APL&PJ

Asian-Pacific Law & Policy Journal

The Exception Becomes the Norm: Law and Regimes of Exception in East Asia

Kanishka Jayasuriya

http://www.hawaii.edu/aplpj

William S. Richardson School of Law

Volume 2
Issue 1
Winter 2001

The Exception Becomes the Norm: Law and Regimes of Exception in East Asia

Kanishka Jayasuriya*

I. INTRODUCTION: REGIMES OF EXCEPTION

The "rule of law" 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.[1] I 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.[2] In highlighting these factors, however, 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 Ibrahim, with its flagrant abuse of the Malaysian judiciary,[3] amply testifies to the importance of these factors.

---

* Senior Research Fellow, School of Politics and International Studies, Murdoch University, e-mail: wotan@cygnus.uwa.edu.au.

[1] For such an analysis in the Malaysian case, see generally Hari Singh, *Democratisation or Oligarchic Restructuring?: The Politics of Reform in Malaysia*, 35 GOV'T & OPPOSITION 520 (1990).

[2] For a more detailed elaboration of this argument, see generally RULE OF LAW AND LEGAL INSTITUTIONS IN EAST ASIA (Kanishka Jayasuriya ed. 1999), particularly Kanishka Jayasuriya, *Introduction*: *A Framework for the Analysis of Legal Institutions in East Asia*, at pages 1-27.

[3] The case was conducted in such a way that it would be difficult to mount anything like an adequate legal defence. As a noted authority on Malaysian law points out, "The net effect is the politicising of the office of Attorney General, the police and the courts. There is obvious public anxiety if not cynicism. The International Bar Association (IBA) expressed strong negative sentiments regarding the conduct of the Anwar trial." *See generally* Wu Min Aun, *The Malaysian Judiciary: Erosion of Confidence*, 1 AUSTL. J. OF ASIAN L. 147 (1999). Wu notes that the Malaysian Bar Council has expressed grave disquiet at the conduct of the prosecution and the judiciary during the Anwar Trial. *See infra* notes 12-15 and accompanying text.

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. These constitutional provisions 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."[4] Schmitt suggests the exception as something that 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 and made to conform to preformed law."[5] Schmitt, especially in his early writings, draws a strong link between the power to decide what constitutes the exception and sovereignty; it is sovereignty that is at the heart of the regime of exception.[6]

Specific emergency constitutional provisions have allowed governments to constitute—in all meaning of that word—a regime of exception. As Brian Loveman 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.[7] The use of such emergency provisions is a familiar aspect of executive power in the region. The beginning of the new order regime, for example, operation cold store in Singapore,[8] and

---

[4] *See generally* CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (1985). Schmitt begins his book with the famous phrase that a "sovereign is one who decides on the exception." *Id.* at 5.

[5] *Id.* at 6.

[6] *Id.* at 5-35.

[7] BRIAN LOVEMAN, THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SOUTH AMERICA 14–15 (1993).

[8] On February 2, 1963, the ruling Peoples Action Party (PAP) detained 111 Opposition leaders. These actions served to weaken the Opposition and enhance the electoral prospects of the PAP in the general election of 1963.

the May 1969 riots in Malaysia,[9] 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. This reorganization, in turn, has resulted in extensive centralization of power and increased reinforcement of the coercive powers of the state.[10] This much is familiar enough. Indeed, the new order regime provides an excellent illustration of a regime of exception. 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.

The paper seeks to illustrate the extent to which political élites increasingly rely on the use of civil and criminal law procedures. Section II discusses the role of juridical exception in constituting a regime of exception. Section III explores the constitutional foundations on such regime of exception in Singapore. Section IV examines the anti political nature of regimes of exception, and in Section V, the concept of the dual state is used to analyze the accommodation between legalism in the economic sphere and a regime of exception in the political domain. This article concludes by teasing out some of the implications of the existence of a regime of exception for the emergence of the rule of the law in East Asia.

II. EXCEPTION AND THE NORM

In recent years, both Malaysia and Singapore have little used the Internal Security Act (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.[11] 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 have become increasingly occluded. In one sense, civil and criminal law have been infused with the very vague political standards that previously defined a state of exception. The exception has become the norm.

[9] Following the electoral loses of the ruling party, the United National Malay Organisation (UMNO) and their allies in the election of 1969, there was serious rioting which in turn led to a subsequent declaration of emergency.

[10] For Singapore, see generally CHRISTOPHER TREMEWAN, THE POLITICAL ECONOMY OF SOCIAL CONTROL IN SINGAPORE (1994). Tremewan provides important details of the elaborate system of social control instituted by the dominant Peoples Action Party (PAP).

[11] For a discussion of these aspects, see Kanishka Jayasuriya, *The Rule of Law and Capitalism in East Asia*, 9 PAC. REV. 367, 378-84 (1996).

Nothing illustrates this point more than the recent trial of Anwar Ibrahim, which 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.[12] The charges originated in an allegation of selective prosecution in relation to actions taken by the Chief Minister in the State of Malacca, a member of the United Malay National Organization (UMNO), the dominant party in the ruling coalition. The Court of Appeal, however, subsequently interpreted the allegation as a general attack on the judicial system.[13] As the International Bar Association's (IBA) 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 mitigate, the law relating to publications and seditions."[14]

More recently, Karpal Singh, the main lawyer in the Anwar Ibrahim prosecution, has been charged with sedition with respect to statements made in court while conducting Anwar's defense.[15] 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. 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.

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 book, *Media Enthralled*, demonstrated the political efficacy of defamation law in silencing foreign media criticism.[16] Use of defamation law is exemplified by the action by Singaporean Prime

---

[12] Lim Guan Eng v. Public Prosecutor, 3 MALAY. L.J. 14 (Court of Appeal, Kuala Lumpur, 1998), *available at* 1998 MLJ LEXIS 193.

[13] INT'L BAR ASSN, JUSTICE IN JEOPARDY: MALAYSIA 34 (2000).

[14] *Id.* at 35.

[15] *Id.* at 36.

[16] Generally on the Singapore response to the international media, see FRANCIS SEOW, THE MEDIA ENTHRALLED: SINGAPORE REVISITED (1998).

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.[17] The judge, in awarding damages against the IHT, stated that the article fundamentally damaged the executive's ability to govern.[18] 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's use of these procedures against its domestic critics has been well documented.[19] For example, Christopher Tremewan 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.[20] 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.[21]

Although 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. For example, in the Indonesian context, notions of legalism and constitutionalism have been central to the consolidation and entrenchment of the New Order Regime. Michael Van Langenberg 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."[22] He further notes that "hand in hand with draconian exercise of power . . . has gone the use of national constitution and the

---

[17] *See infra* notes 36-39 and accompanying text (discussing Lee Kuan Yew v. Vinocur, 3 Sing. L. Rep. 491 (High Court 1995)).

[18] *See* Wang Hui Ling, *Aggravations considered in damages award –Judge*, SING. STRAIT TIMES, Aug. 23, 1995, *available at* 1995 WL 15541775.

[19] *See* Jayasuriya, *supra* note 11, at 378 (analyzing the use of legalism as a technique of political rule); *generally* Jayasuriya, *supra* note 2 (exploring these ideas in a more theoretical context); *also* TREMEWAN, *supra* note 10, at 187–227.

[20] TREMEWAN, *supra* note 10, at 206.

[21] *Id*.

[22] Michael Van Langenberg, *The New Order State: Language, Ideology, Hegemony*, *in* STATE AND CIVIL SOCIETY IN INDONESIA 130 (Arief Budiman ed. 1990).

judicial process to effect social control."[23] Daniel Lev makes the intriguing point that the use of this legalism during the New Order period bears some continuity with colonial legal traditions and institutions.[24] 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."[25]

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 that 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."[26] 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."[27] 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 use of civil and criminal (e.g., defamation and contempt law) procedures to place important political and judicial institutions beyond reach. During the Anwar trial,[28] one of his lawyers, Zainur Zakaria,[29] was charged with contempt, and Lim and Singh were charged with sedition for criticizing the judiciary as a whole.[30] This follows the earlier jailing of

---

[23] *Id.*

[24] *See generally* Daniel Lev, *Colonial Law and the Genesis of the Indonesian State*, 40 INDON. 57, 57-74 (1985).

[25] *Id.*

[26] OTTO KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS 422 (1961).

[27] *Id.*

[28] *See supra* notes 12–15 and accompanying text.

[29] For details of this case, see INT'L BAR ASSN, *supra* note 13, at 26

[30] *Id*. at 31-36

journalist Murray Hiebert.[31] The IBA 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."[32] This demonstrates 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 court interpreted the IHT defamation case in Singapore as defamation of the entire executive.[33] 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.

III. 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.[34] The Singapore judiciary has, in effect, attempted to provide a juridical foundation for the use of executive powers. Singapore bases its attempt on a fundamentally illiberal reading of the constitution. This attempt serves to remind us of the powerful illiberal ideological traditions that provide the backdrop to the relationship between state and citizen in Southeast Asia.[35]

In this regard, a key case is the aforementioned defamation action taken by Senior Minster Lee Kuan Yew, his son, Deputy Prime Minister Lee Hsien Loong, and Prime Minister Goh Chok Tong against the IHT for publishing an article entitled, *The claims about Asian values don't usually bear scrutiny*.[36] In this article, Phillip Bowring, a journalist on the staff of IHT, argued that dynastic politics

---

[31] Chandra Sri Ram v. Murray Hiebert, 3 Malay. L.J. 240 (High Court, 1997), *available at* 1997 MLJ LEXIS 326.

[32] *See* INT'L BAR ASSN, *supra* note 13, at 26.

[33] *See infra* note 38 and accompanying text.

[34] *See* Kanishka Jayasuriya, *Corporatism and Judicial Independence within Statist Legal Institutions in East Asia*, *in* RULE OF LAW AND LEGAL INSTITUTIONS IN EAST ASIA, *supra* note 2, at 173.

[35] *Id.* at 181.

[36] Philip Bowring, Opinion, *The Claims About "Asian" Values Don't Usually Bear Scrutiny*, INT'L HERALD TRIB., Aug. 2, 1994, *available at* 1994 WL 9793610.

is evident in the Singaporean polity.[37] The court found for plaintiffs and awarded damages against the IHT. Justice Goh, the presiding judge, expressed that, because the 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."[38] This statement implies 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.

The *IHT* case was of special significance, because the judgment went much further than simply assessing the injury the article caused to personal reputation (a standard which had been given very broad definition in earlier defamation cases). The *IHT* court explicitly argued that adverse comment on political leaders amounted to a threat to political stability.[39] 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, however, is 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 centered 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.[40] In the appellate 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 Article 15 of the Singapore Constitution.[41] The case, which was heard by Chief Justice Yong Pung How, 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."[42]

---

[37] *Id.*

[38] Lee Kuan Yew v. Vinocur, 3 Sing. L. Rep. 491 (High Court 1995).

[39] *Id*. at 491.

[40] The appellants were four members of the Jehovah's Witnesses detained under the Undesirable Publications Act for possessing prohibited material.

[41] CONST. OF THE REP. OF SING. art. 15(1) (the religious liberty clause).

[42] Chan Hiang Leng Colin & Ors v Public Prosecutor, 3 Sing. L. Rep. 662, 665 (High Court 1994), *available at* 1994 SLR LEXIS 604.

The first recurring ideological theme in this judgment 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.[43] The second theme that runs through the judgment is the implication that the state had a duty to act even before evidence of a disruption to "public order."[44] 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."[45]

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 Li-Ann Thio points out, "this approach advocates a jurisprudence of pre-emptive strikes, indicative of the exaltation of efficiency over all other interests."[46] 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 *Jehovah's* case is the court's appeal to the importance of unique local conditions. This is apparent in the remark of Chief Justice Yong Pung How, who stated that "[he was] not influenced by the various views as enunciated in the American cases cited to [him] but instead restrict[ed his] analysis of the issues here with reference to the local context."[47] Of course, in itself, this reference to local condition is neutral and cannot be said to construe any particular ideological belief. In the particular context of Singapore, however, appeal to the importance of local circumstances

[43] *Id*. at 688. The court noted that

> [t]he Permanent Secretary of the MITA deposed in his affidavit that the then Minister of culture was satisfied that the Jehovah's Witnesses' teaching and beliefs contained in publications published or printed by WTBTS would be contrary to the national interest, in that they were prejudicial to Government's efforts in nation building, in setting up national armed forces and in maintaining national security, unity, integrity and sovereignty . . . ."

Id.

[44] *Id*. at 665 (noting that "[b]eliefs, especially those propagated in the name of 'religion,' should be put to a stop before the damage sought to prevented could be transpire").

[45] *Id.* at 683.

[46] Li-Ann Thio, *The Secular Trumps the Sacred: Constitutional Issues Arising from Colin Chan v. Public Prosecutor*, 16 SING. L. REV. 26, 88 (1995).

[47] *Chan Hiang Leng Colin*, 3 Sing. L. Rep. at 662, 681.

has a certain resonance associated with survival and security. In recent years, this meaning has been extended to cover the defense and protection of "Asian" values. Therefore, the appeal to local circumstances is a proxy for use of public order reasons for enabling executive prerogative.

The *IHT*[48] and the *Jehovah's Witness*[49] cases underscore the pervasive influence of the notion of public order and security by providing a rationale for the regime of exception; the two cases, in effect, provided an illiberal juridical foundation—quite separate from the emergency provisions—for Singapore's regime of exception.

IV. ANTI-POLITICS AND THE REGIME OF EXCEPTION

One of the overriding features of the regime of exception is the hostility to political pluralism.[50] 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 values discourse is the distrust and hostility towards pluralist politics.[51] In Singapore, a kind of anti-political "politics" has emerged. From this anti-political normative framework, politics is often seen as a disruptive element in the political unity that is embodied in the state. To use a phrase of Carl Schmitt, the state is the political unity of the people.[52] 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, politics is defined by the capacity of the state to distinguish between friends and enemies and leads ironically to a deeply anti-political notion of politics.[53]

These ant-political ideas are articulated in a number of ways in the Asian values discourse. First, there is the claim by some that liberal or pluralist politics is unnecessary, because civil society has no

---

[48] *See supra* notes 36-39 and accompanying text.

[49] *See supra* notes 41-48 and accompanying text.

[50] Regimes of exception often rely on the identification of threats to public order and security that in turn often require the identification of political enemies and threats to this security. *See* LOVEMAN, *supra* note 7.

[51] Kanishka Jayasuriya, *Understanding Asian Values as a Form of Reactionary Modernisation*, 4 CONTEMP. POL. 77, 86 (1998).

[52] CARL SCHMITT, CONCEPT OF THE POLITICAL 46 (1996).

[53] *Id.* at 26.

independent sphere.[54] 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 a claim by some others—and this is especially evident in Singapore—that politics obstructs a technocratic and managerial approach to social problems.[55] 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."[56] 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. Similarly, work and the economy are central to East Asian conceptions of citizenship, by providing a focus for state exhortation for discipline and harmony 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.[57]

Asian values, of course, had taken a body blow—although it is very much in the ideological ring—after the Asian crisis. Anti-politics, however, found 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.[58] 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.[59] In fact, these arguments find great sympathy with ideas of North American think tanks, such as the Hoover and the Heritage Foundation, which place emphasis on the importance of protecting property rights, i.e., economic liberty, from, what these groups

---

[54] *See* Jayasuriya, *supra* note 51, at 78

[55] *Id*. at 85. *See also* Garry Rodan, *State-Society Relations and Political Oppositions in Singapore*, *in* POLITICAL OPPOSITIONS IN INDUSTRIALIZING ASIA 104 (Gary Rodan ed., 1996).

[56] Jayasuriya, *supra* note 51, at 89.

[57] *See* Boo Teik Khoo, *Economic Nationalism and its Discontents: Malaysian Political Economy after July 1997*, *in* POLITICS AND MARKETS IN THE WAKE OF THE ASIAN CRISIS 34 (Richard Robison et al. eds., 2000).

[58] Examples include those strategies aimed at creating independent central banks to ensure credibility of monetary policy.

[59] *See* Jayasuriya, *supra* note 51, at 87.

consider as the corrosive effects of democratic politics.[60] 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, rather than giving and providing a supportive framework for political pluralism, the law and legalism may, in fact, turn out 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 sanitized through these kinds of technocratic programs, but anti-politics, in whatever hue, remains deeply antagonistic to liberal pluralism.

V. 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 Ernst Fraenkel, 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.[61] In particular, he distinguishes between a "Prerogative State" as a governmental system which exercises unlimited arbitrariness and violence unchecked by and legal guarantees, and a "Normative State which is an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statues, decisions of the courts and activities of administrative agencies."[62] 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 the necessary and logical interdependence of the normative and prerogative state.[63] 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

---

[60] For example, for a flavour of this approach to freedom, see generally HILTON ROOT, SMALL COUNTRIES, BIG LESSONS: GOVERNANCE AND THE RISE OF EAST ASIA (1996).

[61] ERNST FRAENKEL, THE DUAL STATE 153-170 (E.A. Shils et al. trans., 1941).

[62] *Id.* at xiii.

[63] *Id*. at 186–187.

prerequisites for its technically rational order are preserved."[64] 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 19th century, rather than England, may provide a valuable historical model for the development of authoritarian legalism in East Asia.[65]

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 Michael John, 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.[66] In other words, codification was a state building instrument. The Prussian state had little institutional stability. It was a diverse political structure composed of a range of different legal systems in various provinces, and the law, in this context, was seen as an integrating force.[67]

In this regard, Harold Berman's 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*."[68] The notion of a *Rechtsstaat*, however, 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

---

[64] *Id*. at 208.

[65] On "reform" in a conservative context in Imperial Germany, see generally D. BLACKBOURN & G. ELEY, THE PECULIARITIES OF GERMAN HISTORY (1984).

[66] *See generally* MICHAEL JOHN, POLITICS AND LAW IN LATE NINETEENTH-CENTURY GERMANY: THE ORIGINS OF THE CIVIC CODE (1989).

[67] JOHN BREUILLY, LABOUR AND LIBERALISM IN NINETEENTH-CENTURY EUROPE: ESSAYS IN COMPARATIVE HISTORY 3 (1991).

[68] Harold J. Berman, *The Rule of Law and the Law-Based State (Rechtsstaat)*, 4 HARRIMAN INST. FORUM 449, 451 (1991).

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.[69]

The crucial point about these state traditions in Prussia/Imperial Germany is that the state was constituted as an abstract entity that 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. Accordingly, the state is perceived as an abstract entity acting in the general interest to impose rules upon society.

In this light, Singapore provides a good example of the dual state, identified above, 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 that applies selectively to the economic or commercial sphere. The political arena, however, 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.[70] In short, Hong Kong exemplifies the kind of dual state that we have observed in Singapore. The development of the dual state not only insulates the executive from the constraints and restraints of normative law, but also uses the law itself to curtail and limit political opposition. Put simply, authoritarian legalism takes politics out of the law, an essential element of the dual state identified by Fraenkel[71].

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, 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'). Even more pertinent is 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 of 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

---

[69] *Id*. at 9.

[70] Carol Jones, *Politics Postponed: Law as a Substitute for Politics in Hong Kong and China*, *in* RULE OF LAW AND LEGAL INSTITUTIONS, *supra* note 2, at 145.

[71] *See* FRAENKEL, *supra* note 61, at 200.

of the bargaining power of labour remains highly circumscribed.[72] 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.

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, segmentation will help demarcate 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 recent shifts towards the adoption of the governance agenda by multilateral institutions reinforces the movement towards a dual state. The governance programs can be considered to be a 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.[73] These forms of economic constitutionalism, however, demand the constitution of a specific kind of state organization and structure: a regulatory state whose purpose it is to safeguard market order. This is essentially the kind dual state that Fraenkel identified and which Schmitt, in his later "institutionalist" phase, sought to promote.[74]

This authoritarian liberalism strongly resonates 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.[75] 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

---

[72] *See* Kanishka Jayasuriya, *A Framework for the Analysis of Legal Institutions in East Asia, in* RULE OF LAW AND LEGAL INSTITUTIONS, *supra* note 2, at 13.

[73] For an analysis of economic constitutionalism, see Kanishka Jayasuriya, *Rule of Law and Governance within the East Asian State*, 1 AUSTL J. OF ASIAN LAW 2, 107 (1999).

[74] *See* Carl Schmitt, *Address*: *Strong State and Sound Economy*, *in* CRISTI REANTO, CARL SCHMITT AND AUTHORITARIAN LIBERALISM: STRONG STATE, FREE ECONOMY 211 (1998) (translation of Schmitt's address to a conference of business leaders held in Düsseldorf on November 23, 1932).

[75] For an introduction to some of Eucken's ideas, see generally WALTER EUCKEN, THE FOUNDATION OF ECONOMICS: HISTORY AND THEORY IN THE ANALYSIS OF ECONOMIC REALITY (1950).

to be created through a consistent (*ordnungspolitik*) of the state.[76] This is because the ordo-liberals 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, the ordo-liberal's emphasis on the role of economic institutions in creating market order 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.[77] Eucken, for example, strongly influenced by Carl Schmitt, argued that, by the end of the 19th century, the state was increasingly captured by private interest groups.[78] 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 prevent 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.[79]

VI. 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 political instruments to intimidate political opponents. Similarly, Singapore has moved to provide a

[76] For an excellent survey of ordo-liberal ideas, see generally David J. Gerber, *Constituionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 AM. J. OF COMP. L. 25 (1994).

[77] *See id.* at 49.

[78] *Id*.

[79] *See* Jayasuriya, *supra* note 73, at 115.

juridical foundation for the regime of exception. Quite simply, regimes of exception are compatible with a widespread use of legalism.

An 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 cognize authority and citizenship.

This analysis has attempted to reveal 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. 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.