certain charges of misconduct, as required under the rules of natural justice and flout-

[25] MP Jain, *Indian Administrative Law: Cases and Materials Vol. III*, Wadhwa, Agra at p 2842.

[26] *Ibid.*

[27] AIR 1984 SC 1099.

[28] *Ibid* at p 1100.

[29] [1997] 1 MLJ 154.

ing *Wednesbury* unreasonableness. In making consequential orders in favour of the appellant, the Federal Court determined the monetary compensation to be awarded instead of remitting it with a direction to the tribunal of initial hearing, the Industrial Court. In other words, the court refused to be confined by the narrow precincts of quashing the impugned order on certiorari but iterated that it can also modulate its order so as to grant the appropriate relief.[30] Sudha Pillai remarks that by deciding not to remit the case to be determined again by the Industrial Court and in coming to its own diametrically opposite conclusion that the dismissal was without just cause or excuse, the majority at the Federal Court was going against a basic tenet of administrative law that the reviewing court cannot substitute its own decision in place of that which is sought to be challenged. [31]

The courts reason for not remitting the matter for readjudication was that it would be time consuming and would involve the appellant in another protracted litigation. The court found jurisdiction to order consequential relief by drawing similarities between Article 226(1) of the Indian constitution and para 1 of the First Schedule to the Courts of Judicature Act 1964 (CJA).[32] The dissenting judge, Wan Yahya FCJ however found it difficult to reconcile the vast powers conferred by Article 226(1) which is a constitutional provision with that of the CJA which was a statute enacted by Parliament. Sudha Pillai's argues that this is a technical distinction.[33] Indeed, when the constitution in-

[30] *Ibid* at p 181. The seeds for moulding of relief was already sown in *Hong Leong Equipment v Liew Fook Chuan* [1996] 1 MLJ 481 at p 445. Gopal Sri Ram JCA explained, "In a proper case, I envisage no impediment to the High Court to make the appropriate determination and awarding fair compensation to the workman. In such cases, it is difficult to see what possible good could come out of prolonging the agony of the parties to the dispute by delaying the matter and adding to the cause list of an already overworked tribunal".

[31] S Pillai, 'The Ruling in Ramachandran-A Quantum Leap in Administrative Law?' (1998) 3 MLJ lxii at p lxxi.

[32] Para 1 of the Schedule provides that the High Court has additional powers to issue "to any person or authority directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose. "For the scope of para 1, see *Sivarasa Rasiah v Badan Peguam Malaysia* [2002] 2 MLJ 413 at p 421.

[33] S Pillai, *op cit* at plxxii.

vests power of review to the courts, such an accord will be impotent if not companied by capacity to issue remedies. Para 1 is legislative articulation of a constitutional sanction. Sudha Pillai further goes on to remark that until such time as the provision in para 1 is repealed, there should rightly be no objection to the liberal and progressive interpretation given to the same by the Federal Court.[34] The truth of her statement in undeniable. It however places before us the real possibility that the enforcement of rights in Malaysia, being resident in para 1, can be shackled or extinguished by a swift legislative stroke.

It is submitted that *Rama Chandran* has been misunderstood. One primary reason is that the court had couched its effort to mould relief within the nomenclature of powers and (inherent) jurisdiction but not in terms of *rights enforcement.* As the court lapsed into the semantics of "powers" and "jurisdiction", the truly sublime achievement of the decision remained buried. This is because the court had already recognized that in the instant case, the right to livelihood guaranteed under Article 5 was transgressed.[35] The court observed thus:

> ...life in Article 5(1) of the Constitution, as Gopal Sri Ram JCA has said in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 at p288, is wide enough to encompass the right to be engaged in lawful and gainful employment.[36]

The court was then disturbed that it could not give meaning to the entrenched right by merely recognizing the transgression. In facing with the potential emasculation of the entrenched right to livelihood, the court had unwittingly embarked on a search for the positive dimension to the said right. Without realizing the magnitude of its achievement, the court nevertheless found itself empowered to mould relief by virtue of its para 1 powers. The court then directed the respondent to pay adequate compensation in lieu of reinstatement. By so doing, what the court has done is to ensure that administrative action is responsive to the guaranteed right.

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[34] *Ibid.*

[35] *Ibid* at p 190.

[36] *Ibid.*

Rama Chandran is truly remarkable because it had uncovered the true philosophical presupposition of judicial review which was hitherto confined to enforcement of only negative rights. The positive dimension places obligation on the court to function as an enabling mechanism in realizing the enjoyment of an entrenched right. If this is so, the moulding of consequential relief should no longer be shrouded in controversy. What the Federal Court has articulated is the positive right to an effective remedy.

It is submitted that meaningful judicial review is possible only if the full potential of rights can be truly realized. Constitutional interpretation demands that the courts scrutinize provisions with contemporary insights while accounting for existing pre-commitments[37] and framers intention.[38] In the light of this, although positive rights which impose social obligations on the executive has previously been regarded as non-justiciable, it does not mean that it has to always remain so. As observed, the courts have generally displayed admirable scholarship in relation to constitutional rights guarantees by creative interpretation. If this is so, they are equally competent to interpret the constitution to develop the positive dimension of rights. Otherwise, the possibility of positive rights will remain dormant. Very importantly, in dispensing this task, the courts work as accountability mechanisms. In this capacity, they have a duty to ensure that the executive and legislature are responsive to the true meaning of rights. Empowered thus, the courts can not only enforce negative rights but inevitably create *positive* rights in order to uphold the constitutional guarantee.

Ambit of Positive Rights

Coming now to the ambit of enforcing positive rights, it is difficult to see how express social obligations demanded of the state can be read into the Malaysian constitution. The fundamental rights clauses in the US constitution which is similarly couched in negative terms are also treated in such manner. However, in a notorious treatment of this principle, the US Supreme Court in *DeShaney v Winnebago County*

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[37] *Ong Ah Chuan v PP* [1981] 1 MLJ 64.

[38] *Meor Atiqulrahman bin Ishak v Fatimah bt Sihi & Ors* [2000] 5 MLJ 375.

Department of Social Service,[39] found no violation of federal constitutional rights when state social service workers took no action to remove a four year old boy from the home of his physically abusive father despite warnings of danger. The father later inflicted brain damage on the boy that was so severe that the child was expected to spend the rest of his life confined to an institution for the profoundly retarded. The majority decision found that the due process clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimum level of safety and security. Blackmun J, in his dissenting judgement however called the majority decision a "retreat into sterile formalism".[40] He likened such a position with those judges who had denied relief to fugitive slaves by claiming the decision to be compelled by existing legal doctrinaire.

In Malaysia, a study of the constitution shows that the notion of positive right in this country may only be extended in the *Maneka Gandhi v Union of India*[41] sense. The Indian Supreme Court in *Maneka Gandhi* had stated that "the expression personal liberty in Art 21 [our article 5 equivalent] is of the widest amplitude and covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights.[42] It is noted that Bhagwati J had said in that case that though couched in negative language, article 21 confers the fundamental right to life and personal liberty. This contemplates the positive facet to the enumerated negative right. To reiterate, the test is whether the right claimed is an integral part of a named fundamental right or partakes of the same basic character as the named fundamental right. This means that the exercise of such a right is in reality and substance is nothing but an instance of the exercise of the named fundamental right. This illustrates the existence of a penumbra of unenumerated rights in the constitution which shadow those that are expressly enumerated. It is therefore possible, and in fact necessary, to read the positive rights as arising as a corollary to a negative right.

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[39] *DeShaney v Winnebago County Department of Social Service* (1989) 489 US 189 at p 204.

[40] *Ibid* at p 270.

[41] AIR 1978 SC 597.

[42] *Ibid.*

This means that the positive right dimension that can emanate in the Malaysian constitution is confined to the *Maneka Gandhi* sense. In other words, positive right is attributable to a negative right as well as the corresponding penumbra of rights. By recognizing this, the courts can enforce the true meaning of an enshrined right. Choosing to talk in terms of *rights* rather than policies or interest or in the *Rama Chandran* case, jurisdiction, represents a fundamental jurisprudential commitment which is reflected in the way concrete problems are resolved. This is because rights arise primarily in deontological ethical theories while policies and interests are instrumental or consequentialist.[43] At the same time, this clarifies the notion of duty within the constitution. Certainly negation of positive rights ignores the constitutional duties of the government. The presupposition of judicial review must thus give recognition to the multifaceted possibility of a constitutional right.

Deconstructing Limitations

For too long, enforcement of positive rights remained an unconsidered possibility in constitutional discourse. The attendant problems are not non-existent. The fear is that in enforcing positive rights, the courts will descend into the political realm as decisions will tread on budgetary implications. It also poses questions on the danger of allowing the courts to make a variety of demands to enforce social rights. This would stretch the constitution to an unacceptable height and run foul of the doctrine of separation of powers. The courts competency to undertake such a role is also questionable.

It is emphasized that the multifaceted dimension places an onus on the courts to calibrate the true nuance of the embodied right. The courts, it was observed, are eminently suited for the task of interpretation. Further, budgetary constraints can be overcome if seen in term of long term benefits. Of course, enforcement of positive rights exerts money. Then again, any remedy granted by a court will have some budgetary repercussions, whether it be a saving of money or expenditure of money.[44] Geraldine Van Beuren comments that although the

[43] L Brilmayer, 'Rights, Fairness and Choice of Law' (1989) 98 Yale LJ 1277 at p 1278.

[44] Observation of the Canadian Supreme Court in *Schacter v Canada* [1992] 2 SCR 679 at p 709.

focus is on immediate expenditure, incorporating economic, social and cultural rights may increase the wealth of a state. Applying a cost benefit analysis, she says that the right to education is an investment in human capital, the right to social security helps sustain consumer demand, the right to the highest attainable standard of health ensures a more efficient workforce.[45]

Further, no attempt is made to suggest that this is the *only* way or even optimal way to obtain social justice. Although the judiciary can spur societal reform, social changes are more often than not the result of years of struggle at the grassroots by individuals, NGOs and politicians. Invariably, the law reflects the outcome of struggles in economic, social or political arenas.[46] As observed by Scott and Macklem, constitutional adjudication should be seen as "one locus of struggle in a broader constitutional politics".[47]

Lastly, although Malaysia has not ratified the United Nations Covenant on Economic, Social and Cultural Rights, there is comprehensive legislation in place, ensuring that the welfare of the people are taken care of. Whether the constitution will one day be amended to expressly enumerate social and cultural rights is yet to be seen. For now, as the constitution contemplates positive rights, it falls on the judges to give meaning to it.

Conclusion

To conclude, current ignorance of positive rights provides an obstacle in the effective enjoyment of rights. Until the constitution is amended to meet the demands of positive rights, reliance on the judiciary is the only hope for recognition of the true value of rights. Courts as an institution operate within a particular social and historical context, influencing and responding to community values. The courts must explore the possibilities of positive rights. Otherwise, the poor and downtrodden

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[45] GV Beuren, *op cit* at p 459.

[46] Scott and Mackelm, *op cit* at p 32.

[47] *Ibid.*

will be forgotten entities within the constitutional set-up. Only then will Malaysian rights jurisprudence embody the true meaning of rights.

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THE POLITICAL ECONOMY OF CONSTITUTIONAL REFORM IN AN EXTERNALLY-CONSTRAINED ENVIRONMENT: CHINA'S SHADOW OVER HONG KONG AND STRATEGIES TO MINIMIZE IT

Abstract

Hong Kong is a highly developed metropolis - affluent, dynamic, flexible, open, blessed with excellent infrastructure, enjoying British-style rule of law, benefiting from a free flow of information, and being "guided" by a generally efficient and clean government. Its economic foundations are robust and their social counterparts display few signs of fragility. Hong Kong's political institutions, on the other hand, still bear the marks of the benevolent authoritarianism which characterized the colonial era. As such, they are arguably out of sync with the socio-economic environment in which they are embedded. A distinct majority of the local population is clamoring for representative democracy. Those spearheading the effort have exhibited remarkable courage, dedication, selflessness, and consistency. However, they may have pursued an overly narrow agenda. This agenda could be broadened and, in the process, possibly rendered more palatable from a Chinese perspective, as well as intellectually credible.

Introduction

Hong Kong qualifies as a special case in the annals of international and constitutional law. Over a long period featuring radical shifts in the economic, political, and social domain, it functioned comfortably as a British colony. Its political institutions did not match the sophistication of its economic - or even social - counterparts, but the local government acted in a generally benevolent fashion and avoided authoritarian excesses. Indeed, the policy making apparatus operated in a mostly