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**The Rule of Law and  
Regimes of Exception in East Asia**

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## **INTRODUCTION: REGIMES OF EXCEPTION**

The ‘rule of law’ we agree—and it is almost a motherhood statement—is vital for any functioning of liberal democracy. But why then is it so hard to establish and consolidate in East Asia? The usual response to this problem is framed in one way or another in terms of the malevolent interests of dominant political actors. However, I want to propose instead that the problem is much more deep-seated and needs to be located in the modalities through which political actors—even those of an oppositional bent—have cognized the foundation of state power and the relationship between the state and the citizen.<sup>1</sup> But let me make it clear that in highlighting these factors I do not in anyway seek to deny the capricious and arbitrary use of the legal system by political leaders for short term ends; the recent and most blatant political trial of Anwar with its flagrant abuse of the Malaysian judiciary is ample testimony to the importance of these factors.

What is interesting about the use of state power in East Asia is the constant deployment and justification of executive power in the name of public order and national unity. In pursuit of these ‘public order’ objectives political and military leaders in the region have suspended even the often rudimentary civil and political rights contained in their constitutions. Quite often these objectives have been enabled by emergency or internal security provisions within the constitution—often a product of the colonial state—give public authorities far-reaching power to suspend normal legal and political processes. In short, to exercise power through exceptional and executive prerogative power.

Carl Schmitt, the deeply conservative jurist who was a critic of the Weimar Republic, is perhaps the most preeminent theorist of the exception: ‘Exception’ is the capacity of the sovereign to make decisions in terms of its political will rather than be constrained by normative ‘law’. Schmitt suggests the exception as something which is ‘... codified in the existing legal order, can at best be characterized as a state of peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually

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1. For a more detailed elaboration of this argument see Jayasuriya (1999a) as well as the other papers in Jayasuriya (1999).

and made to conform to preformed law' (Schmitt 1985: 6). Schmitt especially in his early writings he draws a strong link between the power to decide on what constitutes the exception and sovereignty; it is sovereignty which is at the heart of the regime of exception.

Specific emergency constitutional provisions have allowed governments to constitute—in all meaning of that word—a regime of exception. As Loveman (1993) points out in a superb account of Latin American constitutional history, such a regime of exception allows a temporary suspension of existing constitutional provisions in order to give executive authorities far-reaching powers to reorganize the governmental apparatus. The use of such emergency provisions is a familiar aspect of executive power in the region. The beginning of the new order regime, operation cold storage in Singapore, and the May 1969 riots in Malaysia have triggered the initiation of emergency provisions that have resulted not only in the suspension of normal political processes but also a radical reorganization of the apparatus of power which has resulted in extensive centralization of power and increased reinforcement of the coercive powers of the state. This much is familiar enough. Indeed the new order regime provides an excellent illustration of a regime of exception. But what is of more interest here—and this contrasts with Loveman's) analysis of Latin America—is that there has been, particularly in Malaysia and Singapore, no return to a state of normalcy. In fact, regimes of exception have become the norm.

## **EXCEPTION AND THE NORM**

Let me explain. In both Malaysia and Singapore in recent years there has been little use of the Internal Security Act (hereinafter referred to as the ISA) to curb the actions of oppositional political elements. Instead, political executives have routinely resorted to the normal civil and criminal law to intimidate and crush political opposition. In effect, the regime of exception has become normalized in a juridical fashion. One clear consequence of this is that the line between acts of exception (such as the use of the ISA) and normal legal process has become increasingly occluded. In one sense, civil and criminal law has been infused with the very vague political standards that previously

defined a state of exception. The exception has become the norm.

Nothing illustrates this point more than the recent trial of Anwar Ibrahim whose trial has exposed the blatant and obvious abuse of the criminal law as a political instrument. Of course, the trial and consequent jailing of Anwar was preceded by the imprisonment of the Opposition Leader, Lim Guan Eng on a charge of sedition (*Lim Guan Eng V Public Prosecutor* (1998) 3 MLJ 14). The charges originated in an allegation of selective prosecution in relation to actions taken by an UMNO chief minister in the state of Malacca but it was subsequently interpreted by the Court of Appeal as a general attack on the judicial system. As the International Bar Association's (IBA 2000) excellent account of the state of Malaysian judiciary aptly points out the 'case has left us with relatively harsh laws which censor public opinion about the working of the legal and judicial system and which merits re-examination. The decision in Lim Guan Eng's case strengthens rather than mitigates the law relating to publications and seditious' (IBA 2000: 35).

More recently, the trial of Karpal Singh, the main lawyer in the Anwar Ibrahim prosecution, has been charged with sedition in respect to statements made in court while conducting Anwar's defense (IBA 2000:36). The most troubling aspect of this prosecution is the obviously adverse message it sends to those lawyers courageous enough to take on political cases such as the Anwar trial, serving to clearly identify political trials as a separate category of legal procedure where the executive together with a compliant judiciary will not hesitate to use political standards (rather than legal criteria) to achieve the outcomes desired by the executive. But, the more general point I want to make about these recent examples from Malaysia is the fact that the ISA, unlike at times of other political crises, has not been used; instead, the government has employed normal civil and criminal procedures to harass and intimidate oppositional forces.

However, these examples from Malaysia parallel established practice of Singapore which routinely uses defamation and contempt charges against foreign journalists and opposition politicians. Francis Seow, in his *Media Enthralled* (Seow 1998) has demonstrated the political efficacy of defamation law to silence foreign media criticism. For example, the defamation action by Singaporean Prime Minister Goh Chok

Tong, Deputy Prime Minister Lee Hsien Leong and Senior Minister Lee Kuan Yew against the *International Herald Tribune (IHT)* and journalist Philip Bowring who wrote an article on political nepotism in Singapore. The judge, in awarding damages against the *IHT*, argued that the article fundamentally damaged the executive ability to govern (*Strait Times Weekly Edition*, 26 August 1995: 2). The advantage of using such vague legal standards is that it can broaden defamation so as to protect the political executive from any criticism.

Singapore use of these procedures against its domestic critics has been well documented (Jayasuriya 1996,1999a; Tremewan 1994). For example, Tremewan (1994) underscores the way the Opposition leader J B Jeyaretnam has been subject to civil and criminal action, which has severely undermined his capacity to oppose the regime. In this regard, he points out that 'Political leaders from legally registered parties were no longer detained under the ISA as they were in the 1960s. The government began to criminalise such people under the criminal law as professionally negligent or as thieves, perjurers and bankrupts. An analysis of Jeyaretnam's convoluted battle against a series of trumped criminal charges illustrates this change of strategy' (Tremewan (1994: 206).

While Singapore and Malaysia provide clear examples of the use of legalism as a technique of governance, it also reflects a more general East Asian pattern. In the Indonesian context, notions of legalism and constitutionalism have been central to the consolidation and entrenchment of the New Order Regime. To cite an example, Van Langenberg (1990) observes that notions 'about constitutionalism ... and legalism (*hukum*) have been at the forefront of the ideological formulation used by governors of the New Order since its very inception' (1990: 130). He goes on to note that 'hand in hand with draconian exercise of power ... has gone the use of national constitution and the judicial process to effect social control' (p. 130). Lev (1985) makes the intriguing point that the use of this legalism in the New Order period bears some continuity with colonial legal traditions and institutions. He notes that both the colonial and post colonial regimes 'used and appropriately supplemented the repressive instruments of the criminal code much as Batavia had used them' (Lev 1985: 73).

The point I want reiterate here is that this use of normal criminal and civil

procedures effectively normalises the regime of exception; law itself becomes an instrument of political rule. The advantage that this offers authoritarian regimes is that it gives a degree of legitimacy to its action which would have been absent if emergency or prerogative powers were in place. It is rule *by* law not the rule *of* law.

Another feature of these political trials in Singapore and Malaysia is that ‘the restraint of foes is very much less important than the psychological effect on the public at large and on potential or actual competing parties loyal to the regime’ (Kirchheimer 1961: 422). The trial is primarily directed at reinforcing regime policies and actions. In fact, ironically, it transforms the court into a one sided political arena. Hence, these trials serve to shape perceptions and images of events, persons, or groups. The trial provides a quasi neutral authoritative sphere in which the images and perceptions can be constructed, and, as Kirchheimer has correctly observed, ‘the public is given a unique chance to participate in the recreation of history for the purpose of shaping the future’ (1961: 422). The political trial serves a public interlocutory function for authoritarian regimes in East Asia. In other words, the trial is used to disseminate state *practices* and *routines* to the citizenry.

A further aspect of these ‘political trials’ is the fact that civil and criminal (e.g., defamation and contempt law) procedures are used to place important political and judicial institutions beyond reach. During the Anwar trial, one of his lawyers, Zainur Zakaria was charged with contempt, and, Lim and Singh face sedition charges for criticism of the judiciary as a whole. This follows the earlier jailing of journalist Murray Hiebert. The International Bar Association notes that ‘Malaysian courts have interpreted what amounts to or may amount to contempt, there are well-founded grounds for concern that in certain circumstances the ability of lawyers to render their services freely is adversely affected by the use, or threatened use, of the contempt of power’ (IBA 2000: 26). But, the point here is that contempt of court proceedings are not confined to a proceeding in any single court; rather, it is used to restrict any criticism directed at the judiciary as a whole. Similarly, the *IHT* defamation case in Singapore was interpreted by the court as defamation of the entire executive (discussed in more detail below). By the use of such procedures authoritarian political leaders have managed to stifle any critical

public discussion or debate that touches on key institutions of the executive. It effectively serves to insulate key executive institutions from any political criticism.

## **SINGAPORE AND THE JURIDICAL BASIS FOR A REGIME OF EXCEPTION**

The paper has illustrated the extent to which political élites increasingly rely on the use of civil and criminal law procedures. In the case of Singapore, the use of such procedures has been paralleled by a kind of juridical constitutional justification of the use of executive power.<sup>2</sup> The Singapore judiciary has, in effect, attempted to provide a juridical foundation for the use of executive powers. It is a fundamentally illiberal reading of the constitution. But it serves to remind us of the powerful illiberal ideological traditions which provide the backdrop to the relationship between state and citizen in Southeast Asia.(Jayasuriya 1999b).

A key case in this regard is the aforementioned defamation action taken by Senior Minister Lee Kuan Yew, his son, the Deputy Prime Minister, Lee Hsien Loong and Prime Minister Goh Chok Tong against the for publishing an article entitled: ‘The claims about Asian values don’t usually bear scrutiny’ (*IHT* 2<sup>nd</sup> August 1994). In this article, Phillip Bowring, a journalist on the staff of *IHT*, argued that dynastic politics was evident in the Singaporean polity. In finding for the plaintiffs and awarding damages against the *IHT*, Justice Goh argued that, because three plaintiffs are the top three Ministers in the government, to accuse them of corruption and nepotism,

was an attack that would cause grievous harm to them in the discharge of the functions of their office and indignation on their part as it was an attack on the very core of their political credo. It would undermine their ability to govern’ (Singapore Law Reports 1995: 491).

It is implicit in the above statement that one of the main functions of the judiciary is to protect the reputation of government leaders as this would strengthen and enhance the ability of the executive to carry out governmental functions.

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2. See Jayasuriya (1999b) for a more detailed elaboration of this point.

The *IHT* case was of special significance because the judgement went much further than a simple case of an assessment of injury caused to personal reputation by the article in question (which had already been given a very broad reading in earlier defamation action). It explicitly argued that adverse comment on political leaders amounted to a threat to political stability. It is clear that the main ideological core of legal reasoning in this case was the notion that the judiciary should act to defend stability and order. The *IHT* case, is however, a curious one because it also suggests that the judiciary is not only deferential but also activated by a desire to provide new grounds for executive power.

A similar line of reasoning can be discerned in an earlier case that centred on the distribution of publications by Jehovah's witnesses, a group de-registered by the Minister of Home Affairs under the Societies Act in 1972. In the Appeal Court, the appellants challenged the order for de-registration and prohibition on the grounds that they were 'ultra vires' to the enabling Acts and in contravention of Act 15 of the Singapore Constitution. The case, which was heard by Yong Pung How CJ, enables us to delineate some of the key ideological features of judicial reasoning that illustrate the emergence of a jurisprudence of corporatism. In dismissing the appeal, it was argued that the

sovereignty, integrity and unity of Singapore are undoubtedly the paramount mandate of the Constitution and anything, including religious beliefs and practices, which tend to run counter to these objectives must be restrained (Singapore Law Reports 1994, 665).

The first recurring ideological theme in this judgement is the emphasis on the paramount importance of public order. The primacy given to internal security is consistent with an organic conception of state and society. The second theme that runs through the judgement is the implication that the state had a duty to act even before evidence of a disruption to 'public order'. The judgement, as in the later *IHT* case, goes on to strongly defend executive power by noting that

any administration which perceives the possibility of trouble over religious beliefs and yet prefers to wait until trouble is just about to break out before taking action must be not only pathetically naïve but also grossly incompetent (Singapore Law Reports 1994, 683).



This line of reasoning, again, directs us to the strong corporatist elements in judicial reasoning. It places great importance on the judiciary acting to protect the ability of the executive to implement its conception of the good. As Thio (1995) points out, ‘this approach advocates a jurisprudence of pre-emptive strikes, indicative of the exaltation of efficiency over all other interests’ (1995: 88). By adopting such a point of view, the judiciary is transformed into an institution that enforces technocratic conceptions of the good.

The third important element in the *IHT* judgement is the appeal, made in the Judgement, to the importance of unique local conditions. This is apparent in the remark of the Appeal Judge stating that:

I am not influenced by the various views as enunciated in the American cases cited to me but instead restrict my analysis of the issues here with reference to the local context (Singapore Law Reports 1994: 681).

Of course, in itself, this reference to local condition is neutral and cannot be said to construe any particular ideological belief. However, in the particular context of Singapore, appeal to the importance of local circumstances has a certain resonance associated with survival and security. In recent years, this meaning has been extended to cover the defence and protection of ‘Asian’ values. Therefore, the appeal to local circumstances is a proxy for use of public order reasons for enabling executive prerogative.

What the *IHT* and the Jehovah’s Witness case underscores is the pervasive influence of the notion of public order and security in providing a rationale for the regime of exception; it in effect provided an illiberal juridical foundation—quite separate from the emergency provisions—for Singapore’s regime of exception.

## **ANTI-POLITICS AND THE REGIME OF EXCEPTION**

One of the overriding features of the regime of exception is the hostility to political pluralism. Political pluralism is considered to be a basic threat to political order and stability. Citizenship on this perspective means sharing the fundamental values and goals

of the state; there is, a fundamental political unity between the people and the state. Of course, the ideology of 'Asian Values' resonates with this reasoning because one of the distinguishing features of the Asian value discourse is the distrust and hostility towards pluralist politics (Jayasuriya 1998). In Singapore, there has emerged a kind of anti-political 'politics'. From this anti-political normative framework, politics is often seen as disruptive element in the political unity that is embodied in the state. To use a phrase of Carl Schmitt (1994), the state is the political unity of the people. And this political unity (which can be on the basis of any criteria) provides the foundation for the citizens' association or disassociation with the political community. For Schmitt (1994), politics (defined in terms of relationships to other states) is defined by the capacity of the state to distinguish between friends and enemies and leading paradoxically to a deeply anti-political notion of politics.

There are a number of ways in which these anti-political ideas are articulated in the Asian values discourse. First, there is the claim that liberal or pluralist politics is unnecessary because there is no independent sphere of civil society. In turn, groups and interests are denied political legitimacy; to be in opposition is to be disloyal to the state. From this perspective, opposition—formal or informal—has little or no legitimacy in East Asia. Second, there is the claim—and this is especially evident in Singapore—that politics obstructs a technocratic and managerial approach to social problems. In short, anti-politics takes the form of a managerial approach to politics. These forms of anti-politics are especially attractive to those states that have attempted to build 'capitalism from above'. There is a natural affinity between the technocratic and managerial nature of capitalism and the growth of anti politics exemplified in Asian values ideology.

As an anti-political ideology, Asian values redefines the notion of citizenship and the relationship between the state and the individual in terms of duties and obligations rather than rights. For example, in Singapore, welfare services are provided by the state as a reward for loyalty to the state rather than as a right or entitlement. Similarly, work and the economy are central to East Asian conceptions of citizenship as providing a focus for state exhortation for discipline and harmony in order to construct the imagined political community. In Malaysia, for example, criticism of the government's economic

strategies was taken to be fundamentally at odds with the obligation of citizenship.

Asian values of course had taken a body blow—although it is very much in the ideological ring—after the Asian crisis. But anti-politics finds a congenial home in the technocratic and managerial strategies that have come to dominate the region. In fact, there is a strong anti-political bent in the kind of governance programs advocated by the World Bank and other multilateral agencies. Some governance strategies strive to close off and insulate the market from political processes. In this context, it is noteworthy that the Singaporean government often associates Asian values with good governance, which in turn is often seen as quarantining the market from politics. In fact, these arguments find great sympathy with ideas of North American think tanks such as Hoover and the Heritage Foundation which place emphasis on the importance of protecting property rights—economic liberty’—from, what these groups consider as the corrosive effects of democratic politics. From this perspective, the ideology of Asian values embodies an attempt to have a strong state as well as a free market, but without politics.

Again, the law and legalism rather than giving supporting and providing a supportive framework for political pluralism may in fact turn out to be a mode through which the technocratic and managerial state gives effect to its policy goals and objectives. Particularly in the context of economic adjustment of the type underway in East Asia, there will be strong pressure to see legal reform in a highly technocratic and anti-political mould. A regime of exception may well be sanitised through these kinds of technocratic programs but the fact remains that anti-politics in whatever hue remains deeply antagonistic to liberal pluralism.

## **THE DUAL STATE AND THE REGIME OF EXCEPTION**

The preceding discussion has identified the potential for legalism to coexist with an illiberal political regime. The social democratic jurist Frankel (1941), writing about Nazi Germany in the 1930s, described the emergence of what he called the dual state—a state founded on prerogative or exceptional power which functions alongside an arena of private or economic law regulated by a ‘normal’ law. In particular, he notes that, by ‘Prerogative State we mean that governmental system which exercises unlimited

arbitrariness and violence unchecked by and legal guarantees, and by the Normative state an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts and activities of administrative agencies'. He goes on to observe that the most important point about the dual state is the way it has succeeded in combining arbitrary power with capitalist organization. The key to understanding the emergence of the 'Rule of Law' lies in the simultaneous existence of the Prerogative and Normative state. Fraenkel points out that there is a necessary and logical interdependence of the normative and prerogative state. The dual state combines the rational calculation demanded by the operation of the capitalist economy, within the authoritarian shell of the state. As Fraenkel notes (in relation to German capitalism) capitalism 'will accommodate itself to any substantial irrationality if only the necessary prerequisites for its technically rational order are preserved'. At the core of the dual state is the parallel existence of both an economic order regulated by law and a political sphere unbounded by any legal parameters; in a dual state economic liberalism is enjoined to political illiberalism.

The distinctive feature of authoritarian legalism is the capacity of the state to provide an arena of private law without any expansion of the public sphere. In other words, the economic arena is depoliticised. As such, legal institutions—contrary to the expectations of theorists and international policy makers alike—facilitate both authoritarianism and markets. For those looking for historical parallels, the example of Prussia/Imperial Germany in the late 19<sup>th</sup> century, rather than England, may provide a valuable historical model for the development of authoritarian legalism in East Asia.

In the case of Prussia, legal change is from above; that is, through the actions of state élites rather than through pressure from below. The dynamics of legal institutions and the rule of law in this instance must be located in terms of the actions and interests of state élites. This is also confirmed by John (1989) who in an extensive study of codification of civil law in Germany, points out that codification was influenced by the bureaucrats who viewed the national code as a means of tying the newly created nation together; codification was a state building instrument. The Prussian state had little institutional stability. It was a diverse political structure composed of a range different

legal systems in various provinces, and the law, in this context, was seen as an integrating force (Breuilly (1991)).

In this regard, Berman's (1991) discussion of the differences between English conceptions of the rule of law and German positivist notions of law comes in handy. Berman argues that the concept of Rechtsstaat in the German tradition may be regarded as 'Gesetzesstaat, that is, a state that rules by *laws*.' (Berman 1991: 3). But the notion of a Rechtsstaat, unlike the rule of law which was associated with ideas of parliamentary sovereignty, emerged in the context of an authoritarian and non-participatory political system. Berman's discussion of these differences is noteworthy in that it recognizes that any discussion of the rule of law needs to be placed in a historical context, and more importantly, located within a particular authoritarian state tradition.

The crucial point about these state traditions in Prussia/imperial Germany is that the state was constituted as an abstract entity which stood above society. The state, as a legal structure, might guarantee legal equality and civil rights, but these are entitlements *granted* by the state rather than rights *achieved* by political actors working through the state. The point is that the state is perceived as an abstract entity acting in the general interest to impose rules upon society.

In this connection, Singapore provides a good example of the dual state that we have identified as the hallmark of a regime of exception. The rule of law, the Singaporean leaders argue is one of the defining features of the Singapore state, but it is a legalism which applies selectively to the economic or commercial sphere; the political arena is regulated by executive prerogative power. In both colonial Hong Kong and independent Singapore, legalism has been used as a particularly effective weapon to depoliticise the society. Despite assumptions to the contrary new Chinese rulers in Hong Kong may find this form of authoritarian legalism quite handy (Jones 1999). In fact, in the aftermath of the recent and disturbing setback to the rule of law in Hong Kong after the judgement of the Court of Final Appeal on the right of abode, members of Hong Kong's executive were at pains to point out that the rule of law, as it applied to the commercial arena, would be unaffected by recent developments. In short, it exemplifies the kind of dual state that we have observed in Singapore. What is important to note here is that the

development of the dual state not only insulates the executive from the constraints and restraints of normative law, but the law itself is used to curtail and limit political opposition. Put simply, authoritarian legalism takes politics out of the law an essential element of dual state identified by Frankel (1941).

The authoritarian legalism that we have identified in Singapore and Malaysia may prove to be an attractive model for the Peoples Republic of China (PRC). For example it is relevant to note that in the PRC Constitution the grant of legal equality is qualified by the fact that these provisions cannot override the interest of the state (in effect, creating a ‘dual state’). However, even more pertinent is the fact that legal equality does not extend to the workplace where the organization of labour remains paramount. In other words, because legal equality has limited applicability in the sphere industrial relations, labour is restricted in its capacity to bargain either individually or collectively. In fact, the Chinese example can be extrapolated in much of Southeast Asia (perhaps with the exception of South Korea and Taiwan) where the legal recognition of the bargaining power of labour remains highly circumscribed (Jayasuriya 1999a). Again, these examples illustrate the extent to which East Asian states have the capacity to seal off arenas of law so that, for example, legal rights in the commercial arena are not extended to labour.

In Western Europe, it was the political action of labour that enabled the extension of notions of legal equality to the employment contract. Clearly the extension of these rights to labour neatly illustrates the conjunction between private and public autonomy—so vital to liberal legalism and constitutionalism. This linkage is singularly absent in East Asia where the disjunction between private and public autonomy allows the state to seal off distinct legal arenas thereby creating a fragmented state with segmented juridical regimes; the rule of law comes to be seen as the handmaiden of the market economy not as the facilitator of the public autonomy needed for political pluralism and contestation vital for democratic polities.

Indeed, the kind of dual state that we have identified may well be reinforced by the rapid globalisation of the international economy. Governments may well see the segmentation of juridical regimes between the economic and the political arena as one way of adjusting to the realities of the international global economy and foreign investors

who demand open and transparent commercial legal regimes. At the same time it will help to seal off the political arena from political contestation, thereby helping to protect the congeries of vested interests formed around the structures of East Asia's authoritarian capitalism. In other words, authoritarian legalism depoliticises the economy.

The movement towards a dual state is reinforced by the recent shifts towards the adoption of governance agenda by multilateral institutions. The governance programs can be considered to be form of economic constitutionalism; Economic constitutionalism refers to the attempt to treat the market as a constitutional order with its own rules, procedures, and institutions that operate to protect the market order from political interference. However, these forms of economic constitutionalism demand the constitution of a specific kind of state organisation and structure: a regulatory state whose purpose it is to safeguard market order. This is in essence the kind dual state that Frnakel identified and which Schmitt in his later 'institutionalist' phase sought to promote.

This authoritarian liberalism finds a strong resonance in the German school of *ordo liberalism*. One of its prominent exponents, Walter Eucken was closely associated with the extremely conservative Von Papen government in the early 1930s. Central to *ordo-liberalism* and Eucken's thought was the notion that the construction of economic order cannot be left to the spontaneous actions of the market but needs to be created through a consistent ('*ordnungspolitik*') of the state. For the *ordo-liberals* of the Freiburg school economic and legal processes are interrelated; the market is not a spontaneous creation but the outcome of concerted action by the state. Therefore for the *ordo-liberal*, the state should not attempt to conduct the economy but rather should provide a system of juridical institutions that would facilitate the construction of the market. In fact, in its emphasis on the role of economic institutions in creating market order it presages the new institutional economics.

The *ordo-liberals*, unlike the new institutional economists with whom they otherwise have much in common, are clearer about the political ramifications of notions of economic constitutionalism. Eucken and others were very concerned about the anti competitive effects of society on the economy. Eucken, for example, strongly influenced by Carl Schmitt, argued that by the end of the 19<sup>th</sup> century the state was increasingly

captured by private interest groups; this led to the politicisation of the economy which in turn weakened the state. In other words, the main purpose of economic constitutionalism was to protect the economy from these political pressures. Therefore, this understanding of economic order implied the existence of institutions to protect the politicisation of the economy; and this could not be but authoritarian. The kind of regulatory state advocated by the ordo-liberals could only be achieved at the expense of political constitutionalism that is through the construction of a dual state. (Jayasuriya 1999c)

## **CONCLUSION**

The nub of this argument is that the political regimes in Southeast Asia have been constituted as regimes of exception giving political executives in the region far reaching powers to restrict and restrain political pluralism. Consideration of the examples of Malaysia and Singapore has revealed the extent to which regimes of exception have been given a juridical foundation which has in many instances blurred the distinction between normal and exceptional legal situations. What needs to be clearly understood is the way in which a regime of exception is compatible with a widespread use of legalism. For example, in Singapore and Malaysia the normal procedures of civil and criminal law have been used as a political instrument to intimidate political opponents. In a similar manner, Singapore has moved to provide a juridical foundation for the regime of exception. Quite simply, regimes of exception are compatible with a widespread use of legalism

A second overriding consideration to emerge from this analysis is that there is no simple correlation between the development of market forces and the emergence of the rule of law and liberalism. Institutions are not passive structures waiting to be shaped by the forces of economic development; legal institutions, like other institutions, are historically woven into a complex web of social and political forces. In the East Asian case, it has been argued that legal institutions need to be understood in terms of their location within the illiberal political traditions of East Asia. These traditions have deep historical roots in both colonial and post-colonial legal systems and will continue to be a powerful influence on way political élites cognise authority and citizenship.

Finally, I hope this analysis has revealed the complexity of the notion of the rule



of law. The rule of law cannot be engineered; it needs to be located in a historical and political context. Simply assuming that a market economy requires a credible legal framework is not enough to assure the development of a pluralist political system. As we have seen, regimes of exception are quite compatible with a dual state where the 'rule of law' applies to the economy but not to the political arena. Putin's recent statement about the dictatorship of law moves precisely in this direction of authoritarian legalism and it is a path that Singapore has already trodden. Such a development is deeply inimical to the emergence of political pluralism in East Asia. In other words, the rule of law must not be a substitute for politics but a handmaiden for a flourishing liberal democracy. This is the challenge for those wishing to bring about political change in East Asia.

## REFERENCES

- Berman, Harold J. 1991. 'The Rule of Law and the Law-Based State (Rechtsstaat)'. *The Harriman Institute Forum* 4(5): 1-12.
- Breuilly, J. 1991. *Labour and Liberalism in Nineteenth-Century Europe, Essays in Comparative History*. Manchester & New York: Manchester University Press.
- Fraenkel, Ernst. 1941. *The Dual State*. Translated from the German by E.A. Shils, in collaboration with Edith Lowenstein and Klaus Knorr. London: Oxford University Press.
- IBA (International Bar Association) 2000. *Justice in Jeopardy: Malaysia*. New York.
- Jayasuriya, K. 1999. *Law, Capitalism and Power in Asia: the Rule of Law and Legal Institutions*. London: Routledge.
- Jayasuriya, K. 1998. 'Understanding Asian Values as a form of Reactionary Modernisation'. *Contemporary Politics* 4(1): 77-91.
- Jayasuriya, K. (ed.) 1999. *Rule of Law and Legal Institutions in East Asia*. London: Routledge.
- Jayasuriya, K. 1999a. 'A Framework for the Analysis of Legal Institutions in East Asia'. in K. Jayasuriya (ed.), *Rule of Law and Legal Institutions in East Asia*. London: Routledge.
- Jayasuriya, K. 1999b. 'Corporatism and Judicial Independence within Statist Legal Institutions in East Asia'. in K. Jayasuriya (ed.) *Rule of Law and Legal Institutions in East Asia*, Routledge.
- Jayasuriya 1999c. 'The Rule of Law and Governance within the East Asian State'. *Australian Journal of Asian Law* 1(2): 1-28.
- Jayasuriya, K. 1997. 'Rule of Law and Capitalism in East Asia'. *Pacific Review* 9(3): 367-88.
- John, J. 1989. *Politics and Law in Late Nineteenth-Century Germany: The Origins of the Civic Code*, Clarendon: Oxford University Press.
- Jones, C. 1999. 'Politics Postponed: Law as a Substitute for Politics in Hong Kong and China'. in K. Jayasuriya (ed.), *Rule of Law and Legal Institutions in East Asia*. London: Routledge.
- Kirchheimer, Otto 1961. *Political Justice: The Use of Legal Procedure for Political Ends*. Princeton, New Jersey: Princeton University Press.
- Lev, Daniel 1985. 'Colonial Law and the Genesis of the Indonesian State'. *Indonesia* 40 (October): 57-74.
- Loveman Brian 1993. *The Constitution of Tyranny: Regimes of Exception in South America*. Princeton: Princeton University Press.
- Schmitt, Carl 1976. *Concept of the Political*. New Brunswick: Rutgers University Press.
- Schmitt, Carl 1985. *Political Theology: Four Chapters on the Concept of Sovereignty*. MIT Press.
- Seow, Francis 1998. *The Media Enthralled: Singapore Revisited*. Boulder: Lynne Rienner.
- Singapore Law Reports 1994. *Colin Chan v Public Prosecutor* 3: 662-88.

Singapore Law Reports 1995. *Lee Kuan Yew v Vinocur* 3: 477–94.

Thio, Li-Ann 1995. 'The Secular Trumps the Sacred: Constitutional Issues arising from Colin Chan v Public Prosecutor'. *Singapore Law Review* 16: 26–103.

Tremewan, Christopher 1994. *The Political Economy of Social Control in Singapore*. London: Macmillan.

Van Langenberg, Michael 1990. 'The New Order State: Language, Ideology, Hegemony'. in Arief Budiman (ed.), *State and Civil Society in Indonesia*. Monash University, Victoria: Centre for Southeast Studies.