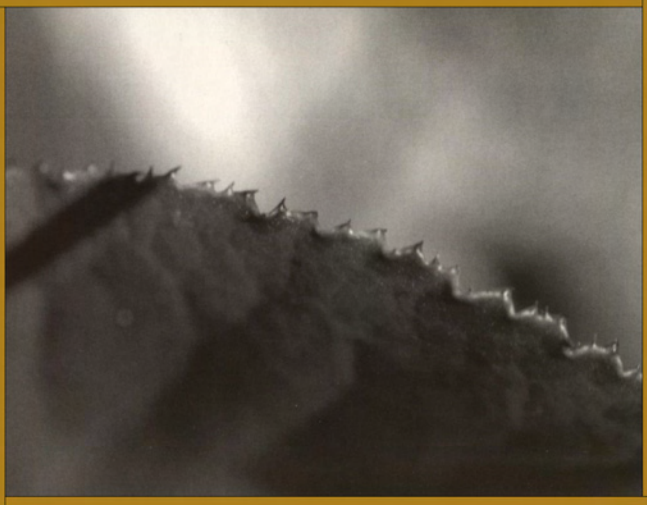
Law, Capitalism and Power in Asia



ROUTLEDGE

the rule of law and legal institutions

edited by

Kanishka Jayasuriya

Asian Capitalisms

LAW, CAPITALISM AND POWER IN ASIA

Liberal democracy is often derided by the political élites of East Asia, and yet the rule of law is a concept that finds a warm reception within the same circles. At first sight this seems to be a paradox, but this discrepancy is in large part a misconception by Western observers who confuse their own idea of what the rule of law should mean and what it often means, in reality, in East Asia.

This book demonstrates how the rule of law in Asia is more likely to be used as a means of consolidating executive power, than as a vehicle for introducing democratically controlled legal, economic and political reforms. A fundamental argument of the authors is that the rule of law needs to be understood in the context of notions of political authority to be found within the state. There are chapters on Hong Kong, China, Malaysia, Taiwan and Vietnam that cover issues such as corporate law, the role of law in politics and legal institutions.

Law, Capitalism and Power in Asia casts serious doubt on the assumed linkage between the development of the rule of law and the emergence of market economies. It suggests that the notions of judicial organisation and independence need to be located in the specific ideological and political context of East Asia.

Kanishka Jayasuriya is a Senior Research Fellow at the Asia Research Centre, Murdoch University. He is co-editor of *Dynamics of Economic Policy Reform in Southeast Asia and Southwest Pacific Asia* and co-author of *Towards Illiberal Democracy in Pacific Asia*.

ASIAN CAPITALISMS

Edited by Richard Robison

Director, Asia Research Centre, Murdoch University, Australia

At the end of the twentieth century capitalism stands triumphant. Yet, it has not been the liberal model of free markets, democratic politics, rule of law and citizenship that has enjoyed general ascendancy. Within Asia, a range of dirigiste, predatory and authoritarian systems have emerged under the general rubric of Asian Capitalism. In this series we seek to explain the political, ideological and social bases of this phenomenon and to analyse the collision of these systems with the power of global economic markets and highly mobile capital and their confrontation with emerging social and political interests domestically. In the context of the financial crisis we ask whether we are witnessing the end of Asian Capitalism. Is Asia caught in an inexorable metamorphosis towards liberal capitalism and what factors drive the processes of transformation?

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The rule of law and legal institutions
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SERIES EDITOR'S PREFACE

This is the first of three research projects organised by the Asia Research Centre at Murdoch University and dealing with the question of 'Asian Capitalisms'. With the devastating impact of the currency crisis upon Asian economies the claims that 'Asian capitalism' represents a different and perhaps superior model for organising production and social cohesion have been seriously challenged. Explanations of the nature of 'Asian capitalism', so often dominated by notions of cultural relativism or rent-seeking economic irrationality, require revisiting not least because they are essential to understanding its decline.

It is entirely appropriate that a volume on the rule of law and legal systems begins the project. As the engagement of Western businesses, governments and international institutions with Asia deepened, issues of governance, regulation, civil rights and rule of law were to become focal issues. Not only have Western businesses been confronted by legal systems which often provided little certainty or consistency, or which impose state monopolies, Western governments found relations with the region difficult where the law was harnessed to the task of political repression and to obstructing advances in human rights. Nor has the problem been confined to relations between Asia and the West. As new social and economic interests emerged within the region, legal systems were to come under pressure as these domestic reformers increasingly confronted legal institutions that functioned to maintain the political status quo.

Kanishka Jayasuriya sets out to provide an understanding of legal systems and rule of law in Asia and to question orthodox explanations and reformist strategies. Rather than accepting the proposition that legal systems are simply technical arrangements that may be reformed by providing training programmes and institution building or by removing rent-seekers, it is proposed that legal systems in Asia are politically embedded in a way quite different to Western liberal models; as more direct instruments for political rule.

It is a study that throws open a range of challenges to orthodox expectations of change in legal systems in the wake of the Asian currency crisis. Rather than providing opportunities for international institutions to impose tech-nical changes in the institutions of law and its procedures, the real impact of the crisis, it might be deduced from this study, lies in the deeper shifts in political and social power and interest produced.

The volume extends its analysis across a variety of topics; from corporate law to the question of judicial independence, from law and politics to law and the market and to legal development in historical context. It brings together a formidable group of specialists on law and legal systems from within the legal profession and the critical social sciences, from universities within Australia and Asia. Its strength lies in its innovative approach and in its blending of close analysis of legal institutions with broader analysis of social and political contexts.

This volume will be followed by volumes on the impact of the Asian economic crisis on models of 'Asian capitalism' and the challenges for these models posed by growing requirements for collective goods.

Richard Robison
Director, Asia Research Centre, Murdoch University

PREFACE

I am writing this preface in a city on the periphery of the Pacific Rim in the midst of the worst crisis to engulf the East Asian economies in the last three decades. With the fountain of red ink, there has come a deluge of prognoses for the crisis. All of these have one thing in common: they seek to build credible transparent economic institutions of which legal institutions and the rule of law are seen as being absolutely essential. No academic analysis or consultant report of this Asian crisis goes without some reference to the ubiquitous notion of the rule of law, which is one of the underlying themes of this collection of essays.

This volume, has its origins in a highly successful international workshop organised by the Asia Research Centre, Murdoch University, Australia and represents an innovative attempt to subject to critical scrutiny the claims about the emergence and consolidation of the liberal notions of rule of law in East Asia. The origin of this research agenda stems from my earlier work on democratisation in East Asia, in particular, the use of liberal rhetoric of the rule of law for illiberal purposes. Thus, the rule of law has been used by the governments of Singapore and Hong Kong, as a mechanism to depoliticise society, and thereby legitimate the exercise of strong executive power. Hence the picture of the 'rule of law' that emerges in states and territories such as Singapore and Hong Kong is at variance with the standard liberal drawing of the rule of law. Moreover, the rule of law in the transitional economies of Vietnam and China often seems to refer to securing the normative basis of the economic sphere while the political sphere is often seen to be beyond the law. This fragmentation and dualism as well as organisation and functioning of judicial institutions departs significantly from liberal notions of judicial independence which are deeply rooted in Anglo-American models of judicial organisation, and warrants critical scrutiny.

The several contributors to this volume, drawn from a wide range of disciplines and professions, all seek to explore and understand how the concept of the rule of law and legal institutions have been employed in East Asia. What is distinctive about their contribution is their engagement with a common research agenda and the commitment to participate in a conversation with the sometimes divergent perspectives taken by various contributors. It is hoped that this volume will be the first instalment of a new and exciting research agenda for the study of legal institutions and the rule of law in East Asia.

I wish to acknowledge the help and encouragement given by Richard Robison, Director of the Asia Research Centre, Murdoch University, who invited me to lead a research project on legal institutions and the rule of law at the Centre. Mention must also be made of Garry Rodan who provided encouragement, stimulation and consistent support for this project. The Centre, as a research institution with a well deserved international reputation for fundamental social science research, has provided a congenial and stimulating environment in which to pursue innovative work on a hitherto relatively unchartered area of research on institutions in East Asia. In the current harsh and difficult economic climate in Australian higher education, the Centre has been an oasis for serious

fundamental social science research, which after all should be the primary task of any reputable university.

A special word of thanks to the administrative staff led by Del Blakeway who were greatly instrumental in the organisation of the Workshop, and the subsequent administrative support for the preparation of this volume, and to Victoria Smith of Routledge who has been a most sympathetic and encouraging editor. Finally, I would like to thank my parents, Laksiri and Rohini without whose support and encouragement this book would not have been possible.

Kanishka Jayasuriya
Perth, April 1998

1
INTRODUCTION

A framework for the analysis of legal institutions in East Asia

Kanishka Jayasuriya

Consider this paradox: liberal democracy is constantly derided by political élites in many East Asian states as 'western' and 'liberal'; at the same time the 'western' and 'liberal' idea of the rule of law finds a receptive audience amongst state officials, policy makers and academics. The governments of Singapore and Hong Kong claim it as a distinctive characteristic of their political system; major multilateral agencies such as the World Bank and the Asian Development Bank spend considerable resources in the provision of legal reform projects; and, academic analysts consider the establishment of credible legal institutions as a necessary feature of the transition to market-based economies and democratic polities. Implicit in the advocacy and/or study of the rule of law is the assumption that legal institutions are part of a wider package of markets and (at least for some) democratic institutions. In fact, this argument is reminiscent of an old maxim of modernisation theory that 'all good things go together'. In this respect, the aim of this volume is to subject these claims about the rule of law in East Asia to critical scrutiny. In particular, the contributors to this volume—albeit from a range of different perspectives—challenge the conventional wisdom that there are necessary causal connections between markets, liberal politics, and the rule of law. Therefore, the argument being advanced here is that the absence of these causal connections suggests the existence of a rather different set of institutional arrangements (or an 'institutional package') in East Asia.

This chapter presents an analytical overview of these substantive issues, and at the same time annotates the discussion, where relevant, with reference to data and arguments presented by contributors to this volume. This chapter is in two parts. The first explores the connection between the development of market forces and the emergence of the rule of law, and goes on to argue for the need to locate the development of institutions, especially legal institutions, in the context of state-building. The second part of the chapter utilises information drawn from studies of judicial independence in East Asia by placing these studies within a broader institutional and political context with an emphasis on the extent to which judicial-executive relations are influenced by state structures and ideology. As such, patterns of judicial independence and organisation need to be located in a specific historical context rather than be treated as abstract ahistorical concepts.

It needs to be acknowledged that there are inherent difficulties in a comparative exercise of the sort being attempted in this volume. These problems relate to the difficulty of generalising across a range of Asian countries whilst avoiding the pitfalls of subscribing to a notion of 'Asian law', with its own distinctive and unique telos which

has all the trappings of a form of what Taylor (1997) describes as a legal orientalism. Taylor (1997) argues that 'Blurring the cultural and historical differences between Asian countries and reducing their laws to a single object of study has little value, except as a way of making a fictionalised Asian law—accessible to the all-knowing Australian observer' (1997:60).

Taylor perceptively identifies the dangers inherent in the attenuation of differences between Asian countries in the attempt to construct a discipline of Asian law. However, her argument runs the risk of making any sensible comparison of Asian legal systems redundant. In short, we run the risk of throwing out the comparative law baby with the orientalist bath water. One of the problems with Taylor's approach is the unstated proposition that the only linking analytical thread of any conception of Asian law is the presence of a common set of cultural understandings. This view overlooks the fact that a number of other non-cultural commonalities can be identified in East Asia. In particular, two important linking features are: a common set of shared normative understandings of the purpose and function of state power and governance (what I call 'stateness'); and a form of managed and negotiated capitalism (that goes under the generic label of the developmental state) of the Japanese variety that has influenced the political economies of East Asia. It needs to be noted at the outset that this collection is not a set of country case studies but an attempt to explore certain themes and issues around the emergence of the rule of law and legal institutions in the light of the East Asian experience.

The liberal understanding of the rule of law makes the following important assumptions: first, that society is composed of individuals and voluntary organisations; second, that the purpose of law is to adjudicate between private conflicts amongst individuals; third, that public officials are guided by law and not by personalism or other extra legal considerations; and, finally, that the law has legitimacy and is widely understood and obeyed. At the heart of these liberal assumptions is the notion that the development of the rule of law can occur only at the expense of a weakening of governmental or public power. One aim of this introduction and the volume more generally, is to suggest that in East Asia, the rule of law—contrary to what is assumed in the liberal paradigm—can serve to entrench and consolidate public or state power.

A critical element of the thesis being developed in this introduction is that notions of the rule of law need to be understood in the context of notions of political authority and rule embedded in the very interstices of the state. In much of East Asia, the post-colonial state was trapped in the repertoire of political rule established by the colonial state. For example, Lev (1978), in an important article, has noted that there are strong similarities in the use of law by the colonial and the post-colonial Indonesian state. More specifically, ideological notions of security and order were constitutive of the post-colonial state in East Asia.

It might be useful to understand both the post-colonial and colonial state in terms of Oakeshott's distinction (1975) between civic and enterprise association. In a civic association, rules do not derive their authority from any end outside the association or their use in the creation of a desirable set of outcomes. In contrast, in an enterprise association the validity of rules springs not from the association itself but from the ends or purposes of the organisation. An enterprise association therefore is a purposive and end-oriented organisation. From this perspective, laws are seen in terms of their capacity to produce accurate outcomes that reflect substantial state objectives and interests.

Conceptions of stateness in both the colonial and post-colonial period have been conceived in terms of an enterprise rather that a civic association; law becomes an instrument to pursue the objectives of the state. In East Asia these state objectives and ends are defined in technocratic and developmental terms.

Markets and the rule of law

The emergence of legal institutions and the rule of law has been the subject of much debate, most of which has centred on the argument that there is a nexus between the growth of a market economy and the development of the rule of law. Of course, this mode of theorising finds a significant pedigree in the work of Max Weber who—despite noting that the relationship between economic and legal rationality is complex and multicausal—emphasised the extent to which calculability and predictability, so essential to a functioning market economy, was established by the development of formal and rational legal systems (Ewing 1987; Kronman 1983; Trubek 1972). Weber notes that:

> the universal predominance of the market consociation requires on one hand, a legal system the functioning of which is *calculable* in accordance with rational rules. On the other hand, the constant expansion of the marker consociation has favoured the monopolization and regulation of all 'legitimate' coercive power by *one* universal coercive institution through the disintegration of all particular status-determined and other coercive structures, which have been resting mainly on economic monopolies.
>
> Weber (1925:40)

Weber, was careful to point out that economic considerations, though significant and relevant, were not necessarily the only determinants in the evolution of formal rational legal systems. Nevertheless, these theoretical subtleties were lost on a host of later Weberian centred accounts, that have emphasised the extent to which the development of institutionalised legal systems provided a measure of calculability that enabled the guaranteeing of the right of contract. Indeed, the considerable impact of these kinds of arguments is markedly evident in the influential 'law and development' movement[1] which originated nearly two decades ago. The underlying assumption of this second school of thought was, of course, that the inexorable logic of economic modernisation will bring in its wake a modern and rational legal system; in other words, that economic modernisation enables the rationalisation of the legal system. While Weber was keen to place the development of law in its proper historical context,[2] these particular theories of law and development (itself a subset of modernisation theory) would seem to assume the operation of a twin logic of economic and legal rationalisation which necessitates the adoption of an ahistorical methodology. As against this point of view, the essays in this volume endeavour to move away from the methodological orthodoxy of conventional studies on law, primarily on the ground that the rule of law needs to be contextualised in relation to the distinctive ideological and structural conditions that obtain in East Asia.

David Clark (Chapter 2) reinforces these points about the contingent nature of the emergence of 'the rule of law'. He notes that the evolution of the rule of law in Western

Europe was bound up with the struggle between legislative assemblies and the Crown to constrain the arbitrary exercise of executive power, and the emergence of the rule of law was often facilitated by dominant cultural and ideological traditions. In East Asia, the emergence of the rule of law takes place under very different cultural and political conditions and may therefore produce legal institutions that differ significantly from those of Western Europe. Clark's analysis is a salutary reminder of the historical context in which the liberal rule of law emerged in Western Europe.

As the simplistic evolutionist, ideological, and ethnocentric biases of modernisation theory became apparent, the influence of the law and development movement declined swiftly. Nevertheless, as argued below, a good many of the assumptions about the linkages between law and economic development have continued to inform a range of recent theoretical innovations bearing on questions of institutional change. However, the waning of the influence of the law and development movement has led to the emergence of a whole series of analyses of institutional change, largely influenced by the methodology of classical economics. In particular, the exponents of the rational choice theory perspective seek to place emphasis on the importance of legal institutions, and institutions in general, by allowing governments to credibly commit to upholding property rights. Thus, we find rational choice institutionalists claiming that successful long-term economic growth requires incentives for political as well as economic actors to desist from rent seeking. For example, North and Weingast (1989) maintain that rulers or states need to be restrained from engaging in rent seeking behaviour and establish bargains with constituents. The suggestion here is that institutions function to enforce and give credibility to these bargains. From this perspective, institutions reflect the rise and success of commercial minded interests whose primary aim lies in the establishment of a set of institutions that restrict the ability of rulers to engage in predatory and rent seeking behaviour. Consequently, a credible legal framework that guarantees property rights becomes a central element of this institutional ensemble which provides a kind of backing for the market participants on centre stage.

Just as the earlier modernisation theories (influenced no doubt by Parsonian explanations of political development) in the form of the law and development movement had a marked influence on the development of legal reform programs two decades ago, so the growing influence of recent theories of rational choice institutionalism, for example, in the form of the law and economics movement, is readily evident in a range of World Bank programs on legal reform. It is apparent that a key objective of these programs undertaken by international financial agencies is:

> to develop a legal environment characterized by respect for property rights, by a law-making process capable of integrating business-oriented laws within the prevailing legal system and minimizing regulatory intervention, and by legal institutions capable of implementing those laws in an efficient and transparent manner.
>
> Webb (1996:46)

The main task of these governance programs is to provide an institutional framework for the protection of property rights considered essential for the development of an environment conducive to sustaining a market economy. In turn, this institutional

environment is perceived as being crucial to sustaining high levels of economic performance.

Despite differences in the theoretical armoury of modernisation and rational choice institutionalist perspectives—perhaps best illustrated in the shift from sociology, with its emphasis on structural explanation, to neo-classical economics and its emphasis on methodological individualism—they share a number of elements.

First, they assume a nexus between the development of market forms of economic life and the emergence of stable effective legal regimes. Indeed, there is a striking similarity in the Weberian idea of the legal system providing a calculability and predictability of actors in the market and North's (1981) thesis that legal institutions provide a framework for states to provide credible commitments to market-enhancing property rights. In both instances, the legal system is seen as the handmaiden of the market. A subsidiary assumption in this respect is that law is about creating a set of bargaining chips or a set of entitlements and rights that enable transactions to be carried out between various market participants, all of which are predicated upon the existence of an independent and autonomous civil society.

Second, both theories share, to an extent, the assumption that the development of the market leads to the emergence of a strong middle class or the presence of commercial interests which in turn hastens the development of representative institutions and the rule of law. Accordingly, we find North and Weingast (1989), in their explanation of the emergence of these representative institutions in the period following the Glorious Revolution of 1688, relying greatly on the pressures generated by commercially minded interests, which it is suggested:

> led to institutions that simultaneously mitigated the motive underlying the Crown's drive to find new sources of revenue and also greatly constrained the behaviour of the government (now the 'king in Parliament' rather than the King alone).
>
> North and Weingast (1989:829–30)

Implicit in this argument is that institutional change arises from pressures on the state generated by social and economic forces unleashed by the development of a market economy. In this context, institutional change is seen as a product of revolution from 'below' rather than from 'above'.

Third, both modernisation and rational choice theories assume that the major dynamics driving institutional change are internal to the nation-state. This can be clearly seen, for instance, in the overriding focus in both approaches on the link between the rise of a domestic middle class on the one hand, and the emergence of liberal legal systems on the other. Yet, as Andrew Rosser's discussion of intellectual property law reform in Indonesia (Chapter 5) suggests, dynamics which are external to the nation-state may also play a central role in shaping institutional change. According to Rosser, intellectual property law reform in Indonesia was not driven by a domestic middle class concerned about securing the competitiveness of US industry. He says that whilst some domestic industry groups had actively lobbied for intellectual property law reform for many years, it was only when the US government went on the offensive over other countries' abuse of

US intellectual property rights in the mid-1980s that significant intellectual property law reforms were actually introduced.

Finally, a feature common to both modernisation and rational choice theories is the assumption that the development of the rule of law is associated with the following institutional characteristics: the rise of a liberal, political and social outlook alongside the rise of parliamentary and representative democracy; the growth of an independent associational life; the emergence of an independent and neutral bureaucracy; and, the growing influence of a 'civil' language in fashioning relations between the state and its citizens. In other words, the emergence of legal institutions is associated with a package of liberal institutions that transform state-society relationships. An illustrative example of this implied association between legal reform and liberalism is given by Blackbourn and Eley (1984) in the development of legal institutions in Germany. These theorists argue that, despite the absence of representative institutions or parliamentarisation, the development of civil law was:

> consonant with needs of a society which rested on unrestricted individual property rights, as for instance, in the principles that underlay the law's bankruptcy and distraint. The way in which the rule of law underpinned and spoke the language of bourgeois society was perhaps most clearly manifested in the Civil Code (BGB) which came into effect in 1900 after decades of preparation.
>
> Blackbourn and Eley (1984:193)

The rise of these legal institutions reflects the growing influence of commercial interests which sought, in spite of an authoritarian state, to revolutionise the civic life. In brief, at the core of these shared assumptions of modernisation and rational choice theory is the belief that the growth of legal institutions is a product of the process of economic and social modernisation, mediated by the growth of commercial interests.

The experience of East Asian legal reform stands in stark contrast to this postulated link between economic modernisation and the emergence of legal structures. In fact, the East Asian example would seem to suggest that high levels of economic performance bear little or no relation to the development of a credible legal system. The greatest difficulty with this orthodox account is that it assumes a rather unproblematic view of the market as an autonomous arena characterised by transactions between independent economic agents. In effect, the legal system provides bargaining chips to facilitate these transactions. Capitalism in East Asia is—to use an apt phrase of Weber—a kind of 'political capitalism' characterised by networks of non-market relationships operating horizontally between economic agents, and vertically between economic agents and state actors.

Winn (1994), in a study of Taiwan, has drawn pointed attention to the importance of relational practices,[3] a term which refers to non-market social networks that provide members with markets, finance, and inputs between small and medium-sized firms. Winn's argument is not entirely clear as to what role the legal system plays in these networks of economic relationships. It suggested that the legal system in Taiwan (ROC) contributes only indirectly by *enabling* these relationships rather than by directly providing a legal framework for the operation of economic activities. More significantly,

many relational practices take place in the informal sector beyond the purview of the formal legal system, and Winn proceeds to conclude by observing that:

> the role played by the ROC legal system in indirectly supporting relational practices is not one that can readily be expressed in terms of legal theories constructed to account for the relationship between law and development in Western nations.
>
> Winn (1994:228)

From a theoretical perspective, the significance of the Taiwanese experience lies in the fact that crucial sectors of the market function outside the legal system. Indeed, Winn and Yeh (1995:571) in a later study, go on to suggest that the formalist nature of Taiwanese legal institutions may be said to complement the operation of network structures because it allows a considerable amount of discretion for legal officials. These officials may in turn tolerate a great deal of illegal activity which, incidentally, also enables 'the full force of the law as written to bear on selected individuals such as opposition political figures' (Winn and Yeh 1995:571). In a similar vein, Jones has argued that *guanxi*,[4] and 'relational capital' in Hong Kong and the PRC has become 'an institutional alternative to highly developed formal legal and bureaucratic structures' (Jones 1994:212). Admittedly, she also argues that *guanxi* and the rule of law may well exist in a complementary rather than in an antagonistic relationship so that it 'directly encourages the modernisation and the growth of capitalism' (Jones 1994:213). This conclusion is one that neatly converges with the work of Winn (1994) on Taiwan as well as the subsequent study of Winn and Yeh (1995). Clearly, the import of this evidence is that, as suggested earlier, there is no logical or causal connection between the development of a Weberian style formal rational legal system and the growth of capitalism. On the contrary, an undeveloped legal system may indeed be regarded as facilitating the growth of networks of personal relationships which are themselves considered integral to the functioning of some types of East Asian capitalism.

An additional characteristic important for understanding the emergence of capitalist and market economies of East Asia is the existence of vertical relationships between economic actors and the state. The liberal model of capitalism which underlies both the Weberian and rational choice explanations of the emergence of legal institutions presupposes, above all, horizontal linkages between economic actors. The Weberian notion of calculability as well as the rational choice emphasis on property rights are seen as facilitating these horizontal linkages between economic actors. But, in the case of East Asian capitalism, economic actors are vertically integrated into the state apparatus. Thus, Wank, in a case study of the PRC, suggests that these connections are not horizontal market connections 'but rather involve power asymmetries between individuals and institutions inside and outside of the state structure' (Wank 1995:74). This instance may well have wider applications in East Asia. To be sure, these vertical connections can take a multitude of forms (a continuum ranging from patron-client relationships to corporatism); however, what is important for the purposes of this argument is that it leads to a model of capitalism wherein there is a high degree of interdependence between the state and economic actors.[5]

The Japanese model of Administrative Guidance, provides us with a further illustration of this vertical relationship between the state and economic actors. In this case, Administrative Guidance has been defined as:

> a series of operations by which administrative organs, in those matters which fall within their specific duties, exercise influence over specific individuals, public and private juristic persons and associations through non-authoritative and voluntary means, and guide parties by means of their own agreement and cooperation toward the formulation of a definite system, the goal of which the administrative organs seek. Some of the operations of this nature which are carried on have clear statutory authority; others do not.
>
> quoted in Ford (1996:50)

There are two essential features of the Administrative Guidance model. The first, pertains to the voluntary and non-authoritative nature of its operation which makes the formal legal system marginal to the Administrative Guidance system. The second relates to the structures of co-operation inherent in these practices to ensure the smooth operation of the system. From this it is seen that while law may indirectly facilitate the formation of this relationship, it is a function altogether different from providing a degree of calculability and predictability for market transactions.

It should be noted in this context that Weber himself recognised that in situations where bureaucratic behaviour is arbitrary, a form of political capitalism may flourish. He conceded that this form of political capitalism may well reach a high level of development without a legal system to provide calculability, but he also pointed out that such a system is not capable of reaching an advanced level of capital accumulation. This would suggest that the Weberian framework of law and market development is arguably applicable only to the specific historical context of liberal capitalism, but remains of limited value for other forms of capitalism, particularly those described by Weber himself as forms of political capitalism. This argument is strengthened further by the fact that liberal capitalism of the kind that underpins the Weberian accounts of legal change requires horizontal market linkages between economic agents. It is the presence of these horizontal linkages that creates the demand for economic calculability which can only be supplied by a formal rational legal system.

Whereas these horizontal linkages between economic agents require pluralistic political and economic markets, it is evident that the kind of political capitalism prevalent in East Asia is characterised by vertical linkages between state and economic actors. Importantly, these vertical relationships that exist between economic actors and the state signified a form of corporatism which:

> can be defined as a system of interest representation in which the constituent units are organised into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories, recognised or licensed (if not created) by the state and granted a deliberate monopoly within their respective categories

> in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.
>
> Schmitter (1979:13)

In other words, economic actors and enterprises are located in institutions in and out of the state, and therefore these actors are more likely to demand access to the state in preference to economic calculability (of the Weberian variety) or a credible property rights regime (of rational choice theorists). Moreover, the presence of these vertical linkages means that it is difficult to establish any clear interest, or indeed, any basis of collective action for economic actors, and even more problematic for the middle class, to seek the establishment of the rule of law. Even in terms of the internal logic of law and economic development theories, no causal connection can be established between markets and a liberal legal structure.

We also need to recognise that this model of liberal capitalism requires, as suggested by North and Weingast (1989), a separation between *public* and *private* power; however, this remains problematic in the political capitalism of East Asia. What underlines this separation of public and private is the emergence of a broader and fundamentally different strategic relationship between the state and the economy on the one hand, and state and civil society on the other. Legal institutions play a major part in the constitution of this boundary between public and private. But, in the case of the prevalent political capitalism of East Asia, an uncertain boundary separates public and private power. Striking examples of this may be found in the 'rent capitalism' of countries such as Indonesia (Robison 1986) where access to state patronage is central to the process of capital accumulation. Similarly, in the Chinese context, a key feature of economic reforms has been the distinctive mix of bureaucratic and market co-ordination at the local level, which has been aptly described as local state corporatism. In short, this conjunction of private and public power in East Asian forms of capitalism is problematic for theories that attempt to link law and economic development on the basis of a model of liberal capitalism.

State-building and law

In attempting to understand the dynamic and evolving structure of legal institutions in East Asia, conventional theorising which highlights such determinants as the degree of economic development and social structural change is of limited value. As we have seen, the contention that legal systems are functional for capitalist development, let alone the proposition that the law develops because it is functional for certain types of economic activity, is difficult to sustain. The East Asian experience would suggest that the dynamics of institutional change must be located in terms of the actions of state élites rather than in terms of pressures from below. Clearly, the simple causal connection between the growth of legal institutions and economic development is inadequate.

The uncertain and ambiguous relationship between the development of market forces and the emergence of the rule of law is clearly demonstrated in Kamarul and Tomasic (Chapter 7) in their comparative analysis of the regulation of corporate insolvency in a number of Asian countries. They argue that while there is a strongly stated view amongst

Asian governments that insolvency should be processed through the legal system ('the rule of law'), in practice, the capacity of the legal system to regulate insolvency is highly limited. They attribute this lack of policy success to the failure of Asian governments to develop appropriate judicial and related administrative structures. Moreover, they also argue that cultural factors often facilitate more informal and less 'legalistic' ways of dealing with business debt.

Having said this, we are still left with the problem of explaining the rapid growth of legal reform in states such as Indonesia, China, and Vietnam, and the increasing resort to the use of legalism as a 'technique of rule' (Jayasuriya 1996) in states and territories such as Hong Kong and Singapore. For instance, the PRC has witnessed a number of major initiatives in the area of civil and criminal law. Lubman, for one, has noted that since 1979 'whole areas of law have been embraced by new codes and statutes (Lubman 1995:3), and points to the civil procedure code and the economic contract law as evidence of this trend. Jianfu Chen (Chapter 4), also provides further details of the PRC legal reform program. Likewise, in Indonesia and Vietnam, there has been a veritable explosion of legal development, and, as Carol Jones in her contribution (Chapter 3) shows, there has been a similar increase in the ideological emphasis on the use of the rule of law as a defining feature of the political system of colonial Hong Kong. One could point to similar examples of the use of the rhetoric of the 'rule of law' as a distinctive element of the Singaporean political system. Indeed, the much contrived controversy in Singapore over Lee Kuan Yew floating the idea of a re-merger with Malaysia, led Deputy Prime Minister Lee Hsien Loong to enumerate the distinctive features of the Singapore polity. Featuring prominently in this list is the idea that Singapore, in comparison with Malaysia, was governed by the rule of law (*Straits Times*, 19 July 1996).

Similar examples may be gleaned even from the West European context where there are significant differences between the English and the Prussian/ German route to legal change. 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 different legal systems in various provinces (Breuilly 1992) and the law, in this context, was seen as an integrating force.

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 (see Neumann 1986), unlike the rule of law which was bound up 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 recognises 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 action 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. Breuilly argues, in the Prussian context, that from this perspective, 'institutions and laws were seen, therefore, not so much as the form taken by the state, but rather as forms sanctioned by the state in the general interest' (Breuilly 1992:189). Stated simply, the development of legal institutions needs to be located in relation to the specific ideas and conception of state. The significance of this statist approach to the study of legal institutions is that it locates the origins of the legal reform or the rule of law in the context of pressures from 'above' (i.e., from state élites) rather than in pressures from 'below' (i.e., from commercial minded interests).

This statist approach to legal institutions has much to offer in terms of understanding the role of legal institutions in several East Asian countries where civil society remains weak (for reasons described above) in relation to state power. A good example of the weakness of civil society can be found in the highly fragmented political oppositions of East Asia, including those countries that have recently experienced transitions to more democratic political structures.[6] Notions of stateness in East Asia are also influenced by organic conceptions of state-society relations, such as, for example, that which can be found in integralist conceptions of the Indonesian state. Moreover, further reinforcing the statist form of East Asian legal development is the pervasive influence of the 'for reasons of state' tradition embodied in structure of both the colonial and the post-colonial state (see Chapter 8). The dominance of this statist tradition allows us to identify in East Asia a conception of law which regards it primarily as an instrument to consolidate and entrench state power, rather than limit the use of public power.

In theorising East Asian legal institutions, we need to examine more carefully the interrelationship between authoritarian or illiberal political structures, capitalism, and the rule of law. If the connection between capitalism and the rule of law is problematic there is an equally tenuous connection between the emergence of legal institutions and political liberalism. Habermas (1996) has argued that the rule of law presupposes both private and political autonomy. This is because the private autonomy provided by law must at the same time be secured through the public autonomy of those citizens subject to it. On this basis, Habermas advances a proceduralist understanding of law where 'the realization of basic rights is a process *that secures the private autonomy of equally entitled citizens only in step with the activation of their political autonomy*' (Habermas 1996:426, his emphasis). Put simply, the argument is that the legitimacy of law is located in democratic procedures; hence, Habermas labels this model as a 'proceduralist paradigm of law'. These democratic procedures, in turn, constitute a public sphere. This is understood as politics, defined in terms (familiar to critical theory) of undistorted public communication so that legitimate law is rooted in the networks of civil society. In contrast to the proceduralist model outlined by Habermas, there is no discernible connection between private and public autonomy in East Asia. In fact, the central feature of East Asian legal institutions is that a degree of private autonomy goes together with a non-participatory or authoritarian political system.

Again, the imperial German legal institutions provide a good example of this authoritarian legalism where the codification of the civil code in 1900 was achieved in the context of a non-participatory political system. The extensive development of private law in Germany established an independent and self-contained arena of private law. As Habermas notes, this was:

> premised on the separation of state and society, doctrinal refinement proceeded on the assumption that private law, by organizing a depoliticized economic society withdrawn from state intrusion, guaranteed the *negative* freedom of legal subjects and therewith the principle of legal freedom.
>
> Habermas (1996:396)

There are a number of important differences between the imperial German and East Asian models. For example, the managed capitalism of East Asia precludes the strong differentiation between private and public law; and, similarly, East Asia lacks the kind of autonomous civil networks that developed in the later nineteenth-century Prussia/Germany. Nevertheless, the Prussian/German model does have heuristic value in its emphasis on the manner in which law is used to quarantine an area of private autonomy, and the consequent depoliticisation of economic society. The disjunction between private and public autonomy lies at the core of this model of authoritarian or statist legalism, and provides a useful tool in understanding the dynamics of legal institutions in East Asia.

In the PRC, Potter (1994b) notes that there have been significant developments in the provision of legal equality, particularly in the area of private law. While the 1982 Constitution made this legal equality conditional on the performance of duties prescribed by the constitution and law, it nevertheless marks a radical departure from the Maoist period. Legislative reform in civil law has further reinforced these changes. In this regard, two significant reforms have been the Economic Contract Law of 1981 which provides that contracting parties enjoy equal rights, and the General Principles of Civil Law. These enactments 'expressed the regime's doctrinal presumptions about equality by ascribing various rights universally to natural persons, regardless of organisational, family or class status' (Potter 1994b:335).

Chen (Chapter 4, see also Chen 1995) examines closely the nature of these developments in civil law, and notes that these changes must be placed in the context of the adoption of the notion of a 'socialist market economy' by the Chinese Communist Party (CCP). Acceptance of the notion of a socialist market economy had the effect of removing ideological fetters on the development of civil law. Chen, in his essay, makes a valuable contribution to the analysis of the origins of commercial law reform in China by drawing attention to the important role of legal ideas and theories in the understanding of legal reform in China. For example, he argues that there has been an extensive transplantation (or harmonisation) of foreign laws in a number of commercial areas to such an extent that the language of Chinese law has become familiar to Western trained lawyers.

Legal transplantation is just one aspect of the transformation of legal thinking in China; Chen notes that there has been extensive debate and discussion within the

academic community over issues such as the fusion of public and private law and the importance of establishing the autonomy of private law. The import of these jurisprudential arguments is to suggest that legal ideas are seen as bits of technology (be it foreign or local) that can be used for state building purposes. In other words, law is seen in instrumental terms as a technical means of introducing market mechanisms in the economy. Similarly, jurisprudential ideas of private law are useful precisely because they allow the state to depoliticise the economy as well as to separate the private from public autonomy. In short, the development of legal equality does not extend to political relationships between state and citizens.

In this connection, it may be 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 (Potter 1994b). However, even more pertinent is the fact that legal equality does not extend to the workplace where the organisation of labour discipline 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 to much of Southeast Asia (perhaps with the exception of South Korea and Taiwan) where the bargaining power of labour remains highly circumscribed. The weakened role of labour illustrates 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.

Orren (1991) in the study of development of liberalism in American labour law (e.g., as in the development of collective bargaining) has observed that it was political action by the labour movement that led to the constitutionalisation of labour or the extension of legal rights to labour in the commercial arena. This example of 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.

Vietnam too has recently introduced reforms in the commercial area that have served to establish a significant arena of the law sealed off from the rest of the political system.[7] John Gillespie, in Chapter 6, provides an excellent overview of these reforms. However, more significantly, he suggests that the relationship between market reform and legal institutions may be more complex than envisaged by those advocating transplantation of liberal rules. He argues that the neo-liberal strategies advocated by multilateral agencies such as the World Bank fail to adequately recognise the complex interrelationship between the bureaucracy and the emerging market economy. In this context, he agues that market-oriented legal reform may serve to strengthen the state rather than cause it to retreat from economic life. In other words, legal reform is an instrument of state-building.

However, the clearest disjunction between private and public autonomy is found in Singapore and Hong Kong where the governments boast of the existence of the rule of law, and indeed, where the rule of law is a key legitimating ideology. In both cases, however, the presumption of legal equality is confined to the commercial arena and the state has not been willing to extend these same provisions to labour. It is apparent that the disjunction of private and public autonomy finds expression in the capacity of the state to deny the extension of legal rights to those arenas it considers to be contrary to interests of the state.

Indeed, this point is central to Jones's argument (see Chapter 3) that the law is a substitute for democratic politics. Her thesis is that the rule of law in Hong Kong has taken on great importance in the last few years with many citizens counting on it as a means of warding off the potentially deleterious impact of Chinese rule after July 1997. As she notes, the interesting sociological question is why and how this rule of law has come to dominate the political language at both an official and popular level in Hong Kong. The origins of the 'rule of law' language can be located in the political conflict the colony experienced in the 1960s, perhaps best illustrated by the riots that broke out following the announcement of a fare rise on the Star Ferry. The response of the Hong Kong government to these challenges to its legitimacy was through a combination of law and welfare. Legality would underpin the actions of the government and provide the basis for bureaucratic procedures. In fact, Jones suggests that law was central to the way in which the colonial government restructured its relationship with its subjects; law was both an instrument of state-building as well as a useful instrument of legitimisation.

The use of legalism as an instrument of legitimisation can be generalised beyond Hong Kong. In fact, there are important parallels in the Singaporean context where law has been equally important as a tool of legitimisation and state-building as evidenced in the use of the rule of law rhetoric to intimidate oppositional political forces (Tremewan 1994). Khoo Boo Teik (Chapter 9) also underscores the importance of legalism in Malaysian judicial thinking. Therefore, it is possible that the use of legalism as a legitimating device may prove to be an important aspect of East Asian politics. More importantly, as Jones argues in the Hong Kong case, it provides a substitute for representative democracy. It is worth recounting in this context that the use of legalism bears important similarities to Max Weber's account of legitimisation through the legal rational techniques. Rather than describing a universal historical process, Weber identified a particularly important feature of authoritarian legalism in imperial Germany. It is the absence of public autonomy in East Asia that makes legalism an attractive instrument of legitimisation.

Law is not merely an instrument of legitimisation; it also acts as a means of rationalising the state. Interestingly, this provides yet another point of convergence with the model of authoritarian legalism of imperial Germany. Whereas in the Weberian model, law is seen as a means of 'calculation' in the market, in models of authoritarian legalism in East Asia it is the calculability of state power that provides much of the impetus for legal reform. Thus, the move towards regulating administrative discretion in a number of East Asian countries, is a good indicator of these developments. For example, Sean Cooney (Chapter 11) notes that one of the main features of the constitutional court in Taiwan has been its control of administrative discretion. The regulated nature of economic and social life in the managed capitalism of East Asia makes these developments in administrative law extremely noteworthy.

In this regard, some of the most significant developments in the regulation of administrative discretion have occurred in Indonesia and the PRC. In Indonesia, the development of the administrative court system stands out as one of the most important legal developments since independence. The administrative court system, created by the Administrative Justice Act of 1986, established two tiers of administrative courts: the Administrative Court and the Administrative Appeals Court. Administrative decisions which are subject to review must be[8] *concrete, individual,* and *final:* to be *concrete* it is

required that the subject matter must be tangible and be capable of being executed; to be *individual* the decision must pertain to a particular individual; to be *final* the decision must be finally resolved and have binding effect (Lotulung 1996). Two notable aspects of the administrative court system are: 1 the greater professionalism of administrative court judges in comparison with the rest of the judicial system; and 2 the greater degree of judicial autonomy possessed by administrative judges in relation to the other types of courts.

Turning to the PRC, the Administrative Litigation Law (ALL) establishes the basis for judicial review of administrative action. In theory at least, the ALL enables citizens and organisations to challenge decisions of administrative agencies, but in practice, the effect of the ALL has been constrained by the refusal of courts to consider cases, the permitting of procuracy to challenge court judgments, and the exclusion of party decisions from review. Nevertheless, Potter points out that

> despite its problems the ALL provides an important foundation for assertions by groups and individuals for greater autonomy from bureaucratic control by subjecting administrative agencies to a greater degree of external supervision through judicial review.
>
> Potter (1994a:290)

The significance of the Indonesian and Chinese cases is that they illustrate the importance of the use of law to rationalise the state; in effect, it renders state power calculable and predictable.

A singular feature of the pattern of statist law in East Asia (and this is a major point of divergence between the East Asian and Prussian models) is the use of law to manage and regulate civil society. The terms ‘managerial’ and ‘regulated’ are intended to refer to the fact that actors in civil society are not autonomous but are both in and out of the state, and therefore, it may be said that the state *manages* civil society. The key to understanding the emergence of this managerial civil society is seen in the vertical linkages between state and other civil actors. No doubt, in a country such as China, economic reform has unleashed a variety of social forces that cannot be contained within a traditional state structure; however, state agencies have attempted to deal with these forces by attempts to incorporate and co-opt these organisations (Ding 1994).

The implication of this form of managerial and corporatist civil society is that organisations are both within the state as well as in civil society. White (1996) points out that the *Regulations Governing Registration and Administration of Social Organisations* issued in October 1989 enable the state to establish control over organisations. While this has allowed the state to exclude unacceptable organisations, a ‘more explicit corporatist motive has gradually emerged which emphasises the complementarity between social organizations and the state as components of a new system of socio-economic regulation’ (White 1996:206). In other words, aspects of governance are transferred to these associations producing an organisational hybrid of state and civil society. Clearly, this form of governance is analogous to Japanese concepts of administrative governance. In Singapore, the Societies Act requiring all organisations, including political parties, to be registered with the Registrar of Societies exemplifies the state’s use of legal instruments to control and manage civil society (Tremewan 1994). According to this legal provision,

a voluntary agency or organisation may be refused registration if (amongst other reasons) the Registrar is satisfied that its establishment would not be consistent with the national interest. However, organisations that do surmount the obstacles created by the Societies Act have been increasingly used for purposes of governance. A good example of this can be found in the setting up of a so-called ethnic self-help organisations which are used to provide a range of governmental functions. Legal structures are one means of managing and regulating civil society and this is perfectly consistent with the corporatist pattern of state-society relationships that feature prominently in the political economy of East Asia.

A central theme of this volume is that the emergence of legal institutions and the rule of law needs to be placed within the distinctive structural and ideological context of East Asia. Therefore, this perspective demands a mode of conceptualisation which is sensitive to the specific historical circumstances of East Asia, especially to those aspects of state structure and ideology that shape legal institutions. This general approach adopted in the present volume distinguishes it from that of the Weberian or rational choice explanations of institutional change. In the next section of this introduction we explore the ramifications of this statist perspective for the understanding of judicial independence and organisation in East Asia.

Judiciaries and judicial independence in East Asia

The notion of judicial independence is central to the understanding of the liberal conception of the rule of law. Notions of judicial independence became influential in the eighteenth and nineteenth centuries and were particularly associated with the development of Anglo-American judiciaries. Without exaggeration, it can be claimed that the notion of judicial independence is a reflection of Anglo-American experience rather than a rigorously defined concept. As Shapiro points out ‘when we speak of judicial independence, we are basically writing large and treating as final culmination or eternal verity this eighteenth- and nineteenth-century experience’ (Shapiro 1981:69). This would suggest that notions of judicial independence are not abstract notions; rather, they need to be located in a wider institutional and ideological framework. Of course, this point can be strikingly illustrated in the contrasting patterns of judicial-executive relations under civil and common law systems.

Shapiro, in his historically centred account of courts, has observed that the notion of English judicial independence needs to be understood in the context of ‘three motifs: conceptions of the rule of law, functional specialization of the judiciary, and the autonomy of the legal profession’ (Shapiro 1981:69). The first two ‘motifs’ provide a useful way of approaching the analysis of judicial independence and organisation in East Asia by taking us beyond simplistic notions of judicial independence influenced by models of state and authority, which have limited relevance for East Asian states. In short, any analysis needs to take cognisance of the impact of the wider political and ideological structure on the nature of judicial organisation and independence.

Apart from Shapiro’s work on courts, Damaška’s (1986) comparative study of the influence of patterns of authority on legal institutions provides an equally valuable model for the analysis of judicial organisation in East Asia. His model seeks to anchor legal institutions on a heuristic framework that links types of political ideology with structures

of judicial authority. As such, the model presents a vital distinction between *activist* and *reactive* ideologies. Going by the former, an activist state is permeated by a particular conception of the 'good life' and attempts to use this conception of the 'good' as a basis for the economic and social betterment of its citizens. This activist ideological foundation of the state leads to a view of the law and legal institutions as an instrument for the realisation of the policy objectives of the state. Therefore, the activist state tends to breed *policy implementing* types of legal institution that function to implement policy through law.

In turn, these policy implementing types of legal institution require, according to Damaška (1986), a hierarchical organisation of judicial authority where power comes from the top to subordinate layers of authority and which, he maintains, creates a 'strong sense of order and a desire for uniformity: ideally, all are to march to the beat of a single drum' (Damaška 1986:19–20). This activist, hierarchical policy-implementing model is distinguished from the reactive-co-ordinate *conflict resolution* model. Here, the structure of legal institutions is determined by the ideology of the reactive state which requires the state to be neutral towards different conceptions of the good. The purpose of law is to resolve conflict between actors in civil society, hence the description of legal institutions in this model as conflict resolution arrangements. Damaška's singular contribution has been to underscore the importance of state ideology in shaping, amongst other things, judicial organisation.

What emerges from the work of both Shapiro and Damaška is the need to acknowledge the critical role of ideology in shaping patterns of judicial-executive relations in East Asia. As such, the key to normative understandings of state power, and in particular, the ideology of developmental states of East Asia lies in strongly defined conceptions of the 'good', often underscoring the goals of development and social harmony. In some instances, these goals are explicit as in Indonesian conceptions of the integral state that prescribe an organic relationship between state and society. In these terms, the ideological make-up of East Asian states—in particular, the ideology of dominant power holders—would conform to Damaška's notion of an activist state.

From the foregoing, it is clear that law and legal institutions reflect underlying ideological assumptions about the role, purpose, and objective of government. Legal institutions need to be understood as one aspect of a complex web of ideas about the nature of government. This overriding theme is underscored by several contributors to this volume, all of whom—albeit from different perspectives—highlight the importance of understanding the nature of judicial organisation and independence in terms of a wider normative understanding of governmental and state power (see Chapter 8 for further elaboration of these views).

In similar fashion, Penelope Nicholson (Chapter 13) formulates a distinctive approach to the understanding of the Vietnamese Constitution and courts system that places these structures and arrangements within an ideological context, namely, of how the law is interpreted in the Vietnamese legal system. Thus, she observes that the role of courts and the Constitution cannot be defined *a priori* but must be located within the interpretative framework used by both Vietnamese citizens and officials—a strategy which in turn, requires a methodological standpoint that takes serious note of Vietnamese ideas of the legal system. From this perspective, she argues that judicial independence has been interpreted as autonomy from colonial and bourgeois power rather than from the

executive interference. Similarly, if one is to understand the Vietnamese Constitution from a liberal constitutional perspective (e.g., by focusing on such features as those which restrain executive power) one is likely to overlook the important point that the Constitution is a document which establishes rules of the political game for powerful actors, in particular the Vietnamese Communist Party.

In characterising the East Asian states as 'activist states', we should, however, acknowledge and recognise that there are significant political changes underway in some parts of Northeast Asia. This is clearly brought out by Sean Cooney (Chapter 11) who uses the Constitutional Court as a case study to analyse the impact of democratic transition on judicial independence in Taiwan. He notes that during the martial law period the Council of Grand Justices acted in a manner that sought to legitimise both martial law and the political dominance of the KMT, and rarely exercised its power to declare legislation unconstitutional. However, the role of the Court has been transformed as a result of the democratisation that has taken place during the last decade. Consequently, the Court has become more assertive in exercising its role of constitutional review, particularly in seeking to curb a range of authoritarian practices. For example, the Constitutional Court has found several regulations that prohibit arbitrary arrest violated Article 8 of the ROC constitution. Similarly, the Constitutional Court has been active in seeking to establish a new framework for administrative decision-making. These actions have sought to curb the exercise of *administrative discretion* which has been an area of great importance in Taiwan where procedures of administrative regulation have been employed to direct important areas of social and economic life. This independence, it should be noted, has its limits. The Taiwanese Constitutional Court, like the Japanese Supreme Court, prefers to frame its interpretations in the form of general statements and directions to the legislature to amend unconstitutional laws. The Taiwanese example is particularly important because it demonstrates the extent to which the processes of democratic transition can transform, at least in part, the legal institutions of an activist state. However, there are some significant differences between Cooney's and my approach to issues of judicial independence in Taiwan. I remain somewhat more sceptical of the ability of the Taiwanese to fully escape the authoritarian and illiberal tradition of the Taiwanese state. In my view, the role of the Constitutional Court is to act as a guide to the executive rather than engage in activist judicial review.

Functional specialisation—between independence and dependence

In examining the role of the judiciary, we need to bear in mind that what is distinctive about the judiciary as an organisation is its specific mission or identifiable purpose. In fact, it is this sense of having a shared normative purpose that makes the judiciary an identifiably separate institution from other organisations within the state. Indeed, as Gillman points out, what makes an institution such as a court unique is its 'distinctive mission and a sense of how the maintenance of this inevitably-evolving mission interacts with other elements in a given (dynamic) social setting' (Gillman 1996:7). In this context, the functional specialisation of courts, the second motif that Shapiro identifies in English notions of judicial independence, is akin to what we have described as a distinctive sense of institutional mission. Shapiro points out that the specialisation and centralisation of

legal institutions with a degree of professional expertise are often seen as necessary facets of judicial independence. However, this conflation of the process of functional centralisation and judicial independence may be a historically contingent outcome dictated by the nature of English judicial history rather than a logical corollary of judicial independence (see Chapter 2).

Therefore, analytically, it is useful to bear in mind that there is a distinction between the process of functional centralisation and judicial independence. This is especially the case in East Asia where the most interesting developments in judicial organisation are reflected in the increasing professionalisation and centralisation of courts; but, of course, this may not be necessarily associated with an independent judiciary. In fact, these developments—running counter to the Shapiro analysis of the English case—may under certain circumstances lead to a diminution of judicial independence from central executive authorities. A good example of this is provided in Pompe's (1996) analysis of the Indonesian Supreme Court where he shows that despite a lessening of independence *vis-à-vis* the executive (particularly the Ministry of Justice), there was a high degree of centralisation of power within the Indonesian Supreme Court, particularly at the expense of local and regional courts. It appears that a focus on judicial independence may cause us to lose sight of important facets in the development of a sense of institutional mission.

Mark Findlay (Chapter 12) makes a similar observation in his analysis of the role of the PRC judiciary. He comments on the role of the PRC Supreme People's Courts (SPCs) in legislative interpretation as one example of increasing functional specialisation. Traditionally, interpretation has not been seen as a judicial function; however, since 1981, after the National People's Congress (NPC) Standing Committee adopted the Resolution on strengthening the interpretation of the laws, there has been an explosion in documents on judicial interpretation issued by the SPG or the Supreme People's Procuratorate. Findlay makes the pointed observation that the interpretation of the general principles of civil law by the SPC may be regarded as an example of the aggressive and creative role the Supreme Court has charted in this area of judicial interpretation (Findlay, Chapter 12). Another instance of functional specialisation cited by Findlay is the implementation of the Administrative Litigation Law of 1990 which vested the courts with limited powers of judicial review. Despite these changes, the independence of the courts remains limited by a range of political structures and institutions, least of which is the power of the CCP, over judicial recruitment and policy.

It is clear from Findlay's study that a shift, albeit tentative, towards functional centralisation may coexist within the framework of an ideologically activist state. As such, it produces a context where elements of judicial autonomy exist alongside structures of political dependence. In other words—to frame this in institutional language—judicial organisations develop a sense of institutional mission within a context where there is a dominant (at least within the state) normative understanding of the purposes of state power. Reinforcing this pattern—perhaps paradoxical—of the co-existence of judicial autonomy and structures of political dependence, I argue (see Chapter 8) that judicial—executive relations can be characterised as conforming to a corporatist pattern in that judicial autonomy exists within the executive structures of the state as a division of responsibility within the executive rather than as a separate power operating outside the executive structures. From this vantage point, the distinction

between *a division of power* and *a separation of power* captures the East Asian judicial condition of simultaneous autonomy and dependence.

David Bourchier's analysis of the Indonesian judiciary (Chapter 10) neatly reinforces this point by noting that on the one hand there have been important moves towards autonomy in the establishment of administrative courts: these courts have exercised an unexpected degree of independence. On the other hand, it needs to be acknowledged that there has been widespread collusion and corruption within the judiciary. As such, the existence of these contradictory elements of autonomy and dependence in the relationship between the judiciary and executive underscores our view that this is an enduring feature of judicial organisation in East Asia. Recognition of this point takes us beyond simplistic notions of judicial independence that are commonplace in the literature on judicial politics.

One factor that may contribute to the enhancing of the autonomous role of the judiciary is fragmentation within the political executive. Khoo's study of the Malaysian judicial system (see Chapter 9) is very revealing. He suggests that fractures within the ruling party, the United Malay National Organisation (UMNO), may have facilitated a period of tragically shortlived independence. Prior to the mid-1980s, the Malaysian judiciary, adopting a stance of strict legalism, remained relatively independent of the political process mainly for ideological reasons. Khoo argues that it was the ideological adoption of this strict legalism that enabled the Malaysian judiciary to be politically pragmatic and conservative. In effect, it allowed a relatively high degree of judicial deference to the executive; or, to restate it in terms employed here, it enabled a degree of judicial autonomy within a framework of political dependence. A significant change from the strict legalism of the post-independence period becomes apparent during the period 1986–7. The trigger for this was a number of judgments in important political cases, which went against the executive. Indeed, one case—*Public Prosecutor* v. *Data Yap Peng* was primarily concerned with issues of judicial independence. Khoo, in his study, canvasses a number of explanations for these changes, such as the decline of threats to the integrity of the state, and the middle-class demand for greater accountability and transparency. His main emphasis, however, is on the internecine warfare (that was soon to involve the judiciary) taking place within UMNO, which demonstrated in clear fashion that the ruling political élite was greatly fractured. In fact, it needs to be pointed out that the judiciary itself was split. Under these conditions, there was clearly a space for a more independent and activist judiciary. Of course, this independence was rather shortlived as Mahathir moved rapidly to regain control of the judiciary by forcing out the Lord President Salleh Abas. Khoo points out that after a period of judicial acquiescence to the executive, the Malaysian judiciary may now be returning to the stance of the strict legalism of the early 1980s. Adoption of strict legalism could well be a reflection of the dilemmas of autonomy and independence that characterise the judiciary in other East Asian states.

A dominant theme (despite the diversity of approaches and methodology adopted by the contributors) to emerge from these revealing and insightful accounts of judicial structures and independence in East Asia relates to the critical role of state structures in shaping the development of legal institutions. This again reiterates how important it is to locate conceptions of judicial independence and the 'rule of law' more generally within the ideological vocabulary of the state. In East Asia, this language often takes a highly

activist bent, or to use Oakeshott's (1975) more familiar term, government is constituted as an 'enterprise association'. However, it needs to be acknowledged that, as many of the contributors to this volume document, there is a significant degree of functional specialisation, but these elements of autonomy exist alongside structures of dependence. Therefore, a narrow focus on models of judicial independence based on the Anglo-American experience is not likely to capture the complex interrelationship between dependence and autonomy. One of the most significant contributions of this study is to point towards an alternative set of questions for the study of judicial institutions in East Asia, prominent amongst which is the crucial role of state structures and ideology in shaping patterns of judicial-executive relations.

Notes

1 For example, see Galanter (1966). For a competent review of the law and development see Tamanaha (1995), though the review is marred by the instrumentalist approach to legal reform, which makes him sympathetic to the policy objectives of law and development scholars. In contrast, the authors in this volume are primarily concerned with *explaining* the dynamics of East Asian legal institutions rather than accounting for the success or failure of legal reform.

2 Note for example Weber's extended analysis of the 'anomalous' English case.

3 In many respects this description has a degree of similarity with the notion of relational contracting expounded by Macneil (1978).

4 For a more detailed analysis of the impact of these networks on the form of East Asian capitalism see Redding (1990).

5 On this issue of public and private interdependence see Weiss and Hobson (1995) who describe East Asian NICs as a form of 'governed interdependence'.

6 For more on the constraints on political oppositions in East Asia see Rodan (1996).

7 For an analysis of some of these legal reforms see Gillespie (Chapter 6 in this volume) and also Gillespie (1994).

8 See Section 1(3) of the Administrative Justice Act (1986) in Indonesia.

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2
THE MANY MEANINGS OF THE RULE OF LAW

David Clark

Introduction

As with all concepts, the rule of law has a history and one of the features of that history is the manner in which the concept has been re-interpreted over time (Mason 1995; Shapiro 1994; Shklar 1987). The expression refers to a doctrine—some would say, an ideology—about how the governments should act, and has been used as a synonym for constitutional government and sometimes, though as we shall see these terms are not coeval, to mean democratic government. In intellectual discussions there are various versions of the term and this short essay will assay some of these meanings and then deal with the relationship between the doctrine and legal institutions and also the relationship between the doctrine and the idea of rule by law.

While the idea is western in origin, there are Asian scholars who maintain that some of the issues have arisen in ancient debates in the East (De Bary 1995; Turner 1992; Wu 1932). In any case all states in the region have written constitutions and all are committed to ruling according to the announced intentions of the constitution. This does not mean that all constitutions are the same, either textually or in terms of the political functions and expectations of the constituting document.[1] A fundamental point to be borne in mind is that the history, economic and political systems of all states shape as well as are shaped by their constitutions.

Historical emergence: from rule by man to the rule of law

Doctrine

In the west, beginning with the Ancient Greeks the question was posed as to what would be the best form of government: rule by man, meaning the best men such as Plato's Philosopher King, or rule by law, which was initially regarded as a second best option (Plato 1995:293b–305d; Plato 1941:427a; Klosko 1986; Bobbio 1987),[2] though it later came to be recognised as perhaps the most realistic option by Aristotle, who conducted an examination of numerous Greek constitutions before coming to this conclusion. The emphasis in all of these debates was on how to produce virtuous citizens in a virtuous society, that is, law was seen as a means by which to rule, rather than a constraint on the King, though in *The Laws* Plato made clear that the law should be the master of the government to restrain potential despots (Plato 1988:715d). The law was seen as a

constraint on judges who were to be left very little discretion in making their decisions (Aristotle 1954:1345a; Aristotle 1948:1282b, 1287a).[3] In political practice these debates did not mean much, though all ancient civilisations had legal codes, some of prodigious length and complexity, yet the view took hold in the late Roman period that the Prince was above the law, (Wallace-Hadrill 1982:39; Post 1968:520) though by the Christian era he might be subordinate to God, but not to other men. In other words, laws existed to order and regulate human affairs and to allow citizens to make choices or face punishments for transgressions. There was little indication until the medieval period that kings should be subordinate to the law, and even when this was suggested, there was little said about what institutional arrangements might be appropriate to achieve this (Nederman 1984). In fact, the impulse to obey the law was said to come only from the monarch's sense of moral obligation; for no man, and certainly no judge, could enforce this (Nederman 1984:63). In short, despite doctrinal assertions that the king was subject to the law[4] and the argument that no Prince should rule without laws (Berman 1983:292–4; Marsilius of Padua 1967), the translation of this idea into an institutional arrangement whereby it might actually be enforceable took several centuries, during which there were notable reverses of course, and also powerful voices opposed to limiting a sovereign, particularly a monarch, by law (Hobbes 1968:232).

Constitutional practice

Though the common law legal systems of England and America pride themselves on having devised the rule of law, in fact it came into being slowly; it was the product of a prolonged political struggle, and in any case was riddled with reverses and exceptions. The west, it should not be forgotten, went through a long period of modernisation, plagued by civil wars, violence, and revolutions. This process was not planned; nor was its success pre-ordained. Nor, it should be said, was the process the same everywhere either in terms of timing or in institutional details (Kriegel 1995; Barnum *et al.* 1992; Downing 1989).

What is clear is that the process owes much to emerging practices of government, rather than deliberate planning and that the idea that not only should the government rule by law, but should also abide by the rules and even be limited by the rules was an idea that took a long time to be actually established. Much of the debate took place in a pre-capitalist economic environment, where political participation was strictly limited to a very small portion of the population. In England, at least, the rule of law, both as an idea and as a constitutional practice pre-dated the industrial revolution and the emergence of democratic politics.

In sixteenth-century England, despite the view that the monarch was an absolute prince, meaning that no man or institution on earth was superior to the monarch, in practice kings relied upon legislation to make major changes in their law and policy (Dunham 1964). The roaring Niagara of Tudor statutes, as one historian put it (Elton 1972), created an expectation that Parliaments would be regularly called, that major policy initiatives would be put into legal form, introduced to the legislature and debated, and these initiatives included spending and taxation measures. Following a political and legal struggle in the seventeenth century which included a civil war, the execution of one monarch and the overthrow and exile of another, the English at last settled on a

constitutional order that, amongst other things, asserted rights over the king. Under the Bill of Rights Act 1689, kings could no longer suspend or dispense with the laws, were obliged to acknowledge the privileges of Parliament and to seek legislative approval to raise revenue (Edie 1977). Despite the laudatory tone accompanying these innovations the king remained very powerful and many aspects of the legal system were underdeveloped. Judges only acquired security of tenure in 1701; juries were still under their thumb into the eighteenth century; political participation did not begin to widen until 1831 and was not completed until 1928. The political system in the eighteenth century was corrupt and the civil service was appointed on the basis of patronage and connections until the nineteenth century. None of this should detract from the historic achievement, but it should serve to warn readers that the emergence of the rule of law has a history bound up with a prolonged political struggle and that it took a long time to be established, and in the history of government it is a recent and a rare accomplishment. Even when the British took the common law to the various parts of their empire there was often a huge gap between the rhetoric of the common law and colonial practice. In Australia, for example, there was a system of military rule between 1788 and 1823, and even after the civilianisation of the legal system, trial by civilian juries and a representative legislature took time to be put in place (Neal 1991: chapter 3; Windeyer 1958–63).

If one had to hazard a generalisation about this process it would be that the political and legal culture that gives rise to, and sustains the rule of law involved the considerable cultural shift in Europe from feudalism to modernity, and that therefore cultures are not static; nor can they be simply manufactured or contrived at the demand of the government. Even the American case suggests that there is both a considerable background to a constitutional document and also that there is often a long period of evolution after the constitution is made before the full emergence of constitutional government takes hold in the society at large.

Formal theories

The modern view of the rule of law seems to have emerged as a doctrine of that name, in the late nineteenth century. Despite the association between the phrase and the English lawyer Albert Venn Dicey (Dicey 1959) who seems to have taken some of his ideas from Professor W.E.Hearn, a Professor of Law at the University of Melbourne (Arndt 1957), Dicey's view proved to be both influential and enduring especially with judges and practising lawyers.[5] In essence he argued that the rule of law in England involved the following institutional arrangements:

- that no person is punishable except for a breach of law established in the ordinary manner before the ordinary courts of the land; this is in contrast to arbitrary power and excludes wide discretionary authority;
- that no man is above the law; that every person, whatever be his rank and condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals, or equality before the law and this excludes exemptions of officials or others from a duty to obey the law which governs citizens;

- that general principles of the constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

It has to be said that much of his doctrine was based on a disdain for continental models of government, though he was familiar with them. Dicey has been attacked and defended. One of the problems with his formulation is that it is narrowly English and less likely to travel well since it is not conceived in terms of abstract criteria that a variety of legal systems might meet, though their institutional details will vary. In particular, Dicey assumed that the laws were relatively clear and fixed, whereas in fact even in England great congeries of discretionary power have existed since the sixteenth century and were rapidly expanding during his lifetime.[6]

The nineteenth-century jurists seemed to assume that judges merely discovered the law, whereas in fact they interpreted it, and actually thereby made law. Since Dicey's death the administrative apparatus of the state has expanded dramatically and the struggle within administrative law has been to extend established principles to these new concentrations of power and to find new techniques such as Ombudsmen, Freedom of Information, and merit review to control the administrative system (Bensel 1980).

Later versions of the doctrine stressed the formal rather than the substantive aspects of the law, and eschewed all connections with human rights or a Bill of Rights, or in fact, with a democratic political order of the western type (Oakeshott 1983; Raz 1977; Hayek 1944). In other words, the rules are facultative, not substantive, and are not intended to be either instrumental or conducive towards the accomplishment of particular substantive goods (Oakeshott 1983). The argument for a formal theory was partly political, that is, it was more likely to be seen as neutral and compatible with a variety of substantive laws actually found in western systems, ranging from more market oriented economies to the welfare state. Despite the differences of substance, it has been argued that a spare formal theory would likely attract greater support across ideological lines (Summers 1993:136).

The laws themselves must meet various formal criteria: i.e., they are promulgated to the public, and not secret; are generally prospective not retrospective; are not impossible to comply with; are clear, coherent with each other, and stable; that lawmaking is guided by the law; that persons who make and administer laws are accountable, and actually do administer the law consistently in accordance with the law (Allan 1993; Allars 1990:15; Finnis 1980:270–1; Rawls 1971:235–43). More recent writing has extended the list of formal requirements to include institutional arrangements such as a judiciary independent of government interference in individual cases, an independent legal profession, access to the courts, the application of the principles of natural justice (i.e., that the decision-makers are not biased in a legal sense and that parties are given a fair hearing), and impartial and honest law enforcement (Walker 1988).

Purely procedural models have also emerged in which the stress is upon due process,[7] i.e., being given a hearing, by independent judicial or administrative officers, leading to reasoned decisions articulated in terms of the governing rules (Jones 1958:145–6). In practice, the term in some states merely means that parties before a court are entitled to be treated in accordance with the rules in existence at the time the case is heard.[8] Such a positivist approach excluded an overarching doctrine by which such rules might themselves be judged, though in the United States there is such a critical approach to this doctrine, and even signs of it in Australia. As with all formal theories, there was no way these positivist criteria could be used to distinguish between regimes that are democratic

or humane and those that deny human rights, impoverish the people and practise racial segregation and religious persecution. As long as the regime, whatever its character, abides by the formal criteria of the law, the rule of law can be said to exist (Radin 1989:786).[9]

The problem with this view is that while it proved a way of distinguishing between arbitrary government, i.e., government where there are either no rules, or rules of a certain type, and the rule of law in the formal sense, this model was compatible with a range of political regimes including apartheid South Africa and even Nazi Germany, both of which had rules and laws. The problem was that the laws were unjust, and in both cases deliberately discriminatory. Such a political and legal order was not compatible with equality, nor—given its racial basis—was it compatible with universalistic criteria of the modern world such as civic equality irrespective of one's background. Various regimes quickly discovered that control over the legislative process gave them the capacity to construct oppressive laws to preserve the regime in power and to thwart demands for accountability.

Given the abuses of human rights in the twentieth century—a centurywhich has seen more humans die at the hands of governments than any other in human history—it is hardly surprising that the United Nations has since 1948 run a campaign to insist on the adoption of certain substantive arrangements, political and civil, and then economic, social, and cultural, said to be universal and to apply in all states. Thus these conditions gave a new substantive twist to the rule of law by saying something about the content of the rules themselves (Swede 1995:371–2). One argument for this approach is that unless there are such standards, governments will continue to treat their citizens, or some of their citizens, according to whim or even deliberate policies that entail abuses of human rights. This argument necessarily implies that national borders were permeable, and that governments did not have absolute sovereignty to do whatever they liked. As a normative ideal, these standards should not be confused with a description of legal and political realities for international standards which have often been abused, and much remains to be done to achieve these standards.

From rule of law to democratic institutions

As we have seen, while the rule of law pre-dated democratic regimes, in modern times the rule of law has also been used either as a synonym for democratic government, or at least linked to it,[10] the argument being that pluralistic or multiparty democratic politics will be more likely to keep a government within bounds than would regimes that are not subject to these disciplines. While this is generally true, two qualifications must be made. The first is that even democratic regimes can abuse the rights of minorities by passing oppressive laws, as indigenous Australians and Asian Australians well know. Second, even systems that have humane and non-discriminatory laws experience abuses of power, usually by individuals, although systematic abuses are not unknown. Yet, that said, the empirical surveys of human rights compliance show that developed democratic regimes have the best human rights records, and military dictatorships, and one party states have the worst records in this regard.[11] Similarly, amongst developing states, those that are well advanced economically are generally the least oppressive, while those that are the

most backward have real problems. But again, this is not a simple correspondence but merely a general tendency.

What emerges from this is that modern systems are not simply based upon the law, but that there are other arrangements—particularly, political institutions and practices—that also vie for pride of place as central principles in the system. In parliamentary systems, for example, even where there is a written constitution, there is sometimes said to be a conflict between the rule of law and parliamentary sovereignty (Griffith 1994). The argument is that the law insists upon stability, while parliamentary sovereignty allows for one branch of government to override all others. Whether this is so need not be discussed here, but the point for our purposes is that legal orders are embedded in political systems.

Role as an ideology

While most proponents of the rule of law have written about the subject from a liberal perspective, a number of writers, on the left in particular, have criticised the concept as an ideological mask which in effect uses the rhetoric of equality before the law and impartiality to mask an underlying reality of inequalities and exploitation (Jones 1994:204; Unger 1976:52–7, 66–76, 166–81, 192–216, 238–42). Within this tradition of writing, there are important variants. E.P.Thompson's account, for example, based on a careful examination of eighteenth-century Britain, notes these points, but concluded that within a system the ruling class occasionally had to accept the application of the rules to themselves or else risk the wholesale loss of legitimacy (Thompson 1975:258–69). In other words, the risk to political rulers of using the rhetoric of legal rule and legal equality is that these terms will be deployed to press for real political accountability by political rulers. At first these developments may be merely an attempt by the political leadership to bring their own subordinates into line and to eliminate the arbitrariness and uncertainty that goes with systems without rules. But these campaigns have a habit of creating demands to extend the rules even higher to encompass the behaviour of the ruling class (Jenner 1994:144). On the other hand, it should not be thought that there is anything inevitable about these processes, and legal orders have existed for a very long time where the law was seen as an instrument for the control of the populace, while the ruling élite remained largely exempt (De Tocqueville 1955).

Underlying assumptions

There are instances where a modern legal order has either been imposed upon, or adopted by, a society that operates at variance with the assumptions of the rule of law. The rule of law is actually based on an assumption that: political leaders make mistakes, therefore, they are not infallible; that since they are expected to rule in the interests of the public good and not merely their own personal interests, they should be held accountable for what they do. In systems where real power is in the hands of an absolute monarch as in Tonga, for example, or in the hands of a political leadership that sees its existence as essential to the nation and imagines that their interests are the same as those of the nation, this idea will prove to be a real problem. For it may be assumed that, to critics, the political leadership necessarily entails an attack on the political order and is therefore necessarily subversive. In the late eighteenth century, Britain's mild mannered calls for a

wider franchise, for example, were simply labelled as treasonable, and such groups were subject to trials for sedition. Where there is no recognition of the legitimacy of a legal and loyal opposition, i.e., no space between lawful advocacy of political change and revolutionary overthrow, calls for change are necessarily seen as a threat. In such cases, especially where the apparatus of control is strong the only prospect for change is usually change from above by a reforming leadership.

In practice, most rule of law systems recognise that large congeries of power are potentially dangerous and have sought to either divide power or at least balance off the various branches of government, and have also recognised that the executive in particular, ought to be accountable for what it does. There are, however, systems such as those in China that assume that divided power means governmental weakness, and that this weakness will lead to societal breakdown and chaos.

In practice, the operation of a rule of law state assumes that public officials are aware of the legal limits on their power, and will for the most part accept these limits. The evidence shows that this is not always so and that even in established legal orders the executive will sometimes manipulate the law to get round judicial rulings, though this is normally not so widespread or blatant as to undermine the legitimacy of the legal system as a whole, but its corrosive effects on public sentiment towards the legal system ought not to be underestimated (Pearce 1991).

Another assumption is that legitimacy comes from obeying the law, and in democratic systems by having attained power by free and fair elections; and also that the state recognises a relatively autonomous civil society consisting of voluntary organisations, e.g., clubs, societies, professional associations, political parties, trade unions and churches which the state does not directly control and in operations of which it does not interfere.

East Asia: rule by law

In a number of East Asian states, such as China, there has been a recognition that rule by a single man is dangerous. The experience of the Cultural Revolution (1966–76) was said to bear this out. On the other hand, rule by law, that is, rule according to known rules rather than arbitrary dictates, is also recognised as essential, both politically and also in order to create a sort of predictability upon which to base economic modernisation.[12] (See Jayasuriya, ‘Introduction’, this volume.)

The argument here is that the government should rule by known laws rather than by mere fiat or personal rule. Rules are here seen as a more rational and perhaps more efficient means of guiding or steering the society (Minxin Pei 1994:101–2; Lo 1992; Zhongguo Fazhi Bao 1985; Von Senger 1985:200). Nevertheless, despite these points, there is less interest in holding senior political leaders accountable; in fact, in some places they are effectively exempt from the law, unless there is a purge or minor officials are caught in an anti-corruption campaign. One of the contradictions in the use of an instrumentalist view of the law is that the relationship between one-party rule and rule by law remains problematic. On the one hand, the party should adhere to the law; but on the other hand, the party is obliged to guide the state, i.e., the law. While officially there is said to be no such contradiction (Li Buyun 1982), in reality, as critics have pointed out,

the party, especially its senior leadership, is effectively above the law, (Lee 1996; Yichou 1986; Heuser 1986; Ma 1981). Chinese writing on the subject seems to veer between assertions that the party must obey the law to claims that the party must provide leadership for the organs of state power.[13]

Several of the underlying assumptions of this view of the world are at odds with the views taken in the west, though whether these opinions represent merely the ruling élites in these societies or are actually subscribed to be the populations remains an open question. These assumptions are: first, that society is not really plural, even if there is evidence of this such as ethnic diversity, religious and regional pluralism, but rather society is a corporate whole where the emphasis is on unity rather than on diversity; second, that the political leadership should prescribe a ruling ideology, e.g., Indonesia's Pancilla, Singapore's national ideology, the four principles in China, and this principle should govern the legal order; third, that the stress should be on collective responsibilities rather than on the assertion of individual rights[14] with the political leadership acting as the guardian of these collective responsibilities and having the duty to prescribe them in the interests of the nation; fourth, that criticism of the political leadership is tantamount to criticism of the nation and its overriding interests, and that this is necessarily a threat to social order, which in some versions is so precariously poised that anything might upset it and cause disaster (Chew 1994). It follows from this that the state and its organs should suppress what the west calls dissent, but which in accordance with the view of Asian values[15] is really an unacceptable threat to social and political stability. The emergence of these differences occurred early around the independence period (ICJ 1966; Heuston 1964:56–7) and presents a number of Asian states with a contradiction between their relatively liberal legal systems, at least on paper, and the authoritarian demands of their political and social systems. Fifth, it follows from this that the law and its institutions are a weapon to control society and in particular to nip societal threats in the bud (Seow 1994).

East Asia: practice

The difficulty with talking about East and Southeast Asia is that, in fact, there are territories in this region ranging from Japan at one extreme to Burma and North Korea at the other, with all other states somewhere between in terms of regime type, the sophistication of the legal order, and levels of economic development (Case 1996; Alagappa 1995). It should be noted that institutions, economies and political systems do not always coincide. Thus the Philippines has a democratic political system, a free press, a modern constitution (1986), but a backward economy which is also in some areas based on semi-feudal land holding practices. Much the same could be said of India, while Pakistan has a weak democracy, a semi-feudal economy, and along with Bangladesh, chronic political instability and endemic corruption. Singapore, on the other hand, is clean in terms of corruption, has an efficient modern bureaucracy, a high standard of living but operates as a virtual one party state with a leadership that is paranoid about opposition (Haas 1989). While Malaysia shares some of these characteristics, the greater diversity of the country allows for a greater measure of political freedom and a more independent minded judiciary than its neighbour. Taiwan has undergone the early stages of legal as well as political modernisation in the past decade and this has been attributed

to cultural renaissance as well as a re-interpretation of Chinese culture (Winn and Yeh 1995; Lee Teng-hui 1995; Cheng 1989; Winckler 1984) as has South Korea (Yang 1993). Indonesia has a political order still dominated by the military but yet human rights debates occur (Kokott 1995; Nasution 1994; Lubis 1993; Wanandi 1993) within the context of what has been called soft authoritarianism. These various characterisations should warn the unwary against the notion that there is either one path to developed status or that there is something inevitable about it.

Nevertheless the rise of a law based political system requires certain institutional supports to both implement the idea of the rule of law as well as to support it. Minimally, this involves a reference in the constitution to either the principle itself, or more usually, to the idea that the constitution is the highest form of law, which will prevail over all lower forms of law and over policy. By itself, this is rarely sufficient unless all that is sought is a symbolic representation of the concept in a constitutional instrument. Normally, the idea is further supported by the existence of an independent judiciary and by laws regulating the political and electoral process. The necessary implication of this arrangement is that the Supreme Court, having jurisdiction over the law, is in a position to entertain applications concerning legal irregularities in the electoral process, and possibly the legislative process as well. Of course, such challenges might lie unused until the political circumstances arise to invoke these laws. In addition to the minimal institutional requirements of a supreme law and judicial review by an independent judiciary, some states have made provision for other forms of legal accountability, such as an Ombudsman, an anti-corruption agency, and a system of administrative tribunals. If used, and if effective in use, these institutions will both extend the range of matters subject to external review and deepen the institutional grip of the law on the political-administrative process.

Whether these institutions exist, and more importantly, whether they are actually deployed in an effective manner depends upon political as well as institutional arrangements. Some states with these arrangements simply witness their formal existence because citizens are unwilling to use them. Another factor in the use of accountability mechanisms is the character of the personnel who staff these agencies and courts, and in particular, whether they are prepared to entertain applications from citizens and pursue them vigorously if the circumstances merit this. It would seem that citizens of regimes that are more advanced along the road to democratic accountability are more likely to resort to institutional uses of accountability mechanisms. In this volume, the chapters on Korea and Taiwan detailing their experience support this tendency. Other regimes that are less well developed politically, but in which tentative steps have been taken to institutionalise citizen complaint handling, such as Indonesia, are at the early stages of institutionalising the rule of law. While the impetus towards institutional change is likely to be fed by domestic pressures, it also seems, given the economic experience of 1997–8, that external pressures for change may add to domestic tendencies and induce greater institutional reform. The rise of the rule of law in Europe was partly a response to the requirement to provide a predictable and stable legal order on which to base economic and political development. It is unlikely, whatever local variants emerge, that the states of East and Southeast Asia will be able to stand aside from the pressures towards rule-based administration.

Even within systems where individual rights are not traditionally prized it has been recognised that administrative review is desirable; hence its emergence in a number of East Asian states recently (Hills 1994; Levin 1995; Fa and Leng 1991). As most of these laws are very recent, no detailed assessment of their effects is at this stage possible. Potentially, these developments might lead to greater public accountability or they may be constrained by the overall political culture and have little impact outside the cases involved (Hall 1990–5; Hickling and Wishart (1988–9). The open question is whether the emergence of legal institutionalisation documented in the chapters in this volume will produce similar effects as in the west or whether there really is some distinctive Asian way towards economically developed societies without an accompanying political and social liberalisation.

Notes

1 For a classification of constitutions that emphasise their form and functions see Elazar (1985) where he lists the following five models: 1 as frame of government and protector of rights; 2 as code; 3 as revolutionary manifesto; 4 as a tempered political ideal; 5 as a modern adaptation of an ancient traditional constitution.

2 While Plato thought that rule by the best men, the philosopher king, was superior to rule by law in the Republic 427a where it was said that detailed laws would not be needed, in *The Statesman* (Plato 1995 trans.) he had begun to shift ground and indicated that rule by law might be necessary despite its disadvantages, notably its inflexibility and generality. In his last work (Plato 1988 trans) he had come round to the idea of a comprehensive code of laws. For a discussion of Plato's Rule of Law in his later work see Klosko (1986:225–34).

3 See also Aristotle (trans) (1948:1287a, 1282b) where the same argument is applied to rulers.

4 For a review of these doctrines see Weston (1960).

5 See for example, Mason (1996); Toohey (1993); McLachlin (1992); and Menzies (1971).

6 For criticisms see Harvey (1961:492–3); Jennings (1952:53–78, 289–301); Barker (1914).

7 The term was first used in legislation as long ago as 1351 and 1354. See Rand (1961:177).

8 *Adler* v. *District Court of New South Wales* (1990) 19 NSWLR 317 (CA).

9 See Franz Neumann (1986) where the formal theory is said to be consistent with a German style Rechtstaat; see also Von Caenegam (1995).

10 Re Buchanan (1964) 65 SR (NSW) 9. 10 'Every truly democratic system of government rests upon the rule of law, and no system is truly democratic if it does not'.

11 There are many of these. See Humana (1992) and Sing Ming (1996:352 table 9).

12 This is a constant theme in Chinese writing on the subject. See Ne Zhengmou (1987).

13 Compare Liu Qingcai (1984) with Lin Yicui (1983).

14 Tay (1996) calls this a *gemeinschaft* model of society and law.

15 There is now a vast literature on this. For views see Moody (1996); Emmerson (1995); Ghai (1994); and Kausikan (1993).

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3
POLITICS POSTPONED

Law as a substitute for politics in Hong Kong and China

Carol Jones

‘End of Empire’

At midnight on 30 June 1997, Hong Kong ceased to be a British colony. Unlike other former colonies, Hong Kong did not become a self-governing territory but a Special Administrative Region of the People’s Republic of China. There was no hoisting of a flag of independence, no claim of a bright democratic future. Indeed, the only glimpse of democracy Hong Kong had experienced, Legislative Council (Legco), was dissolved at midnight and replaced by China with the Provisional Legislature.

This was the third time the body politic in Hong Kong had been dissolved. The first, I argue, came in the 1970s, when a shaky colonial government dissolved and re-made ‘the people’. The second was in 1984, when the Joint Sino-British Declaration started the process which would make Hong Kong part of China again in 1997.

China’s dissolution of Legco was expected. Since 1992, it had opposed reforms which had given Hong Kong people greater legal and political rights. Many of these reforms took place after the arrival of Chris Patten, the last British Governor. The ensuing conflict sharpened the realisation that China and Hong Kong held competing conceptions (and expectations) of law and politics. China had its own internal problems with democracy; it was also undergoing a tremendous social and economic upheaval. Greater participation by the masses in the affairs of government was not an idea it wished to encourage.

Hong Kong’s taste of representative government was brief. In 1995, for the first time ever, 20 months before the handover, the majority of Legco members were popularly elected. For almost its entire 155 year history Hong Kong was governed by a small power bloc consisting chiefly of British business interests and expatriate colonial officials. Wealthy local Chinese slowly penetrated this élite and were co-opted by it. Though the postwar administration considered introducing democracy, the idea was shelved (Tsang 1988). Until the 1970s, the colonial administration continued much as before. Hong Kong’s rapid economic restructuring in the 1950s and 1960s resulted in the development of a large industrial working class, consisting of locally-born Chinese as well as about two million Chinese who had fled the Mainland after the Communist Revolution in 1949. This was to be the era of mass production of plastic goods, exported throughout the world with ‘Made in Hong Kong’ stamped on the bottom. The easy supply of cheap labour, coupled with a government policy of *laissez-faire*, meant that large profits could be made. Working conditions in the industrial and manufacturing sector were Dickensian. Wages were low; there was no penalty for employers who paid late or not at all. Working

conditions were cramped and unsafe; those in garment manufacture worked in sweat-shop conditions for long hours at a time. Rest periods and holidays were minimal and subject to cancellation during periods of continuous production. If the machinery broke down, there was no pay until it was repaired. Trade union organisation was weak in the 1960s. The best the workers might hope for was that the employer provided cheap dormitory-type accommodation adjacent to the factory and subsidised meals.

By the mid-1960s, an immense gap had opened up between government and people. In 1966 and 1967, this was to develop into direct conflict. Scott argues that the large-scale riots of 1966 and 1967 posed a 'crisis of legitimacy' for the Hong Kong government, raising profound questions about its right to rule (Scott 1989). This forced government to consider ways in which it could close the gap with 'the people'. One possibility would have been to introduce some form of representative government. The British administration chose instead to create a consultative machinery to provide readier access to government. It also embarked on an impressive programme of welfare colonialism. I argue that this formed part of a wider process of hegemonic restructuring. Law played a crucial role both practically, as a means of instituting the new policies, and ideologically, by setting new rules of engagement between the government and 'the people', state and society. In the absence of democracy, law became an alternative means of redress but also a new means of governance. Hong Kong is therefore a good test of the argument advanced in the Introduction to this volume that the rule of law can provide an effective instrument of legitimacy for strong executive governments.

The central place of law in popular political discourse of the 1990s has its foundations in this period. It is from this point onwards, I argue, that we can trace the formation of Hong Kong people's attachment to law, an attachment which intensified during the run-up to 1997. China's resumption of sovereignty in 1997 has raised many anxieties among Hong Kong people. Rule of law has become their talisman against the anticipated depredations of a post-1997 Chinese government. Years of living in an undemocratic but prosperous society mean that few see democratic institutions as crucial to their way of life. Law, on the other hand, is associated with a nostalgia for a stable and prosperous golden age, particularly the MacLehose era of the 1970s. Since the enactment of the Bill of Rights (BOR) in 1991, law has also come to be regarded as the moral centre of Hong Kong society. The BOR generated a heady discourse of rights.

In the 1840s, when the British first came to Hong Kong, they sought to 'attach' their new colonial subjects to British rule by instilling in them a love of British institutions. In 1848, the Chief Justice, John Hulme told the Chinese that, 'As inhabitants of a British Colony, one of the greatest privileges you enjoy is the right to a due and even-handed administration of the English laws, and I am satisfied that the more you become acquainted with these Laws, the more you will learn to love and respect them' (Munn 1995). Rule of law was part of the civilising mission of colonialism; it was the 'White Man's Burden' to carry civilisation to the natives. History shows, however, that the British seldom managed to 'attach' their colonised population to colonial rule, except by coercion. In the years between 1990 and 1997, just as they were about to depart, they eventually managed to 'attach' the Hong Kong Chinese to British rule of law.

As I have indicated, the past has been crucial to the formation of this 'attachment'. The first important period was between 1970 and 1985, when the Hong Kong government employed rational legal domination (or bureaucratic legality) as part of a

wider programme of hegemonic restructuring. The second stage is the period between the mid-1980s and July 1997. In this period, law assumed the full-blown liberal trimmings of Dicey's concept of rule of law. The events in Tiananmen Square on 4 June 1989, were to encapsulate for Hong Kong people all that distinguished a society governed by rule of law from one governed by the exercise of arbitrary power, caprice and discretionary powers of constraint. To restore confidence in the colony, the Hong Kong government instituted a BOR in 1991. A powerful discourse of rights and rule of law developed. At the point of transition, in June 1997, the question on everyone's mind was whether and how the incoming government of the Hong Kong Special Administrative Region (SAR) could counter this discourse 'without a thorough revolution in the institutions and manners of the nations' (Dicey 1959:199).

Local resistance to any change which weakens rule of law in Hong Kong is now very strong. Rule of law was portrayed by the last Governor, Chris Patten, as the most important legacy Britain could bequeath her colonial subjects. Whilst one might expect such justificatory rhetoric from a departing imperial power, the strength of support for law amongst local people is surprising given the rather anti-Chinese nature of law in Hong Kong's colonial past. The formation of this 'attachment' to rule of law is of relatively recent origin. Though it reached full maturity in 1997, its beginnings lie in the 1960s and 1970s, at a time when law provided a panacea for the pains of industrialisation.

The 1960s: a regime of complacency

The image of Hong Kong as a 'city of law' is the total opposite to its image in the 1960s. Then, it was a city of unbridled capitalism and equally unbridled corruption. Trade and industry flourished. *Laissez-faire* meant government stayed out of industry, leaving employers to do as they liked, usually to the detriment of the work force. Lau has characterised the government of the time as an aloof and remote bureaucratic polity, whilst the people of Hong Kong were themselves 'politically apathetic' (Lau 1982; Lau and Kuan 1988). Their quietism reflected not some innate feature of Chinese culture so much as their total political exclusion. Power lay with the colonial government; local élites were co-opted into what King calls a system of 'administrative absorption of politics' (King 1975). Decisions were taken behind closed doors. The institutions of government were élitist, complacent, secretive and unresponsive. Relationships of authority were hierarchical, clientelist, and largely patrimonial. Legal, political and economic power in 1960s Hong Kong accrued as much to the person as his office.

Hong Kong in the 1960s was effectively run by a small group of expatriate colonial officials and an even smaller economic élite, comprising such enterprises as Jardine Matheson (the Hong Kong Shanghai Bank), Hutchison International, Swire, Dairy Farm and Wheelock Marden. Indeed, it was commonly held that Hong Kong was actually controlled by about 20 persons (Rabushka 1973). At the lower levels of Hong Kong society, the District Officer maintained a paternalistic approach towards the rural population, whilst in the urban areas a corrupt paramilitary police force provided the mainstay of colonial control. To the people at the bottom, decisions about their lives were

handed down as a *fait accompli*. There was no popular electorate to constrain the concentrated power of the bureaucrats (Rabushka 1973).

The riots of the late 1960s changed all this. The 1950s and 1960s were a period of rapid economic restructuring. The gap between the rich and poor punctured the belief that, left to itself, the free market would ultimately adjust to maximise the good 'of the whole society as well as the individual's welfare' (Wu 1973:292). Hong Kong's business élite prospered but the benefits were not 'trickling down'. By 1965, the number of people in resettlement blocks had reached 740,000. By 1965, the colony was experiencing a slowing down of its previously high rates of growth. That year, rumours about the collapse of two banks led to a more general run on other banks in the colony. The government abandoned its non-interventionist stance, flying in from Britain a special delivery of 20 million pounds sterling; it even made sterling legal tender in Hong Kong. By 1966, government spending on welfare was five times what it had been in 1956, but this was still only 1.1 per cent of total government expenditure, or less than HK$6 per head. The government's White Paper on Social Policy was criticised as cold and negative, 'an apologia for inaction'.

In response, the Colonial Secretary sought to counteract the popularly held view that government was only interested in making money. He argued that, 'the government is most certainly interested in people as people and not only in their economic potential' (HKAR 1965:4). However, official and academic publications talked of Hong Kong people in precisely those terms, as 'homo economicus', hard workers, united by nothing except a will to overcome hardship, earn a living and turn a profit. Hong Kong, on this view, was not so much a society but an economy, its inhabitants a body of producers rather than a body politic.

In 1966 there were 13 strikes and two lock-outs. There was also large-scale rioting which went on for several days. The riots followed protests about a proposed fare rise on the Star Ferry. It was the manner in which the rise was decided, rather than the increase itself, which caused resentment. Despite vocal public opposition, Legco passed the Star Ferry Company's request with little debate. This sent a powerful message of indifference to public opinion and reinforced the view that the Hong Kong government was unrepentantly a government of and for big business. The government's immediate response to the riots was to fall back on its paramilitary capability. Afterwards, it blamed the trouble on Hong Kong's 'hooligan' youth (1966 Report: 113). Over 40 per cent of the colony's population were under 16; 50 per cent were under 21. They were said to be suffering from a sense of 'Impermanence and Not-Belonging' (1966 Report: 125), with no stake in the community of Hong Kong. To belong they 'must be induced to accept Hong Kong' (1966 Report: 125). Finding some means to induce these people to identify with Hong Kong was to become the overarching theme of the 1970s.

In 1967 the colony experienced more—and more serious—riots. These continued for most of the year; the numbers taking part ran into thousands. These disturbances are usually dismissed as simply a 'spill-over' from the Cultural Revolution, then beginning in China. However, the presence of so much readily combustible material testifies to profound and widespread discontent within Hong Kong itself. The riots were sparked off at a picket line protest outside the Hong Kong Artificial Flower Factory in San Po Kong, amongst people whose conditions of work closely resembled the worst of nineteenth-century Britain. They had been dismissed by the management for seeking better hours

and conditions of work. The picket itself was perfectly legal. However, the police were called in, setting off violent clashes between the police and the workers. Local communist groups saw the incident as a vehicle for agitation against the colonial regime more generally. Riots, demonstrations, protests and petitioning followed.

As far as the government was concerned, the riots were a mere 'blip' on the otherwise tranquil history of colonial rule. Any blame lay not in its own complacency but with communist agitators, the favoured enemy of the Cold War era. It emphasised the 'massive support for law and order' amongst the community (HKAR 1967), and it turned again to its paramilitary force and Emergency Powers to quell the disturbances. Raids on the premises of trade unions provided an opportunity to weaken their power, as did the imprisonment of 'leftist' students and workers. Immediately after the riots, government introduced a tough new Public Order Ordinance, giving police wide powers. In the 1990s, following the implementation of the Bill of Rights, this Ordinance was amended. However, during May 1997, the incoming SAR administration was to undo some of these amendments in order to resume the more extensive powers of control provided by the 1967 Ordinance.

The official account of the riots played down their implications, but in private, government recognised that they represented a profound challenge to its legitimacy. In a society without democracy, government relies heavily upon 'performance legitimacy' i.e., its achievements. The legitimacy of the Hong Kong government lay largely in delivering economic growth. By the mid-1960s, it was clear that whilst its *laissez-faire* stance might deliver prosperity to business, it did not deliver prosperity to all. The colony's laws and policies favoured capital over labour. More often than not, government *was* capital. The Federation of Hong Kong Industries summed it up at the time: the Hong Kong government was 'Hong Kong Inc.' (Turner 1996:4).

The 1970s: 'dissolving' and re-forming the people

Despite this crisis of legitimacy, the government was not prepared to introduce wider constitutional change. In its view, what was sought was not so much a change in government as readier access to government. It would examine itself to discover which aspects had 'tended to create an image of detachment from the actual problems of the person in the street' (1966 Report: 128). A more open and accountable government would be achieved through a wider structure of consultation, with the legal system providing some checks and balances, and channels for redress.

The 1970s opened with a change of Governor. One of MacLehose's principal tasks was to convince the Hong Kong people of the government's goodwill, to demonstrate that, no matter what the Red Guards said, Hong Kong was a better place to live than China. Much of what happened next was, therefore, an exercise in winning the hearts and minds of the people, an exercise in counter-propaganda.

Once the riots had been successfully repressed, legal ideology made an immediate appearance. The government represented itself as a politically neutral and even-handed administration. Demonstrating a novel commitment to freedom of thought, it argued that:

> Hong Kong has no quarrel with China, nor indeed with the communists as such. It is not an offence to be a communist (or to belong to any other political party) nor to practice the doctrines and beliefs of communism, although it is an offence to translate these beliefs into actions contrary to the law. The government has taken action against supporters of confrontation not because, as the communist press has asserted, of their political beliefs but simply because they have broken the law. Its basic aim and policy throughout has been to preserve law and order and to regain for the Colony its traditional role of providing a place for people to live and work in peace, whatever their race or political belief.
>
> HKAR (1967:19)

This theme of the even-handedness of law was a hallmark of the 1970s. It went along with what Turner calls the 'dissolving the people' (Turner 1996). He argues that government depicted Hong Kong people as a mix of displaced persons, with all kinds of particularistic loyalties, who saw themselves as 'residents', or 'inhabitants'. This discourse never allowed them to become 'citizens'. A 1965 report by the Director of Social Welfare had spoken of a 'lack of social cohesion' amongst Hong Kong's 'great assemblage of people' (1966 Report: 141). Hong Kong was 'not a single community in terms of accepted traditions and values' (HKAR 1965). This was reflected in the description of Hong Kong as an economy; not a nation' (1966 Report: 6).

Turner argues that: 'The Government has lost the confidence of the people, so the Government had decided to dissolve the people and appoint a new one' (Turner 1996). Hong Kong people were seen as living a superficial, ambiguous, de-politicised 'lifestyle'; they were 'rootless, apolitical opportunists: short term residents with expensive tastes but no real culture' (Turner 1996:7). Local culture was, Turner argues, rendered a mere 'lifestyle' by this discourse. Where there is 'no culture there cannot be said to be a people'. In the absence of a 'people', there could be no democracy.

In its place, government set about appointing a new people. Hong Kong's new identity would emphasise the individual of law rather than the citizen of politics. Government also re-shaped its own image by dishing out a good dose of welfare colonialism. It committed itself to ensuring 'that an appropriate share in the colony's resources' would be applied in a coherent manner to social development (HKAR 1970). Having made this promise, delivery became imperative. Social welfare, housing and education became the three strands of welfare colonialism, legal rights and obligations the new compact between government and people.

Community building

What the government was about to engage in was an exercise in state formation. This was partly an exercise in rhetoric, but then rhetoric and symbolism were necessary to capture the popular imagination, to create what Anderson has called 'an imagined community' (Anderson 1983).

In 1968, just after the riots, the Hon. Mr Dhun Ruttonjee had commented that:

> In Hong Kong last year we found ourselves more of a community than ever before. The real people of Hong Kong wonderfully, even heroically, made it quite clear just where their loyalties lay; or perhaps, Sir, I would be more accurate to say where their loyalties did not lie… We have, and have had for some time, a golden opportunity to bond together this wonderful community of ours…an opportunity to show the people of Hong Kong that it has a Government which really cares, Sir, for the man in the street. But I fear, Sir, that we are in danger either of not grasping this opportunity—or, indeed, of just casting it away. But, Sir, I have only one other matter which I wish to raise. It is, however, something that I regard as the single most important issue that faces us today. More important than money and taxes, more important than Government organization, our schools and our hospitals. It is a matter of leadership. As I have said earlier, the people of Hong Kong made it quite clear last year where their loyalties lay. But since that time they have been waiting for some indication that this Government realizes just how desperately many of them are for leadership, just how much they long for a realization, a manifestation, by those who govern them that the problems are urgent, and that minds are confused. We have heard it said so often since last May that 'things can never be the same' without any suggestions as to how Government intends to meet what is an entirely new situation. I sometimes wonder whether the only thing that will be changed is that Government will stop saying 'things will never be the same again' whilst carrying on as before. Let us not delude ourselves: we are faced with a very real problem. There is a vacuum of leadership waiting to be filled, and I urge this Government—and I urge you, Sir, to fill that vacuum before it is too late.
>
> cited in Wu (1973:348)

MacLehose responded to this challenge. Community building became a major strand of a government-sponsored civil society. Having dissolved the people, government needed to create a new collective loyalty, a Hong Kong identity. Community workers, community centres, youth services and the *kaifongs* were now brought into a network of dispersed and localised organisations. Government developed new channels of consultation with the people, such as the City and New Territories District Offices. New avenues of complaint were made available to deal with public grievances. It also set about mass mobilisation through programmes such as the Hong Kong Festival, the Keep Hong Kong Clean Campaign, the Fight Violent Crime Campaign, and Junior Police Call. By the late 1970s, the latter involved over 40 per cent of all Hong Kong youth.

Education was also reformed. Government now abolished all fees for government-aided primary schools, setting in train a programme of free primary education. It also set about providing three years compulsory subsidised education for the 12–14 age group, aiming to provide places for about 50 per cent by 1976 (Rabushka 1973:70). In 1973, Chinese became an official language. In 1971, it was proposed that the second university in Hong Kong, the Chinese University at Shatin, specialise in Chinese literature and

language (HKAR 1971:16). A Chinese identity was to be permitted (but preferably far out in the New Territories, where it belonged).

Selected aspects of Chinese culture were in fact quite useful to this programme of state formation. It stressed moral and civic consciousness, traditional values, the merits of self-discipline, family life and community spirit. These helped provide a semblance of self-management, a degree of self-control over certain aspects of life. As such, they provided a substitute for self-determination. Confucianism, with its respect for superiors, its emphasis on obedience and subservience were all harnessed to the curriculum, whilst troublesome history was left off the syllabus. The much-vaunted strength of the Chinese family was a useful adjunct to a polity concerned with minimising spending on welfare whilst retaining social cohesion. Moreover, the more one sees society as made up of interpersonal relations, the more it is possible to lose sight of the materiality of economic relations altogether.

As a means of increasing public participation in the practice of government, the number of advisory and consultative bodies was increased from 64 in 1961 to 132 in 1971. Government also set about repairing the 'failure of communication between Government, the press and the general public' (1966 Report: 127) by developing improved public information services, increasing the number of public service announcements broadcast in the press, on TV and on radio, and increasing the participation of government leaders in local organisations. Government was to 'demonstrate more clearly its responsiveness to public opinion' (1966 Report: 127). There was to be more 'personal contact between Government servants and the public' (1966 Report: 127). The Urban Council ward system was to be expanded and Citizens' Advice Bureaux established 'as an extension of, or addition to, the present Public Enquiry system' (1966 Report: 127).

Government also actively sought to mobilise an alternative, but no less effective, bond of cohesion. Dissolving the people entailed dissolving the norms and loyalties shared by them, and replacing these by another, more universal, loyalty. Law was perfect for this purpose for it creates a sovereign individual—the state—'conceived abstractly as the mechanism for governing the relations between sovereign individuals, the very embodiment of the rational, self-knowing, will of the nation or people' (Conner 1997:61). In so reconstituting 'the people', the government of the 1970s deconstructed their dispersed cultural identities, splitting them between an identification with a backward mainland China and a modern Westernised Hong Kong identity. Existing ties of clan and neighbourhood associations were to be reshaped, since their pull weakened loyalty to this new Hong Kong identity.

The 1971 Education Ordinance gave the director of education the power to compel all parents to send their children to primary school. Law played its part in instituting this programme for 'Parents who fail to comply could be charged with committing an offence against the law' (Rabushka 1973:71). Government now began to use the law against Chinese culture, something it had hitherto proved reluctant to attempt. Like the 1971 Marriage Reform Ordinance, which made Chinese customary marriage and concubinage unlawful, this was a means of breaking up the remnants of older social ties, of dissolving the identity of the Chinese. To these laws we can add the 1971 Probate Administration Ordinance, the Intestates Estates Ordinance, and the New Territories Ordinance, which together effectively abolished a whole range of customary practices and personal law

relating to Chinese family life, adoption and inheritance of land. The 1970s also saw the end of the old District Watchman's Ordinance, originally initiated by the Chinese élite as an alternative means of policing the Chinese community.

Loyalties to local associations, native place or surname ties were weakened by the clearance of squatter villages under the urban renewal programme. Cumulatively, such measures dissolved much of traditional Chinese society. However, some aspects of clan and neighbourhood associations were co-opted to provide a new foundation for a wider loyalty. Community leaders were exhorted to work harder to 'build bridges' and to 'stimulate a more informed and constructive approach to public issues'. Government intertwined itself with these local level organisations. It maintained overall control of the appointments of local leaders to community organisations and District Boards; it rewarded local leaders for their efforts in community building with honours in the Queen's Birthday List; it subvented the finances of many local charitable and religious institutions. What the Hong Kong Government of the 1970s was thus engaging in was governance at a distance.

Social welfare

Rabushka, writing in the 1970s, was alarmed at the government's departure from its *laissez-faire* policy. Since January 1971 onwards, it had expanded social security through a Public Assistance Scheme; it also provided a cash allowance on top of any public assistance payment under a Disability and Infirmity Allowance Scheme. Public assistance grants were extended to able-bodied unemployed males aged between the ages of 15 and 55. Those over 55 and unable or unfit to work became eligible for public assistance if, after rent, their income came to no more than $70 per month; families were allowed $50 for the first three members, $40 for the next three, and $30 for any others. Between 1 April and 31 December 1971, expenditure for public assistance amounted to HK$8.5 million compared with HK$6 million for 1970–1, and the number of public assistance cases had risen from 7,010 to 12,533. Social welfare posts increased from 1,427 posts to 1,519, whilst government expenditure on welfare services overall had increased 27 per cent over 1970 to nearly HK$43 million (Rabushka 1973:70).

This was all a 'major departure from government's reliance on market forces' (Rabushka 1973:70). By the mid-1970s about 45 per cent of Hong Kong people lived in public housing with subsidised rents. Alongside this went further measures: government subsidies for foodstuffs, fuel, lighting, transport, telephone, public utilities and other major household expenditure items, the regulation of fish and vegetable marketing, consistent provision of low quality foodstuff and consumer durables from the PRC, the regulation and supply of rice. This all contradicted the government's official free market rhetoric (Schiffer 1984:9). On the other hand, it all assisted economic, social and political stability.

Creating the 'feel good factor'

Building a new collective identity required ideological as well as material input. The 1971 Government Report started by emphasising Hong Kong's 'beautiful beaches', its public gardens, its sports facilities, its improved public health environment (HKAR 1971). It also spoke of its community feelings, inspired by the second Hong Kong Festival, a government-sponsored event designed to make Hong Kong people feel that the Colony was an enjoyable, as well as an orderly, stable, and prosperous place to live. The 1973 Government Report continued this theme, talking of 'A Better Tomorrow', emphasising rising social benefits, unprecedented prosperity and social progress, 'better standards of living for all', 'housing for all', a 'new look for welfare', 'education higher and brighter', and 'an underlying respect for human dignity' (HKAR 1973:2). Such policies, the government claimed, represented a 'new deal,' a 'blueprint for the 1970s'.

Slogans such as 'Be loyal to Hong Kong' and 'We are a family living under one roof added to this 'feel good factor' (Turner 1996:8). There were numerous high profile public occasions: the Prince of Wales, Princess Alexandra, the Queen and the Pope all visited Hong Kong in the 1970s. The word 'colony' now became taboo; it was replaced by the word 'territory'. The Colonial Secretary became the Chief Secretary, the Colonial Secretariat became the Government Secretariat. A Ten-Year Housing plan was developed; a Mass Transit Railway and a Cross Harbour Tunnel were built; an Ombudsman's Office was established to hear grievances and complaints (Scott 1989).

The role of law

In terms of substantive law, the 1970s was a period of frenzied legislative activity. Hong Kong people were not given democratic rights but they were given legal rights. In place of political accountability they were promised legal accountability; in place of political transparency they were to have legal transparency; instead of political redress, they would be given legal redress. Thus the Hong Kong government became somewhat responsible to the people, but not directly to an electorate and not in a manner which allowed it to be dismissed from power. What it had was a state-sponsored form of civil society with which government could engage on its own terms.[1]

The services of the Labour Department were extended, and an immense programme of labour legislation was drawn up which set the rules of engagement for conflicts between capital and labour. However, Hong Kong's business community lost little sleep over this. In its view, the government probably would not enforce much of what it legislated (Rabushka 1979:75). In any event, the ordinances dealt mainly with sick leave, vacations, fringe benefits, and workmen's compensation. These were peripherals and as such were not seen as 'obstacles to productive enterprise' (Rabushka 1979:75). The Labour Department was so overburdened that it lacked the resources to enforce the legislation. And since most labour legislation was directed at the 42 per cent of the population working in the manufacturing sector, this still meant that 48 per cent of the workforce were excluded (Wu 1973:314). Indeed, some in government were more concerned that employers who failed to pay wages within 7 days would lose 'face' if summoned to appear for such a thing in court (Wu 1973:316).

By the end of the decade, therefore, the 'classical economist's dream world' remained substantially intact (Rabushka 1973:13). Hong Kong was still 'the textbook model of a competitive economy, encumbered with only the barest overlay of government' (Rabushka 1973:13). Law helped present the continuing inequitable relations of capitalism as fair and just. The universalising norms of law also promised to cut a swathe through corruption and particularism—all the things that protected the privileged few and made social mobility difficult for those without money or influence. Rational legal administration meant people were to be treated impartially, on their merits rather than according to their status. Everyone was to be equal on the fair field of law. This was Hong Kong's version of the American Dream. A society which was open and fair was a society in which anyone could make it. The 'bootstrap capitalist' now became part of Hong Kong mythology.

Law in the 1970s also meant 'law and order'. The fact that the police were seen as corrupt posed a problem for the government, much of whose legitimacy now rested on delivering a clean administration. The police needed a new image. They had to become clean and friendly. The second goal was easier to accomplish than the first. A series of police posts was established in the resettlement estates; government embraced the idea of community or Neighbourhood Policing. In 1971, a Police/Public Relations Bureau was founded and in 1974, a Police Community Relations Officer was appointed. Junior Police Call was established and a Cadet Corps formed to bring youth into closer contact with the police and military. The Armed Forces and Auxiliary Service were instructed to patrol isolated areas to 'help to keep the government in touch and engender confidence among the inhabitants' (HKAR 1974:154). A 'Fight Crime' Campaign began in 1973, followed by a Road Traffic Campaign in 1975. A Complaints Against Police Office (CAPO) was also established.

The police, however, were still widely seen as deeply corrupt. Cleaning up corruption was crucial. It was here that government could most convincingly demonstrate that the bad old days were over, that power lay not in the person but in the office, that even the police had to answer to the law. In May 1971, a Prevention of Bribery Ordinance was passed, the Anti-Corruption Office was reorganised, and a new Target Committee on Corruption was appointed by the Governor. In 1973, the government agreed to set up an Independent Commission Against Corruption (ICAC). In 1977, when the ICAC had firm proof of syndicated corruption in the police, the government faced the prospect of a police strike. As Lo says, it was thus caught between one hegemonic goal and another: keeping the police force on side (coercion was always useful for a colonial government short on legitimacy), or being seen to have a genuine commitment to clean government (Lo 1993). Eventually, it granted the police an amnesty. From the mid-1970s onwards, the ICAC became absolutely central to Hong Kong's image as a 'city of law'. There was to be public opposition in 1997, when the SAR government proposed to drop the word 'Independent' from its title.

If the promise of legal redress was not to sound hollow, however, law had to become more accessible to the public. Legal Aid legislation was therefore enacted to rapidly expand its scope and eligibility. In August 1972, Legco passed a resolution raising the income limits so that more people could qualify; it also enacted the Legal Aid [Scale of Fees] [Amendment] Regulations to attract solicitors in private practice to carry out more legal aid work. In October 1972, five additional posts were added to the Legal Aid

Department, almost doubling its professional personnel (HKAR 1974:203). In August 1972, the Legal Aid [Amendment] Ordinance was passed, giving the Director of Legal Aid, his deputies and assistants the rights and duties of a solicitor admitted to practice whenever they were carrying out their duties (HKAR 1974:203). This was followed in September 1972 by the Legal Aid [Amendment] Regulations, providing for fees and costs for legal aid staff involved in civil legal aid cases. The Legal Aid in Criminal Cases [Amendment] Rules were also passed in 1972, enabling legal aid to be granted to a person on whom sentence had been passed, and whose sentence had been appealed by the Attorney General. In 1973, the Legal Aid [Assessment of Contributions] [Amendment] Regulations extended legal aid further; the department also opened up its own litigation unit. More regulations extending eligibility were approved in 1975.

Government sought to develop a voluntary Code of Employment for employers. A Labour Tribunal was established to hear disputes quickly and informally (without lawyers). A special glossary of English-Chinese legal terms was sponsored by government and produced by the Chinese University of Hong Kong.

Legal aid continued to be expanded throughout the 1970s and 1980s ‘to promote social justice’ (HKAR 1984:263). By 1984 the department had expanded to 316 staff and 45 lawyers; HK$14 million was spent on civil legal aid and HK$21 million on criminal legal aid. Free legal advice was also provided through the newly-established Legal Advice and Duty Lawyer Schemes, started in 1979. This operated through 242 unpaid voluntary lawyers and 110 referral agencies. In 1983, a new scheme, Tel-Law, set up five phone lines to provide information on, and education about, law. The Duty Lawyer Scheme employed 281 lawyers.

All this was a vast expansion on legal provision in the 1960s. In 1967 the Legal Aid Department was staffed by one professional officer and five assistant staff. By 1980 that had grown to 34 professional staff, 48 law clerks, 2 executive officers, plus support staff—in total over 200 people. It had also moved from one small room in the Old Supreme Court Building to newer and bigger offices. By 1978, a staggering 67 per cent of Hong Kong’s population of over 4.5 million were covered by legal aid. Civil legal aid was, the government held, ‘essential so that people who cannot afford the high costs of litigation in Hong Kong have access to the courts and can meet the opposing party there on equal terms’ (HKAR 1978:228).

Where once law had been a means of keeping a potentially dangerous population in order, therefore, it now became their aide, available to all as a check on abuse of power. Law set the rules of engagement for conflicts between capital and labour, state and society, coloniser and colonised. Politically, however, very little had changed. The ‘people’ had been re-formed, but the government stayed the same. Official and academic texts still portrayed Hong Kong as an ‘economy’ not a polity. At the end of the 1970s we could still find:

> homo economicus…homo Hongkongus… Hong Kong man’s first and most telling characteristic is his single-minded pursuit of making money. A companion characteristic is his emphasis on the material things in life. Hong Kong’s free port, free trade economy offers for sale the latest in fashions, furnishings, food-stuffs, appli-ances, motor cars, gadgets, stereos—portable stereos, built-in stereos, automobile stereos, any and

> every conceivable brand and model of stereo at tax-free prices. If there is a new breakthrough in stereo goods to sell, some Hong Kong entrepreneur will be selling it that night. Tomorrow would mean foregone profits.
>
> Rabushka (1979:83)

In the mid-1980s, however, homo economicus was to assume a new identity; the 1970s laid the foundations for this change. From the 1970s until the mid-1980s, however, the absence of a culture of democratic control and political accountability led to the atrophy of politics. The government had not given Hong Kong people democracy, but it had developed a sufficiently liberal regime to manage its democratic deficit. This helps explain why democracy was not the main priority of Hong Kong people. As Scott puts it, 'there is no reason why it should be if they think they already have it' (Scott 1996:146).

The 1980s and 1990s: from rational-legal domination to rule of law rhetoric

Legitimacy is always a matter more fundamental than mere legality, and though 'mere acquiescence may shore you up for a good while…you will do best in the long term if you can transform habitual obedience into genuine allegiance' (Hague *et al.* 1992). Law may have helped close the gap between the ruling élites and the masses in the 1970s, but events in the 1980s were to re-open it. Surveys of the 1980s showed a dramatic rise in the population's differentiation of themselves as 'Hong Kong people' in preference to 'Chinese'. Towards the end of the decade, 'academic and official opinion polls found the great majority in favour of moves towards full democracy' (Turner 1996:8).

There was a rapid politicisation of Hong Kong people during the 1980s. This led to an 'intensification of politics and the search for democracy' (King 1995:107). It was triggered by a series of events, starting with the Sino-British talks in the early 1980s. The Joint Declaration itself, signed in 1984, punctured the image of a caring consultative government. Hong Kong people had been excluded from talks which affected their entire future. After the Joint Declaration, talk of law became more widespread than at any other time in the colony's history. It was stimulated by every meeting of the Joint Liaison Group, every discussion about the Basic Law Drafting Committee, the events in Tiananmen Square on 4 June 1989, the enactment of a Bill of Rights in 1991, the trials of Chinese dissidents, reports of China as a lawless and dangerous place and concerns about stability during the transition period.

All this was a means of continuously asserting, contesting, and re-asserting the importance of law. It is by such means that a community builds up the moral consensus, the mentality, which endorses law in a society. Margaret Ng writes of the 'passion and intensity of those years' (Ng 1997:1). She argues that from 1985 onwards, 'a process of mental and cultural reshuffling took place' (Ng 1997:2). The internal structure of government also changed. The first elections were introduced in 1984–5. Legco meetings ceased to be closed to the public. Government officials ceased to be members or have votes on Legco; the Governor ceased to be President and Chair of its sittings. Legco set up its own Secretariat, from which members of Exco were excluded. Bit by bit, Legco

was becoming a more independent check on government (Ng 1997). In 1985, the Legislative Council [Powers and Privileges] Bill was introduced. This was:

> the first declaration of Legco's autonomy…(it made)… Legco master of its own house, protects it from the interference of the executive, safeguards the freedom with which matters are debated in Legco, and empowers Legco to compel government officials to give evidence to its Select Committees under oath and on pain of penalty.
>
> Ng (1997:3)

A discourse of politics now began to grow alongside the discourse of law. The 1984 riots caused some to wonder whether, in the run-up to 1997, Hong Kong would become ungovernable (Lau 1991). However, as Ng says, despite the fact that interest in elections now shot up and that political campaigns became a part of life, this did not lead to chaos or instability:

> The public soon took all this for granted and started to use the new dynamics for their own good. Petitioning, demonstrating, by all kinds of groups outside Legco became a regular event.
>
> Ng (1997:5)

This politicisation of the Hong Kong Chinese in the 1980s and 1990s coincided with important changes in the political economy. Throughout the 1980s, Hong Kong Chinese money had gradually succeeded British money as the dominant force on the Stock Exchange. In addition, as the economies of Hong Kong and China became increasingly interdependent, so more Mainland Chinese money also began to enter Hong Kong. Since the beginning of China's open-door policy in the late 1970s, many of Hong Kong's leading entrepreneurs had shifted their investments inwards, towards Mainland China. Some British hongs, on the other hand, had moved outwards, into the global economy. The resumption of Chinese sovereignty over Hong Kong in 1997 aroused fears that British capital might be less secure in the future. The relocation of its corporate headquarters to Bermuda by Jardine Matheson in 1984 was seen as the first sign of this insecurity amongst British hongs. In 1991, the company switched its main public listing to the London Stock Exchange, and in 1994 it de-listed the shares of six of its associate companies from the Hong Kong Stock Exchange (Ngan 1995:84).

As the old expatriate hongs globalised, so the Hong Kong Chinese hongs localised and regionalised by 'networking into a regional structure through strategic alliances' (Ngan 1995:84). In 1988, Swire Pacific sold 12.5 per cent of its share to China International Trust and Investment Corporation (CITIC); Hong Kong Telecom sold 20 per cent of its equity to CITIC in 1994. CITIC, as Ngan notes, is a ministerial-level Mainland company under the supervision of the Chinese State Council (Ngan 1995:87). The new alliances were powerful alliances indeed.

As Ngan argues, the interests of expatriate hongs no longer fully coincided with the government policy of convergence with China. Nor could the government rely on the unwavering support of the Hong Kong Chinese conglomerates. Anxious to protect and further their investments in China, their interests now lay in supporting the Mainland

government. Businessmen who once 'loved Britain' now 'loved China'. The composition and balance of Hong Kong's ruling élites had thus shifted.

The loss of the colonial government's former stable centre of support was nowhere more clear than in the opposition of business and commercial élites to Patten's democratic reforms in 1992. Ngan argues that it was the loss of this power base, coupled with the shift in the government/élite axis, which forced Patten to cultivate a new basis of support for British rule amongst the grassroots. To do so, she suggests, he replaced the discourse of 'convergence' with a discourse of 'democratisation' which could cut across social groups and classes. This discourse was also a discourse of rights (Ngan 1995:88).

However, it would be a mistake to see this discourse simply as a last-ditch bid for legitimacy by an ailing colonial power. In Hong Kong after 4 June, over one million people protested peacefully. This may have allowed the colonial government to extol the link between rule of law and freedom of political expression, but the contrast with the Mainland government's handling of its own demonstrators was not lost on the Hong Kong Chinese, and probably did much to bind them to the government, its laws and its legal institutions. On 4 June, rule of law came to crystallise what was just and good about Hong Kong, as well as what was bad about China.

Patten's discourse of rights connected with this but did not create it. Its foundations had been laid in the 1970s, when the administration had cultivated the expectation that people could expect governments to act fairly, evenly, and according to law. The legacy of the 1970s was that even the lowliest member of Hong Kong society had some sense of rights, some idea of the right to fair trial, the right not to be bossed around, the right to due process and legal redress. Hong Kong people's grasp of rule of law may amount to little more than this, but it is based on a deep-seated intuition that, like the democracy demanded by the 4 June protesters, it is inherently anti-absolutist.

The fourth of June threw into stark relief the 'difference' between Hong Kong—city of law—and Beijing—city of tanks. Together with the adoption of a Bill of Rights in 1991, it was a high point in the formation of legal and political consciousness. Patten's discourse of rights thus dovetailed with the grassroots demand for entrenchment of rights and the rule of law. This was still chiefly a discourse of law; it closed off many questions of real politics. The Bill of Rights, more than any other single act of the colonial government, ushered in an appreciation of exactly what rule of law could do. It raised the interesting idea that if rights were possible under undemocratic colonialism, they should still be possible after it ended in 1997.

The future of law after 1997

Many of the legal protections introduced by the British between 1992 and 1997 were in fact opposed by the Chinese leadership, and the new SAR administration was committed to dismantling them. This deprived it of the role of liberator and cast it instead in the role of oppressor. Moreover, the discourse of law is far more difficult to dismiss than the discourse of democratisation. Rule of law is not just some little local difficulty that can be dismissed as privileging colonialism. It has immense international currency. It possesses a transhistorical and transnational character. For the authority of any regime to be accepted as legitimate in the modern world, it must be seen to be based on law (Cotterrell

1984). A China wishing to be taken seriously as a player in the global economy could ill afford to offend such widely held sensibilities. Equally, as a regime intent on securing consent, the SAR government could ill afford to antagonise the grassroots. Seeing this 'city of law' being submerged into its 'Other'—China, the land of the X-files, the outer limits, the land without law—raised feelings of great unease among the Hong Kong public, despite assurances from China that it would uphold the 'one country, two systems' concept enshrined in the Joint Declaration.

The new SAR regime was already low on legitimacy. Scott argues that the overwhelming support for the Democratic Party shown by the 1995 direct elections already indicated that 'the transition to Chinese sovereignty is taking place without the support of a majority of the Hong Kong population' (Scott 1996:148). Any attempt by the SAR government to dismantle civil liberties laws 'will further deepen the anxieties of the population and give the lie to the Chinese government's claim that its resumption of Hong Kong is desired by the people of Hong Kong' (Scott 1996:149). Seeing their new rulers cosy up to the Chinese Communist Party has created further distrust amongst Hong Kong people, many of whom fled Communist China in the 1950s and 1960s. The anti-democratic stance of China, coupled with the expedient manner in which Hong Kong's own élites had switched allegiance, meant that local people placed little faith in either. Under such circumstances, rule of law began to look like a promising alternative. Hong Kong people now look to Hong Kong's legal institutions for the preservation of their 'Hong Kong way of life'. It is a way of life seen as different from life in Mainland China. Talking about law has become a means of keeping this 'Other' at bay, of differentiating oneself as 'Hong Kong Chinese', of mapping out the future in the hope, one suspects, of exercising some control over it.

Rule of law in Hong Kong is, then, very far from being a ruling idea of the ruling class. Rule of law talk was never simply the rhetoric of a declining colonial regime. Law may be part of the Ideological State Apparatus, but it has also become a cultural resource for grassroots organisations of many different political persuasions. For them, it has the potential to transform local legal difficulties into embarrassing issues of international debate about human rights. Recourse to law has become both a belief and a strategy. Rule of law in Hong Kong therefore has its grassroots defenders. This is something which the new SAR government must negotiate with great care if it is to gain popular support. Hong Kong people may be no longer so willing to obey law simply because it is the law. To be valid, to merit obedience, and to secure legitimacy, law must also be seen to be good law.

Rule of law may also gather increasing support from Hong Kong's fickle élites. The existence of the Democrats amongst this élite already means that its cohesion is fractured. To date, the business élite has tried to marginalise the Democrats and seems an unreliable defender of rule of law. But this may change. In Chinese societies, the preference for doing business on the basis of relational networks *(guanxi)* may equally well facilitate economic interactions whilst undercutting law and legal universalism (Jones 1994). However, despite (or because of) the fact that much business is done through relational networks, the invisible hand of the free market must still be seen to operate invisibly. Universalistic legal forms camouflage the play of interests, the operation of the inside track. It may therefore be in élite interests to maintain such a layer of legality in Hong Kong.

Moreover, the business élite may begin to find law more appealing than *guanxi*. One problem with favouritism is that favourites sometimes fall out of favour. Old friends amongst China's political élite may find new friends amongst their own 'Red Chip' enterprises. Sooner or later, then, it may be in the interests of Hong Kong business élites to 'love law' more than they 'love guanxi'.

The future of law in Hong Kong also depends crucially on the future of law in China. Rule of law rhetoric, that commodity designed by the eighteenth century English ruling class for mass consumption, is increasingly deployed in the rhetoric of the CPP. Exhorting the people to 'act according to law' may act as a check to mass activism. It is also an extremely winning strategy for persuading Western investors that China, too, is a 'land of law'. China now has a great deal of law. Apart from company law, securities regulations, trade and investment laws, intellectual property and trade mark laws, international commercial arbitration and increasing use of contract law, China has also introduced a new prison law, an Administrative Litigation law which allows officials to be brought to account, a Lawyers' Law, a Judges' Law and in 1997 a new Criminal Law and a Criminal Procedure Law, containing some aspects of due process. Law schools have re-opened and there are fast track avenues of qualification, designed to produce at least 150,000 lawyers by the year 2000. In addition to the state-run law firms, there are now also private practitioner law firms; numerous foreign law firms are also licensed to practice in China. The days when rule of law was a bourgeois ideology and lawyers were purged as 'rightists' are clearly over.

The Friedmanite formula of 'market+law=capitalism' has provided some impetus for instituting practical legal changes in China's commercial sector. At the ideological level, it also allows the story of communism to be retold as a story of how the market economy+law+'socialism with Chinese characteristics'=prosperity for all. The formula suggests a certain sociological naïvety, but it is the dominant narrative of capitalism in East Asia that market economies with 'Chinese characteristics' produce 'economic miracles'.

However, law is not simply some sort of transferable technology. As any sociologist of science will testify, no technology is neutral. As a process, as a set of practices and institutions, law carries within its fabric the values of its makers. Transferring any technology without recognising the value system embedded within it is, as the modernisation theorists of the 1960s discovered, liable to produce unintended consequences. There are some in the West who clearly hope (and some in China who fear) that China's adoption of Western legal institutions will prove a Trojan Horse, smuggling in Western human rights. This seems unlikely, given the peculiar mix of common law with civil law, liberal legal theory with socialist legal theory, not to mention a whole array of social, political, economic, cultural and historical factors which make for a very different set of ingredients to those which produced human rights protections in the 'West'.

'Rule according to law', on the other hand, conceives of law as a technology devoid of values. It promises China many things. It can be a set of instruments for delivering capitalism, a legitimating ideology, a means of rational administration, and also a technology of governance, extending the reach of the state at a time when the state itself is in transition. Rational legal administration means that policies decided at the centre

stand a better chance of being delivered at the periphery, where law can cut through those local interests which threaten to mire and distort the leaderships' intentions.

As a technique of governance, this sort of law has promise. 'Rule according to law' is not the same as Dicey's concept of rule of law, but it is very similar to what happened in Hong Kong in the 1970s. It seems 'Learning from the West' means China has learnt a few tricks from the colony. Hong Kong demonstrated very well how the juridification of social life can neutralise politics. Indeed, in the last month before the handover, the incoming SAR administration consciously revived some of the old structures of colonial governance which concentrated power in the executive; these dovetail very nicely with the aims of democratic centralism. Old colonial laws on public order and civil liberties were also re-enacted. This fits well with the instrumental view of law as a lubricant of the economy and a technique of governance.

This instrumental view of law is encouraged by a widely-held economistic view of development which talks in terms of capital, labour, land, natural resources, and technical know-how. Law is simply technical know-how. Like the doctrine of *laissez-faire*, this discourse erases the politics from political economy, and glosses over the fact that economic power translates into political power and privilege (and vice versa). It construes the person not as an actor in a wider socio-political/cultural collective, but as 'economic man/ woman' with legal rights, a self-interested producer and consumer of commodities whose inner-life is determined by the cash nexus, the property market, and the rise and fall of the Hang Seng Index. The instrumental view of law collapses the political, the social and the cultural into the legal; the legal is then submerged into the economic. Thus law, economy, and the person are stripped of all normative content. Neutral, impartial law, apolitical economy and 'economic man' are three of the best worked ideological constructs of capitalism. Just as the one 'dissolves' personal identity, so the other strips law and economy of their sociology and politics. A return to this kind of 1970s rational legal domination, with some 'Chinese characteristics', must hold great appeal for élites on both sides of the border.

Conclusion

An opinion poll carried out for the Democratic Party in May 1997, noted that 54 per cent of respondents thought they would enjoy fewer human rights and freedoms after 1997. Moreover, 40 per cent thought the ICAC's power to fight corruption would decline, and almost 80 per cent said that corruption in China would affect Hong Kong. Only 2.2 per cent thought the new government would bother to consult the people, whilst 42 per cent thought government would not be able to maintain the degree of honesty enjoyed by the colonial government's civil service before July 1997.[2] These results confirm that the incoming SAR government has a legitimacy problem. Keeping Hong Kong's legal institutions intact could help secure popular consent and bolster the shaky legitimacy of the SAR government, but on the eve of the handover, members of the Provisional Legislature were already indicating that laws on phone-tapping, collective bargaining and labour rights would be repealed; new laws on subversion were also on the agenda. Though it has long been argued that law is the bedrock of Hong Kong's economic success, for China keeping prosperity clearly does not entail keeping all of Hong Kong's

laws. All the signs are that the SAR government wants a return to the rational legal domination of the 1970s, to 'economy in command' rather than 'politics in command'.

But Hong Kong in the 1990s is a different place from Hong Kong in the 1970s. Awareness of legal and political rights is far higher, as are expectations of government. It is not just the Democratic Party which supports the Diceyean version of rule of law but also the grassroots. Rule of law is now a deep-seated liberal value. It is, as Dicey noted, difficult to erase it without a wholesale change in the mentality of the people.

Is another such dissolving of 'the people' possible? If so, it will most likely come in the form of an appeal to 'Chinese culture' and 'Asian values'. This is a discourse which resonates powerfully with Hong Kong people's longing to resolve the ambiguities of their colonial identities. Like rule of law, the appeal to a common 'Chineseness' is one means of uniting the rulers and the ruled, the élites and the masses, the Hong Kong people and the Mainland government. If this succeeds, sooner or later English rule of law may be seen as ill-suited to a Hong Kong which is now more Chinese in complexion. For the Hong Kong Chinese, their belief in English rule of law may thus become at once a defining sensibility of civilised society, but also a betrayal of Chinese values. The degree to which the Diceyean version of rule of law endures after 1997 will depend on how deeply it has become incorporated into their self-identity. Their subjectivities may both overlap or conflict. Their 'attachment' to law, being so recent, may prove too shallow to survive. Much depends on how far being a 'good Chinese' entails disavowing all things English, how far Chinese patriotism gets its sticky fingers into their souls.

Notes

1 I am grateful to Ian Scott for introducing me to this idea of a 'top down', state-sponsored formation of civil society.

2 Survey conducted by the Democratic Party, Hong Kong, 15, 16 and 19 May 1997 (unpublished).

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4
MARKET ECONOMY AND THE INTERNATIONALISATION OF CIVIL AND COMMERCIAL LAW IN THE PEOPLE'S REPUBLIC OF CHINA*

Jianfu Chen

Introduction

Globalisation or internationalisation of law in developing countries means, predominantly, the transplanting of Western laws. The process is a one-way movement, from the West to the East or North to South. In this context, globalisation of law is a continuing process of the 'Law and Development' movement in the 1960s.[1] For these countries, law is to be used as an instrument for social engineering, and, by transplanting Western laws, to radically alter their economies (Seidman and Seidman 1996:1; see also Seidman and Seidman 1994). Even though globalisation of law seems to be an unstoppable process, the long standing questions as to whether law is readily transferable, whether the transplanted law works in the same way as it does in its places of origin, and if so, under what circumstances, remain unresolved (Seidman and Seidman 1994:44–51; Zweigert and Kötz 1987:15–17).

In China, after three decades of self-reliance, a policy, in the name of economic reform and 'open door', was adopted in the late 1970s to integrate the Chinese economy into the world market. After a decade or so of implementation of this policy on a trial and error basis (Garnaut and Liu 1992), a new direction of economic reform and 'open door' policy—to establish a 'Socialist Market Economy'—was proclaimed by the Communist Party of China (CPC) in 1992. Since then, 'assimilation or harmonisation with international practice' or 'doing things in accordance with international practice' have become the new and most frequently used catchwords in China, and the new topics most frequently discussed in socio-legal studies in Chinese journals and newspapers (Li 1993b).[2] Some Chinese scholars thus claim that studies in China on assimilating or harmonising Chinese law with international practice began in 1992 (Li *et al.* 1994:3; He 1992:53).

Globalisation or internationalisation is generally perceived by Chinese scholars as a historical process propelled by market economy (Wang, Y. 1995a, 1995b; Li, J. 1995; Li 1993a; Yu and Wang 1992). As such, the internationalisation of Chinese civil and commercial law only makes sense when we understand the role of law in the transformation of the Chinese economy.

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This chapter thus critically reviews the evolution of the role of law in the context of Chinese economic reforms. It also critically analyses the changing attitudes towards foreign (Western) laws and the justification, rationales, and major problems in the process of internationalising Chinese law. By doing so, it is hoped that a better understanding of the nature of civil and commercial law in China is achieved and the need for new approaches and analytical framework, as raised in Jayasuriya's 'Introduction' in this volume, is further appreciated.

The perceived needs for law in post-Mao China

The need for law to institutionalise and generalise ad hoc *policies*

Chinese scholars see 1978 as a new epoch in Chinese modern history and a turning point in legal development in China. In that year, the Third Plenary Session of the Eleventh Central Committee of the CPC declared that large-scale nationwide mass political movements should be stopped and 'the emphasis of the Party's work should be shifted to socialist modernisation as of 1979' (Communiqué 1978). Legal system was declared a necessity for socialist modernisation (Communiqué 1978:573). Also repeatedly emphasised by Party leaders was the importance of law for providing a social order conducive to economic development (Ye 1979a:3). Such a need for economic development and for law was summarised by Deng Xiaoping as a 'Two-Hands' policy: On the one hand, the economy must be developed; and on the other hand, the legal system must be strengthened (Wang *et al.* 1996:7).

This new policy under the leadership of Deng thus differs greatly from the practice under Mao's leadership. In the early part of the PRC's history (1949–76) under Mao, China was a country virtually without law or a legal system. Law under Mao's leadership did not 'wither away'[3]—there was no law to wither away—but law was simply denounced and rejected. Under Deng's leadership in the 1980s and 1990s, in sharp contrast, China has witnessed massive and rapid enactment of laws and regulations, particularly laws and administrative rules regulating economic and commercial relations.[4] However, one must not be misled by this apparent difference.

The changing fate of law lies directly with the need, as perceived by the Party leadership, for national development. In fact, Mao was not only reported as having said that '[we must] depend on rule of man, not rule of law' (Leng 1977:356). He was also reported as having said that '[law] is needed—not only a criminal code, but also a civil code' (Gu 1989:102). What is important is the fact that when he advocated law, it was at the time when the 'storming revolution' was perceived as being over, and an orderly economic development was considered necessary. When he repudiated law, it was at the time when he was advocating the 'uninterrupted revolution' which aimed at destroying 'old' orders. When Deng took over leadership, the 'uninterrupted revolution' had pushed the Chinese economy to the edge of collapse, and the legitimacy of the Party leadership had to be re-built upon economic development. For him, therefore, law must be *used* to establish stability and order for economic development (Deng 1980:335–55; Communiqué 1978:574). It was against this background that the Party declared in 1978:

> There must be laws for people to follow; these laws must be observed; their enforcement must be strict; and law-breakers must be dealt with…
>
> Communiqué (1978:574)

Clearly, both Mao and Deng have unambiguously seen law as an instrument of Party policy; neither has taken the establishment of the Rule of Law as an end in itself. One of the most prominent and influential jurists, Zhang Youyu, once clearly spelt out the role of law in the PRC:

> Socialist democracy and the legal system [*fazhi*, sometimes translated as 'Rule of Law'] are inseparable; both of them are [to be used] to consolidate socialist economic bases and to enhance socialist development. At present, they are powerful tools for promoting the Four Modernisations. Neither of them is an end but both of them are means.
>
> Zhang (1981:41)

If law is to facilitate economic development, an apparent question then arises: Why does China need law in addition to Party policy since it is these policies that decide the direction of economic reform? According to Peng Zhen, then the Chairman of the Standing Committee of the National People's Congress (NPC), law is an important and necessary tool for implementing Party policies:

> Law is the fixation of the Party's fundamental principles and policies, that is the codification of the Party's fundamental principles and policies. These fundamental principles and policies are those that have in practice proven effective and correct.
>
> Peng (1979:160–1); see also Chen (1980), Yu (1989)

In other words, law is, to a large extent, to be used to generalise and institutionalise party and state economic reform policies and measures. To many Chinese lawyers and scholars, law is only a *better tool* than policy, capable of securing and institutionalising *ad hoc* policies in a more universal manner, of providing stability and order, through state coercive forces, for economic development and of defining rights and duties in relation to the state as represented by various administrative authorities (Wu and Shen 1987:165–77; Law Department of Beijing University 1984:212–21). Rule of Law *per se* has no virtue. As such, the nature and the extent of legal development essentially depend on the parameters set by the reform programme.[5]

As economic reform had no clear direction,[6] it was then not surprising that legal development had taken an *ad hoc* and piecemeal approach. Indeed, among the first casualties in pursuit of economic development had been the stability and continuity of law. When the need for law first emerged, it was also recognised that:

> Laws, rules and regulations, once they are framed and adopted, must be stable, have continuity, and enjoy full authority.
>
> Ye (1979b:224)

However, the urgent need for law to facilitate economic development took precedence over the importance of stability and continuity of law. A piecemeal approach to law-making was quickly adopted in line with the 'pragmatic' view of law held by Deng. He maintained in 1978:

> There is a lot of legislative work to do, and we do not have enough trained people. Therefore, legal provisions will inevitably be rough to start with, then be gradually improved upon. Some laws and statutes can be tried out in particular localities and later enacted nationally after experience has been evaluated and improvements have been made. In terms of revision and supplementation of law, once one provision is ripe, it should be revised or supplemented, we should not wait for a 'complete set of equipment'. In short, it is better to have some laws than none, and better to have them sooner than later.
>
> Deng (1978:158)[7]

This piecemeal and unsystematic legal development then produced a large system of a law consisting of many individual statutes and administrative regulations and rules made under different *ad hoc* policy orientations. Consequently, laws dealing with civil and commercial matters were more in the nature of administrative authorisation which sanctioned the implementation of *ad hoc* reform policies than that of private law dealing with general civil and commercial matters in an equal and universal way (Chen 1995a).

The need for 'rational' law for a market economy

However, the practice began to change in 1992 when the Party officially adopted the policy of establishing a 'socialist market economy' as a future direction of economic reform. The notion of 'socialist market economy' was first officially adopted by the 14th Congress of the CPC, held from 12 to 18 October 1992 (Political Report 1992; *People's Daily*, 24 October 1992). According to the *People's Daily*, the concept came directly from Deng Xiaoping: At the end of 1990, Deng pointed out that 'planning and markets are not criteria for distinguishing socialism from capitalism'. He re-stressed this point during his tour to Shenzhen and Zhuhai Special Economic Zones (the 'Southern Tour') in February 1992 (*People's Daily*, 24 October 1992:3). This, then became a guideline for drafting the Political Report which declared that economic reform must be accelerated towards the central task of establishing a 'socialist market economy'.

There is little that is new in the notion of 'socialist market economy' as far as reform measures are concerned. The real significance, as I have argued elsewhere (Chen 1995a:280–5), lies with the justification for introducing the notion, rather than with the notion itself. The Political Report declares that theoretical and ideological innovations for reform should not be constrained by the abstract question of whether such innovations are capitalist or socialist; all modern business and enterprise operation mechanisms, foreign

capital, resources, technologies and talented personnel, no matter whether they are socialist or capitalist, should be made use of for socialism (Political Report 1992:2). Thus, the significance lies in the abandonment of the requirement for ideological correctness in introducing reform measures. In other words, the notion of 'socialist market economy' must first and foremost be seen as a licence to practise capitalism in the economic sphere, and to introduce capitalist mechanisms and measures (including legal measures) that will facilitate economic development. It is in this sense that Chinese economic reform and 'open door' policy have entered into a new phase and set new parameters for legal developments.

Symbolic though it may seem to be, the new direction for economic reform has enormous implications for legal development in general, and attitudes towards legal transplant in particular. It is capable of allowing scholars and officials to abandon any pretence of upholding socialism, as an ideology or a politico-economic system, when new ideas or practices are to be introduced. This explains, and is evidenced in, the lively discussions in legal circles regarding the reform of legal ideologies and legal development since the remarks made by Deng during his 'Southern Tour' and the 14th Party Congress.

'Market Economy', according to Chinese scholars, is a result of human wisdom; it is not a 'privilege' *(tequan)* of the West (Liu 1995:70). A socialist market economy, it is asserted, is an economy under the Rule of Law *(fazhi jingji)* (Xiao 1994; *Guangming Daily,* 9 March 1994; *Legal Daily,* 2 January 1994; *Economic Daily,* 7 March 1994; Min 1994; but also Liu 1994). The establishment and perfecting of a socialist market is thus a process of establishing the Rule of Law (Wang *et al.* 1996:3). To establish a market economy in China thus demands a revolution in legal theory and legal thought (Wen 1995; Zhang 1995b; Guo 1994; Xie 1994b).

Certain changes in legal theory are indeed occurring in China. For instance, legal discourse in jurisprudence is now a strongly rights-based discourse as evidenced in the general debate on the relationship between rights and duties, namely, whether law should emphasise rights instead of duties (*Xinhua Digest* 1991). Although the general debate on the relationship between rights and duties and the nature of law has been a continuing one since 1978, the current debate is on the issue of whether law should take rights, or duties, or both, as its main concerns. Many scholars take the view that law must first deal with rights; duties will naturally follow as a consequence of protecting these rights. They argue that the emphasis on rights will liberate people from constraints imposed by traditional duties, status and dictatorship. Such a debate, according to some jurists, is essentially an argument for and against a shift from emphasis on duties to the state, to an emphasis on rights against the state (*Xinhua Digest* 1991). On specific fronts, there are similar debates. In civil and commercial law circles, several notable changes are occurring.

First, legal theories and civil law legislation are now subject to sharp criticism for being too restricted by 'traditional doctrines', and for being too willing to compromise with the politico-economic system and ideologies (China Law Society Symposium 1992; Zhang 1993; Liu *et al.* 1993; Civil Law Symposium 1993; Project Group 1993). Many Chinese jurists declare that these 'traditional doctrines', namely, theories largely based on that of A.Y.Vyshinsky and imported from the former Soviet Union in the 1950s, are the legal ideologies that must be abandoned and cleared out in the first instance (Zhang 1994;

Project Group 1993).[8] Current laws governing civil law matters are seen as being too unsystematic and unsophisticated, and in many cases, dated. Urgent revisions and the making of laws governing civil and commercial matters are therefore demanded (Fang, S. 1993:27–32; Civil Law-making Symposium 1992:120; Symposium 1992:3–12; *Beijing Review* 21–27 December 1992:4).

Second, jurists also openly criticise the 'piecemeal' approach towards law-making. They argue that such guiding principles as 'law can be rough to start with', 'a law shall be made only when there is the need' and 'a law should be made when an issue is ripe',[9] have played positive historical roles, but are no longer appropriate for the current situation in China (Fang, S. 1993:29–30; Civil and Economic Law Conference 1992:118–19). Others urge the government to halt the practice of making policies for experimentation purposes and then translating them into law after gaining experience (Gan 1991:3). To secure the legitimacy of reform, scholars argue, law—not policy—must be relied upon (Gan 1991:3).

Third, the strongest attack is now directed against the fusion of public and private law—a long standing controversial issue in China and other (former) socialist countries (Chen 1995a:52–6; Li, M. 1995). To the Chinese scholars, the separation of public and private law is not merely an academic issue; it challenges the fundamental politico-economic system in present China. It goes to the very foundation of establishing a Rule of Law in China (Chen 1995a:52–6; Li, M. 1995). Thus Professor Liang Huixin, a prominent civil law scholar in China, points out that such a fusion reflects the 'old' administrative-economic system and the influence of Soviet civil law theories. It provides a theoretical basis for state interference through administrative measures in civil law activities. To establish a legal order for a market economy, the government must be separated from enterprises; economic and political functions of government must be distinguished, and enterprises must become truly independent civil law subjects, capable of resisting undue intervention from state administrative authorities. In short, the autonomy of private law must be upheld (Liang 1992:5). Liang further argues that not only must public and private law be separated and distinguished from each other, but also that private law must take precedence over public law. Liang asserts that public law having precedence over private law is a product of dictatorship, of a natural agrarian economy *(ziran jingji)* and of a centralised administrative-economic system. He asserts that public law has been in a dominant position in China until now, and that in order to build a modern legal system in China, private law must have precedence over public law (Market Economy and Law Symposium 1992:2–3). Other scholars also see the denial of the existence of private law as an 'extremist leftist' practice, and strongly emphasise the importance of the distinction between public and private law (Project Group 1993:6–7; Liu *et al.* 1993:5; Civil Law Symposium 1993:119–20; Zhou 1993:16; Li 1992:37). Some scholars emphasise that the fusion of public and private law is responsible for the interference of government in enterprises and for many forms of corruption such as officials conducting profit-seeking business (Xie 1994:62–6; Wang and Liu 1993:28–36; Fang 1992:56–8). It is not surprising that some scholars have argued that central to the establishment of a Rule of Law is the establishment of private law in China (Yang 1995; Zhang, 1994).

Finally, it is strongly urged that all economic participants must be treated equally and that law must be made universally applicable to all kinds of economic actors (Xie

1993:12–14; Zhou 1993; Market Economy and Law Symposium 1992:3; Dong and Li 1992:65–7; Wang, B. 1992:3–4; Zhao 1992:21–3). Further, if public property is upheld as sacred and not to be violated, then private property must also be elevated to the same level of protection, and not just be allowed to have 'lawful existence' (Zhang 1993:18–19; Market Economy and Law Symposium 1992:3).

In short, for Chinese scholars, the catchwords are now 'equality', 'universality', 'private rights', 'freedom of contract' and 'humanity'. Market economy, for Chinese scholars, demands 'rational' law in the sense defined by Max Weber.

Such a pursuit of 'rational' law is also reflected in the legislative agenda of the NPC which has made it clear that the establishment of a socialist market economy must be guided, promoted, and protected by law. Not only do new laws have to be made, existing laws and regulations have to be revised, consolidated or repealed (*Economic Daily,* 23 March 1994). To this end, an ambitious legislative plan was instituted after one year of deliberation in 1993: Within the five-year term of the 8th NPC (1992–7), 152 laws are to be drafted and deliberated, and 125 of them must be guaranteed for full deliberation, that is, to be adopted. Among these 125 laws, 54 directly relate to the socialist market economy, and many of them will be consolidated codes of existing laws.[10]

With this ambitious legislative plan in place, it is not surprising that great attention has been given by scholars and law-makers to foreign legal experiences.

Changing attitudes towards foreign (Western) law

Legal transplant and the modernisation of Chinese law

Internationalising Chinese law, in the sense of transplanting foreign (Western) laws, started, not in the 1990s, but at the turn of the century when modern legal reform was imposed by the Western Powers as a prerequisite and an incentive for relinquishing the extra-territoriality then enjoyed by these powers in China (Chen 1995a:914; Tay 1969:163).

Modern reform of Chinese law during the dying days of the Qing Dynasty was, essentially, a process of wholesale Westernisation with a clear utilitarian and instrumentalist approach. From the very beginning, officials were instructed to carry out legal reforms along the lines of Western models (Cameron 1963:57–8). The ultimate goals of legal reform were clear: to secure the emperor's position, to alleviate foreign aggression, and to quell internal disturbance (Zhang *et al.* 1986:332–3; Teng and Fairbank 1954:209).

When the Qing Dynasty was overthrown by the revolutionaries, the Kuomintang (KMT), the process of modernising Chinese law continued, and in fact, accelerated. However, the process under the KMT was a better balanced process, in which foreign laws were selected not just because they were foreign and new, but because they were appropriate for adoption and adaptation in China. Further, traditional law and practice were taken into consideration when adopting foreign law and practice. Despite its fundamental flaws in the utilitarian and instrumental philosophy in guiding the development of Chinese law, the achievements of modernising Chinese law by the KMT were remarkable and the process highly successful (Chen 1995a: Chapter 1; 1995c).

Foreign law for reference

When the communists took over in 1949, law was abolished first and foremost for ideological reasons; the ensuing politicisation of law was therefore not surprising. What followed after the abolition of the KMT law and legal system, were a few short-lived attempts to re-build a legal system when the Party's focus shifted from political struggle to economic development during the first 30 years of socialism (Chen 1995a:35–44). These efforts, however, laid the foundation of legal reform for post-Mao China.

More importantly for the present discussion, it was during those short periods of legal effort that overwhelming Soviet influence in law became entrenched in China. Many young students were sent to study in the Soviet Union and many Soviet scholars came to lecture in China. A large number of Soviet law textbooks and codes were also translated into Chinese. In the civil law area alone, more than forty Soviet textbooks and monographs were translated into Chinese by 1957 (Zhang and Wang 1989:327). It is frankly admitted by Chinese officials and scholars that the legal system of the PRC was established on the basis of the pre-1949 experience of communist justice and on the Soviet model.[11] Soviet influence or Marxist theories of law did not, however, lead to any significant activities in law-making or institution-building in China. Instead, the early Communist experience and Soviet practice, in the first 30 years of communism in China, led to not only the use of law as a terroristic means for class struggle while disregarding enactments for formal procedures, but also for the popularisation of justice, politicisation of law, and the *ad hoc* nature of legal provisions (Leng and Chiu 1985; Butler 1983; Tay 1969, 1973–6, 1976; Leng 1967).

The influence of the Soviet model led to the continuation of a Civil law style legal system, though fragmentary in China, while it also introduced a formidable barrier to the importation of any other Western influence. Fundamentally, Marxist legal theories, as introduced to China from the former Soviet Union, strongly emphasised the class nature of law (Li and Xiao 1994:14–15; also Tay and Kamenka 1980). This emphasis led to an almost automatic denial of any usefulness of 'feudalist' and 'capitalist' law (Münzel 1980:275).

The ideological emphasis on the class nature of law helped to justify the destruction of 'old' law but it was unable to offer anything to fill the legal vacuum left by this destruction. It was to history and foreign laws that China turned for ideas and assistance for legal construction. Apparently, neither history nor foreign influence could easily be discarded.[12] It is, therefore, not surprising that during the first serious efforts to rebuild a legal system, the question of heritability of law arose. The more daring jurists, perhaps misinterpreting the intention of the Party's invitation to participate in the '100 flowers' debate in 1956–7, began to attack the legal taboo, and argued that there were laws of a technical nature which were 'internationally common' and thus could be 'critically inherited' (Münzel 1980:275–7). The drastic turn around of the '100 flowers' debate not only abruptly ended the academic debate on this important question, but also made this issue a most formidable legal taboo until the late 1970s when China entered its new reform and 'open door' period.[13]

With the reform and 'open door' policy in place in late 1970 were the slogans: 'old things must be put to the use of the present' and 'foreign things must be put to Chinese use'. Such political slogans then led to the renewed discussion of and debate on the question of heritability of law when legislative programmes and legal research resumed

around 1977–8 (Lin 1979:280–6). That discussion and debate was dubious and sometimes confusing; the central issue was whether there were technical norms in the 'old' law (both in history and from foreign countries) that could be used as 'reference' or be 'critically inherited'; both arguments for and against heritability of law subscribed to, and upheld, Marxist ideology of the class nature of law (Lin 1979; Li 1979).[14]

While scholars continued their debate on heritability of law (Yu and Cui 1987), law-makers were facing more pressing tasks of building a new legal system and making laws, almost out of nothing. Thus, law-makers took a much more pragmatic approach towards 'old' laws—both 'feudalist' and 'capitalist'. Foreign legal terminologies, structures, and methodology found their way into Chinese laws made in the 1980s whilst rhetoric was on the 'socialist' nature and 'Chinese characteristics' of the new law. Indeed, as some Chinese scholars have rightly observed (Li *et al.* 1994), transplanting foreign laws and assimilating Chinese law with international practice immediately started with the reconstruction of a legal system in the post-Mao era, although the practice in the 1980s was not as pronounced as it is today. The Joint Venture Law, first promulgated in 1979, was borrowed extensively from foreign practices. The revision of the Chinese Constitution in 1982 was reported to have only been carried out after a systematic study of constitutions in 35 countries (Wang, C. 1992:42; Guo 1988:126–7). Leading members of the Legislative Committee of the NPC also stressed the importance of foreign experience, to be used as 'reference' for building a socialist law with Chinese characteristics in the early 1980s (Xiang *et al.* 1984:6–8).[15] Even the more conservative forces recognised the usefulness of foreign legal experience. For instance, Peng Zhen, then the Chairman of the Standing Committee of the NPC, held that foreign experience—whether socialist or capitalist, or from the Anglo-American or the Continental legal system, as well as from Chinese historical experience—should be consulted in making Chinese law (Peng 1982:294–5). Despite its *ad hoc* approach towards foreign laws, certain legislation was distinctly Western. For instance, when the 1986 General Principles of Civil Law (GPCL) was adopted, it was commented that the GPCL, in its form, is a 'general part of a civil code constructed on the German or pandectist model', and its structure of provisions 'follows the German model exactly'. (Jones 1987:310–11).

Further and stronger emphasis was given to foreign experience in 1987 when the CPC declared that China was at a primary stage of socialism (Zhao 1987:10). Such an ideology implied that certain 'capitalist' aspects were useful for advancing socialism in China; thus, a clearer 'utilitarian' approach towards foreign laws and legal experience began to emerge. Legislation, it was emphasised, must be based on Chinese reality but foreign experience must also be used as 'reference' (Gu 1989:29).

The fundamental Chinese reality, one official explained, was that China was a socialist country and socialism in China was at a primary stage (Gu 1989:29). He did not directly explain what this meant in relation to legislation. Instead, he emphasised that Chinese socialism was not built on an advanced economic base and that extensive investigation had to be carried out before a law could be made. Using foreign experience, he continued, was recognising that foreign laws could still be useful for China while socialism was at a primary stage. He justified using foreign laws in building a *Chinese socialist* legal system by explaining that laws which supported capitalism were to be rejected, but those concerning economic management and [legislative] techniques could be used. Furthermore, recognition of international practice and customs was seen as a necessity

for attracting foreign investment and advanced foreign technologies (Gu 1989:31). With this legislative policy in place, a trial to systematically transplant foreign laws was also instituted in the late 1980s. In 1988, the State Commission for Structural Reform proposed that the experience in Hong Kong be transplanted into Shenzhen. Accordingly, the Shenzhen government established a 'Leading Group for Drawing on and Transplanting Hong Kong and Other Foreign Legal Rules' to adopt Hong Kong law and other foreign legal experiences (Zhang 1995a: 13; He 1992:52–3).

Despite the ambiguous recognition of relevance of foreign law and international practice, laws made in the 1980s—especially those regulating commercial transactions and economic relationships—were distinctively Western in style, form, structure and language. The Equity and Cooperative Joint Venture Laws (1979 and 1988 respectively), the Foreign Economic Contract Law (1986), and individual statutes for the protection of intellectual property (e.g. Trade Marks Law (1982, revised in 1993) and Patent Law (1984, revised in 1992)) are just some of the examples which clearly reflect the influence of Western law (Wang 1995; Li *et al.* 1994).

Legal transplant and internationalisation of Chinese civil and commercial law

Apparently, the language that was being used was ambiguous and the ideological constraint obvious. It was not until 1992 when the Party adopted the notion of 'socialist market economy', that a major ideological breakthrough was brought about that enabled the direct use of clear language such as 'legal transplant', 'assimilation', 'harmonisation' and 'internationalisation' of Chinese law. This more direct language stands in contrast to the earlier rhetoric which used phrases such as 'using foreign experience as a reference' in building a socialist law with Chinese characteristics.

Together with the argument for 'rational' law for a market economy is the direct call for legal transplant. Comprehensive and systematic study of foreign laws and basic legal theories is now strongly called for by Chinese law-makers and scholars. Some foreign laws, it is argued, may simply be transplanted into Chinese legislation (*People's Daily*, 26 March 1994; *People's Daily*, 3 July 1993; Meng 1993:79–81; Deputies on Law-making 1992:28–9; *People's Daily*, 5 December 1992). No longer are Chinese scholars sensitive to Western criticisms that China is making its law by borrowing Western laws and that Chinese law has lost its socialist and Chinese characteristics.[16] Instead, jurists and law-makers argue that to build a legal system for a market economy, legislation must be foresighted, systematic, and close to international practice (*People's Daily*, 7 November 1992; Market Economy and Law Symposium 1992:2; Southern Tour Symposium 1992:4–5). 'Chinese characteristics', some urge, should not be overemphasised, or simply, should not be pursued at all (Zhang 1994; Sun 1993; Market Economy and Law Symposium 1992:2; Southern Tour Symposium 1992:4–5).

What has now been emphasised is the urgency of assimilating or harmonising Chinese law with international practice. It is therefore not surprising to note the frequent use of words such as 'transplant', 'assimilation' and 'harmonisation' in all Chinese legal literature. 'Internationalising' Chinese law, it is argued, is a necessity, and the direction for modernising Chinese law, and its reason lie in the nature of the market economy and the 'open door' policy (Zhang 1995b; Geng 1994:2; Li and Xiao 1994; Fang, J. 1993:9;

Sun 1993; He 1992). Features of a modern market economy include its internationalisation and openness; so do those of a socialist market economy. Thus, the modern development of the market economy requires that the Chinese economy is part of, and competing in, the internationalised market. To do so, all economic activities, domestic or international, must be regulated in accordance with internationally accepted norms, customs, practices, and rules. Assimilating or harmonising Chinese law with international practices is thus a logical necessity (Geng 1994:2; Li *et al.* 1994:3–4).

Others, though keeping to a traditional Marxist line which insists that law is an expression of the wills of the ruling class in a given society, argue that law has its class nature as well as social nature which is common to all societies. Market economy has its own rules and mechanisms; technical and managerial norms are common in all market economies. The decision to establish a market economy in China thus provides a foundation for legal transplant, assimilation and harmonisation (Cong 1992:70; He 1992:50–1). As such, what would be transplanted is not the will *(yizhi)* of a particular country or that of a particular historical period or of a particular ruler; it is a scientific management system. The legal system relating to such a system and its experience in the West can be valuably used not only by China but also by the whole world (He 1992:50–1). Still, some scholars go further to suggest that internationalisation of law is a demand of the common activities and common rationale of human beings (Sun 1993:79).

As the need for internationalising Chinese law is closely linked to the 'open door' policy and the establishment of a market economy in China, the emphasis on legal transplant or assimilation is on market-related legal mechanisms. Indeed, to defuse the fear that modernisation is to become a process of Westernising Chinese law, many scholars stress the importance of international conventions and practice in the process.[17] Thus, it is easy to note that much of the Chinese literature concentrates on assimilating or harmonising Chinese law with international practices and conventions and transplanting Western laws on market-related mechanisms (Gong 1995; Geng 1994; Li and Xiao 1994; Li *et al.* 1994; He 1992). The criteria for internationalisation of Chinese law are to be determined by the goals of structural and economic reforms and the liberation of productive forces (He 1992:52–3; Wang, C. 1992:43; Chao *et al.* 1992).

If the admission of the usefulness of foreign law and international practice in building a Chinese legal system in the 1980s was dubious and thus prone to different interpretations, the language in the 1990s has been unambiguous. Now, deputies to the National Congress have called for bold absorption of foreign laws (Deputies on Law-making 1992). The official organ for law-making has formally adopted such an approach for fulfilling its tasks (*People's Daily*, 3 July 1993). Leaders in the law-making authorities have also explicitly endorsed bold adoption and direct transplant of foreign laws (*People's Daily*, 16 March 1994; *Legal Daily*, 16 December 1994). With such a legislative policy in place, the Maritime Code which had been in the making for over 10 years and primarily composed of borrowing from international conventions and practice, was not only adopted in 1992, its adoption was also heralded as an excellent example for assimilating Chinese law with international practice (Li *et al.* 1994). Many long awaited codes, e.g. the Company Law (1993), the Foreign Trade Law (1994), the Arbitration Law (1994), the Audit Law (1994), the Securities Law (1995), the People's Bank Law (1995), the Law on Commercial Bank (1995), the Law on Accounting (1995), and Insurance Law (1995) have now all been adopted. Speedy revisions or additions have also been made to

existing laws which were deemed inconsistent with international practice. Taxation law, joint venture laws, intellectual property protection law, and most recently, the Criminal Procedure Law and the Criminal Law, have all undergone major revisions. Further, China has now ratified a large number of international conventions dealing with international economic relations, especially intellectual property protection.[18] Thus, Western scholars now easily find their familiar language in Chinese law, because Chinese law, in its forms, structure and methodologies, has become undoubtedly Western.

Some general comments

Legal instrumentalism and legal transplant

Clearly, it is the attitude of law as being a tool, and tool mainly, that has facilitated a utilitarian reception of foreign legal institutions in China. This utilitarian approach has, in particular, enabled law-makers and scholars in the PRC to make use of legal institutions established during the late Qing and the KMT legal reforms, as well as of certain Western legal institutions despite differences in ideology. Although the adoption of the notion of 'socialist market economy' has facilitated the overcoming of ideological barriers to the acceptance of foreign legal institutions and has enabled Chinese scholars to enter into the many 'forbidden zones' in legal studies, the criteria remain the same: legal reform is to liberate productive forces (Chao *et al.* 1992).

There is nothing wrong with global borrowing in developing a legal system. Indeed, as Professor Watson has concluded in his seminal work, *Legal Transplant*, major legal developments in the modern world are the results of borrowing (Ewald 1995; Mattei 1994; Zweigert and Kötz 1987:15–17; Watson 1974:95). Obviously, such a reception of foreign legal institutions depends on the 'usefulness [in] and need' of the recipient country (Zweigert and Kötz 1987:16). In other words, law as an instrument for social engineering may be transplanted from one system to another.

However, the instrumental approach to law and utilitarian approach to foreign law do raise a number of questions. First is the question of the function of law in society. Without entering into a debate about this question in general, one may assert that the end of law is, and should be, justice and humanity; facilitating economic development is only one of the many functions of law in society. Second, instrumental use of law is not without conditions or danger (Seidman and Seidman 1994:39–53). Social engineering through law, as pointed out by Ann and Robert Seidman and many others, may become either highly manipulative and authoritarian, or participatory and democratic (Seidman and Seidman 1994:42–4; 1996:14). The dividing line in use and misuse of law and of comparative law is how and who is able to define the 'usefulness and need' in the country concerned. Here lies one of the fundamental flaws in Chinese legal developments and the practice of internationalising Chinese law.

The process of modern reform, ever since it was started at the turn of this century, has been hardly a voluntary one (Chen 1995c). In the late 1970s, the Party was morally bankrupt and the country's economy faced a total collapse. When the authorities accepted the inevitable, the reform was to be led and controlled by the authorities; the people were to obey and follow. In the name of upholding the Party leadership there has been a clear

authoritarian attitude towards reforms. The obvious and constant lag between political and economic reforms, the reluctance to participate in international human rights dialogue by hiding behind the shield of national sovereignty, and the insistence on human rights as being an idea are just a few examples of the instrumental and authoritarian approach to law.[19] The fundamental danger of such an approach to law is to cynically use law as a weapon both to 'legitimate' and to enforce repressive policies against attempts towards democratisation. The declaration of martial law 'according to the Constitution' in May 1989 in Beijing is only one of the recent examples of this cynical use of law. The recent insistence by the Chinese Premier, Li Peng, and the Party Secretary-General, Jiang Zemin, that the 1989 Beijing Massacre was a correct measure, closely follows this instrumentalist and authoritarian logic.[20] With this attitude towards law, Chinese scholars are rightly concerned that China might end with a Rule by Man in the name of Rule by Law (Guo 1994:2). Chinese scholars are also rightly concerned that, without rejecting the ideology of legal instrumentalism, it would be very difficult for the Rule of Law to be realised in China (Xie 1994a; Yu 1989).

Foreign things for Chinese use and Chinese characteristics of the law

Utilitarian use of foreign law can also cause distortion and difficulties. Law is first of all a part of culture in a given society—a part of its social, historical and intellectual product. A legal theory can only be understood in the context of the environment which produces it. To say law is part of culture and history is not to deny the fact that law can be used instrumentally for 'social engineering' purposes. Indeed, whilst a legal institution can be fairly readily transplanted, a culture or a tradition cannot. To import any legal institutions, one must study the whole legal system of which such institutions are a part. To make the 'imported' legal institution work, one also needs an associated political and economic environment as well as trained personnel. Even if law is a tool, such a tool does not necessarily work in every environment without distorting itself. Using selected legal institutions and theories out of context and as instruments to achieve economic reform, or to justify economic reform measures, can bring about more theoretical problems and practical difficulties than legal reform is able to solve.[21] In other words, if legal borrowing has been the main source of legal development in the modern world, it should not be interpreted to mean direct copying of foreign laws without careful and systematic study of the environment in which the law operates. International experience, at least in the sense of not repeating the mistakes others have made, is useful and beneficial. But direct copying without careful study will not work. This is because law does not work in a vacuum; its effectiveness is determined by the political, economic, historical and cultural environment. Put another way, the desired behaviour cannot be induced simply because a law is promulgated, as:

> inevitably, people choose how to behave, not only in response to the law, but also to social, economic, political, physical and subjective factors arising in their own countries from custom, geography, history, technology and other, non-legal circumstances.
>
> Seidman and Seidman (1994:45)

In short, every law, by definition, must be 'indigenous' in nature—rooted in and responding to the environment where it is supposed to work. Here lies the second major problem in the Chinese practice of internationalising Chinese law.

Although the neglect of 'indigenous' development of Chinese law has long been a phenomenon in its development since 1978,[22] the adoption of the notion of a 'socialist market economy' has facilitated the further abandoning of the 'Chineseness' of Chinese law, and, as discussed above, has made the present legal discourse and legislation distinctively Western. The insistence on a 'native character' or 'Chinese characteristics' in Chinese law was criticised by some scholars as hampering the development and modernisation of Chinese law, and therefore, should not be overemphasised, or, should not be pursued at all. While socialist ideology is rhetorically upheld, discussion on 'Chinese characteristics' is clearly missing. It seems that by arguing legal transplant Chinese scholars are advocating direct copying of foreign law, a practice that has universally failed (Seidman and Seidman 1994:44).

'Rational' law and socialism

Under the banner of 'socialist market economy', the Chinese legal discourse and legislative policy accord more with Max Weber than with Karl Marx. However, again, one must not be misled by appearance. In internationalising Chinese law and building a legal system for a socialist market economy, Chinese scholars and law-makers are reminded that over and above 'pragmatism' and 'utilitarianism' stand the 'Four Fundamental Principles' in making [and implementing] laws (Gu 1989:42–3). The implications of upholding these principles should not be underestimated. Under these principles, as explained by Gu, first, important principles of all legislation have to be approved by the Party, and second, the Party line, its guiding principles and policies must be written into law (Gu 1989:42). Under the guidelines for establishing a 'socialist market economy', Marxism may be out of fashion, 'socialism' is not, at least when it is useful. The suppression of the 1989 democratic movement was carried out under the banner of 'Four Fundamental Principles', and so was every single political movement during Deng's leadership.

The search for 'rational' law is incompatible with the pre-imposition of a Party ideology. Clearly, what China should abandon is not 'Chinese characteristics' but 'socialist characteristics' as symbolised in this loosely defined 'Four Fundamental Principles' which focus on an unqualified continuing leadership role for a Leninist Party.

Conclusion

There is no doubt that the search for 'rational' law and the movement towards internationalising Chinese law is to be welcomed as a very positive development in modern law reform in China. Such a process has clearly moved Chinese law away from the dogmatic ideologies imported from the former Soviet Union, made the Chinese legal theories much more sophisticated, accelerated the law reform processes, facilitated the mutual understanding of legal cultures internationally (though not without a real danger of mutual misunderstanding), and helped China to avoid the mistakes experienced in the

Western development of law. It also has the potential for leading the Chinese reform to some fundamental political changes and the establishment of a Rule of Law in China.[23]

While not being dismissive of these new developments, the principal flaws in this process should not be overlooked either. Fundamentally, the problem lies with the guiding principles for legal reform, i.e., instrumentalism, utilitarianism and authoritarianism as underlying philosophies in building a new legal system which regards maintenance of a political regime as being the main goal of legal reform. Instrumentalism and utilitarianism are not wrong in themselves; what is problematic is the crude use of law for the purpose of political domination and for societal goals defined and imposed exclusively by a single political force. It should also be pointed out here that this fundamental problem, as I have argued elsewhere (Chen 1995c), is not unique in the post-Mao reforms; it has been so since the initial reforms at the turn of the century. Thus, the failure to establish a Rule of Law in China has as much to do with the Qing and KMT reforms as with the present efforts.

What is now important for China's legal development is to realise that the Rule of Law *per se* has its own virtue and the end of law is justice and humanity. Further, Chinese scholars and officials must not make Deng's 'Thought' a dogmatic ideology, thereby falling back to the traps in the 1950s' debate on inheritability of law. Again, more comprehensive and systematic studies on foreign legal institutions and basic legal theories must be carried out if any imported law is to work in China. Finally, China perhaps needs to make much greater efforts to implement the laws that have already been made. Without rigorous enforcement, law may well be a dead letter.

Notes

1 From a historical viewpoint, it is a continuation of the story of imperialism and colonialism (Chanock 1996). As such, it has attracted many criticisms (Arup and Marks 1996).

2 Professor Li Shenzhi, a former vice-president of the Chinese Academy of Social Sciences (CASS), is perhaps the most prominent scholar among the Chinese academics published in globalisation issues. The present author thanks Professor Wang Yizhou of CASS for supplying me with several unpublished papers by Professor Li Shenzhi.

3 Under Marxist theory of law, both the state and the law as coercive apparatus are to wither away in a communist society once antagonistic classes are eliminated (Kamenka and Tay 1985; Kamenka and Tay 1971).

4 By March 1997, the National People's Congress (NPC) and its Standing Committee had promulgated 311 statutes and decisions. The State Council had issued more than 700 regulations and the local legislatures had adopted over 4,000 local rules (*People's Daily*, 1 April 1997; Chen 1995b:151–2). Such an achievement is particularly remarkable, considering that from 1949 to 1992, only 170 statutes were made and adopted (*People's Daily*, 20 March 1994).

5 I have discussed elsewhere, in detail, the relationship and interaction between legal development and economic reform in the context of civil and commercial law (Chen 1995a).

6 This is characterised by the Chinese phrase 'Crossing the river by touching the stones underneath' *(Mozhuo Shitou Guohe)*.

7 The English translation has been amended by me according to Deng's original works published in Chinese under the same title in July 1983.

8 Some scholars have, however, offered some qualified defence for Vishinsky (Sun and Zeng 1996).

9 These are in fact instructions concerning legislative work given by Deng Xiaoping in 1978 and have been held as guiding principles in legislative work ever since.
10 For a full list of the 152 laws, see *Economic Daily*, 14 March 1994.
11 Dong Piwu in his speech to the Eighth National Congress of the CPC explicitly stated that the establishment of the PRC's legal system was based on the experience of revolutionary justice before 1949 and the Soviet experience of law (Dong Piwu 1986:480). Chinese scholars plainly hold the same view (Zhang and Wang 1989).
12 After all, Marxism is an alien idea to China.
13 Jurists who advocated heritability were all labelled 'rightists' and subjected to criticism and humiliation (Zhang 1995a:20).
14 'To be used for reference' in the debate was to serve the purpose of pointing out what a socialist state must not do. 'To critically inherit' was to adapt the 'old' law to the principles of socialism and assimilated into new law (Münzel 1980:277–8).
15 Xiang and Gu were then Vice-Chairmen of the Legislative Committee of the NPC's Standing Committee, and Yang was Deputy Secretary of the Committee.
16 This was the case until quite recently (Keith 1994:99–100).
17 Some scholars specifically call for the bold and massive use of conventions to avoid the question of whether they are socialist or capitalist (Chao *et al.* 1992; He 1992).
18 In 1993 alone, China ratified 17 international agreements (*People's Daily*, 16 March 1994). By now, China is a party to all major international intellectual property agreements.
19 For further detailed studies on Chinese inconsistent international behaviour, see Feinerman 1995. For Chinese official attitude towards human rights and international human rights dialogue, see Information Office of the Chinese State Council (1991). For a recent analysis by Amnesty International on China's human rights policies and legal aspects of violation of human rights, see Amnesty International (1996).
20 Li Peng made this insistence during his visit to Germany in July 1994 (*The Age*, 7 July 1994). A similar statement was made by Jiang Zemin during his talk with Malaysian Prime Minister, Dr Mahathir, in Beijing in May 1994 (*People's Daily*, 13 May 1994).
21 The controversy and the practice of using Western corporate theories to deal with the separation of ownership and management is a good example (Chen 1995a: Chapters 7 and 8).
22 For instance, in analysing the development of civil law in China, Professor Jones has strongly criticised Chinese law-makers and scholars for devoting little effort to the actual practice of the Chinese people (Jones 1985–6:11). Professor Keith however insists that emphasis on harmony and mediation is still very pervasive and distinctive in China (Keith 1994:100). But with a socialist ideology, whether such an emphasis is more on form or substance is arguable.
23 The rapid development of an administrative law system, including the recent adoption of an Administrative Punishment Law (March 1996), and the recent comprehensive revision of the Criminal Procedure Law (March 1996) and the Criminal Law (March 1997) which now incorporates some fundamental 'due process' principles (such as the presumption of innocence) and abolishes certain controversial provisions (such as the counter-revolutionary crime provisions) have a great potential to cause some fundamental changes in the Chinese legal system, for the protection of human rights, and for establishing a Rule of Law in China, if they are properly implemented. Also, the above mentioned jurisprudential debates clearly evidence a strong rebellious flavour against authoritarianism and totalitarianism.

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5
THE POLITICAL ECONOMY OF INSTITUTIONAL REFORM IN INDONESIA

The case of intellectual property law*

Andrew Rosser

Introduction

Over the past decade and a half, the Indonesian government has introduced a series of institutional reforms aimed at creating a more market-oriented economic system within that country. In the legal sector, for example, it has introduced several new pieces of economic legislation in areas such as intellectual property, banking, companies, the capital market, customs and small business, and begun work on at least two others on arbitration and secured transactions. Through the USAID-funded Economic Law and Improved Procurement Systems (ELIPS) project which it established in 1991, efforts have also been made to improve the quality of legal education and the availability of legal information in Indonesia. In 1993, the government took the process of legal reform a step further by upgrading the status of the legal sector within the Broad Outlines of State Policy (GBHN), a move that has seen increased resources and attention given to legal development issues over the past few years. In 1995, the government also began working in conjunction with the World Bank on a broad-based legal development project aimed at, amongst other things, reforming Indonesia's notoriously corrupt judiciary. So dramatic have been the legal reforms introduced in recent years that at least two prominent commentators on Indonesia's legal system, Todung Mulya Lubis and Erman Rajagukguk, have described them as nothing short of a legal 'revolution' (*Kompas,* 7 January 1995; *Eksekutif*, November 1995).[1]

The purpose of this chapter is to enhance our understanding of the dynamics that have shaped the process of institutional reform (and legal reform in particular) in Indonesia since the mid-1980s by examining one particular case: intellectual property law reform. In doing this, the chapter begins with a critique of the work of rational choice institutionalists who, as Kanishka Jayasuriya noted in the 'Introduction' (this volume), have come to dominate recent discussions on the dynamics of institutional reform. According to these theorists, institutional reform is an essentially technical process which is best understood in terms of the victory of economic rationality over political and social

* I wish to thank Richard Robison, Kanishka Jayasuriya and Roman Tomasic for comments on an earlier draft of this chapter.

interests. The view taken here, by contrast, is that institutional reform needs to be understood within a political and social context and, in the Indonesian case at least, particularly within the context of structural pressures emanating from the global political economy. The chapter: 1 discusses the nature of intellectual property law in Indonesia prior to the mid-1980s; 2 examines the way in which political factors have shaped the process of intellectual property law reform in Indonesia since the mid-1980s; and 3 presents the conclusions to the chapter.

Before proceeding any further, it is necessary to define the terms 'institution' and 'institutional reform' as they are used throughout this chapter. As Douglass North and Robert Thomas (1970:5) have pointed out, the term 'institution' has been used in everyday parlance to refer variously 'to an organization (such as a bank), to the legal rules that govern the economic relations between people (private property), to a person or position (king or monarch), and sometimes to a particular document (Magna Carta)'. For our purposes, however, the following definition, proposed by North will be used: 'Institutions are the humanly devised constraints that structure human interaction. They are made up of formal constraints (e.g. rules, laws, and constitutions), informal constraints (e.g. norms of behaviour, conventions, self-imposed codes of conduct), and their enforcement characteristics. Together they define the incentive structure of society and specifically economies' (North 1994:360). Because this chapter focuses on changes in particular laws, it is the first type of institution (i.e., formal constraints) that is of primary concern here.

'Institutional reform' is used here to refer to the creation of so-called 'market-friendly' institutions within society. In particular, it refers to the creation of institutional structures which provide a more secure environment for property rights within society. It should be distinguished from 'institutional change' which is more general in meaning.

Understanding the dynamics of institutional reform

Rational choice institutionalists have offered a number of explanations as to why institutional reform occurs over time. By far the most commonly employed explanation is that institutional reform occurs in response to changes in relative factor and product prices (North 1989:1324; North 1981:207–8; North and Thomas 1970:1; Demsetz 1967:350). Historically, the most important sources of relative price changes are seen as being population change, technological change, changes in the cost of information, and the expansion of markets through, amongst other means, political and military conquest. Yet rational choice institutionalists are generally vague on precisely how relative price changes translate into institutional reforms. North (1989:1324), for example, argues that institutional reform occurs as relative price changes lead individuals to perceive that they could do better under an alternative institutional arrangement. But he does not explain precisely how these individuals' perceptions shape government decisions concerning institutions. Given the general emphasis on the efficiency-improving and growth-promoting character of institutional reform in North's writings, one is left with the distinct impression that governments adopt institutional reforms simply on the basis of considerations of efficiency and growth.

Another explanation of institutional reform offered by rational choice institutionalists has been that institutional reform occurs as a result of cultural development. In his most recent work, for instance, North argues that 'the most fundamental source of institutional change is learning by individuals and entrepreneurs of organisations' (1994:362). According to North, institutions are a product of the culturally-derived mental models of the world that individuals use to understand their environment:

> The relationship between mental models and institutions is an intimate one. Mental models are the internal representations that individual cognitive systems create to interpret the environment; institutions are the external (to the mind) mechanisms individuals create to structure and order the environment.
>
> North (1994:363)

On this basis, he argues that the main reason that Western societies have grown much more strongly than Third World ones in recent centuries is that the former have learned to create efficient and growth-promoting institutions whereas the latter have not. Most societies, he argues, became 'stuck' with belief systems and institutions that failed to 'evolve into the impersonal exchange essential to capturing the productivity gains that came from the specialization and division of labour that have produced the Wealth of Nations' (North 1994:364).

The main problem with both these approaches is their exclusive reliance on the operation of an instrumental rationality which addresses efficiency and economic growth but not the redistributive dimension of institutional reform. Both approaches portray institutional reform as if it is propelled by a quest for more efficient and growth-promoting institutions within society. But, as Pranab Bardhan (1989:1393) has argued, it is less a technical concern to improve efficiency and economic growth that drives institutional reform than a political concern to reinforce, protect, or gain social and economic power. Institutions, he points out, not only determine the efficiency with which economic resources are used but also their distribution within society (i.e. they determine 'who gets what, why, and how'). Consequently, institutional reform should not be seen as a technical process but rather as a political one because it usually involves struggles between competing groups over the distribution of resources within society.

Of course, the link between power and institutions has not been entirely ignored by rational choice institutionalists. North, for example, has argued that inefficient institutions often persist because the interests of powerful groups within society are embedded in them: 'even when rulers wish to promulgate rules on the basis of their efficiency consequences, survival will dictate a different course of action, because efficient rules can offend powerful interest groups in the polity' (North 1989:1321). Similarly, North and Thomas (1970:7) have noted that efficiency-impairing institutional change may occur if it benefits the interests of certain powerful groups within society. In explaining institutional *reform*, however, rational choice institutionalists have generally ignored explanations based on power relations in favour of ones, like those mentioned above, which emphasise the role of instrumental rationality.[2]

But how exactly can questions of power be incorporated into a theory of institutional reform? How does social and economic interest and power translate into policy outcome?

For capitalist societies such as Indonesia, scholars of political economy have devised three main sets of approaches which address these questions: instrumentalist, structuralist, and state-centred. Although there is significant variation within each set of approaches, their broad features are as follows.

1 Instrumentalist approaches explain state policy (and, therefore, the institutional structure of society) in terms of the direct control of the state by the dominant class or class fraction in society, either through a class-based party, occupation of bureaucratic office, or ideological hegemony (Robison 1988:54). In this view, the state is an instrument that is used by this class or class fraction to further its own economic and political interests. Institutional reform occurs, therefore, as a response to the demands of this class or class fraction. Whilst instrumentalist approaches have been widely used, they have been criticised on several grounds, the most important of which is that they ignore the structural pressure capital exerts on the state.
2 Structuralist approaches, by contrast, explain state policy in terms of the restrictions imposed on state action by the very structure of capitalist society. According to this approach, the state is constrained by capital, not because capitalists inhabit the state, but rather because they 'are the key to investment, production, and economic growth, and are essential to the economic survival of society as a whole' (Robison 1988:55). Amongst the obligations imposed on the state in this way, it is argued, are 'the need to mediate conflict, resolve crises, [and] provide the legal, political and fiscal conditions essential to the process of economic growth and capital accumulation' (Robison 1986:127). One of the main criticisms of this approach is that whilst it acknowledges that the state is not the mere instrument of capital, it cannot account for those occasions when the state pursues policies clearly detrimental to the collective interests of capital.
3 State-centred approaches explain state policy in terms of the collective interests of state officials. According to these approaches, the state is an autonomous actor in its own right, which can, if required, act against the interests of the dominant class or class fraction in society. In other words, the state is seen as being separate from society and at times even in conflict with it. According to this approach, then, institutional reform is an expression of the state's interests. Whilst state-centred approaches therefore avoid the reductionism of 'society-centred' approaches, they have been criticised for overestimating the autonomy of the state, especially in capitalist societies (Cammack 1990).

The view taken here is that a combination of all three approaches is the most useful way to explain institutional reform in the Indonesian context. This is because the New Order state which has ruled Indonesia for the past three decades has a 'multi-dimensional' character in that it responds, not just to instrumental, structural or state-centred dynamics but to all three, depending on the particular historical circumstances that prevail. The New Order has an instrumental dimension because of the close personal connections that exist between many leading capitalists and senior political and bureaucratic figures. It also has a structural dimension because—despite these instrumental pressures—it is often compelled to act in the interests of capital as a whole, especially at times of economic crisis, and to mediate conflicts between individual fractions of capital. And finally, it has a state-centred dimension because the independent interests of state officials are also

often incorporated into state policy (Robison, Hewison and Rodan 1993:31; Robison 1986:126–7). In this view, then, the New Order state is a much more complex entity than suggested by the instrumental, structural, and state-centred approaches when used separately, and analysis needs to take into account the way in which all three dynamics shape the New Order's actions in particular historical circumstances.

The case of intellectual property law reform reveals clearly the usefulness of this 'multidimensionalist' approach in explaining the dynamics of institutional reform in Indonesia. As the remainder of this chapter will illustrate, intellectual property law reform in Indonesia was driven largely by structural pressures emanating from the collapse of oil prices in the early and mid-1980s.[3] The oil price collapse deprived Indonesia of an important source of investment funds and foreign exchange and reduced the government's ability to fuel economic growth in Indonesia. In order to attract new sources of investment funds and develop non-oil exports, the government had little option but to adopt economic policies more favourable to foreign capital. Within this context, foreign, and especially American, appeals for greater protection of intellectual property in Indonesia had added force. In most cases they ultimately proved more powerful than resistance from certain state-centred forces (the Health Ministry, in particular) and those segments of domestic capital which had a vested interest in poor protection of intellectual property. For the most part, even where the interests of well-connected capitalists were at risk, the government was still willing to push ahead with reforms. If it had been possible for the Indonesian government to ignore external appeals for intellectual property law reform prior to the mid-1980s, it was no longer possible to do so after that time when Indonesia desperately needed to attract greater foreign investment and improve its non-oil export performance.

Intellectual property law in Indonesia prior to the mid-1980s

The struggles that have taken place over intellectual property law reform in Indonesia during the 1980s and 1990s need to be understood against a background of limited protection of intellectual property within Indonesia since independence. The Dutch, who until 1942 were the colonial power in most of what is today Indonesia, constructed a relatively detailed and complete legal framework for intellectual property protection during their rule. In addition to introducing copyright, patent and trademark laws into the colony, they also ratified a number of international intellectual property agreements on behalf of the colony including the Paris Convention in 1888, the Madrid Agreement in 1893 and the Berne Convention in 1913. After independence, however, the Indonesian government paid little attention to the protection of intellectual property. The only substantial development in intellectual property protection during the immediate post-independence period was the introduction in 1961 of a new Trademark Act. However, even this did little to improve intellectual property protection in Indonesia because it more or less just adopted the same provisions as the Dutch trademark law (Antons 1991:366–9).

This indifference towards intellectual property protection on the part of the Indonesian government continued when the New Order came to power in 1965. Although initially the New Order was under considerable pressure to make concessions to foreign investors

in order to attract capital into Indonesia, this pressure all but vanished with the onset of the oil boom in 1973–4. Higher oil tax revenues meant that the state itself was able to fund much of Indonesia's economic growth during this period. Nevertheless, there were two notable improvements in the intellectual property law framework during the first two decades of New Order rule: first, the decision to ratify the Stockholm Revision of the Paris Convention in 1979 and, second, the introduction of a new Copyright Law in 1982. However, as Antons (1995:5) has pointed out, this law was strongly criticised right from the beginning for providing inadequate protection: copyrights were only protected for 25 years after the death of the author; foreign works only received protection if they were first published in Indonesia; and copyright could be appropriated by the Indonesian government if doing so was considered to be in the 'national interest'.

The relatively limited protection given to intellectual property under Indonesia's intellectual property laws provided an environment in which it was easy and profitable to produce counterfeit goods. The result was a significant growth in pirating activities in Indonesia following independence. According to some estimates, by the mid-1980s pirated goods accounted for up to 90 per cent of the domestic markets for books, videotapes, computer software, records and audio cassettes in Indonesia (Uphoff 1991:29; Holloway 1986:59). Not surprisingly, then, by the mid-1980s Indonesia had earned a reputation as one of the worst infringers of intellectual property rights in the world. The losses incurred by developed country producers of intellectual property because of intellectual property violations in Indonesia were considerable. The British Publishers Association, for example, estimated that its members lost around US$7 million per year in sales and royalties in Indonesia in the mid-1980s because of copyright violations (Holloway 1986:59).

It was in the area of sound recordings, however, where concern about intellectual property rights violations was greatest. By the end of 1985 there were estimated to be twenty local companies producing around 1.5 million pirated Western music cassettes per month (*Kompas,* 13 December 1985). Many of these producers had invested in sophisticated recording equipment and had agents situated abroad who would personally carry the latest Western music releases to Indonesia for copying (Uphoff 1991:27). In addition, a significant number of producers also exported cassettes to the Middle East, Europe and other parts of Asia. Even before Singapore shut down its pirated audio cassette industry in 1986 making Indonesia the world's largest exporter of pirated cassettes, exports of pirated tapes earned the Indonesian economy around US$25 million per year (*Tempo,* 21 December 1985). The great demand for pirated cassettes both within and outside Indonesia enabled many pirated cassette producers to grow strongly during the 1970s and early 1980s. For this reason and because mergers and acquisitions were common within the industry, many pirated cassette producers had become quite large by the mid-1980s (*Kompas,* 28 October 1984).

Whilst some domestic industry groups, such as the Indonesian Recording Industry Association (ASIRI) and the Book Publishers Association (IKAPI), had for many years lobbied the Indonesian government to provide greater protection of intellectual property in Indonesia—and there had been several attempts within the Departments of Justice and Education to draft new intellectual property laws—little had actually materialised. The introduction of the 1982 Copyright law, which some of these industry groups helped draft, was a major success for them but even then it was not fully implemented (Uphoff

1991:30). It was not until the mid-1980s when oil prices collapsed and the US government began to actively lobby the Indonesian government in relation to intellectual property issues that significant improvements in intellectual property protection were introduced.

The political economy of intellectual property law reform in Indonesia

The struggles that have occurred over intellectual property issues in Indonesia since the mid-1980s have been part of a broader global struggle over the protection of intellectual property stemming back to the previous century. Ever since the signing of the first major international intellectual property rights agreements—the Paris Convention on industrial property in 1883 and the Berne Convention on copyright in 1886—intellectual property protection has been an issue that has pitted the interests of the developed countries, which have been the major producers of intellectual property, against the interests of the developing countries, which have mainly been consumers of intellectual property. As Robert Benko (1987:27–8) has pointed out, developed and developing countries have held diametrically opposed views on the need for greater protection of intellectual property. The developed countries have argued 'that monopoly rights [over intellectual property] must be enforced to ensure proper compensation for the private innovator… [and to] establish necessary economic incentives for future technological innovation'. The developing countries, by contrast, have taken the position that intellectual property rights allow Western companies to charge excessive prices for their products and thereby frustrate their own efforts to modernise. As a result, many developing countries have resisted attempts by the developed countries to force them to provide greater protection for intellectual property within their borders.

Since the late 1970s, the global struggle over intellectual property protection has intensified considerably. Probably the main reason for this has been a broader concern about the declining competitiveness of Western, especially American, industry in world markets during this period. High labour costs have made it increasingly difficult for Western countries to compete in labour-intensive manufacturing industries, especially against the so-called 'tiger' economies of Northeast and Southeast Asia. Consequently, many developed countries have been forced to rely on technological innovations to stimulate growth in their economies. Poor protection of intellectual property in developing countries has, therefore, posed a serious threat to the interests of many Western countries. As Bernard Hoekman and Michel Kostecki (1995:146) have argued, many Western countries have 'increasingly felt that inadequate protection of IP in technology-importing countries [has] reduced their competitive advantage in the high technology area'.

Leading the charge against the developing countries over the issue of intellectual property protection has been the US government and several private business organisations such as the International Federation of Phonogram and Videogram Producers (IFPI), the International Intellectual Property Alliance (IIPA) and the Business Software Alliance (BSA). Many of these organisations have closely monitored the intellectual property rights situation in developing countries, produced publicly-available

reports about intellectual property violations, complained publicly about the vast losses incurred by their members because of these violations and lobbied the US government for support in cracking down on violating countries. The US government, for its part, has pursued these groups' interests by applying pressure on developing countries through bilateral talks and multilateral fora such as the Uruguay Round of GATT. It has been particularly active in this regard since 1984 when the US Congress gave the President—and then subsequently the US Trade Representative (USTR)—the authority to impose trade sanctions on countries that deny protection to intellectual property rights.

In the Indonesian case, US pressure for greater protection of intellectual property has been an important factor in encouraging the adoption of intellectual property law reforms during the 1980s and 1990s. Indeed, it would be fair to say that the US has been the principal proponent of intellectual property law reform in Indonesia during this period. Indonesia has figured prominently in the USTR's 'watch lists' ever since they were first produced in the late 1980s. It has also been frequently criticised in the reports of business lobby groups such as the IIPA. Furthermore, the US government has consistently raised intellectual property issues in intergovernmental talks between the two countries. According to one senior US Department of Commerce official, intellectual property issues have constituted more than half the duties of USTR officials when they have visited Indonesia in recent years.[4] But US pressure on Indonesia in relation to intellectual property issues has not been limited simply to the production of lists and reports and diplomatic appeals. The US government has at times been willing to back up these other initiatives with threats of trade sanctions in order to get results.

The remainder of this section examines the conflicts that emerged in Indonesia during the 1980s and 1990s over two major intellectual property issues: copyright protection and patent protection. Whilst other intellectual property issues were raised during this period, these two issues produced the most significant conflicts. Each case is examined in turn below.

Copyright protection

The first major intellectual property issue to be pursued by the US government in Indonesia in the mid-1980s was copyright protection. As Elisabeth Uphoff (1991:28) has pointed out, the US government wanted certain revisions made to the 1982 Copyright Law: among other things, it wanted copyright protection to be extended to cover foreign works not originally published in Indonesia, the term of copyright protection to be extended from life of the author plus 25 years to life of the author plus 50 years, and penalties for copyright violations to be increased. Initially, however, its appeals met with a lukewarm response from the Indonesian government. As far as the Indonesian government was concerned, protection of intellectual property rights was not yet necessary because Indonesia produced very little intellectual property. Consequently, US trade official Olin H.Wethington's proposal in early 1985 that Indonesia introduce new intellectual property laws in order to attract US investment was met with a firm rejection. The head of BAPPENAS, J.B.Sumarlin, stated in May that whilst Indonesia was willing to consider simplifying investment and port procedures in order to attract US investment, it was not willing to consider the introduction of new intellectual property laws (*Tempo*, 11 May 1985; Uphoff 1991:28–9).

As time went by, however, structural pressure on the Indonesian government to provide greater protection of copyrights increased substantially. Much of this pressure was generated by two events in December 1985 which focused international attention on Indonesia's weak intellectual property regime. The first of these was pop singer Bob Geldof's widely publicised protest over the production and sale of pirated recordings of the Live Aid charity concert by Indonesian audio cassette producers. According to Geldof, several hundred thousand cassettes to the value of US$6 million had been produced within Indonesia following the concert. He bitterly criticised Indonesian cassette producers and the Indonesian government—which, he estimated, had earned about US$300,000 in tax from the sale of the cassettes—for cashing in at the expense of starving millions in Africa: 'This is a despicable act. With that amount of money, thousands of Africans would not have to die' (as quoted in *Tempo*, 14 December 1985). His protest was widely reported by the press in the United Kingdom, the US and other countries and was even discussed in the British Parliament (Uphoff 1991:29; *Kompas*, 16 December 1985).

Geldof's attack on pirate cassette producers in Indonesia and the Indonesian government was backed by the British arm of the IFPI, an industry organisation representing Western recording companies. Whilst acknowledging that these producers could not be said to be breaking the law because Indonesia was not a member of any international copyright agreement, Federation spokesperson David Laing said that he still considered the production of pirated cassettes a form of stealing. He called on the British govern-ment to impose economic sanctions against Indonesia in order to pressure it into providing greater protection for intellectual property rights (*Tempo*, 14 December 1985; 21 December 1985).

Initially, spokespeople for the Indonesian government denied that Indonesian cassette producers had done anything illegal because Indonesia was not a member of any international copyright convention (Uphoff 1991:29). In the end, however, the embarrassment caused by the incident became so great that the government was forced to take a harder line. In mid-December, for example, Indonesia's Foreign Minister, Mochtar Kusumaatmadja released a press statement condemning Indonesian cassette producers for exploiting suffering in Africa. He also claimed that cassette producers had deceived consumers by stating on the cassette cover that proceeds from the sale of the cassette would be used to alleviate famine in Africa. A week later, the Minister of Justice, Ismail Saleh, summoned a group of Indonesian cassette producers to his office for private discussions. By 28 December all Live Aid cassettes were withdrawn from sale. The Indonesian government also decided to donate US$30,000 to the Live Aid cause (Uphoff 1991:29; Holloway 1986:59; *Straits Times*, 20 December 1985; *Tempo*, 25 December 1985).

The second event which focused international attention on Indonesia's weak intellectual property regime was the arrest of Indonesian businessman, Anthony Darmawan Setiono by the FBI on 13 December 1985 for allegedly breaking US customs and copyright laws. Darmawan was accused of having arranged for the shipment of 5,000 pirated cassettes to a US firm established by the Recording Industry Association of America. It was also alleged that he had used the diplomatic pouch to send 'samples' and that the commercial attaché at the Indonesian Embassy in Washington was involved in the operation. Whilst Darmawan's case was eventually dismissed on the grounds of

entrapment, the affair was nevertheless deeply embarrassing for the Indonesian government (Uphoff 1991:29; Holloway 1986:59).

By attracting international attention, these two events created a political climate in which it would have been easy for Western governments to impose trade or other sanctions against Indonesia. At a time of declining oil prices, this possibility clearly worried the Indonesian government. Consequently, in early 1986 the Indonesian government's public attitude towards intellectual property protection began to change. In late February, the Minister of Justice, Ismail Saleh, speaking at a one-day conference on copyright law, described copyright violations as 'a detestable act' and 'in contravention of the Pancasila spirit'. He argued that the implementation of the 1982 Copyright Law needed to be reviewed and that the light sentences given to copyright violators were one of the main reasons why copyright violations often occurred in Indonesia (*Jakarta Post*, 24 February 1986). According to Uphoff (1991:30), the events of December 1985 also had an impact on President Soeharto: 'Several knowledgeable sources believed that at this point President Soeharto took a personal interest in the issue and gave orders that the embarrassment be taken care of.

After these events, US lobbying activity in Indonesia increased significantly. When US President Ronald Reagan visited Indonesia during 1986, he spoke to President Soeharto about intellectual property rights violations in Indonesia. Following his visit, several US delegates were sent to Indonesia to appeal for greater protection of US intellectual property in Indonesia. In addition, the US Ambassador to Indonesia, Paul Wolfowitz, made constant appeals to the Indonesian government to improve its intellectual property laws: 'One important problem for us is the protection of intellectual rights which must be improved before it damages the trade relationship between our two countries' (quoted in *Tempo*, 19 September 1987). The pressure being placed on Indonesia by the US culminated in June 1986 when the IIPA petitioned the US government to have Indonesia's GSP privileges withdrawn (Uphoff 1991:30).

In response to this pressure, President Soeharto announced the formation of a 'working team' under Cabinet Secretary Moerdiono to draft two new intellectual property laws—the first consisting of amendments to the 1982 Copyright Law, the second a new patent law. However, this move was not enough to satisfy Western governments and business groups. Later in 1986, the US government threatened to reconsider Indonesia's classification under the GSP if no significant improvements were made by March 1987. In April this deadline was extended to October 1987. In May, the European Community Commission announced that it would launch an investigation into the adequacy of copyright protection in Indonesia for phonograms (Antons 1991:371–2; Uphoff 1991:30–1).

In September 1987, the Indonesian Parliament passed the amendments to the 1982 Copyright Law, just in time to avoid any GSP reprisals. Many of the US demands were incorporated into the new legislation. Protection was extended to cover video recordings, sound recordings, and computer programs. The length of protection was also extended—to life plus 50 years for original works, 50 years for derived works and 25 years for photographs, computer programs and collections. Finally, the new legislation also changed the basis of protection for foreign works from first publication in Indonesia to the existence of relevant bilateral or multilateral agreements (Antons 1991:372).

Following the passage of the revisions to the Copyright Law, several Western countries moved to conclude bilateral copyright treaties with Indonesia in order to ensure that the protection granted to Western intellectual property producers under the new law would be realised. On 27 April 1988, for example, the Indonesian government signed an agreement with the EC which provided for reciprocal protection of sound recordings from 1 June 1988.[5] In early May, the Indonesian National Recording Companies Association (APNI) appealed to the Indonesian government to suspend the implementation of the agreement for a further six months in order to allow cassette producers to clear existing stock of Western music cassettes. According to APNI, there were still around three million Western music cassettes valued at Rp. 5 billion (US$ 3 million) for sale at retail outlets in Indonesia. The Indonesian government, however, was unwilling to delay the implementation of the agreement. Moerdiono threatened Indonesian recording companies and retail outlets with criminal prosecution if they were still selling pirated cassettes from EC countries once the new agreement took effect. Within a short period of time, all pirated Western music cassettes were withdrawn from sale (Uphoff 1991:31; *Jakarta Post*, 11 May 1988; Garnett 1988:9–10).

Despite these measures, however, copyright protection in Indonesia has remained relatively weak since the introduction of the 1987 revisions to the Copyright Law, although substantial improvements have been made in some areas. The most substantial improvements have been made in the area of sound recordings. Following the signing of the bilateral copyright treaties with the EC and the US, the number of pirated cassettes being produced in Indonesia fell dramatically. By September 1996, the piracy rate for locally produced music was estimated by ASIRI to be as little as 20 per cent. For Western music, the piracy rate is generally believed to be even lower (*Suara Pembaruan*, 8 September 1996). However, book piracy, especially of school and university textbooks, and software piracy are still widespread. According to the IIPA piracy of textbooks was virtually 100 per cent in the late 1980s and is still considered to be very high (*Suara Pembaruan*, 28 September 1996; Uphoff 1991:32). Software piracy is estimated by the BSA to also be close to 100 per cent (*Suara Pembaruan*, 20 September 1996; *IP Asia*, 30 November 1994).

Continuing dissatisfaction amongst American business groups with copyright protection in Indonesia led to calls by the IIPA and BSA during 1995 for the USTR to impose trade sanctions against Indonesia in order to pressure it into introducing further reforms. In early 1996, both these organisations reiterated their calls for action to be taken against Indonesia. According to BSA President Robert Holleyman:

> Although Indonesian government officials have made great sounding promises about enforcing intellectual property (IP) for software, in actuality there has only been a modest attempt to crack down on Indonesia's rampant software piracy problem… Software theft in Indonesia remains unchecked.
>
> BSA (1996)

In May 1996, the USTR responded to these calls by moving Indonesia from its 'watch list' to its 'priority watch list'. As a result of this move, Indonesia received special attention from US intellectual property investigators during 1996. In April 1997, the

USTR announced that Indonesia would remain on the priority watch list meaning that the increased level of surveillance would be maintained for at least one more year (*East Asian Executive Reports*, 15 April 1997).

The Indonesian government has responded to this recent pressure by introducing several new intellectual property protection measures. First, as part of the recent Customs Law, it has granted the Directorate General of Customs and Excise the authority to stop the importation of pirated goods (*IP Asia*, April 1995). Second, it has revised its intellectual property laws in accordance with the Trade-Related Aspects of Intellectual Property (TRIPs) agreement which it ratified during the Uruguay Round of GATT negotiations in 1994. The Indonesian government had originally planned to take until 2000 (the maximum length of time allowed under TRIPs) to introduce the required revisions to its intellectual property laws, but decided to push them through more quickly as a symbolic gesture to the US. The revised laws were passed by Parliament in early 1997. Amongst the most significant changes to copyright protection introduced as a result of the revisions were recognition of 'rental rights' and 'neighbouring rights', improved protection of anonymous works, and an increase in the term of copyright protection for several products including computer programs and cinematography (*IP Asia*, September 1997). Third, the government has begun drafting four new intellectual property laws on industrial product design, new varieties of plant species, trade secrets and integrated circuits. Originally, it had planned to have these new laws passed by Parliament during 1997 as well, but by early 1998 they had still not been approved (*Bisnis Indonesia*, 3 May 1996). Fourth, the government has announced that Indonesian government departments and state-owned companies will in future be required to use only original software. According to Trade and Industry Minister, Tunky Ariwibowo, this measure was introduced in order to maintain good relations with the US (*Bisnis Indonesia*, 28 June 1996). According to the BSA representative in Jakarta, Wayne Eglinton, by November 1996 the Ministry of Finance had already legalised around 750 copies of Lotus 123, a well-known spreadsheet package.[6]

Patent protection

The next major intellectual property issue to be pursued by the US and other foreign governments in Indonesia was patent protection. Shortly following the passage of the Copyright Law amendments, the US and EC drew the Indonesian government into bilateral negotiations over the production of a new patent law (*IP Asia*, 10 February 1989). The main area of concern for foreign governments and business groups was the widespread production within Indonesia of so-called 'generic' drugs—that is, drugs which are essentially copies or imitations of well-known drugs. Because Indonesia did not have a patent law, Indonesian pharmaceutical companies were legally allowed to copy foreign pharmaceutical companies' newly released 'innovative' drugs (that is, drugs produced through research rather than imitation) without having to pay for the right to do so (Uphoff 1991:28). Furthermore, they were also allowed to import cheap copied ingredients from countries such as Spain, China and Italy that also had weak or non-existent patent laws. These two factors allowed them to produce more or less the same drugs as foreign pharmaceutical companies at considerably lower cost.

Persuading the Indonesian government to introduce patent law reforms, however, was not an easy task for the US and other Western governments. First, whereas there had been at least some domestic industry support for copyright law reform (from organisations such as ASIRI and IKAPI), there was almost no domestic industry support for patent law reform. In the late 1980s, when negotiations over a new patent law began, very few Indonesian pharmaceutical or other companies were engaged in serious scientific research activities. Consequently, there was very little domestic demand for strong protection of patents. The relatively low level of concern about patent protection amongst domestic industry groups is reflected in figures on patent applications in Indonesia between 1953 and early 1989.[7] Of the 13,046 patents registered at the Ministry of Justice during this period around 96 per cent were registered by foreigners (Uphoff 1991:30; *Tempo*, 11 February 1989).

The second reason that Western governments faced a difficult task in persuading the Indonesian government to adopt patent law reforms was that, whereas copyright law reform generally only threatened the interests of relatively small and poorly-connected entrepreneurs, patent law reform threatened more substantial corporate interests. In contrast to the pirated cassette, book and software industries, the pharmaceutical industry has attracted some of Indonesia's biggest and best-connected conglomerates. Whilst some of the largest domestic pharmaceutical companies, such as PT Kalbe Farma and PT Tempo Scan Pacific, are generally not considered to be politically well-connected, many other large domestic pharmaceutical companies are. PT Darya Varia, PT Kenrose and PT Central Sari Medical, for example, are all part of the mighty Salim group which has strong connections to the President and his family. PT Sandoz Biochemie is part of the military-linked Gemala group. Several other major pharmaceutical companies—PT Kimia Farma, PT Indonesia Farma, PT Bio Farma and PT Phapros—are owned by the Indonesian government.

However, the degree of resistance to patent reform from well-connected conglomerates has been tempered by two factors. As one informant pointed out, most well-connected conglomerates involved in the pharmaceutical industry have not invested heavily in that industry; their largest investments are in industries such as petrochemicals, cement, automobiles and other capital-intensive industries. As such, it is unlikely that they have been as concerned about patent law reform as they have about market-oriented reforms in other industries. Furthermore, most well-connected conglomerates involved in the pharmaceutical industry have established licensing agreements with foreign companies under which they produce original products for the Indonesian market. For example, PT Kimia Farma produces 52 products under licence from foreign companies such as Rohto, Schering, Medinova and Organon; PT Darya Varia produces about 50 per cent of its drugs under licence to foreign companies; and PT Sandoz Biochemie has arrangements with the Austrian company, Sandoz Biochemie, and the British company, GLAXO (*Economic and Business Review Indonesia*, 4 September 1996).[8] Because patent law reform in Indonesia has not threatened these agreements, well-connected conglomerates have been better placed to deal with tighter patent laws than many other domestic pharmaceutical companies.

The third reason that Western governments faced difficulties in persuading the Indonesian government to adopt patent law reforms was that there was strong opposition to reform from within the Health Ministry. This was at least partly because many officials

within this Ministry have derived considerable material benefit from the fact that copied drugs are produced in Indonesia. One major source of rents for Health Ministry officials, for example, has been the illegal sale of foreign pharmaceutical companies' confidential registration documents to domestic pharmaceutical companies. In order to market a drug within Indonesia, pharmaceutical companies (both foreign and domestic) must first register the drug with the Health Ministry. This requires the submission of a broad range of documents which, among other things, detail the advantages of the new drug over existing drugs and the results of tests that have been conducted to determine the safety of the drug. Rather than prepare their own submissions on the basis of their own research—which would be a time-consuming and expensive process—many domestic pharmaceutical companies simply buy foreign companies' registration documents from Health Ministry officials, photocopy them and resubmit them as their own. Because of the rents generated by this arrangement, Health Ministry officials have been reluctant to see any regulatory changes introduced that would prevent domestic pharmaceutical companies from producing copied drugs.[9]

The strength of opposition towards patent law reform in Indonesia, particularly from within the pharmaceutical industry and Health Ministry, significantly limited the scope of protection the Indonesian government was willing to provide for patents. As early as January 1987, for example, Bambang Kesowo, a leading member of the government's 'working team' on intellectual property law, stated that the forthcoming Patent Law would not apply to areas that affected the interests of the broader community, especially the production of generic drugs. Whilst he argued that the main reason generic drug production would be allowed to continue was that it would prevent pharmaceutical prices from rising, it is likely that he was also concerned about the impact of tougher patent laws on local pharmaceutical companies (*Kompas*, 27 January 1987). As he told the *Far Eastern Economic Review* over two years later, the Patent Law was not designed to put local pharmaceutical companies out of business (Schwarz 1989:53).

In January 1989, apparently prompted by the US government's decision to impose trade sanctions on Thailand for failing to improve intellectual property protection quickly enough, the Indonesian government announced that new patent legislation had been prepared (*IP Asia*, 10 February 1989). In March 1989, this legislation was presented to parliament for ratification. Whilst the new legislation did not specifically exempt pharmaceutical products from protection, it contained two controversial provisions which favoured domestic pharmaceutical companies. The first provided for a patent protection period of 15 years commencing from the date of application for a patent with a possible extension of three years. As lawyer Duane Gingerich (1989b:13) has pointed out, because it often takes up to 12 years to bring an 'innovative' drug to market, the draft law allowed very little remaining time for protection. Many innovative drug-producing pharmaceutical companies, he argued, 'would be satisfied only with a 20-year period beginning with the filing of the patent application'. By contrast, domestic pharmaceutical companies stood to gain from this provision because it meant they did not have to wait long before being able to copy new drugs legally.

The second controversial provision allowed counterfeit or pirated goods to be imported without incurring any penalty. As several commentators have pointed out, this provision dramatically reduced the protection effectively granted to patent holders (Schwarz 1989:53; Gingerich 1989b:13). As Uphoff (1991:33) has noted, this provision

was probably incorporated into the legislation 'at the request of Indonesian companies (which did not want themselves cut off from cheap imports) and accepted by the writers of the bill on the grounds that it was not Indonesia's affair if another country was pirating'. Amongst those companies benefiting most from this provision were domestic pharmaceutical companies which, as noted earlier, relied heavily on imports of pirated substances for drug production.

Concern about these two (and other) provisions prompted several foreign companies to submit detailed critiques of the draft legislation to Parliament in order to persuade it to amend these provisions (*IP Asia*, 10 August 1989). The US Embassy also lobbied the Indonesian government to make amendments to the draft legislation (Uphoff 1991:33). Perhaps surprisingly, the draft legislation was also criticised by Indonesian pharmaceutical companies although on completely different grounds. In July 1989, Edy Lembong, the then head of the Pharmaceutical Association (GPF), the official representative body of the pharmaceutical industry, called for pharmaceutical products to be completely excluded from the draft patent legislation. He argued that whilst he realised that patent protection was positive and beneficial, it was not yet the right time for Indonesia to provide patent protection for pharmaceutical products (*Merdeka*, 3 July 1989).

Despite the objections put forward by all of these groups, however, the patent legislation was passed by the Indonesian Parliament in October 1989 without substantial amendment. (The period of protection was changed, however, to 14 years with a possible extension of two years.) Whilst some groups expressed dissatisfaction with the new law—the president of one US pharmaceutical company, for example, described it as 'quite a disappointment'—the USTR suggested that it found the new law acceptable (Uphoff 1991:33; Schwarz 1989:52).

Following the passage of the Patent Law, the US government's concern shifted to matters of enforcement. In February 1990, former US Ambassador, John H.Holdridge, told the Indonesian press that the US government was expecting Indonesia to put in place an effective enforcement mechanism for the new Patent Law by 1991. Whilst he did not say that trade sanctions would be taken against Indonesia if this was not done, he did not rule out this possibility either. He revealed, however, that the US government's current attitude towards Indonesia was highly favourable because of the efforts it had made to improve the protection of patents, including working with legal experts provided by the Asia Foundation in San Francisco. He also said that Indonesia's privileges under the GSP were no longer under threat (*Jakarta Post*, 27 February 1990).

In June 1991, the Indonesian government responded to US concerns about enforcement of the new law by issuing three implementing regulations on the registration of patent consultants, applications for patents, and the range of patented pharmaceutical products that were legally importable (*Jakarta Post*, 15 June 1991). The latter regulation, in particular, appears to have been designed to accommodate US and other foreign concerns. In contrast to the Patent Law which allowed the importation of all patented pharmaceutical products, the implementing regulation limited the range of pharmaceutical products that could legally be imported to a specified set of 50 substances. The regulation does not appear to have been intended, however, to greatly limit the activities of domestic pharmaceutical companies. Indeed, according to the regulation itself, the 50 substance limitation was introduced in order 'to secure

continuous supplies of certain kinds of materials for domestic pharmaceutical producers, notably those who operate outside the foreign investment scheme' (*Jakarta Post*, 15 June 1991).

The government's decision to ratify the TRIPs agreement in 1994, however, posed a much more serious threat to the interests of domestic pharmaceutical companies. As a signatory to the agreement, the Indonesian government committed itself to several major revisions to its Patent Law, including extending the term of patent protection from 14 years to 20 years and prohibiting the importation of all patented products, including the 50 permitted under the June 1991 regulation. Of particular concern to domestic pharmaceutical companies was the possibility that the revisions would allow foreign pharmaceutical companies to seek patents in Indonesia for substances which were at that time out of patent or near the end of their patents overseas. The substances they were most concerned about included the 50 covered by the 1991 implementing regulation plus a further 83 which were patented overseas but not in Indonesia (*Bisnis Indonesia*, 28 February 1996). In February 1996, the deputy chairman of the GPF, Gunawan Pranoto, appealed to the Indonesian government to restrict the granting of patents in its revisions only to those substances that are 'novel'—that is, truly innovative and new (*Kompas*, 17 February 1996),

Perhaps realising that no amount of lobbying would dissuade the Indonesian government from going ahead with the TRIPs revisions, the GPF instead focused on trying to convince the government to defer implementation of the revisions until 2000, instead of 1997 as the government intended.[10] In November 1995, during a hearing at Indonesia's House of Representatives (DPR), Gunawan Pranoto appealed to the Indonesian government for a longer transition period for implementation. He argued that if the revisions were not deferred for longer, many domestic pharmaceutical companies would be forced to close down and many workers would lose their jobs. 'We have no problem with a revision of the law,' he said. 'We will accept it. But we foresee difficulties in the transition period. The Indonesian pharmaceutical industry needs more time to strengthen itself before it can face up to foreign competition' (quoted in *Jakarta Post*, 25 November 1995).

In early October 1996, the head of the GPF, Anthony Sunaryo, reiterated the GPF's call for the government to delay the TRIPs revisions until 2000. Speaking at a press conference following the conclusion of the Tenth National Deliberative Council of the GPF, Sunaryo said that Indonesia's pharmaceutical industry was not yet ready for tougher patent laws because Indonesian companies imported about 95 per cent of the ingredients for the drugs they produced. In contrast to foreign pharmaceutical companies, he said, domestic ones did little research or product development. 'We very much appreciate the aim of patent protection—that is, to encourage research. But the problem is we are a long way from being able to conduct research. We are not yet research minded' (*Suara Pembaruan*, 5 October 1996). According to Sunaryo, Indonesian pharmaceutical companies simply could not justify spending up to US$350 million to produce an innovative drug given the relatively small size of the Indonesian pharmaceutical market. Annual per capita medicine consumption in Indonesia, he pointed out, was only about US$5 compared to US$14 in the Philippines, US$12 in Malaysia, US$42 in Singapore and US$13 in Thailand (*Jakarta Post*, 8 October 1996). Consequently, he argued, if the government went ahead with the TRIPs revisions, it would have an extremely severe

impact on industry turnover, reducing it by as much as Rp 200 billion (US$85 million). Furthermore, he said, it would probably also result in a substantial increase in drug prices because of the reduction in competition from local firms (*Kompas,* 18 September 1996).

The government's reaction to the GPF's appeals, however, was decidedly unsympathetic. In mid-September 1996, for instance, the Minister of Justice, Oetojo Oesman, told the press that Indonesia could no longer afford to tolerate intellectual property rights violations within its borders because of the damaging effect these have on Indonesia's international reputation and its ability to attract foreign investment (*Kompas,* 17 September 1996). Later in the month, the Director-General of Food and Drug Supervision, Wisnu Katim, took a similarly tough line. Speaking at the GPF Assembly, he said that rather than relying on protection in the form of weak patent laws, domestic pharmaceutical companies should show that they were capable of competing in a more open and competitive marketplace (*Suara Pembaruan,* 29 September 1996). And in October 1996, Bambang Kesowo, rejected accusations that the forthcoming revisions to Indonesia's Patent Law would discriminate against domestic pharmaceutical companies: the provisions of the new law, he said, would apply equally to all pharmaceutical companies and were therefore non-discriminatory (*Bisnis Indonesia,* 17 October 1996).

The Patent Law revisions were passed by Parliament in March 1997, along with revisions to the Copyright and Trademark Laws. As expected, the new Patent Law increased the term of patent protection from 14 years to 20 years and prohibited the importation of patented substances. The only really positive point for domestic pharmaceutical companies was the introduction of stronger novelty requirements, making it more difficult for foreign pharmaceutical companies to seek patents in Indonesia for products on which overseas patents had already expired. Whereas the 1992 Patent Law stipulated that the novelty of an invention was related to whether or not it had already been published in one form or another, the new law simply states that an invention is new if it is not part of a previous or existing invention (*IP Asia,* 22 November 1989; May/June 1997).

Conclusion

So what does the case of intellectual property law reform tell us about the dynamics of institutional reform in Indonesia? It suggests that institutional reform cannot be understood simply in terms of the victory of 'rational' economic criteria over 'irrational' political and social interests. Intellectual property law reform in Indonesia—whilst it may have improved the efficiency and performance of the Indonesian economy—was clearly driven by specific political and social interests. In particular, it was driven by structural pressures emanating from within capital following the collapse of oil prices in the early and mid-1980s. Following the initial collapse of oil prices in 1982, the Indonesian government was at first indifferent about intellectual property law reform. It was only when the US and other Western countries began applying diplomatic and trade pressure in 1985–6 and the Geldof and Darmawan affairs drew international attention to intellectual property infringements in Indonesia that the government's attitude to intellectual property law reform began to change. Intellectual property law reform was the price the Indonesian government has been forced to pay in order to ensure continued

access to the investment funds and markets controlled by Western governments and capitalists.

Ultimately these structural pressures proved stronger than resistance to intellectual property law reform from state-centred forces and segments of domestic capital with a vested interest in weak intellectual property laws. Even in the case of patent law reform, resistance from pharmaceutical companies and the Health Ministry was easily overcome. Whilst pressure from these actors resulted in provisions being included in the 1992 Patent Law which minimised the impact of the law on the pharmaceutical industry, they were nevertheless unable to have pharmaceuticals entirely exempted from the Law, and were unsuccessful in their attempts to convince the Indonesian government to delay the implementation of the TRIPs revisions until 2000. Perhaps the main reason capitalists in counterfeit industries were largely unsuccessful in preventing intellectual property law reforms from being adopted was that they were, for the most part, politically insignificant. Indonesia's major conglomerates, including those owned by the major bureaucratic capitalist families, do not appear to have been involved heavily in counterfeiting operations, with the partial exception of pharmaceuticals. Counterfeiting industries appear to have been dominated by relatively small entrepreneurs without high-level political connections.

For this reason—and because international demands for greater protection of intellectual property remain strong—it is likely that the Indonesian government will continue to strengthen its intellectual property regime in coming years. As Christoph Antons (1995) notes:

> the economic pressures that were behind the reforms in intellectual property law in the 1980s have recently increased rather than lessened. The economic opening of Eastern Europe and especially that of China and Vietnam has intensified competition for foreign investment and the necessity to create a legal environment that is conducive to such…investment.
>
> Antons (1995:20–1)

As such, if the Indonesian government wishes to maintain the process of capitalist development within Indonesia, it will have little option but to continue to improve the protection of intellectual property in Indonesia.

Notes

1 Not all commentators, however, believe that these reforms constitute a revolution *per se*, including this one. It is clear nevertheless that there has been substantial institutional reform in Indonesia in recent years. For an alternative view to that of Lubis and Rajagukguk see Nono Anwar Makarim (1995).

2 An important exception is North and Barry Weingast's (1989) examination of the emergence of the parliamentary system in England following the Glorious Revolution of 1688. In contrast to the other work discussed here, they interpret institutional reform in terms of political conflicts between groups within society—in this case, the Crown and the propertied classes: 'The principal lesson of our article is that fundamental institutions of representative government…are intimately related to the struggle for control over governmental power'

(1989:829). This article, however, stands in stark contrast to most work by new institutional economists on the causes of institutional reform.

3 The collapse of oil prices came in two main stages. During 1982, the per barrel price of oil fell from US$38 to US$28 and in early 1986 it fell further to US$12 before eventually recovering to US$18 (Robison 1988:66).

4 Interview with Robin McClellan, Commercial Officer, Embassy of the United States of America, 13 November 1996.

5 A bilateral copyright treaty with the US took longer to arrange because of US concerns about certain provisions in draft versions of the treaty, particularly in relation to compulsory licensing. However, the final version of the treaty, signed eventually on 22 March 1989, was much more extensive than the EC agreement. It not only protected copyright on sound recordings, but also books, films, computer software, and other creative works. The EC and US bilateral copyright treaties were followed by similar agreements with Australia in 1992 and the United Kingdom in 1993 (Gingerich 1989a:18; Uphoff 1991:31).

6 Interview, 15 November 1996.

7 Uphoff (1991:28) notes that, although the Indonesian government did not introduce a patent law until 1989, it nevertheless began registering patents in 1953 in anticipation of a patent law being enacted.

8 Interview with an informed source, November 1996.

9 Interview with an informed source, November 1996.

10 Interview with Anthony Sunaryo, Jakarta, 21 November 1996.

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6
LAW AND DEVELOPMENT IN 'THE MARKET PLACE'

An East Asian perspective

John Gillespie

Introduction

All transforming states attempt to use laws and institutions to engineer economic development. In their dual transition from socialist command to 'mixed-market' economies and from developing to developed industrial societies, China and Vietnam are searching for ideological and legal inspiration. Both countries are experimenting with a mixture of normative law, administrative discretion and communist party fiat to stimulate and manage their emerging 'socialist-oriented' market economies.[1] This chapter explores one of the central themes of the introduction: the role of law as an instrument of state building (see Jayasuriya, Introduction, this volume). Contrary to the conventional wisdom about the restraining influence of law on state power, Vietnamese policy makers are attracted to neo-liberal modes of law and development advocated by multilateral agencies precisely because they hold out the possibility of centralised economic and legal mechanisms.

Like telecommunications and roads, multilateral (World Bank, IMF, and UNDP) and most Western bilateral (e.g., AusAid) aid providers assume that rights-based, normative legal systems[2] are a prerequisite of efficient industrial economies (Lichtenstein 1994:43–4, 60–1; Hoang Phuoc Hiep and Bergling 1994). According to this neo-liberal modernisation theory, universal property and contractual rights are of primary importance to stable and predictable markets; they are excited and protected by positive law. Only universal legal norms embodied in legislation, it follows, are capable of preserving the fruits of labour and providing the degree of systematisation required by modern industrial states. According to social theorists like Durkheim, Weber and Parsons, this transformation requires a shift from the particular to the universal (Huntington 1981:96). Neo-liberal assumptions arose out of, and presuppose, the 'rule of law', liberal democratic institutions and 'free markets'.

Despite their imperfect legal frameworks, China and Vietnam have experienced rapid economic development, while better developed legal systems in Eastern Europe have failed to stimulate similar levels of economic growth (Rubin 1994; Harrold and Lall 1993:30–51). Though admitting the importance of cultural and structural differences, this comparison nonetheless contests the putative link in neo-liberal theory between positive law and economic development (Trubek 1972a). Another development path is championed by certain East Asian bilateral donors (principally Japan) (Nguyen Ngoc

Nien 1994:165–8), which industrialised through close co-operation between government and industry, with only a marginal reliance on universal, positive law.[3]

Particularly after the Communist Party of Vietnam (CPV) declared (Do Muoi 1994; Le Phuoc Tho 1994) industrial development as the country's most urgent national goal, proponents of the neo-liberal and East Asian legal models have competed with proselytising zeal to influence Vietnamese (and Chinese) legal development. This chapter draws on phenomenological perspectives gleaned from field work to evaluate the law and development debate in the context of the 'rule of law', legal institutions (courts) and consumer markets in Vietnam.

The development context

Economic transformations

Economic change in Vietnam can be divided into two stages: a socialist-command economy, and transition to a mixed-market economy. Though each embodies various ideas and policies contained in official documents and legislation, the middle level propositions needed to explain behaviour come most often from observing the interaction between policy and reality (what actually happens). In describing the unique dual transformation in Vietnam (and China), sociological theory frequently operates at too high a level of generalisation, and requires micro-level observation to produce meaningful insights (Seidman and Seidman 1994:115–27; von Benda-Beckmann 1989:129–33).

Prior to the introduction of *doi moi* (economic renovation) reforms in 1986, economic production in Vietnam resided in dual, but interdependent systems. One system resembled official socialist policy, reproducing a facsimile of soviet central planning (Fforde and Paine 1987). State economic management, prescriptively regulated production through administrative directives issued by line-ministries and peoples' committees *(uy ban nhan dan)*, allocating raw materials to meet quantitative planning targets, and distributing outputs through state-managed markets. Economic transactions were based on legally obligatory targets rather than commercial choice; only technical decisions affecting local conditions like packaging and delivery were devolved to production managers (Pham Thanh Vinh 1966).

In reality a second market oriented system co-existed with and intertwined state planning. As Fforde and de Vylder (1996:3–4) observed, the Vietnamese encapsulated this economic plurality with the expression, '*chan ngoai dai hon chan trong*' (the outside foot is longer than the inside foot), implying that state planned activities (inside) are of less value to producers and consumers than marketable production (outside). The commercial incentive for private production and distribution was extremely potent. By 1986 officials reported that less than 40 per cent of manufactured consumer goods in Vietnam passed through the state trade network (Vo Van Kiet 1986:9).

Competing economic development models

Although bottom-up adjustments were introduced in the late 1970s to increase the efficiency of State Owned Enterprises (SOEs) and planning systems, they did not disturb the central precepts of socialism, socialist property rights, central planning, and socialist distribution (Beresford and Fforde 1996:7–8). On any measure, economic regulation was dysfunctional, characterised by hyper-inflation, low economic growth, rampant malfeasance, and poor consumer choice (Nguyen Van Linh 1987, n11; Hong Hui 1986:86). By 1987 most aspects of central planning and price controls were replaced with market-management mechanisms (Decree No. 217, 1987) while the transition from a command to a commercialised, but not privatised, market economy concluded in 1989 (Fforde and de Vylder 1996:253–4).

There are two basic interpretations of the reform process. 'Big-bang' theorists (Pham Van Thuyet 1996; World Bank 1993b) maintain that the application of economic shock therapy[4] (Dollar 1994:361), based on policies implemented in Eastern Europe and Russia, excited a market economy. This explanation is favoured by multilateral funding agencies and attracts support from some Vietnamese law-makers, because it reinforces government mythology about a strong state, capable of engineering economic development. Others argue that economic reform has been a gradual, pragmatic response to existing social conditions (Fforde and de Vylder 1996:246–53; Gates 1995a:382). In other words, a weak state has struggled to maintain relevance by legitimising 'bottom up' economic reforms. These divergent views provoke different perceptions about the importance of state, law, and legal institutions to the development process.

Neo-liberal development theory

If change is induced by policy and law, as the 'big-bang' theorists maintain, then economic reform is simply a matter of legally implementing correct policies. The trajectory of this positivist development theory warrants closer examination. Although widely discredited in the West (Trubek and Galanter 1974), and leading to decades of development failures in non-Western countries (Seidman and Seidman 1994:92–101), it remains the preferred dogma of the IMF (Dodsworth *et al.* 1996:10, 26, 36; World Bank 1993b; Shihata 1991:85) and UNDP.

Starting in the 1950s and reaching a zenith during the United Nations development decade (1960s), Western—mostly American—scholars urged developing countries to copy modern features of developed countries, including their legal systems (von Benda-Beckmann 1989:129–33; Galanter 1966). Relying on Max Weber's (1954) emphasis upon the contribution of predictable positive law to economic development, early law and development theorists favoured rules that were general and autonomous, with clear boundaries between the public and private spheres. Particularistic customary and bureaucratic laws were de-emphasised. Stated in propositional form neoliberal theory assumes that:

- society is comprised of individuals, voluntary organisations, and the state;
- the state exercises control through laws that address individuals (Raz 1977);
- laws are made through pluralist processes and are accordingly understood and widely obeyed (Hart 1960:98–9, 189–95); and,

• officials are guided by rules, and not personalism, class, cultural, economic or other extra-legal considerations.

These instrumentalist concerns resonate in UNDP legal advice in Vietnam. ‘The two most essential elements of a market-orientated legal framework are: a) a clear, complete definition of property and property rights, and, b) a clear, and complete system of contract law’ (Bentley 1995:3–4).

The structural functionalism underlying neo-liberal legal theory (a Parsonian model) (Stone 1966:29–49) was substantially discredited long before the emergence of law and development theory. With devastating effect, during the 1920s and 1930s the United States based Realist Movement collapsed the bright-line distinctions separating private (property and contract) rights from state power (Hale 1943). At issue was objective legal methodology. If judges could not evoke legal reasoning, then all decisions became a function of cultural and political choice. Prevailing notions that laws existed in isolation from the particularist concerns of their historical and cultural context were effectively debunked, while leaving intact a positivist faith in the ability of law to engineer social change within specific societies (Trubek 1977).

Informed by ‘Third World’ development failures and a ‘homegrown’ American crisis of faith in the ability of neo-liberalism to induce political plurality (Tamanaha 1995:474–7; Hunt 1981), two leading exponents of neo-liberal legal development very publicly recanted. In a singularly influential article, Trubek and Galanter (1974) accused Western legal assistance of ‘ethnocentricity and naivety’. If the realists were correct, and neo-liberal law is infused with particularistic values and precepts, transplanted laws (and social theory) are not easily internalised by another society. Simplistic, comparativist assumptions that legal systems in all societies face similar problems but find different solutions to produce similar results (Zweigert and Kötz 1987:36–48) were also repudiated.

Parson’s functional approach, with its analytical separation of ‘legal and political systems’ currently attracts few supporters. Indeed, neo-liberal modernist theory has always acknowledged the gaps between transplanted legal theory and reality. The purpose of the movement was to design legal assistance projects to fill these gaps (Webb 1996:55–63; Trubek and Galanter 1974). Theorists of industrialisation further contended that modernising legal rules could only flourish where bureaucracies and community attitudes are supportive; thus social, political and economic institutions must reorganise to foster development (Rostow 1990). Influenced by these views, Western legal assistance to transforming socialist states, including Vietnam (and China), attempts to refashion (capacity building) existing institutions into the neo-liberal mould (Sidel 1993). Projects are overwhelmingly concerned with perfecting legislative drafting, establishing a normative legal framework, strengthening legal institutions (particularly the courts), increasing the number of lawyers, and providing Western commercial legal training (ADB 1995:60–70; Hoang Phuoc Hiep and Bergling 1994:115–18). By exalting private property rights over the good of society as a whole, the objective of ‘good governance’ translates, in neo-liberal theory, to keeping the government from interfering with the market. East Asian development theory directly contradicts this proposition.

East Asian development

The path-dependent effects of history are central to an understanding of East Asian economic development. There is little doubt that East Asian regimes are interventionist; what remains controversial is the contribution of industry policy to economic success (MacIntyre 1994:2–10). If there are any unifying themes, they are encapsulated in the belief that economic regulation is more complex than simply implementing policy with legislative and macro-economic levers.[5] This approach sits comfortably with the evolutionist view of legal and economic development, which portrays Vietnam's reforms as spontaneous (not reliant on legal rules) and both precipitating and responding to government initiatives.

Development theory in East Asia is anti-definitional. It resists precision and strives for fluid adaptive relations between the public and private spheres (Weiss and Hobson 1995), avoiding through this process neo-liberal legalism's preoccupation with inducing market predicability through universal legal norms. Occupying opposite, but by no means mutually exclusive ends of a positive law-administrative discretion spectrum, commercial laws in the East Asian model are primarily (but certainly not exclusively) used to augment bureaucratic economic management, and only coincidentally (if at all) function as neo-liberal, positive law (Unger 1976:66–85). Admittedly laws are used in both the neo-liberal and East Asian models to engineer economic development; however, corporatist structures in East Asia foster strong state-links with medium to large private sector banks, conglomerates and traders, frequently subverting and co-opting private legal rights. Variously described as 'corporate states', 'statist' or 'development states', postwar industrial growth in Japan (Johnson 1982), Korea (Haggard and Lee 1993:17), Taiwan (Wade 1990) and Indonesia (Hill 1996:93–8) has been attributed, not to neo-liberal institutions (the rule of law, independent courts and free markets), but to authoritarian states relying on bureaucratic power implemented formally through licensing-gateways, and informally through politically insulated state and quasi-state institutions (Campos and Root 1996:109–37; Chowdhary and Islam 1993:42–53; World Bank 1993a: 353–62). Similar corporatist, state-private links are beginning to emerge in China (Pearson, 1994) and showing signs of emerging in Vietnam (Fforde and de Vylder 1996:254–6). Primarily for this reason Frank Upham speculates that 'money and talent spent on chasing the rule of law chimera in nations like Laos and Vietnam may detract from the creation of the stable investment environment that must be the World Bank's ultimate goal'… (Upham 1994:71).

Compared to forces like discretionary market management (Administrative Guidance), culture, ideology, and relational networks, there is little doubt that universal legal norms played a relatively minor role in East Asian economic and social development (Upham 1994; Vogel 1991). Most market players successfully operate in the shadow of bureaucratic regulation, by relying on structures bound by interpersonal trust, based on kinship, personal, ethnic, military and commercial backgrounds (Landa 1994:15–19; Baldwin 1974:179–99). Take for example, the *Zaibatsu* in prewar Japan (Upham 1987:226), *chaebol* in South Korea and clan based trading conglomerates in Singapore (Cooter and Landa 1984:15–22).

Vietnamese policy makers can hardly ignore the East Asian path for social, political, and economic regulation, which has produced much of the world's wealth over the last two decades. Indeed the fear of being left behind was a primary catalyst for economic

reform. At the same time a decline in Western foreign aid, off-set by large aid inflows from Japan, renewed interest in traditional legal values (Nguyen Van Thao 1993) and membership of ASEAN, have, propelled the search for a regulatory formula capable of inducing and sustaining rapid industrial growth. The remainder of this chapter evaluates the neo-liberal presumption that legal instruments, courts, and consumer markets are essential to economic development.

Rule of law or ideology?

Both neo-liberalism and state management (East Asian Model) find support amongst Vietnamese policy-makers. Now that the *Constitution* formally recognises private economic activity and guarantees capital and profits, and the *Civil Code* erects fundamental legal boundaries between public and private rights, certain law-makers (*Nha Nuoc Va Phap Luat* 1992:48–50; Duong Dang Hue 1992) advocate rational laws, rather than administrative measures, as the main market regulators. Others (CPV 1996:49–54; Le Quang Thanh 1994:55–6) warn against the evils of individualism, consumerism and capitalism fermented by private rights, and actively promote state economic dominance through executive power. Not infrequently both positions are held simultaneously, indicating that unlike the neo-liberalists, normative laws and legal institutions are treated as merely mechanical means of implementing state economic management.

One of the most profound and far-reaching inquiries confronting legal reform concerns is the theoretical justification of law-based governance. The role of law in allocating resources is central to the selection of economic development models. Neo-liberal market regulation rests on the 'rule of law', which embodies clear distinctions between public and private property and contractual rights, and the state-sponsored, impartial dispute resolution fora. Rule of law is also used in a Diceyan (Unger 1976:52–5; Dicey 1968:186–96) sense to denote legal systems that protect private rights within constitutional and legal frameworks against bureaucratic and political interference.

Debate in Vietnam has polarised around two antagonistic principles: the rule of law *(Rechtsstaat)*[6] and *nha nuoc phap quyen* (literally rule of law or, state legal rights)[7] a version of socialist legality. Both theories insist on strict legal obedience, but in theory the rule of law also requires a depoliticisation of the legal system and a shift of law-making power from administrative apparatus to democratic, legislative assemblies (Ghai 1991:413–15; Jowell 1989:1–10), creating a highly differentiated legal and political system with an autonomous civil society (Jayasuriya's 'Introduction', this volume). In contrast, *nha nuoc phap quyen* is primarily concerned with securing conformity with the rules established by the political leadership; it does not differentiate between the sources of law, their form or content. Developing in an authoritarian state,[8] this highly instrumental construction of law (Do Muoi 1995:6; Vu Oanh 1993:3) was confirmed by the Mid-Term CPV Conference on 20 January 1994:

> The party formulates lines and policies, and leads political organisations to implement them…. Our state upholds the law and manages all social activities through the law. The characteristics of our laws are different from those of bourgeois laws. Our laws are aimed at developing our

> nation in accordance with the socialist orientation while the laws of the bourgeois state are aimed at protecting capitalism.
>
> Saigon *Giai Phong* (1994:2)

According to this Leninist (Pashukanis 1978; Lenin 1975:19–24) formulation, Western law is crudely regarded as a political tool used to entrench the interests of the ruling élite, while socialist law furthers the interests of the 'working class' by implementing the party's policy of economic modernisation and industrialisation. Law is thus transformed into an instrument of action which safeguards the interests of the working class against exploitation. It does this by managing private ownership of the means of production.

Since the Vietnamese political system and state-society relations no longer adhere to Leninist structures, this formulaic doctrine attracts few sincere advocates. Despite continuing rhetorical homage to Marx, Lenin and Ho Chi Minh, their ideology is losing its relevance in a mixed market (Thayer 1995:59–61), and as corollary, its ability to legitimise state power. Affected support for democratic processes, evinced through the constant repetition of the borrowed slogan 'the State of the people, by the people for the people' (Do Muoi 1995:6), is similarly unconvincing. An alternate ideological explanation for *nha nuoc phap queyen* is required. Though it has by no means officially replaced Marxist-Leninism, the government increasingly projects nationalist images of a modern industrial state to justify its monopoly of normative and bureaucratic processes. Bound up in this view is an expectation that the general public should make short-term individual sacrifices for long-term public benefits. This subordination of private interests for shared economic growth is a formula successfully pursued by non-Communist 'hard states'[9] elsewhere in East Asia (Campos and Root 1996:28–30). Legal legitimacy thus resides in the ability of governments to deliver and share prosperity which may evaporate in the face of a prolonged economic downturn (Neher and Marlay 1995:23–4). In contradistinction, where legal and political power are highly differentiated by democratic processes, economic performance becomes a key indicator of political, but not legal legitimacy.

Ideological infallibility

From its inception the party drew heavily upon neo-Confucian principles of *chink nghia* (exclusive righteousness) (Young 1979) to legitimise state ideology and law. When transformed by CPV ideology, *chink nghia* means not having anything to hide from the party, or allowing personal interests to conflict with the party (Nguyen Khai Vien 1974:45–52). Contrary to Western notions of political pluralism and legal dominance, *chinh nghia* legitimises political domination through ideological infallibility and legal subordination. The state is well aware that legal legitimacy is a double edged sword. Its own authority can be challenged if law is dignified with too much authority. Even the cautious experiment with *nha nuoc phap quyen* (state legal rights) is overlaid and infused with *chinh nghia*, entrenching the party's domination of state institutions. Although the *Constitution* (articles 4, 83, 101, 109, 126, 127) purportedly separates the functions of the legislature, executive and judiciary, subordinating party authority to the law, in practice a chaotic overlap between party and state functions is observed by foreign commentators (Thayer 1991:22). Indeed, suggestions by the UNDP that bureaucratic efficiency would

benefit from depoliticisation have been denounced by sections of the party as ideological sabotage. It seems formal legal documents have not unravelled decades of an undifferentiated party—state system (Marr 1994:7–9).

By allowing party members to occupy senior positions in the bureaucracy, the *nomendatura*[10] system fuses the party and state, enabling the political élite to become the bureaucratic élite. Democratic centralism (CPV 1996:10–12) reinforces hierarchical and particularistic authority by requiring all party agencies to strictly follow instructions issued by the party leadership. In many respects, the party functions like a *siêu làng* (super village)[11] and secret society (Weggel 1986:418) where administration is intermingled with kinship and social relationships. Internal cohesion is maintained by an organisational statute which sanctions non-compliance with truncated career advancement, reduced benefits, and expulsion from office and the party (Phong Lan 1994:2). In short, state power rests on status and personalised relationships blurring the distinction between party and state.

Legal development

In Vietnam's politicised landscape, laws serve dual functions. Particularly since the enactment of the *Civil Code 1995*, they are used to standardise commercial and civil transactions, and institutionalise party policy and executive power. The state activity promotes legal equality between commercial sectors and players and is creating the trappings of a modern legal state. At the same time *nha nuoc phap quyen* engenders political inequality by promoting social goals, at the expense of individual entitlements. As the leading force in the country, the party reserves the exclusive right to define community values and customs and set economic goals. This political function of law is now formalised in the *Law on Promulgation of Legal Documents 1996*, which defines legislation according to its ability to regulate social relations 'along the socialist orientation'. A monopoly over political power has not automatically delivered economic hegemony. Perhaps this is because the use of *chinh nghia* to legitimise ideological domination has always been difficult to sustain in a society that tolerates and even expects syncretic beliefs.

Though useful for raising issues like legal legitimacy, domination and equality, Weberian sequential development theory (traditional, charismatic and rational legal authority) (Weber 1978:1393; Trubek 1972b:731–46) cannot account for the complex transition from a command to a market-orientated economy, or polycentric legal development where modern institutions overlay and are infused with customary processes and practices. Legal stratification is not unique to Vietnam and is well described in other Asian countries (Park, Park and Choi 1992; von Benda-Beckmann 1989:129–37). Dispute resolution presents a particularly clear example of this phenomenon.

State resolution of commercial disputes

Comparative concepts of dispute resolution

According to neo-liberal theory, courts stand at the centre of the legal system.[12] In Blackstone's words, judges are 'the depositories of the law, the living oracles' (Dawson 1968). Nineteenth century *laissez-faire* philosophy left resource allocation to market bargains, while under the guise of neutrality, courts were left to settle disputes according to property, contract and tort laws (Shapiro 1981:1–5). Though this paradigm is not without controversy in the West, multilateral aid agencies continue to emphasise the neo-liberal, adjudicative role of the courts (Webb 1996:59–60).

Like China, Vietnam's legal history followed a different path. Courts were largely used to enforce criminal law *(fa)* (Hooker 1986:451) and did not perform the neo-liberal function of backing private rights with state power. Resort to the courts, which were synonymous with punishment and coercion, was always a last resort. Litigation exposed disputants, and by extension, their families and clans to loss of proper virtue (Hooker 1986:449–51). If dispute resolution is configured as a triadic relationship, in which two or more parties call upon a third to resolve a conflict, the relationship is only sustainable where outcomes are broadly satisfactory to all parties. In China and Vietnam, judicial resolution had nothing to offer except criminal sanctions and loss of status.

Except for a brief period under French colonisation, the separation of powers doctrine never formed part of Vietnam's legal tradition. After independence in 1945, to the extent they functioned at all, courts and the procuracy were subordinate members of a politicised legal system dominated by the party's security and played almost no role in commercial or consumer disputes. The prevailing revolutionary culture perceived colonial courts as instruments of national subordination. In their place, people's courts became bureaucratic instruments for implementing state policy, rather than genuinely independent bulwarks against state action.

The institutional framework

Under the command economy conflicts arising from production contracts were managed by a highly bureaucratic system of economic arbitration (Pham Thanh Vinh 1966:89–99). As market decision-making replaced central planning, economic arbitration declined in importance.[13] After the abolition of Economic Arbitration in July 1994, jurisdiction over economic disputes was transferred to the newly created economic division of the people's courts (Law Amending the Ordinance on the Organisation of the Supreme People's Court 1994, articles 3–7). Unlike its predecessor, economic courts do not pro-actively monitor contractual compliance; jurisdiction is confined to economic disputes referred by litigants. In the first full year of its operation the number of commercial disputes fell to less than 500,[14] from over 3,000 considered by economic arbitrators in their final year of operation.

Various explanations are advanced for this precipitous decline, such as unfamiliarity with new procedures, concern that open courts may reveal commercially damaging information, standards of proof too onerous (in other words, courts require formal documentation when often none exists) and unrealistically short time limits (Tran Van Su

1995:2–3). Informed commentators suggest,[15] however, that the primary disincentive is a function of the change from state management to adversarial contest. Economic Arbitration suited a system where litigants were State Owned Enterprises (SOEs) and arbitral awards were budget adjustments, not balance sheet liabilities. Moreover, because awards took the form of an administrative order, they required compliance without question. In contrast, court orders directly bind litigants, do not have the force of administrative orders, impair balance sheets and command corporate prestige. These tentative explanations for the marginal status of litigation call into question neo-liberal assumptions regarding the centrality of courts to market transactions.[16] In pursuing this inquiry, the following discussion evaluates the importance of law to judicial outcomes and popular attitudes to litigation.

Legal development and dispute resolution

In a society where adversarial dispute resolution reflects unfavourably on all parties, winner take-all outcomes are particularly offensive, since they encourage litigants to prosecute their cases to the full.[17] In addition to the previously discussed cultural factors, a lack of detailed normative rules continues to constrain decision-making (Vu Manh Hong 1996:24). Most commercial legislation consists of broad hortative principles; even relatively prescriptive subordinate legislation, such as the *Ordinance on Economic Contracts 1989* fails to delineate boundaries of acceptable commercial behaviour. Once embedded in a textured doctrine developed by courts and academics, the recently enacted *Civil Code* will eventually go a long way to providing a normative framework (Dinh Van Thanh 1996:15–18). But for the present, this type of judicial law-making is not politically possible, and a few words of terse, abstract prescription offers little practical guidance for courts and litigants. In the meantime, the limits of acceptable commercial behaviour are established administratively through business licences.

Within the constraints imposed by civil law jurisprudence, the Supreme People's Court publishes a body of legal thought consisting of similar fact cases in its annual report and monthly publication *Tap Che Too An Nhan Dan* (The People's Court Review). These authoritative commentaries inject a degree of certainty and uniformity, moderating the wild improvisation often infusing judicial interpretation. This practice is derived from Soviet (Butler 1988:99–130) and to a lesser extent Chinese legal theory (Jones 1994:97–100).

The Ministry of Justice opposes even a modest programme of judicial commentary. Early drafts of the *Promulgation of Law on Legal Documents,* for example, stripped the Supreme Court of its legislative powers. The reason for this attitude is not entirely clear. Perhaps it is thought that if courts strictly adhere to the letter of legislation, poor signposts though they may be, government policy will be more faithfully implemented. Any increase in judicial discretion, it follows, will encourage inexperienced judges to look beyond the four corners of contracts to examine subjective notions of fairness and unconscionability. The function of judges is to apply predetermined law (and sometimes outcomes) to the facts of each case. Judicial activism is not encouraged or practised. Conservative decisions which ignore inequality in bargaining positions that transform agreements into one-sided privileges, are evidently preferred to market disruption. It is interesting to speculate whether judicial quiescence will continue as market-mechanisms

widen the division of wealth to levels not experienced in a generation of communist rule (Do Nguyen Phuong 1994:30–4).

Judicial practice and public perception

In addition to procedural and legal shortcomings, informants suggest that courts lack sufficient respect to attract litigation. First, there is a chronic shortage of experienced judges in Vietnam.[18] Most recruits for the economic court were originally economic arbitrators, and while familiar with state plans and economic contracts, they have little knowledge of market laws and court procedure (Pham Van Thuyet 1996:590; Sidel 1993:223–8, 253–4). The trial judges in provincial court cases observed by the author, pointedly extolled the war record, party and community contribution of certain litigants, thus implying that the other party should settle. Outcomes rarely conformed to legal norms, though they sometimes appear to satisfy basic community notions of equity. Although positive law has the appearance of generality, in practice it is frequently treated as a convenient way of getting things done. Rules and processes are ignored where expediency points in other directions. It is also widely believed that precepts and loyalties formed during their period as virtual employees of people's committees, continue to colour judicial outcomes. For these reasons, courts are 'perceived as both incompetent and corrupt' lacking the authority and willingness to reconcile private commercial rights, with a state ideology that insists upon strict observance of democratic centralism and obedience to the party line (Sidel 1994:170).

Second, on the rare occasions when orders are made, they do not bind administrative authorities, and will remain pyrrhic victories until the *Law on Business Bankruptcy 1993*, and *Ordinance on the Execution of Judgments in Civil Cases 1993* become fully operational.[19] In Ho Chi Minh City, for example, only 37 per cent (Thu An 1995:4) of all court judgments are enforced. In the interim, judicial institutions lack the culture of neutrality and the procedural 'teeth', which makes the enforcement of rights commercially attractive in neo-liberal legal systems.

Not surprisingly the public is openly cynical about the power of the courts to resolve disputes, focusing instead upon the ability of laws to disrupt their daily lives. Vietnamese private lawyers report that commercial litigants only reluctantly approach courts for dispute resolution, fearing loss of personal control over a potentially hostile situation. The day to day reality of judicial fora is one where personalities and power relationships dominate. Although neo-Confucian precepts have been unravelling for at least a century, family centred moral influence continues to reinforce and stabilise most human interaction (Ngo Ba Thanh 1995:26–9; Whitmore 1987). Impersonal laws have few points of intersection with a society composed of individuals connected by highly fluid and contextualised family and political networks. In comparison to Western jurisdictions, rule observance[20] is extremely low, further reducing the possibility of building mutually acceptable outcomes based on interpretations of abstract commercial legislation. In short, courts traverse a marginalised legal system where vague and often irrelevant positive law only rarely touches a social order comprised of networks of interpersonal relationships.

As the economy grows and intermeshes with ASEAN and the rest of the world, reliance on external legal norms is increasing. Foreign investors in particular regularly call for adherence to the rule of law and creation of an independent judiciary (Scown,

1995:31). Nevertheless, it is far from certain that neo-liberal legal institutions are needed to resolve domestic commercial disputes. It is equally possible that informal and non-state institutions, more in tune with particularised trading networks will expand to perform this function.[21]

Regulating the consumer market

Consumer choice

Prior to *doi moi* reforms, economic regulation was the prerogative of the State Planning Committee, which with limited success attempted to satisfy consumer needs through centralised command mechanisms. Throughout this period consumption remained a passive aspect of planning. Consumer desires were marginalised by production units in the pursuit of planning targets (Beresford and Fforde 1996:8–10). Marx's famous discourse in *Das Capital* concerning the fetishism of commodities (Marx 1971:48–86), infused government policy. The failure of central planning in all socialist countries to meet consumer aspirations is well documented.

Statistical analysis (Do Thai Dong 1995:54) of the emerging post-*doi moi* consumer market reveals rapidly increasing consumption of high value manufactured commodities, like furniture, motorcycles and electronic goods (Tran Quong Sach 1995:54–7). Consumption is not, however, evenly spread between urban and rural areas. Subsistence agriculture supporting particularistic modes of consumption (Jamieson 1993:34–5) based on group obligation and mutual aid *(tuong tro Ian nhau),* predominate in the poorer rural areas although even here, internal and external development (Tran Quan Nhiep 1994:38–41) has aroused consumer expectations. An entirely different process is transforming urban centres, where, for the first time in Vietnam's history, the educated young are moving away from home before marriage, forging a distinct consumer culture (Marr 1996:14–19; Thuc, Doan Thanh Lam and Son Tung 1996; Nguyen Thi Loc *et al.* 1996).

Despite voluminous economic literature, little is known about market behaviour and whether it conforms with the consumer choice theory underpinning much of the government's economic reform programme.[22] In doubt is the elasticity between price and market mechanisms, which purportedly balances consumer demand with product supply. Neo-liberal assumptions that a combination of perfectly informed consumers and competitive markets brings supply and demand into equilibrium, are mediated by Marxist precepts that all 'non-productive' consumption is unnecessary, and thus the product of false or irrational behaviour (Do Gia Phan 1996:1–3). Both perspectives assume perfect, or at least sufficient market information to make rational choices. Where they differ, is in their explanations for market efficiency. Although invariably mitigated by public interest considerations, neo-liberalism presupposes the non-comparability of personal values. If peasants buy luxury goods while their children starve, this is a legitimate market outcome—consumption is a matter of utility and has no sociological properties (Seidman and Seidman 1994:92–5). Marxist rational choice links consumption to basic needs. Demand for 'surplus', or luxury goods and services is attributed to psychological manipulation by market researchers and advertisers (Maguire 1978:117–20). This thinking is interwoven and reinforced in Vietnam with development policy, which

emphasises productive (export or import replacement) use of scarce domestic capital (Nguyen Phu Trong 1994; Cao Buy Hu 1994).

Social constructions of choice

Everywhere consumer choice is based on many factors other than spending power. It is particularly closely linked to market-support institutions operating in areas like information, marketing, banking, packaging, transport and insurance (Campbell 1994:123). Emerging from a culture of official secrecy and state controlled distribution, access to information is crucial to market development in Vietnam. State and privately owned companies have only in the last five or six years begun spending on advertisements and product promotion (Gates 1996), while multinational companies have recently extended their transnational battles for customer loyalty to Vietnam (Ngoc Anh 1995:7).

Consumer reaction to product promotion suggests a society quite different from the atomistic, Protestant cultures that nurtured neo-liberal, rational choice theory (Gordley 1991:132–58; Weber 1949:25–30). Advertisements in Vietnam, for example, are often interpreted literally (Nguyen Van Phu 1994:14). A newspaper advertisement depicting a colour-blind dog watching a colour television, provoked hostility because consumers resented being compared with dogs, however indirectly. Research conducted by the consumer protection authority (Vinastas) suggests that promotional claims appear singularly pompous, conceited or vacuous to Vietnamese audiences.[23] Bait advertising, offering consumers the chance to win prizes, lead to frenzied buying of instant noodles. Government attempts (Decree No. 194 on Advertising Activities on Vietnamese Territory 1994; *Vietnam Investment Review* 1994:5) to restrict the use of foreign words and general availability of advertising have evidently made little difference to the patterns of consumer demand.

Product status is another extremely important element of choice. For example, maroon, Honda Dream II motor-cycles are the transport choice of Vietnam's middle class (Tri Binh and Le Nguyen 1996:2). Hundreds of identical, parked motor-cycles, resembling a Honda showroom, are a cultural determinate of office buildings in Vietnam. Monopolising 90 per cent of the market, Honda has become the generic term for motor-cycle (Carpenter 1996:42). Vinastas's research indicates that communitarian yearnings for group identification are primary consumer motivators outweighing individualistic, self-promotion and self-differentiation (Tuong Lai 1993:12–15). Pragmatic considerations like resale prices are, of course, also relevant. There is considerable evidence that social attitudes to consumption are rapidly transforming in response to abundant consumer goods. The con-spicuous display of the accoutrements of wealth by successful entrepreneurs (Schwarz 1996:42–3), usually in the form of imported luxury cars, is a recent example of changing—but officially disapproved—representations of status (Tran Thai Ha 1996).

Most consumer purchases are bargained at government licensed formal markets and retail shops, and are technically illegal (Decree No. 36 on Ensuring Traffic Order and Safety on Roads in Urban Centers, 29 May 1996, article 62), but *cho coc* (mobile street markets) (Lam Giong 1997) are commonplace. Although underlying conservative, personalistic, impulses do not necessarily inhibit the acceptance of new products such as

computers and dairy food (Everitt 1996:35), prices do not always respond to economic rules of demand and scarcity. Informal price cartels are maintained by traders according to complex rules determined by personal relationships, customer loyalty and capacity to pay. For example, traders choose to forego sales to *tay* (Westerners) in preference to selling at 'Vietnamese' prices. Individual wealth maximisation is overtaken by group altruism. Overwhelmingly, the tradition of *tuong tro Ian nhau* (mutual assistance) and reliance on personal connections *(quen)* dominate market exchanges. Without a credible court system, or consumer protection authority, consumers depend on personal bonds to remedy transactional breaches.

The highly particularistic nature of market transactions makes it difficult for individual actors to gain reliable information about people, commodities, prices, and distribution channels. This has led to a high degree of market fragmentation and reliance on personal relationships for vital market information. At the same time, the intellectual infrastructure lacks people and institutions with skills (marketing professionals, accountants, lawyers and commercial bankers) needed to maintain the flow of information presupposed by neo-liberal, rational choice theory. However powerful its forces may be, the market has not destroyed communitarian, party, family and village affiliations, but rather it has accommodated them. This process is observed elsewhere in East Asia (Chang Yun-Shik 1991:106; Dore 1982:13–29).

Particularistic relationships of one kind or another are also reported in Western, rights-based legal systems, suggesting to some sufficient transactional commonality to justify rules transfer between systems. Macaulay's (1963) study of commercial transactions in America's Mid-West, almost forty years ago, is often cited in this regard. There are, however, a number of issues which challenge these comparativist assumptions. First, Macaulay's research showed that although personally mediated bonds of trust were preferred to abstract law, few trading relationships of any significance were consummated without detailed legal advice. If anything, reliance upon legalism in the West has been propelled by a proliferation of litigation over the intervening years (Cooter *et al.* 1982). Second, not only is the ratio of lawyers per capita much lower in Vietnam than in Anglo-American jurisdictions, but the role of the profession is markedly different (Lan Hao 1996:18–20). This is especially true of the United States, where the ideological belief that transactions must be framed within legal norms, since they may ultimately be tested in adversarial contests, engenders a legalistic approach to business (Galanter 1983:159) unknown in Vietnam. In fact the Vietnamese *Constitution* 1992 only countenances legal services where they contribute to the defence of 'socialist legality'. Relationships between commercial players and lawyers are generally regarded by bureaucrats as a dangerous break from the past, where lawyers were duty bound to put the interests of their employer (the state) before those of their clients. In response to these pressures, lawyers pursue dual, but mutually self-interested goals. Since a competitive advantage accrues where state power is enlisted to support one commercial player over another, lawyers compete to broker personal links between clients and the bureaucracy. Transactions are shaped by these interactions, rather than by positive laws and the possibility of litigation.

Third, the kind of legal pluralism (Galanter and Luban 1993:1400–2) which allows extra-legal commercial rules to lawfully co-exist (as separate entities) with state-centred law, is possible in Western countries with clearly articulated civil societies, but fails to

account for the amorphous, porous interface between state and private activities in Vietnam (Kerkvliet 1998; Fforde and Porter 1994:16–21). In the West, personal trust brokers agreements, but transactions usually conform to legal patterns; in Vietnam (and much of East Asia) personalism suffuses both state and non-state orbits.

State regulation of consumer production

Licensing market entry

Economic laws in Vietnam are hortative, providing a general description of policy which allows the executive an extremely wide latitude to determine how laws are applied. As arbiters of a vast and proliferating technology of subordinate rules, line-ministries and local government have assumed a broad administrative discretion. Open textured legal drafting is likewise used in other East Asian countries, like Japan (Upham 1987:17–18) and Taiwan (Winn 1994), to vest the executive with power to manage the economy through a mix of prescriptive regulations and 'Administrative Guidance' (Ford 1996:50).

While consumer choice is framed by a complex interplay of culture, regulations and economic imperatives, large scale consumer production in Vietnam is still primarily a creature of state planning. Exercising a broad administrative discretion, people's committees (local government) control market entry for both state (Tran Tien Cuong 1996, 19–24) and private investors (Duong Dang Hue 1994, 22–4; *Law on Companies* 1990, article 2). Powers required to fulfil licensed objectives are automatically granted on registration, though companies are not permitted to expand their range of business activities by including a 'shopping list' of associated or tangential objectives (*Civil Code 1995*, article 96, 1).

A narrow and policy-laden construction of business objectives is sometimes used by the state to imply standards of commercial behaviour in consumer contracts. Opportunities for state management arise where licences oblige companies to guarantee the quality of manufactured goods (*Law on Companies* 1990, Article 13 (3). Line-ministries are supposed to promulgate standards for goods and services within their portfolio responsibilities. In the many instances where this has not occurred, or where standards are vague, the possibility of state involvement induces policy conformity. When exploring the scope of their business licences, commercial players must second guess official policy, which ebbs and flows in rhythm to shifting political nuances. Where activities exceed licensed business objectives, *ultra vires* civil and economic transactions are automatically rescinded, exposing those who contractually bound the company to personal liability (Dinh Van Thanh 1996:15–16), in addition to administrative and criminal penalties (*Penal Code* 1986, article 168). This uncertainty engenders commercial caution. Without the need for actual intervention, the regulatory system ensures that state policy prevails over legal autonomy. In short, the use of production contracts to implement state economic planning has been replaced by the licensing system.

Consumer contracts

Experience controlling the Vietnamese economy using planning directives led to a desire for more flexible and binding mechanisms. Since 1955 contract regulation has altered several times in ways that reflect changing economic policy (Temporary Rules on Economic Contracts, 1955 DVR). By retaining the socialist division (Harmathy 1977:197–201) between income and non-income producing contracts, Vietnam's contract laws since *doi moi* have become a hybrid of socialist command contracts and Western (French) concepts of civil (non-income producing) and commercial (income producing) contracts (Dao Tri Uc 1995:6). Only entities with business licences can form economic contracts, while civil contracts are open to all possessing legal capacity. The *Civil Code 1995* implies basic warranties as to product information, fitness and quality, compliance with trade description and clear title, but otherwise leaves parties to form their own bargains free of the normative rules used in the West to preserve contractual fairness.

On a practical level, the distinction between economic and non-economic (including consumer) objectives is often difficult to ascertain. While adopting the French civil law distinction between commercial *(acts commerciales)* and civil contracts, the Vietnamese legislators failed to adequately define the difference between commercial and consumer activities. If a company purchases a house for an employee, the objective may be either economic (since it aims to further the commercial interests of the company) or non-economic (consumer) because the house does not directly generate income. Additional confusion arises where contracts have multiple objectives, raising the possibility of choice of law and forum shopping.

Consumer torts

The *Civil Code* now recognises a general tortious right (liability for damages outside contract) for compensation when 'foodstuffs, medicines or other products that do not meet quality standards', cause personal and/or property damage to consumers (*Civil Code 1995,* Article 632). Like all other 'civil transactions', tortious rights are qualified by a series of 'civil rights and obligations' which entrench state and public interests (*Civil Code 1995,* Articles 2–4).

Even in Western economies, with easy market entry, competition alone has failed to safeguard quality standards. Only recently freed from central planning, Vietnamese state enterprises demonstrate little understanding of market-responsive production. Reform-minded policy makers[24] argue that tortious rights sensitise manufactures to consumer interests, and prepare state-owned manufacturers for competition. Competition increases, it follows, where substandard products incur a financial penalty (Schwartz 1995:56–7). Others caution against extending tortious rights to situations where manufacturers and suppliers have no opportunity to contract away liability, fearing that a flood of consumer actions may harm manufacturing, and prejudice economic development. Recalling law and economic theory (Posner 1986:3; Calabresi and Melmud 1972:1089), they suggest that consumers should become conscious self-insurers, a view entirely consistent with the East Asian model, which subordinates of private interest for state economic development. These concerns closely parallel the (now rejected) argument in the West that recognition of a duty of care transfers an unacceptable geographic spread and quantum of risk to manufacturers.

The efficacy of consumer regulation

Without a fully functioning norm based legal system, political and bureaucratic connections are considered necessary to inject certainty into unclear rules and administrative discretion (Hoang Kim Giao and Nguyen Doc Thang 1995:29–30). Various tactics reduce transactional risk. *Vuot roa* (fence breaking) flourished under socialist market suppression and remains a pragmatic response to government licensing.[25] Oblivious to contractual rules, trade follows customs, information networks and mediation mechanisms established within familial or vertically integrated kinship structures. If obligations are embedded in personal linkages, transacting with strangers is fraught with risk, since either party can default with apparent immunity—a moral code encapsulated by the proverb *nhat than rhu quen* (first family, other relationships second). Operating outside state policy directives, unlicensed family-centred traders flexibly respond to market demands, not infrequently with illegal production and smuggling (Le Thang Long 1995:21).

Law-makers argue that external rules are internalised and bureaucratic procedures followed where they allow traders and consumers to predict how state power affects their transactions and assets (Vu Mao 1995:7). This is most likely to occur where regulation follows knowable rules and procedure, and less likely where administrative discretion is unchecked by personal connections *(quen)*. External rules become attractive when they facilitate access to commercial transactions that may not otherwise occur. For example, those (like foreign investors) outside the relatively safe trading environments provided by personal networks and bureaucratic linkages, look to the state for other means of preserving transactional interests. Unable or unwilling to form personal connections, foreign investors are the loudest advocates for neo-liberal legal reforms (Schwarz 1996:42–3). With their familiarity with the processes implied by the Vietnamese proverb *due nuoi beo co* (in muddy water storks grow fat), East Asian companies adapt comparatively well to state economic management.

State managed consumerism

Policy makers wanted to reconcile balancing legitimate consumer complaints with party policy, in a non-adversarial environment that emphasised the inherent contradiction between rapid industrial development and consumer rights. A solution was found in bureaucratic management. Constituted as a mass organisation, Vietnam Standards and Consumer Protection Association (Vinastas) was established as a consumer education and advocacy mass-organisation, operating within the ideological orbit of the Fatherland Front.[26] Through consumer clubs,[27] Vinastas provides one of the few authorised outlets for consumer concerns about product quality and safety. The primary function of the organisation is not to resolve disputes, but educate the public about dangerous goods and practices, providing an official safety valve for consumer dissent. Spontaneous expressions of rights consciousness are co-opted and diffused, ensuring that they do not directly confront manufacturers.

Vietnam's consumer protection system is undoubtedly corporatist (Chalmers 1988:137), since the party-state endows a mass-organisation with monopoly powers to manage confrontation. From a local perspective, it echoes traditional consumer consciousness, which is manifested through well-developed personal information

networks (word of mouth).[28] Complaint predominantly takes the form of buyer resistance or low key negotiations brokered by middlemen, customary alternatives to adversarial confrontation. Reflecting these social values, Vinastas and Consumer newspapers (e.g., Saigon Tiep Chi) emphasises voluntary compliance. Recidivists are publicly rebuked through the media; Vinastas uses its own consumer magazine *Nguoi*

Tieu Dung (The Consumer) for this purpose. A consumer protection law is currently being drafted, but lingering party concerns about consumer consciousness—an unwanted facet of civil society—is reportedly delaying its enactment.

Conclusions

Any assessment of the role of law in market development must traverse Vietnam's bifurcated social landscape. What appears to Western observers as fractured and contradictory, is frequently transformed by Vietnam's syncretic belief system into policy flexibility, depth and diversity. Plurality exists, of course, in all societies, but is especially evident and necessary in those undergoing rapid legal and economic transformation. Mallon (1993) put this phenomenon in a political context, '…even if decision makers had a clear vision…the very enunciation of this vision could have reduced the likelihood of success of the reform process' (Mallon 1993:221).

Reforms now cast the state as defender—even creator—of markets, a destabilising role for a party that for most of its history has sought legitimacy through disrupting and destroying markets (Fforde and de Vylder 1996:268; Do Nguyen Phuong 1994:30–4). The move from central planning to market licensing shifted power from the centre to middle ranking provincial officials, exacerbating bureaucratic inertia, obfuscation and corruption (Nguyen Nien 1996:5–10). Compounding the problem, the public law emphasis found in socialist law provided bureaucrats with ideal training for the administration of a command economy, but failed to convey an academic and cultural (Sidel 1993:223–8) understanding of the key concepts of the 'rule of law', judicial independence and market autonomy underpinning neo-liberal theory. Fundamental educative and organisational reforms have so far had little impact, and bureaucrats are understandably reluctant to embrace a rights-based legal system that threatens prerogatives with few reciprocal benefits.

Regulatory dualism is particularly evident in the interface between general positive law and discretionary licensing. The state encourages legal equality in market transactions. The *Civil Code 1995* (Article 8), for example, bases the validity of producer and consumer transactions on legal capacity and free choice, rather than on the status of contracting parties. Characterised by minimal implied warranties and fair trade rules, the legislative landscape resembles *laissez-faire* nineteenth-century Europe (Gabel and Feinman 1982). Legal equality preserves the sanctity of contractual promises, enabling the largest institutions (usually state-owned) to enter civil transactions with the same bargaining power as sole traders and consumers.

The sanctity of contractual choice dissolves, however, in the face of the political inequality embedded in *nha nuoc phap quyen* (state legal rights). The legitimacy of civil transactions rests on the principal of respect for state interests (Dao Tri Uc 1995:6). Porous boundaries between public and private law, a legacy of Soviet civil law, are used

by the discretionary licensing system to manage private market activities. Presupposing sharp boundaries between public and private power, neo-liberal legalists blame administrative discretion for inhibiting private commercial autonomy (market entry, business objectives and product distribution) and encouraging rent seeking (Webb 1996:51–5; Gray 1991:765–7), but provide no explanation for its influence in forming market behaviour.

In many East Asian states a blurred public-private interface is considered necessary to vertically integrate state and commercial players along corporatist lines (Upham 1994:67–73; Chen-Kuo Hsu 1994:307–18). Lacking bureaucratic connections, small scale commercial players rely on sources of authority outside the state. Mutual rights and obligations embedded in familial and group networks perform this pivotal role in forming, maintaining and adjudicating consumer production and consumption transactions.

One of the main themes of this volume is that the 'rule of law' needs to be anchored within specific ideological and political traditions. In Vietnam, lacking an ideological commitment to the liberal notion of the rule of law, development is not treated as a rule-versus-discretion-contest, a misleading dichotomy if ever there was one. Rather, the exercise of state power through rules and administrative discretion is assessed according to the ability of each mechanism to implement policy—law becomes an instrument of state-building, dissolving legal distinctions into the political matrix (see Jayasuriya, Introduction, this volume). A high level of non-compliance is the social cost of new legal instruments. Until normative law becomes more socially integrated (by no means inevitable), licensing continues to provide flexible and creative economic management despite problems of cost, complexity and corruption.

Duality also pervades the newly established, but relatively untried and underdeveloped legal institutions. Court decisions are frequently based on status and personal connections—factors that can be determined without the expense of court proceedings. As a result, the enforcement of private legal rights often proves of no more worth than compromise at an earlier stage of a dispute. Cases involving conflict between parties of unequal political status are widely reported to favour the state. If this perception is correct, what is currently lacking is a commitment to the neo-liberal principles of neutral adjudication, regardless of its consequences for the party and state.

Like other modernising states, the Vietnamese government wants to enhance its political credibility, for both local and foreign audiences, by bringing the entire economy under central control. This is a difficult task for a party-state that, despite aspirations of ideological and legal dominance, is in reality comparatively weak, fragmented and prone to localism (Kerkvliet 1995:399–400). Unlike many other modernising states, which recognise co-existing positive law and customary jurisdictions (for example *Adat* in Indonesia), Vietnam does not recognise legal plurality. This means that market behaviour is polarised between binary alternatives; lawful and licensed—unlawful and unlicensed activity. Since customary practices are not recognised by state law, their influence upon market transactions and legal institutions is officially disregarded and defined out of existence. As a corollary, attempts to centralise power through law are increasingly creating a crisis of legitimacy. If the state cannot control unlicensed market activity, it loses legal authority, while tacit acceptance of the status quo produces similar consequences. Neo-liberal and East Asian models are attractive to Vietnamese law-

makers, precisely because they hold out the possibility of strong centralised economic and legal mechanisms.

Political, economic and legal conditions in Vietnam do not create particularly fertile conditions for either of these transplanted legal models. Political inequality entrenched by *nha nuoc phap quyen* (state legal rights), a low level of rights consciousness and a weak central state, frustrates the development of neo-liberal institutions. To varying degrees, these factors also constrain the emergence of the institutional preconditions required for East Asian development models. However, the largest impediment is the absence of a bureaucratic meritocracy (Nguyen Duy Gia 1996:7–12), capable of resisting demands made by interest groups, and imposing economic policy over all sectors of the economy.

In other respects, the East Asian reliance on clan and group linkages to forge market and consumer transactions closely resembles Vietnam's market places. In this personalised public-space access to credit, government trading concessions and physical infrastructure (telecommunications and roads) are undoubtedly more important than legal rules. This conclusion infers a degree of contention between neo-liberal and East Asian development theory which is not evident in Vietnamese legal thinking. Rather than asking how important is law, a better question for a regime intent upon engineering rapid industrial growth is how can laws excite and support economic development—state-building? Although not always (or even often) followed, legal procedures and state ideology have demonstrated a limited capacity to guide behaviour and sustain market development. Laws shape market behaviour just by being there.

Notes

1 In both countries, only vague intonations of a socialist orientated market economy are forthcoming, but in all its manifestations, a continuing role for central government management over production, labour and distribution is ensured. The state-owned sector is also promoted as the corner-stone of the economy (Nguyen Phu Trong 1994; Cao Duy Ha 1994:9–10; Chen *et al.* 1992).

2 The term 'legal system' is used here to describe a regime of rules committed to being general and autonomous as well as public and positive, in this way neoliberal legal systems are distinguished from customary and bureaucratic law (Unger 1976:66–85). Although Max Weber is often thought to have inextricably linked rational legal systems with industrialisation, recent interpretations suggest a more complex analysis and reject this simplistic conclusion (Ewing 1987:488–93).

3 There is no uniform development model in East Asia. However, for the purposes of this chapter some common themes identified in emerging and recently emerged East Asian (non-common law) legal systems are used as an argumentative device to counterpoint the themes of neo-liberalism. In particular, these countries include Thailand, Indonesia, Taiwan and the Republic of Korea.

4 Between 1989 and 1990, most price controls were lifted, foreign investment liberalised, the exchange rate unified and devalued and the financial sector partially deregulated.

5 The literature in this area is vast, and much of it is summarised in the publication by the World Bank (1993a). See also Chen-Kuo Hsu 1994:66–72; Crobo and Sang-Mok Suh 1992:306–23).

6 The common law concept of rule of law is more all encompassing than the civil law notion of Rechsstaat, and prescribes techniques used in parliamentary democracies to subordinate political power to the observance of juridical rules intended to safeguard the freedom of

citizens. In contrast, Rechsstaat developed in an authoritarian, non-participatory political system (Ajani 1992:3–6).

7 It is commonly asserted by Vietnamese law-makers that law should be closely connected to the role of the state and not be separated from politics. Law is not merely an instrument used to implement policy, but is a form of policy in its own right (Dao Tri Uc 1994:19–20; Do Phuong 1995:4–5; Thayer 1991:24–26).

8 It should be noted that articles 11 and 12 of the Constitution not only demand official obedience to the law, but also require citizens to observe the law and assist the state to observe the law.

9 Sometimes described as bureaucratic polity (Jackson 1978:4–6), hard states enjoy a substantial capacity to form and implement strategies which impose the cost of development upon consumers.

10 The nomenclatura system establishes a list of appointments by the CPV, ensuring that key legislative, executive and judicial posts are occupied by party members. It forms an informal patronage link between party and state (Porter 1993:73–87; Vu Oanh 1993 221–5; Thayer 1991:114; Vu Oanh 1993:3).

11 The 'super village' is a term applied to extra legal organisations that arranged themselves as corporate entities, an extension of the traditional Vietnamese village organisation (Hoang Ngoc Hien 1996:6–8; Jamieson 1993:213–20, 256–7).

12 This position is most strongly emphasised in common law systems (Dworkin 1977). Others argue that the centre of all legal life is not the court room (Ehrlich 1936:198–203, 501–3).

13 According to State Economic Arbitration Statistics, 6,900 cases were filed in 1989, 4,202 in 1991, 1,648 cases in 1992, rising to 3,200 in 1993–4 (Hoang The Lien 1992:18).

14 During 1995, 531 economic disputes and 22 petitions for bankruptcy were heard by courts throughout the country. Most disputes related to economic contracts (sale-purchase, transport, construction etc.) (Ha Hung Cuong 1996, 10; *Vietnam Law and Legal Forum* 1996 November).

15 Interview with Nguyen Khac Long, Judge Supreme People's Court, Hanoi (1 June, 12 September 1994, 12 June 1995; 14 December 1996).

16 It is also possible that the Vietnamese will follow the Chinese experience and embrace commercial litigation. From 1981 until 1987, economic cases jumped from 6,132 to 332, 496 (Potter 1994:351).

17 General comments about the operation of courts are based on numerous interviews with Judges at the Supreme and Provincial levels, legal practitioners and academics, and personal observations of provincial and district courts in Hanoi, Ho Chi Minh City and Vinh Phu province.

18 Statistics from the Ministry of Justice suggest an overall shortage of 1,714 and jurisdictions are most severely affected (Nguyen Tri Dung 1996:2).

19 In two years, only 27 cases have been heard (see *Vietnam Law and Legal Forum* 1996 November).

20 It is estimated that 95 per cent of businesses that should be registered under the *Law on Companies 1990* or *Law on Private Enterprises 1990* have not complied, while officials conservatively estimate that 80 per cent of Hanoi's houses are illegally constructed.

21 For example, becoming an international trading power has not substantially changed Japan's litigation adversity (Dogauchi 1994:246–7).

22 Government publications speak of 'market mechanisms under state control', but as much economic activity exists outside state control it is possible to argue for the existence of hybrid markets (Fforde and de Vydler 1996:267–74).

23 Consumer sampling by Vinastas during 1995–6 questioned approximately 2,500 informants in ten urban and rural provinces. Precise details of the research methodology are not available, but efforts were made to capture opinions from a broad demographic base. *Source:*

interviews with Hoang Manh Tuan, President, and Do Gia Phan, permanent Member Vinastas, 1995–7.

24 Interviews with Hoang Manh Tuan, President, Vietnamese Association for Standardization of Metallurgy and Quality Control (VINASTAS) Hanoi, 1992–7.

25 It is estimated that 600,000–700,000, well over 95 per cent of business entities that should be licensed, remain outside the state system (*Vietnam Investment Review* 1994:36; Gates 1995b:30–1).

26 The FatherLand Front is a party sponsored political organisation that coordinates the activities of state sanctioned mass organisations such as, for example, the Confederation of Vietnamese Trade Unions and the Women's Union.

27 These are small, locally based organisations which are jointly organised by Vinastas and Departments of Science, Technology and Environment attached to provincial/city people's committees (DGP 1994:8).

28 These comments are based on interviews with Do Gia Pham, Permanent Executive Member, 1994–6, and group focus interviews with members of consumer clubs 1995–7.

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7
THE RULE OF LAW AND CORPORATE INSOLVENCY IN SIX ASIAN LEGAL SYSTEMS*

Bahrin Kamarul and Roman Tomasic

Introduction

While the notion of rule of law is ultimately used as a polemical term, rather than as an analytical one, it is an aspirational ideal for legal reformers in many Asian states (Cotterrell 1996; Tomasic 1995; Ghai 1986). While its open texture deprives the rule of law concept of any particular specificity, the doctrine constitutes an important part of the rhetoric of recent business and commercial law reform undertaken by Asian governments seeking to modernise their legal systems. Consequently, as suggested in Jayasuriya's 'Introduction' in this volume, analysis of the rule of law in Asian states needs to be understood in the context of notions of political authority and rule embedded in the very interstices of the state, as well as the socio-cultural environment. Further, the 'Introduction' emphasises the contingent nature of the rule of law. In this chapter, insolvency law and practice in six Asian jurisdictions is examined, and, based on a socio-cultural study* of the perceptions and practices of leading insolvency practitioners, officials and business people, the chapter explores specific manifestations of 'rule of law' as reflected in the character and operation of insolvency regimes in six Asian legal systems. We look in particular at insolvency practice in China, Taiwan, Hong Kong, Singapore, Malaysia and Indonesia. The research involved the conduct of fieldwork in each of these six legal systems. This consisted in the collection of relevant legal materials on each jurisdiction and the conduct of interviews with key insolvency practitioners and officials; A total of 115 in-depth interviews were conducted (see Tomasic and Little 1997:5–7).

It is clear from this research that the doctrine of the rule of law has a wide variety of meanings. Also, legal practices in the six legal systems studied often depart from Western notions of the rule of law in many significant respects. In some jurisdictions, insolvency law forms part of a new commercial law which justifies executive control and

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management of the economy and private business activities. In most jurisdictions judicial independence is not securely institutionalised, there is a high level of avoidance in recourse to formal insolvency law by indigenous businesses, and there is widespread reliance on extra-legal, informal and even illegal processes to resolve corporate insolvencies. This chapter seeks to explain the conceptual diversity of the rule of law as found in Asia and the resort to practices not in keeping with the Western concept of the rule of law. This reflects the impact of Asian legal ideologies, cultural values and social and governmental institutions on an essentially Western legal doctrine. This has often meant that the idea of the rule of law has been reformulated in Asia into rule by law, as has most clearly happened in China and Singapore. The chapter further suggests that any analysis of the rule of law in Asia must take into account the diversity of Asian cultural, social and political contexts and the legally pluralistic character of these jurisdictions. Sometimes, cultural values such as the Confucian ethic run counter to values inherent in the rule of law idea.

Rule of law in non-Western legal systems

The rule of law is generally considered a 'good thing', although it remains 'one of those essentially contested concepts every theorist, advocate and political protagonist wants to claim for her or his own' (Lustgarten 1988:25). Cotterrell suggests that the rule of law concept implies not just specific political contexts or institutional structures but an appeal to transcendent ideals (Cotterrell 1996). He identifies the moral essence of rule of law as consisting of the values of equality, individual autonomy and security. Whatever its specific content, it has been suggested that the rule of law doctrine continues to be the widely echoed aspiration of legal systems and it has become regarded by many as the new natural law ideal which all legal systems should strive to achieve (Tomasic 1995:471). As a tool for analysing the legal process, particularly in Asian and African contexts, Cotterrell, for example, suggests two dimensions of the rule of law. First, that law is 'not only reliably enforced but also general in application, applied uniformly to all cases within its terms. It is, therefore, predictable and calculable in its general consequences, permitting a sphere of freedom to the citizen'. And, second, that the courts function to 'provide security against arbitrary exercises of discretionary power by government' (Cotterrell 1996). Jones, on the other hand, suggests that rule of law implies that law is 'autonomous, general, public and positive' (Jones 1994). Where the rule of law exists, 'administration is separate from legislation. Generality in legislation and uniformity in adjudication establishes formal equality and shields the citizens from arbitrary state power. The law is applied without regard to person, class or status' (Jones 1994:207).

The above suggestions highlight aspects of A.V.Dicey's characterisation of the rule of law, including, first, the absolute supremacy or predominance of regular law in contrast to prerogative, discretionary or arbitrary powers; and second, the existence of equality of all subjects before the ordinary law; and third, that the state and its officials would ultimately be subject to the ordinary law of the land (see discussion of Dicey's characterisation in Tomasic 1995). However, a key issue in this regard is the manner in which rule of law ideas can be mobilised in a legal system. It is one thing to provide rules

which are equally enforced and general in character. But an equally important question concerns who it is that can effectively mobilise these rules. This question is essential if we are to avoid an abstract approach to such rules. Ultimately, a thorough-going expression of the rule of law idea depends upon the existence of a civil society in which significant constraints are not placed on the mobilisation or application of law. On this basis, very few societies would qualify as being good illustrations of the operation of the rule of law ideal.

But, it is doubtful whether a comprehensive system of legal rules binding state agencies and citizens alike to prevent government absolutism, has ever been a primary basis of social order, Western or non-Western. The rule of law doctrine functions more as a legitimising ideology for existing legal institutions than as providing the basis of actual practice and of substantive equality before the law (Tomasic 1993; Cotterrell 1992). Even in Western legal systems, where it had historically been most highly developed, the rule of law is continually being undermined by unfavourable changing economic and social conditions (Cotterrell 1996; Neumann 1986). In Africa and Asia, the idea of the rule of law is an imported doctrine. Consequently, the assessment and interpretation of the extent to which the rule of law is practised in Asian and African states should be examined in the context of changing social and cultural conditions.

The rhetoric of the rule of law is commonly adopted as a hallmark of legal development and modernity in many Asian and African states and this is reflected in the use of insolvency laws in the six Asian legal systems discussed here. Corporate insolvency laws in these jurisdictions have their origins in, or have been strongly influenced by, European insolvency laws. Many provisions relating to insolvency in Indonesia are based on laws enacted by the Dutch. The Malaysian, Singapore and Hong Kong corporate insolvency regimes have been adopted from English and Australian sources. Taiwan's insolvency law is modelled on the now reformed Western-based insolvency laws of Mainland China which themselves have German origins. And, the recently enacted Chinese insolvency laws have been strongly influenced by Western concepts and principles. In all these jurisdictions, the idea of the rule of law, which include such notions as 'equality of treatment of all creditors', 'protection of individual creditors' rights' and 'fair distribution of assets between creditors', has formed a part of the rhetoric of administration and practice of insolvency law. These principles, however, are not a good indication of the character of insolvency laws in these jurisdictions, nor are they reflected in the actual practice of insolvency administration. Indigenous cultural, ideological, political and institutional factors have strongly influenced and shaped the nature of Asian commercial law generally (Kamarul 1995), and professional practice of insolvency administration in these jurisdictions, in particular.

As many writers have observed, the recent rise of the modern state and market-driven economies in Asian states has not generally been accompanied by the development of the rule of law, understood as limiting the arbitrariness and power of the state, in the legal systems (Tomasic 1995; Jones 1994; Ghai 1986). Even in rapidly growing economies based on capitalism and liberalised markets, such as those of East Asia, the spread of the rule of law, defined as protecting individual and private rights against the state, has not taken place. It has been argued that recent economic growth in several East Asian states has not been accompanied by the institutionalisation of rule of law norms in their commercial legal regimes (Jones 1994). First, East Asian cultures have mediated the

reception of these norms and the supposed relationship between the growth of capitalism and formal rational law. The spectacular economic success of Hong Kong, Singapore, Taiwan, South Korea and China, has instead been based on a cultural emphasis on family relationships and business networks, as opposed to legal institutions. There is an emphasis upon collectivist values which puts business and social interests before those of the individual, and a reliance on informal networks of relationships to protect and promote business interests. Second, there is the influence of a positive ideology of law, in which law is seen as a 'powerful and indispensable directive instrument of government policy, actively used on an extensive scale to reshape social and economic conditions and even popular attitudes' (Cotterrell 1988:6). Consequently, commercial and business activities in East Asian states are associated more with a combination of 'rule by law' and 'interactional law' regimes rather than with Western ideas of 'rule of law' (Jones 1994). The prerogative of the state to direct and control economic activities in order to promote economic development is seldom challenged (Gillespie 1997). Third, the doctrines of separation of powers and independence of the judiciary have not been constitutionally entrenched or institutionally established in many Asian states. The judiciary is either subjected to direct executive control or is severely constrained in its operations by political and administrative factors (Hassell 1997; Tomasic 1995).

Finally, there is continuing reliance on traditional and informal legal processes, rather than on formal law, in the protection of rights and the enforcement of duties and liabilities (Antons 1995; Winn 1994; Gray 1991). Gray, for example, contrasted the formal legal system with the 'informal model' of the legal process (Gray 1991). The formal legal system is characterised by clear and binding standards, even and effective enforcement of the law, and an impersonal and predictable way of resolving disputes, while the informal legal process reflects uncertainty in legal standards, uneven and inconsistent enforcement of the law and an *ad hoc* and personalised resolution of disputes. In many Asian countries, the legal systems are better understood in terms of an 'informal legal process'. A consensus of reciprocal expectations based on shared views of right and wrong commonly govern business activities and positive law is often superfluous (Jones 1994). And, 'even in fields of law that were newly introduced and had no basis whatsoever in the traditional law…people continued to circumvent the adapted rules and to use informal practices that over time became so firmly established that they could be described as an "informal legal system"' (Antons 1995:111).

The state's overriding role in Asian corporate insolvency law and practice

The imposition of constitutional limits on the legitimate powers of the state and government is one important ideal of the 'rule of law' (Shapiro 1993). These limits aim at protecting citizens and private organisations from the exercise of arbitrary power by the state and government. The reality in many Asian constitutional systems, however, is the tendency for the law to legitimise the dominance of the state. This is even so in Asian legal systems with a strong rule of law heritage such as Singapore and Hong Kong. Non-state interests and rights are subordinated to the prerogative of the state (Hassell 1997). Such primacy is justified by a variety of ideologies, such as socialism in China, state

ideology of *Pancasila* in Indonesia and, in Singapore, by a blend of Confucianism and Western ideas (Simone and Feraru 1995). State dominance is commonly reinforced by the ideology of 'developmentalism', in which law vests government with the authority to direct, manage, and control private organisations in order to promote economic development (Seidman and Seidman 1994; Ghai 1986; Johnson 1982). Rather than the rule of law, a common feature of Asian legal systems is the 'rule by law' (Jones 1994), in which law is not autonomous but 'decisively subordinated to the achievement of the desired political or economic result in each particular situation' Unger 1976:233; see also Gillespie 1997). Many Asian legal systems are 'statist' in character. Civil society is not autonomous or independent; rather it is managed and regulated by the state (Jayasuriya 1996). Statist ideology justifies 'an extensive role for the state in redistributing national assets, setting economic objectives, regulating foreign transactions, providing an effective national defence, and directing the national development effort' (Simone and Feraru 1995:236).

Absolute sovereignty of the state is not reconcilable with complete adherence to the rule of law, as these ideas logically contradict each other. As the German theorist Franz Neumann argued:

> Both sovereignty and the Rule of Law are constitutive elements of the modern state. Both however are irreconcilable with each other, for the highest might and highest right cannot be at one and the same time realised in a common sphere. So far as the sovereignty of the state extends there is no place for the Rule of Law.
>
> Neumann (1986:4)

Under the rule of law, 'the government itself must be bound by substantive law, not only by the constitution, but as far as possible by the same laws as those that bind other people. We should be very wary when we find governments giving themselves the power to do things to people that people may not do to one another' (Walker 1996:265). Judicial independence in a legal system is one critical element in safeguarding against executive dominance and ensuring equal treatment of disputants before the courts. It involves a judiciary which does not take sides in disputes; consistency and equal treatment of persons in the administration of law; and a machinery capable of implementing and enforcing the law impartially and honestly (Walker 1996).

The character and practice of insolvency law in the six Asian jurisdictions examined here contain varying degrees of statism, where states give themselves powers that private individuals are not given. Private interests and individual rights are subordinated to the overriding claim of the state to regulate and control economic activities. Where these overriding formal powers are not given, governments informally dominate private interests and rights by virtue of their superior political power and ownership of significant productive enterprises. The judiciary's role in safeguarding private interests against the state is severely constrained in many jurisdictions.

Of the six legal systems discussed in this chapter, statism is most highly developed in the insolvency law and practice of the PRC. China's commercial law is generally statist in character and state dominance in its insolvency law and practice reflects this fact. One major aim of insolvency law is to make government business enterprises more efficient

and market-oriented through government control and direction. Consequently, the state is formally dominant and administratively powerful in China's insolvency law and practice. In addition, the judiciary's role in administering insolvency law is subject to government policy and control. In Singapore, however, the state's dominant role takes a different form. Its insolvency law does not give the state formal powers of controlling business enterprises. Corporate insolvency is administered in a legalistic and universalistic fashion, very much in accordance with English common law principles. But the Singapore government's strong administrative, economic and political control of business and commerce results in its exercising a major influence on the governance of corporations generally, and of insolvency, in particular. In Taiwan, on the other hand, the state is frequently an important stakeholder in corporate insolvency. Although most enterprises consist of numerous family-owned and private businesses, the state owns many large business corporations. But, because the state often has a major interest in corporate insolvencies, Taiwanese government policies and interests frequently distort the administration of corporate insolvency.

In Malaysia and Hong Kong, however, formal provisions of insolvency law reflect a more *laissez-faire* philosophy, in which, insolvency is regarded as essentially a private matter. In both jurisdictions the law is administered in a strict legalistic fashion, reflecting the profound influence of British common law practices. Government intervention in insolvency matters, however, is not uncommon in both jurisdictions, but only under special circumstances. In Malaysia there is public ownership of some important business enterprises and, in addition, the government has sometimes intervened in the insolvency process to maintain stability in significant areas of industry. In Hong Kong, while there is no significant public ownership of business enterprises, the government has occasionally intervened in corporate insolvency to maintain business and financial stability. And finally, in Indonesia, while the state has little or no formal role in corporate insolvency, there is widespread interference in insolvency matters by stakeholders who possess political and governmental influence. As creditors, Indonesian government agencies have priority over private creditors. Indonesian courts are relatively weak institutions and are open to bribery, corruption and political influence.

Let us now look more closely at the role of the state in regard to insolvency laws in each of our six legal systems.

People's Republic of China

Chinese laws governing corporations generally refer to at least two different notions of rule of law. One, is a 'political' or prescriptive notion, in which, the rule of law is seen as a command of the state under which the company and its various stakeholders must comply with the rules, policies and regulations of the state. Second, there is a notion which focuses upon various individual rights which are immune to the overriding command of the state (Tomasic 1995). Tomasic argues that the political notion of rule of law predominates in Chinese company law administration. This is even more so in regard to the application of China's 1986 Enterprise Bankruptcy Law. China's new commercial laws, to a large extent, are used to generalise and institutionalise Communist Party and state economic reform policies and measures (Chen 1995). Consequently, the authoritarian concept of the rule of law and the primacy of government and bureaucratic

control over insolvency matters are strongly reflected in contemporary Chinese bankruptcy law and practice.

The insolvency regime in the PRC is currently governed by the law of the People's Republic of China on Enterprise Bankruptcy (For Trial Implementation) 1986 (1986 Bankruptcy Law) which took effect on 1 November 1988. The 1986 Bankruptcy Law applies to state-owned enterprises only. Non-state-owned enterprises may be subject to the Company Law which contains winding-up provisions in Chapter 8, (which took effect on 1 July 1994), and the Civil Procedure Law Chapter 19 (which was promulgated in 1990) (Wang and Tomasic 1994). There are also a number of local insolvency regimes, and in the case of the Shenzen Special Economic Zone, a system of regional bankruptcy courts. In addition, the Supreme People's Court of China has issued an opinion regarding the implementation of the national 1986 Enterprise Bankruptcy Law. This Opinion supplements the 1986 Bankruptcy Law. Insolvent foreign enterprises are subject to the provisions of the Code of Civil Procedure (Chapter 19) and special foreign investment enterprise bankruptcy and liquidation regulations in Shenzen SEZ, Beijing, Shanghai and Tianjin. However, there is still no PRC bankruptcy law which governs individual bankruptcy or the insolvency of partnerships, although this may be enacted in the next year or two.

The 1986 Bankruptcy Law has reflected an effort to move China from a central command economy to a socialist market economy. It aims to provide the state with increased capacity to impose greater efficiency in the management of state-owned enterprises (SOEs). As one member of the Drafting Committee for the new Bankruptcy Law said to us, 'Economic development is the main purpose… How to improve and modernise state-owned and collective enterprises is the main purpose of our bankruptcy law'. However, all this is occurring against a backdrop of an ongoing attempt to maintain social stability by avoiding unemployment which would be caused by unrestrained closure of SOEs through the application of the 1986 Bankruptcy Law. Consequently, the law places the interest of the state above private and individual interests. As one local government lawyer put it, insolvency law 'is really there to protect the State, which cannot be *parens patriae*, as the SOE no longer owns all'. The law also aims 'to protect employees of SOEs', according to one international commercial lawyer. And, as an interviewee from an international accounting firm said to us, 'the main purposes from the PRC authorities' point of view is the allocation of remaining assets [of the bankrupt enterprise], especially if it involves SOE assets'.

Chinese government policy and planning directives often intrude into insolvency practice. As one member of the Drafting Committee of the new Bankruptcy Law said to us:

> In China, law has sovereignty in theory, but in practice, in the operations of the State, government and State policy are above the law. These policies have effect as by-laws. Some policies have been used for a long time and are subconsciously followed by the people, rather than the law.

Judicial administration of insolvency law in China is subject to government direction. As a lawyer in a Guanzhou law office said to us, 'bankruptcy cases are not decided by the Courts—they are really decided by the government. Bankruptcy cases in the PRC have to

be approved by the government. The government directs the courts not to accept bankruptcy petitions'. One member of the Drafting Committee of the new Bankruptcy Law said that 'the policies of the government are effectively by-laws in China. You have Central Government policy and exceptions at the local government level. Most local governments have their own rules… There is no clear policy about uniform administration across China'. And, finally, preferential treatment is given to state-owned enterprises 'so as to protect the prosperity of the state', according to a Chinese law professor expert in this area.

Singapore

The development of post-colonial Singapore has been greatly influenced by aspects of colonialism which emphasise strong executive power (Tan, Min and Seng 1991). Singapore attained sovereign statehood in 1965 when it left the Malaysian Federation. The state in Singapore has been described as a 'strong state' (Simone and Feraru 1995). Under the leadership of the People's Action Party (PAP), Singapore's 'administrative state' has managed to invite foreign investment without becoming its captive, to keep the rising middle class quiescent, to control labour unions and to keep political opponents incapable of challenging the PAP's dominance. The ruling ideology is a mixture of Confucian principles of collectivism, consensus and hierarchy and Western notions of individual freedoms. Concerns for order and economic growth are paramount under this ideology.

Singapore's corporate insolvency laws are found in the Companies Act of Singapore. Its Companies Act was originally based on the companies legislation of Victoria, Australia, which, in turn, had a largely English prototype. Insolvency law provides an important means for the government to impose discipline on firms participating in Singapore's market economy. As one Singapore-based lawyer put it, 'the conventional reason is to control the operation of firms—to discard those that are not competitive so as not to cloud the market'. In discharging this role, the Singapore government 'is offensive, aggressive, pragmatic and very nimble; it is an able and dedicated group, due to the condition of a city state. A major insolvency here would impact upon people's perception of Singapore and would be watched closely by the government', according to a partner in a large legal firm. The Singapore government has responded quickly to reform insolvency law in order to maintain confidence in Singapore's business environment. One litigator in a large local law firm recalled that following the collapse of Pan Electric in 1985 'there was a stock broking crisis with domino effects from back to back deals. A year or so later [the Singapore government] introduced judicial management to stop future industries from going into decline in the same way'.

Singapore's government intervention into corporate insolvency, however, is less direct than that by the Chinese state. According to one barrister, the Singapore government intervenes, 'in the sense that government policy is not to condone roguish or irresponsible behaviour on the part of the businessmen. The government tries to bail out small firms which are challenged by large multinationals'.

Insolvency administration by Singapore's judiciary, however, is relatively legalistic, consistent and free from corruption. As a partner in an accounting firm said, insolvency administration in Singapore is consistent and uniform. The reason is 'not so much

[Singapore's] size, it's the overall pervasive governmental attitude here that creates uniformity'. The courts are generally tough on offenders against insolvency law. A partner in an international legal firm described how a 'debtor is barred from being a director if they are linked to two corporations that have gone insolvent'. A local lawyer noted, however, that:

> The state is quite selective and will prosecute harshly in some well publicised cases to set an example. Large private companies subject to mismanagement are less likely to be subject to prosecution due to bad publicity. You prosecute selectively and fearlessly to set an example in politically appropriate cases.

Taiwan

Taiwan's recent industrialisation has been based on a combination of the ideology of 'statism', in which the state has ownership of many large business enterprises, and 'familism', the ideology of small-scale and privately-owned enterprises (Simone and Feraru 1995:236). State ownership of some large enterprises influences the operation of insolvency law in Taiwan. The law, consisting of the Bankruptcy Law of 1935 and the Company Law of 1929, is based on earlier (European based) mainland Chinese models. It was not until 1966 that the 1929 Company Law was amended to provide a system of company reorganisation. Minor changes have also been made to the provisions of the Bankruptcy Law in 1937, 1989, and 1993.

In Taiwan, insolvency law 'is there to primarily facilitate debt collection', according to a partner in an international accounting firm. But because many large enterprises are state-owned, these enterprises enjoy a practical advantage over privately-owned businesses. As one local lawyer put it, 'there is no legal privilege, but maybe there is some practical privilege'. Government intervention to rescue large private corporations from dissolution is also quite common, particularly in the banking and financial sectors, but more generally in 'industries which support Taiwan'. For example, one corporation was supported because 'the brand value it has for Taiwan is tremendous'. Another example, given by an attorney in Taipei, was the government's rescue of an electronic company.

But, the court system in Taiwan is not highly regarded. The low esteem in which the Taiwanese judiciary is held is described by a local partner in an accounting firm who said to us that:

> The court system here is not very well regarded. The general perception is that the well-to-do and well-connected will win a case against a guy who is not as well-off. People see the courts as biased, even if this may not be the case. People see results that are quite hard to believe. There is no consistency in the interpretation of evidence or of the law.

As a result, few cases of insolvency go before the courts.

Malaysia

The Malaysian Companies Act 1965 (Revised 1973) regulates insolvency in Malaysia. The law is based on the pre-1986 UK law on bankruptcy. The Malaysian law has 'no other public purpose than the pursuit and recovery of debt' said a local lawyer in a national legal firm. The use of insolvency law is primarily tactical. As another local lawyer said, 'banks choose bankruptcy as a method of debt collection because the threat of insolvency is an effective tactic. Whilst not the fastest technique, it is a common and effective legal tactic in the recovery of debts'.

The Malaysian government, however, has intervened recently to rescue insolvent companies in the housing construction and insurance industries. One local lawyer said that, 'these development companies are closely monitored to ensure the protection of members of the public who have paid deposits under the instalment payment schemes… Bank Negara Task Force intervenes to revive the project'. And more recently, 'an insurance company recently had to pay back 70 cents in the dollar thanks to government intervention', said one foreign accountant.

In insolvency administration, the Malaysian courts are relatively free from government interference. This is illustrated, for example, by their approach in dealing with the government's claims as a creditor in insolvency. As a local accountant said:

> The Civil Law Act is the overriding act that gives the government priority. However, the courts are now upholding the Company Act and the judges have watered down the priority given to the government. For example, see Isabella De Silva's victory in *Lee Cheng Chye* v. *Customs* (1995) where the government's commercial claim was not given priority. As a result of this decision the government must rely on the Companies Act for priority.

The Malaysian courts' strict legalism in insolvency law is illustrated by a barrister who said: 'Employees are preferred creditors at law. There have been a string of cases which favour employees. Certain judges will bend over backwards to favour employees'. There is also general agreement among interviewees that in Malaysian courts 'the *pari passu* principle applies generally according to law'. This requires that all creditors with equivalent legal rights will be treated equally.

Hang Kong

Hong Kong's corporate insolvency laws are to be found in Parts V to X of the Hong Kong Companies Ordinance, Chapter 32. These provisions can be traced back to 1929 United Kingdom legislation, although various amendments to particular sections have occurred over the years. The most substantial of these amendments can be traced back to 1948 United Kingdom legislation. Also, a new corporate rescue regime is currently being introduced. Compared to China and Singapore, Hong Kong's bankruptcy law has operated in a more *laissez-faire* environment. There is a widely held view that 'there ought to be minimum government regulation of business'. With regard to insolvency law,

the generally accepted view is that the primary role of Hong Kong's law is the protection of creditor and debtor interests and of the community of private business. As one expatriate lawyer in a Hong Kong legal firm told us, 'the purpose is twofold: 1 debtor protection; and 2 as a means of recovering debt. It is a weapon to hold over people's heads'.

The policy aims of Hong Kong's law were described by a senior official in the Official Receiver's Office.

Indonesia

Indonesian bankruptcy and insolvency law originated in a special Bankruptcy Ordinance enacted by the former Netherlands-Indies government for the population groups of Europeans and Foreign Orientals (Chinese). The law followed closely the law of bankruptcy then operating in the Netherlands and was promulgated in 1906. Due to the fact that there was a strict segregation between different legal groups in the Netherlands-Indies, based on colonial constitutions, most Indonesians came into contact with Western-based laws, such as insolvency law, only very recently (Antons 1997).

At the formal level, bankruptcy law in Indonesia has no significant role as a means of economic and fiscal management by the state. The major use of Indonesian insolvency law is tactical. It provides private creditors with a stronger leverage to secure the recovery of their assets. However, as a creditor, the Indonesian government, through its Ministry of Finance, often collects its debts ahead of other creditors. A local lawyer described how the 'BUPN, an agency of the Ministry of Finance, uses its superior powers, for example foreclosure without judgement, to give the government an advantage, even over secured creditors'. It is the policy of the BUPN, which was set up for the purpose of settling debts owed to the state, that state-owned companies have priority over other creditors. The BUPN can confiscate property to discharge debts in a similar way to seizure of assets of debtors under Judgment Debt orders. The low regard in the business community for the Indonesian court system has meant that it is rare for an insolvency related matter to be litigated; litigation is usually a sign that informal mechanisms have failed.

The attitude of Indonesian courts was summed up by a foreign banker when he said that 'judges are corrupt and the government always wins'. Courts and judges are subject to the control and management of the Ministry of Justice. There are high levels of uncertainty and inconsistency in the enforcement of insolvency law. Inconsistent enforcement of law is explained by a local lawyer to be the result of Indonesia's 'patriarchal system and culture'. With regard to the principle of equal treatment, for example, one foreign banker said that 'the *pari passu* principle [of equality of creditors] is adhered to by foreign lenders, but whether local companies see it that way is doubtful. As foreigners, we will come out second best'. A local banker summarised a common view when he suggested that 'if you are close to the inner circle you may get a form of protection and often state banks may be required to do things that they would not normally do in like commercial situations'.

‘Marginalisation’ of formal insolvency law

One feature of many non-Western legal systems is a high degree of ‘marginalisation’ of formal law in the conduct of business and commerce (Jones 1994; Winn 1994; Ghai 1986; Nelken 1984; Unger 1976; Diamond 1971). Instead, there is much reliance on customary usages and traditional practices. In addition, unlawful and coercive means of recovering debt are frequently resorted to by creditors to ensure debt recovery. Jones argued that businesses in East Asian states rely more upon informal networks of relationships rather than the law to protect their interests (Jones 1994). Some breakdown in traditional Chinese collectivist values in business is however occurring in response to socio-political intervention. But, according to Jones, ‘interactional law’ rather than formal bureaucratic law is relied upon to govern business relationships. Consequently, a feature of business and commerce in the East Asian economy is its domination by personal networks of business people, particularly of Chinese origin (Naisbitt 1995; Redding 1990). Overseas Chinese are a network of networks in East and South-east China, and this system is described as follows:

> All the key players among the ethnic Chinese know each other. Their businesses stay singularly apart, but they work together when necessary. They are intensely competitive among themselves, and exclude outsiders, especially those not of the same family, village or clan. When a crisis arises or a great opportunity presents itself, they will close ranks and cooperate.
>
> Naisbitt (1995:15)

While Western law contributes to the regulation of business activities in Asia it is often not significantly relied upon by indigenous populations. As Antons concluded in an examination of Asian law, ‘Western law can neither be seen as the legal basis of Asian society because of its rather insignificant use by indigenous populations for the regulation of their affairs, nor as totally unimportant, because of its impact as an administrative instrument in the process of development and the link to international trade that it provides’ (Antons 1995:112).

Of the six Asian jurisdictions studied here, formal insolvency law is most highly marginalised in Indonesia and Taiwan. In these jurisdictions, traditional and informal means, including illegal methods of resolving insolvencies, are widely used. In Hong Kong, insolvency law is used mainly by foreign enterprises but rarely by Chinese businesses. Cultural and traditional values are a strong influence in the law’s marginalisation within Hong Kong’s Chinese community. In Malaysia and Singapore, however, the formal insolvency process is much more used and accepted by business enterprises. Traditional and informal methods of resolving insolvencies still linger in the Chinese and Malay communities, but a practical and professional approach has developed strongly in Malaysia and Singapore. In the PRC, however, it is government policy to promote insolvency law as a means of managing and controlling the transition of the Chinese economy into a socialist-market economy. This has resulted in insolvency law’s increasing (but still limited) use in China. But there is still resistance to the adoption of the new insolvency law, reflecting Confucian and Communist values and traditional

practices. Consequently, traditional means of resolving debt disputes are still widespread in China.

Let us look more closely at this question in relation to each of our six legal systems.

People's Republic of China

In the People's Republic of China, despite promotion of the increased use of insolvency law by the government as a means of regulating and controlling corporations, there is widespread resistance to its application. As a local government lawyer observed: 'for the past ten years traditional Chinese culture has been at variance with these very Western types of law. When you come down to the implementation of the laws you see this.' A foreign accountant also said, of insolvency law, that:

> In reality there will be many under-the-table or informal deals done that will deal with a lot of the debt situation. There is not much of a legal system in China, and it will be a rule of men rather than a rule of law, as the legal system in China takes years to develop.

The result is, according to a director of a Law Office in Guangzhou, that 'the law itself is very Western but in practice it is a mixture of Chinese tradition and Western ideas'. Traditionally, bankruptcy has been looked upon as 'bad luck'. Bankruptcy in Chinese means 'broken fortune'. According to Chinese tradition, 'if a father owes a debt, the son is responsible for his father's debt. In feudal society, even a grandson is responsible for his grandfather's debt… A grandson may even have a debt or obligation before he is born under the feudal system,' said a senior official from the Commission of Legislative Affairs, Standing Committee of the National People's Congress. 'Traditionally, Chinese treat friendship as more important than individual interests,' said one academic lawyer. A second influence is Confucianism. As a local lawyer suggested, 'Confucianism encourages balance and harmony. Unless there is no other choice, people will try to keep their friendships and relationships intact. As a result, it is difficult to declare bankruptcy in China.'

Socialist attitudes have also inhibited the acceptance of the new insolvency law. The influence of traditional and communist attitudes to debt was described by a foreign accountant as follows:

> Because during the past 40–50 years there has been a Communist system in China people do not believe that corporations can go bankrupt as it suggests Communism can be bankrupt… The Confucian ideal is to seek for balance and to seek the middle way—they don't want to see something as extreme as the bankruptcy of a SOE. There is a fear of losing face and they don't want to be seen as managerial failures.

The settlement of bankruptcies is 'very commonly through the use of connections. Companies in the PRC are often far more powerful than the courts, and so it is difficult for the courts to do anything,' said a legislative drafter in Beijing. A member of the Drafting Committee of the new Bankruptcy law observed that 'non-legal means are used

a great deal. For example, compensation outside the court provisions is found in section 83… In addition, in re-organisation proceedings we leave a large amount of room for parties to negotiate outside court.' And as a foreign accountant suggested, 'non-legal means are used all the time. They are preferred as the legal system is so immature in China. They prefer to settle things through the use of relationships.'

Taiwan

Turning to Taiwan, it has been suggested that the relational structure of traditional Chinese society has survived in a modified form which blends elements of the modern legal system into networks of relationships. According to Winn:

> The interaction of law and society in Taiwan might more accurately be characterised as 'the marginalisation of law', a process in which the ROC legal system plays a significant role in Taiwanese society but is often displaced by a more fundamental source of social organisation—fluid, highly contextual networks of human relationships.
>
> Winn (1994:196–7)

The reluctance of the business community to have recourse to formal insolvency law in Taiwan is explained by a range of factors. In Taiwan, 'the cultural tradition is that companies are family controlled, even those listed on the stock exchange. This tradition may prevent cases going to court,' said a partner in a law firm in Taipei. There is often reliance on *guangxi*, or mutually beneficial personal relationships, to settle the payment of debts. And a partner in an international accounting firm suggested that 'it is Chinese culture. It affects everything… There is a tendency for compromise and out of court settlements. People in Taiwan do not like to go to the courts.' A partner in an international accounting firm in Taipei also observed that in Taiwan, 'being an Asian country, people take bankruptcy very seriously and it is the last thing that anyone would want to go into'. According to one lawyer, 'bankruptcy is a foreign concept. We adopted this concept from the civil systems of Europe and it is not a native concept in our history'. According to a lawyer in an international legal firm, 'one cultural attitude is not wanting to be the bad guy who forces the collapse. So, there is a tendency not to resort to bankruptcy if possible. So, there are few corporate bankruptcies.' An interviewee from an international accounting firm suggested therefore that political interference in the insolvency process contributes to insolvency law's marginalisation.

Informal means of settling debt are common in Taiwan. A local partner in an international accounting firm said that 'given the fact that people try to avoid the courts, there will always be negotiation. The use of other non-legal means depends on the level of the economy you are at. At the lower levels there are loan sharks and more criminal activity. I have heard that some companies may hire a company to collect debts—"I'll break your knees if you don't pay shortly—like yesterday".' Underground methods are often used in Taiwan to settle debt problems. According to one lawyer and a member of the Judicial Review Committee:

> Some creditors go underground to recover assets. If a creditor knows you have assets elsewhere, they use underground persons to assist, for example, there are many kidnapping cases involved in this area… Lawyers decline to become involved as administrators because often the underground is involved. If these sort of people lose their money they become crazy and mad. People who get involved risk their lives.

Hong Kong

In contrast, in Hong Kong, insolvency law is used mainly by foreign creditors and corporations, and rarely by Chinese businesses. Hong Kong's insolvency law 'is there to ensure that creditors get their money back', as one expatriate lawyer in an international law firm put it. Its administration is legalistic in order 'to assist creditors in the recovering of their debt in accordance with their legal rights', observed an accountant with an international firm. Few Chinese businesses, however, use the legislation as it is perceived to be based on foreign laws, rather than on Chinese social tradition. 'It is a tradition that people will pay their creditors when they can—there is a moral obligation to pay creditors,' said one expatriate accountant. According to one major international accounting firm, in Hong Kong, 'there has been little purely Chinese insolvency. We are involved with foreign investors who come unstuck. Chinese families stick together generally, except where they want to make an example of someone or recognise the situation is beyond their collective means.' An expatriate accountant said, of the insolvency law, that 'we have an English system imposed in Hong Kong, which does not necessarily reflect how Hong Kong works. The Chinese system is one of self-reliance, where people aim to solve their problems themselves—you keep it within the family.'

In Hong Kong the extent of the use of non-legal means of dealing with insolvencies is described by an expatriate accountant as follows:

> Before an administration starts, a lot of pressure can be applied on debtors (for example, triads and collection agencies). This tends to sort out any problems—even if it is a public company because there are always families behind them. Non-legal means are not an issue after insolvency begins.

But, as an expatriate lawyer suggested, 'triads still operate. There are also quite a lot of private debt collection agencies. It is a growing industry in Hong Kong.' As a senior official of the Official Receiver's office in Hong Kong acknowledged, the use of debt collectors 'is quite frequent. It is cheaper.'

Indonesia

Similar tendencies leading to the marginalisation of insolvency law are evident in Indonesia, where very little use is made of the formal procedures of insolvency administration. Insolvencies in Indonesia are more often resolved by relying on traditionally consensual methods, or by using extra-legal means, than by having recourse to formal law. One expatriate officer with a foreign bank observed of Indonesian

insolvency law that 'the recovery of debt should be the main purpose but it does not show through. In Indonesia it is seldom that you will even see a formal insolvency as most are conducted informally through arrangements and negotiations by powerful business interests.' According to a foreign lawyer with an Indonesian legal firm, 'the main purpose is to call the ultimate bluff when all other avenues have evaporated'. Further, 'if banks enforce securities, it is usually because of political connections, for example, an official causes the action to be brought,' said a foreign accountant from an international firm in Jakarta.

One foreign accountant with an international accounting firm said to us that, 'insolvency law doesn't work according to law but according to face saving'. An Indonesian law professor and senior partner in a local law firm also said that 'avoidance of insolvency is a cultural factor. I have been involved in this area for three years and I have noted that with corporations that are not yet declared bankrupt [for example, Bank Summa], creditors and the public seek to solve the problem in the honourable or peaceful way rather than go to court. They think it is best to settle in the family way.' In Indonesia, insolvencies are 'being settled by other means' according to a foreign accountant. A foreign lawyer noted that 'to the extent that there are bankruptcy problems, non-legal means are the primary means of solving the problems—by calling in favours, helping people out, promises of future favours'. Those with 'financial muscle and political connections' and 'positions of power' can rely on extra-legal means of resolving bankruptcy difficulties. In Indonesia, 'most large corporations have influence and can get favours'. One interviewee also suggested that, 'if the company is large and of strategic significance or has influence, the government will help directly or ask another SOE to help'.

Malaysia

In Malaysia, however, there is less evidence that insolvency law is marginalised, at least by large business. Insolvency law which, according to an officer in a foreign bank, 'follows from the English law and is concerned with the ordinary recovery of debt', is seen as serving important purposes for Malaysian businesses. They are 'to help with the orderly administration of insolvencies and to provide certainty and predictability to commercial transactions and in the protection of creditors', according to a local accountant with an international firm of accountants. A foreign lawyer suggested that there is a more business-oriented approach to insolvency in Malaysia as it 'has such a multi-cultural society [and] that there is no one cultural regime affecting insolvency. It is a so-called Asian culture with a transplanted legal regime. Bank officers do not have any cultural inhibitions with taking action.' Some residual cultural influences, however, remain, especially amongst the Chinese. According to one interviewee, 'the strictest culture is Confucianism because of the long history of commerce in China where "my word is my bond". In such a culture, if you failed to deliver then you were outlawed and being bankrupted was even worse.' But even in the Chinese community in Malaysia, as one interviewee said, 'Chinese community traditions are on the decline, as foreign educated children (who are not as obedient to those values) take over from the family patriarchs.' And, as another interviewee put it simply, 'greed is now the ruling force'.

In Malaysia, the use of unlawful means of collecting debt is not common and is limited to particular types of loans. As one interviewee said: 'negotiations are commonly the usual starting point. Strong arm tactics may be used at the lower levels prior to legal proceedings. However, they are not common because you can report it to the police. Occasionally, you will get debt collectors who merely pressure and harass in front of customers.' And, as a local lawyer said: 'in Malaysia, I have known files to "go missing" in the court office—court clerks may be bribed. In addition, eleventh hour tactics are common, like lodging spurious counter-claims.'

Singapore

In Singapore, as in Malaysia, insolvency law is widely used by business. The law is administered highly legalistically. According to a lawyer with a Singapore legal firm, 'corporate insolvency law is the means of compelling parties to settle outstanding debts in Singapore. Winding up proceedings are taken out often in Singapore. Even if the company is insolvent and you will get nothing out of it, the proceedings are still taken out as a form of punishment.' The influence of traditional Asian values on insolvency law administration has declined to relative insignificance. 'Insolvency is very straight forward and practical,' said one interviewee. 'These cultural factors don't affect insolvency in Singapore. The laws are based on British and Australian laws. Unless you are talking about a very Chinese company where there may be a loss of face. But not otherwise,' said a partner in a local legal firm. Most interviewees agreed that any residual influence of cultural factors on insolvency law is declining further with recent reforms of insolvency law which promote greater business competitiveness.

Consequently, in Singapore, the use of non-legal means of settling debt is not common. A partner in a local legal firm said to us that 'non-legal means are not used among larger corporations. It is not very common, but I am sure it exists.' Another Singapore lawyer agreed, and he said that the use of non-legal means is 'very negligible. Less subtle pressures are quite rare. It is very common in Malaysia but the criminal law in Singapore is just not worth tangling with. There are no longer cases where the family will be called upon to rescue, for example, their sons. Now, modern business will dictate what occurs. The father will turn his back on the son.' According to a partner in an international accounting firm, 'non-legal means are used to a much lesser extent in Singapore. After all negotiation fails, then insolvency is used… The use of force is very uncommon in Singapore.'

Conclusions

Political and legal élites in Asian states frequently proclaim adherence to rule of law values. However, such statements should not be taken at face value, or at least, they should be interpreted by reference to local conditions, cultural values and practices. However, Asia is not dramatically different in that regard from many Western legal systems in which the rule of law rhetoric usually serves only symbolic purposes and is often used merely as a legitimation device. For this reason, debates about the rule of law have become relatively infrequent in the West and have only recently resurfaced largely

due to the serious difficulties which many legal systems have faced in meeting the promise of the rule of law rhetoric in the face of a rising tide of expectation of due process and the resolution of social and economic questions through often overburdened legal institutions. The findings of this chapter are consistent with the thesis, outlined in the 'Introduction' to this volume, that the rule of law has to be seen in the context of the authority of the state. In its examination of the insolvency law and practice in six Asian jurisdictions, it was found that the state through its executive and administrative agencies, plays, in varying degrees, an important management role in the enforcement of insolvency law, thus undermining the notion of the rule of law which subordinates the state to the same status as private bodies and interests.

In the six legal systems discussed here there is clearly a strongly stated view that insolvency matters are susceptible to processing through the application of the rule of law. But, in reality, it is rare for this to occur. One reason for this, of course, has been that rising economic prosperity has brought about a relatively low level of insolvency, at least compared to the West. As we have seen above, the explanation for the widespread failure to mobilise insolvency laws in dealing with corporate debt are somewhat more complex. In many jurisdictions, these can be related to either the poor development of judicial and related legal structures for dealing with insolvency, or to the political or administrative constraints which are placed on these structures. Cultural factors also suggest little faith in the promise of the rule of law and have often led to a preference for the use of informal or even illegal methods of dealing with business debt. In addition, the state plays a large management role in business matters including corporate insolvency. Whilst none of the legal systems discussed here are static, it is nevertheless clear that there are significant restraints upon the degree to which unqualified rule of law values can be implemented. Indeed, informal mechanisms of dealing with insolvency may well become more prevalent. But, this, in itself, is not an undesirable development.

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8
CORPORATISM AND JUDICIAL INDEPENDENCE WITHIN STATIST LEGAL INSTITUTIONS IN EAST ASIA

Kanishka Jayasuriya

Introduction

In understanding the dynamics of institutional reform in East Asia, it has often been readily assumed that institutional forms will replicate West European patterns.[1] This essay, in exploring the nature and dynamics of legal institutions in East Asia, seeks to argue that institutional patterns in East Asia are more incondite than conventional theory would allow. Institutional patterns in East Asia are embedded in a wider structural context, and the specific form they take needs to be understood in a larger framework which includes the nature of state and civil society. This contingent approach to the study of institutional forms in East Asia stands in opposition to the notion that the development of markets will inexorably lead to the constitution of liberal institutions.

Within this framework, the essay proffers two main arguments. The first is that we need to distinguish between liberal and statist legalism. Liberal legalism requires a liberal state and an autonomous civil society, whereas statist legalism is located within a corporatist state and a managed and regulated civil society. Second, it will be argued that conceptions of judicial independence need to be located within liberal or 'statist' models of legalism. Through case studies of Singapore, Indonesia, and China it is proposed that notions of judicial independence in statist models of legalism take on corporatist forms where there is significant concertation or collaboration between the judiciary and the executive. Crucial to this argument is the fact that these corporatist notions of judicial independence are embedded in specific conceptions of stateness. However, it is important to recognise that these corporatist structures will vary in terms of the degree of autonomy and independence granted to the judiciary. For example, judicial—executive relations are more symmetrical in Singapore in comparison with Indonesia and China. But there are indications that the development of the market economy in states such as China and Indonesia will lead to a rationalisation within the state, and that this will, in turn, push the judiciary towards a more symmetrical relationship between the judiciary and the political executive similar to that which obtains in Singapore. Nevertheless, while the relationship between the political executive and the judiciary can be more or less symmetrical, it lies firmly in the domain of the executive structures of the state.

In this regard, Steinmo *et al.* (1994) have pointedly drawn attention to the manner by which state structures[2] and organisation shape and influence the form and nature of social and political institutions; this essay seeks to show more specifically that legal institutions

are critically dependent on state structures. In relation to legal institutions, Damaška (1986) has suggested that the nature of state organisation and ideology plays an important role in shaping the development of legal institutions. This essay is similarly within this historical approach to the analysis of institutional formations in different socio-political contexts. At the same time, this perspective differs from conventional 'bringing the state in' type argument because of the emphasis placed on conceptions of 'stateness' which refers to the way state authority and the relationships between state and civil society are conceptualised by state actors. In other words, we need to uncover the normative language of state power in order to understand how state power is cognised by state actors. The concept of state structure, as used in this study, includes both the institutional structures and the normative language of the state or conceptions of stateness. In other words, legal institutions need to be located within a broader understanding of law and the nature of government. This emphasis on the normative language of the state requires that institutions and associated political notions such as judicial independence, rights, and citizenship are discovered within this language of stateness.

This approach to the state, in contrast to the position adopted by some statist theorists, has the virtue of not describing the state as a unitary entity that is detached from and floating above civil society. The perspective adopted in this chapter conceptualises the state as a set of institutions, practices and rules that influence and shape civil society. In this context, the notion of stateness describes the relationship between state and civil society; the use of such an approach enables us to focus on a variety of possible arrangements or relationships between state and civil society. Consequently, institutions such as courts need to be located within these state—civil society constellations.

The chapter is in two parts. The first part explores the distinction between statist and liberal legalism, paying particular attention to the images of state and civil society embedded within these legal regimes. The central thesis is that ideas of stateness which encompass state and civil society relationships greatly shape the nature of legal institutions. The second section explores one crucial facet of 'statist' legal institutions—the corporatist nature of judicial and executive relations. This feature of statist legal institutions is explored through case studies of judicial independence in Singapore, Indonesia and China.

Liberal and statist legalism

Orthodox approaches to the study of the emergence of legal institutions, such as those emanating from the classic work of Weber (1954) does not adequately recognise the role of the state structure in the shaping of legal institutions. The conventional Weberian conceptions of the relationship between markets and the rule of law emphasise the link between economic rationality and legal rationality (Trubek 1972) so that the functional requirements of the market for predictability and calculability lead—though not in a direct causal way—to the development of a formal rational legal system (Jayasuriya 1996a; 1996b). Interestingly, recent rational choice approaches to the study of legal institutions arrive at similar conclusions by suggesting that the need for credibility and commitment within a market economy leads to the formation of independent legal institutions (North and Weingast 1989).[3] Although these accounts differ in terms of the

methodology employed—a macro sociological Weberian approach, as against the methodological individualism of rational choice theory—they produce strikingly similar conclusions about the relationship between the market and legal institutions. Indeed, a notable recent development has been the resurrection of the concept of modernisation theory in the guise of rational choice theory.[4]

A major problem in these accounts of the nature, form, and evolution of legal institutions—which incidentally have been a considerable source of influence on multilateral agencies such as the World Bank and the Asian Development Bank (ADB) in their governance and legal reform programmes—is that they assume a set of structural or institutional arrangements that are not likely to hold in East Asia. By contrast, Unger (1996) has recently observed, in a different context, that legal analysis in general needs to recognise the institutional context in which such analysis is necessarily embedded. Accordingly, he notes that:

> for every right of individual or collective choice, there are different plausible conceptions of its conditions for effective realization in society as now organized. For every such conception there are different plausible strategies to fulfil the specified condition.
>
> Unger (1996:3)

The main difficulty with both Weberian and rational choice accounts of institutions lies in their failure to grasp the institutional embeddedness of legal institutional forms. There is an implicit assumption that contours of state and civil society are drawn in liberal or pluralist, rather than corporatist terms. The weakness with these analyses is the assumption that only a particular set of liberal legal institutions and legalism is compatible with capitalism thereby failing to recognise that different forms of capitalism may coexist with alternative arrangements for individual and collective choice.

This prevailing liberal framework is pluralist in that it requires the constitution of a concomitant image of an economic and civil society which assumes a diversity of interests. Liberal markets create a range of private interests and rights that need to be regulated; within this framework, the rule of law serves to co-ordinate, regulate and balance interests. Rational choice institutionalists argue that legal institutions, and indeed institutional mechanisms more generally, serve to create institutional frameworks for the co-ordination of these private interests. The Weberian standpoint is that these pluralistic institutional arrangements serve to produce a condition of generality and formality within the law, or what Weber termed ‘formal legal rationality’. However, in general, what underpins these mechanisms in both approaches is the image of a pluralistic community—economic and political—where the law is not only a means of regulating and co-ordinating these private interests but also a means of limiting the executive power of the state. Complementary to this image of law as the resolution of conflict between private interests lies a conception of an autonomous and independent civil society. In other words, civil society and the autonomy of private interests within it allows a boundary to be drawn—albeit one that is constantly contested—between public and private spheres or arenas.

In brief, this suggests that orthodox accounts of legal evolution are associated with a distinctive array of structural and institutional arrangements representing a set of

pluralistic economic social structures which determine the allocation of private rights amongst individuals. These pluralistic arrangements enjoin the need to resolve conflict between various right holders, and in turn, leads to the construction of legal institutions as conflict resolution mechanisms. Indeed, Damaška (1986) points out that in this perspective:

> the law facilitates and supports autonomous regulation by members of civil society in its creation of 'bargaining chips' for transactions amongst citizens. Participants in negotiations realize that unless they reach agreement, one side can invoke the state forum, which is apt to impose the 'model' arrangement.
>
> Damaška (1986:76)

In other words, legal institutions reflect private interests located within civil society, where:

> the government celebrates self-regulation by members of civil society the mainspring of the law tends to be outside of the state or 'above' it. And where individual preferences are sovereign, the most suitable norm-creating devices are various types of agreement, contracts and pacts.
>
> Damaška (1986:75)

The key to understanding the liberal conception of law is the construction of a boundary between private and public—a boundary which also depends on a liberal conception of the state.

The essential requisites of this liberal model are the existence of:

- liberal markets;
- an autonomous civil society reflecting pluralistic social arrangements; and
- legal institutions with the role of resolving conflicts between various 'interests' in civil society.

A central proposition of this chapter is that the causal chain that connects liberal markets, civil societies and 'conflict resolution' mechanisms is highly problematic in the East Asian context. The implied causal connections often fail in the East Asian context because of the absence of an autonomous and independent civil society, and it is this absence that makes difficult the construction of a boundary between public power and private interests. It creates a form of capitalism in East Asia which exists without an independent civil society. As a consequence, the law, rather than reflecting interests of actors within civil society, serves to entrench public power.

The absence of an autonomous civil society in much of East Asia can be attributed to two main reasons. In the first place, East Asia, like many late industrialising states (Gerschenkron 1962) is distinguished by a highly interventionist and activist state that has been a key factor in the regulation of markets, and, in the case of transitional economies, in the creation of market economies.[5] Despite differences in approach and methodology, the conclusion of many recent studies in the 'statist' tradition of political economy suggests that East Asia has moved towards a form of *managed capitalism:* a

form of capitalism characterised by the interdependence and interpenetration of public and private power. This interpenetration of public and private power implies, in turn, that no rigid boundary can be drawn between public and private. Even in the area of private property rights, there is a substantial admixture of both public and private power. For example, in China, the growth of local state corporatism exemplifies a tendency to mix market competition and public ownership (Oi 1992). In a similar fashion, the significant presence of rent seeking capital in Southeast Asia demonstrates a trend towards a mix of private and public power. It is this interpenetration of public and private that makes it difficult to identify the liberal and autonomous civil society that is important in establishing the oft mooted causal connection between liberal legal institutions and markets. Indeed, unlike liberal capitalism associated with an autonomous civil society, 'managed capitalism' is likely to produce a managerial or technocratic civil society in East Asia. In turn, these forms of civil society have significant ramifications for the study of legal institutions. In short, the conjunction of managerial capitalism and civil society is likely to lead to a statist, rather than a liberal, form of legalism.

The other reason for the absence of an autonomous and independent civil society in East Asia is the fact that, unlike in Western Europe, there is in East Asia a distinctive view of the nature of sovereignty or the idea of stateness. What is characteristic of Western Europe is that the absolutist state was central to the development of the notion of sovereignty which had the task of constituting the state as an international legal entity with power over subjects within its domain. However, this aoristic or unlimited power over subjects was soon limited by the development of civil society which was itself a result of the growth of the absolutist state (Koselleck 1988).

The transplantation of the modern state in East Asia in the form of the colonial state led to the importation of West European ideas of sovereignty; and more importantly, facilitated the development of notions of executive power rooted in ideas of 'state prerogatives' that were formed within the womb of the absolutist state. The colonial state was pre-eminently an 'executive state' defined by the 'reason of state' juristic tradition. Of course, the role of strong executive power is not merely confined to East Asia. Davidson (1991) has recently argued that the strong tradition of legalism in Australia is in part due to the existence of a powerful executive within the colonial state. However, a critical point to note in this connection is that the development of these state forms in East Asia occurred without a corresponding development of civil society. Young (1994)[6] draws attention to an analogous development in relation to Africa, by pointing to:

> the high degree of hegemony and autonomy that the African state enjoyed at its zenith makes it a particularly fit subject for analysis as actor. Because its behaviour was relatively uninhibited by constraints imposed by subject society, the polity had unusual freedom to chart a course by reason of state.
>
> Young (1994:45)

The development of the post-colonial state in East Asia also has been greatly influenced by those aspects of the colonial state which emphasise the strong exercise of executive power. For example, in Singapore the state has tended to justify the use of executive power in a manner reminiscent of the colonial state.[7] According to Lev (1978) there are

strong similarities in the use of law by the colonial and the post-colonial Indonesian state. We may conclude from this that the different trajectory of state formation in East Asia has produced a state with strong executive power but a weak civil society; in other words, the post-colonial state could continue to be characterised as an executive state. The existence of this executive state influences the shape and form of legal institutions; the law is seen in instrumental terms as a means of extending and consolidating, rather than limiting, state power.

It can be argued that the trajectory of state formation in East Asia has served to induce a curious twist to the Weberian model of legal rationality. Thus, instead of legal rationality being the outcome of a process of historical evolution, it becomes a set of routines and practices that underpin the colonial and the post-colonial state; and what is more, it is utilised to expand or entrench its power. Consequently, the techniques and routines of legal rationality are disconnected from their moorings in civil society, and attach themselves as instruments of state power.

These contrasting understandings of the state, which we can label as *liberal* or *statist*, come with their own different accounts of state—society relationships. The liberal conception or image of law is embedded in a characteristic set of pluralistic arrangements—economic and social—all of which are built around a distinctly independent and autonomous civil society organised around a multiplicity of interests. This, in turn, implies that legal institutions require a degree of autonomy or independence from the state. To be sure, this autonomy implies the increasing emphasis on the deployment of 'infrastructural' rather than 'despotic' power (Mann 1986). On the other hand, the statist image of law is embedded in a set of corporatist economic and social arrangements which presuppose a highly managed and regulated civil society. The dominant aspect of the corporatist image or conception of law posits an 'organic' conception of the relationship between state and civil society. It is organic in that the permeable boundary between 'public' and 'private' spheres comes with an image of law that manages and regulates civil society rather than one which mirrors interests in civil society. For these reasons, the nature of the state in East Asia facilitates a model and image of statist law that can be contrasted with the liberal model of law. Whereas the liberal image of law is associated with pluralist arrangements within civil society, the 'statist' image of law is reflected in the dominance of state interests and objectives.

The liberal model of law envisages legal institutions as a set of institutional devices which provide the infrastructure for civil society to function. It does this through the allocation of rights for transactions within civil society. However, within a statist image, civil society is not autonomous or independent; rather, it is managed and regulated by the state. It therefore follows that law is seen as a means of enhancing and enforcing state interests and objectives. Herein lies the essential dichotomy between 'liberal' and 'statist' images of law. While it might be tempting to parallel these differences to those between communitarianism and liberalism, it should be noted that the notion of communitarianism does not adequately express the fact that the pursuit of these collective goals and objectives flows from the state rather than from society. Unlike in culturalist arguments that tend to suggest that cultural practices give rise to a distinctive understanding of law, the point of view of this essay is that the shape of legal institutions is influenced by the interrelationships between the state, society, and the market, and also by the way these relationships are cognised by state actors.

Stated differently, it is evident that the contrasting liberal and statist conceptions of law produce different conceptions of institutional architecture. The liberal model of 'legal architecture' builds independent and autonomous institutions that *link* civil society to the state. By contrast, statist legal architecture leads to the building of legal institutions that *fuse* the civil society and the state. Within this statist perspective, judicial independence is a matter of autonomy *within* rather than *from* the executive. As will be argued below, legal reform in the rapidly modernising economies of East Asia often entails the development of autonomy within the state.

In adopting a Weberian model of legal rationality, as in the West European pattern development, we assume that a set of legitimisation structures links state and civil society, or provides the basis for 'infrastructural power'. But, within a statist framework as in East Asia, the use of legal rational techniques implies a rationalisation within the state.[8] The problem with most approaches to the study of legal institutions lies with the assumption that markets are compatible with only one particular set of structural arrangements between state and civil society. At the heart of these differences are contrasting images of the relationships between civil society and state. However, given that the institutional architecture is more variegated than that suggested by the orthodox approaches, it could be argued that markets are compatible with a number of alternative institutional arrangements.

In the context of this analysis, it is instructive to examine the work of Damaška who provides one of the few examples of an attempt to work through the implications of different forms of state for the study of legal institutions. In fact, Damaška's conception of 'policy making' institutions presents a useful and novel way of approaching the role of legal institutions within a statist model. Damaška's distinction between *reactive* and *activist* states is one which corresponds to the previously presented liberal and statist dichotomy. A 'reactive state' provides order and facilitates the resolution of disputes by individuals, and bears some similarity to Oakeshott's (1975) notion of 'civil association'.[9] Activist states, on the other hand, 'espouse a theory of the good life, tried to use it as a basis for a conceptually all embracing programme of material and moral betterment of its citizens' (Damaška 1986:80). This notion again bears some parallels to Oakeshott's notion of an enterprise or a 'purposive association'. Damaška's important contribution has been to suggest that these two 'ideal type' states give rise to very different notions of the legal procedure: reactive states giving rise to 'conflict resolving' procedures; activist states leading to the formation of 'policy implementing' institutions.

In a policy implementing type of legal institution, state interests and goals have primacy over the allocation of rights. Therefore, the purpose of legal institutions is to produce accuracy of outcome—outcomes that reflect substantial goals or objectives of the state rather than being determined by objectives and goals internal to legal institutions. As Damaška notes:

> The architects of the policy-implementing process thus strive to devise procedural rules and regulations that facilitate attainment of accurate outcomes.
>
> Damaška (1986:150)

He emphasises the point that

> the more fully a state realizes its activist potential, the narrower the sphere in which administration of justice can be understood as dispute resolution, and the more the legal process is pruned of procedural forms inspired by the key image of a party-controlled contest.
>
> Damaška (1986:87)

An equally important point in this context is that 'adjudication and administration tend to converge as a government begins to approach its fullest activist potential' (Damaška 1986:89). This observation needs to be examined further in the East Asian context as it suggests that the key legal reforms may lie in the provision of access to the state rather than in the allocation of rights to individuals in civil society. Of course, in such a viewpoint, legal reform, through rationalising administrative processes, will serve to provide avenues and processes for this access to the state.

To summarise, the statist model of law, characteristic of much of East Asia, has the following features:

- a managed form of capitalism;
- a managerial and regulated civil society characterised by an organic conception of state; and
- legal institutions which serve to implement the policy objectives and interests of the state.

Corporatism and judicial independence in East Asia

Corporatism as a model for judicial-executive relations

Having identified these models of legal institutions, we proceed to examine the nature of judicial-executive relations under statist forms of legalism in East Asia. The defining aspect of judicial independence under a regime of liberal legalism is the separation of judicial and executive power, which importantly is embedded within a liberal conception of state. Within this framework where the state is neutral to different conceptions of the good, an independent judiciary is essential to restraining executive power. In contrast, within a statist regime of legalism, there is an organic notion of the state and society wherein, unlike the liberal state, the organic or the corporatist state seeks to actively implement a conception of the good. Of course, this difference is founded on the constitution of the boundary between public and private. Institutional structures, rather than being rooted in civil society, reflect and seek to implement policy objectives of the state. The task of the judiciary within this model is to assist in the implementation of these goals and objectives, and for this reason, judicial independence within a statist legal regime is perceived as a division of power within the executive structures of the state. The differences in approach to judicial—executive relations can be encapsulated as the contrast between a model of a separation of power within liberal legalism and a division of power within statist legalism; this distinction neatly illustrates the ideological gulf between these two contrasting conceptions of judicial independence.

The structural form of this relationship between the judiciary and the executive may also be categorised as a form of corporatism. Corporatism, as used in the literature, exemplifies a system of interest representation (Schmitter 1979), which points to the regulation and licensing of groups by the state as well as the exchange of political resources between groups and the state. As Schmitter points out, under corporatism groups have:

> by and large, singular, non-competitive, hierarchically ordered, sectorally compartmentalized, interest associations exercising representative monopolies and accepting (de jure or de facto) governmentally imposed or negotiated limitations on the type of leaders they elect and on the scope and intensity of demands they routinely make upon the state.
>
> Schmitter (1979:8)

Clearly, this interest representation of corporatism is not applicable to the study of judicial-executive relations. Corporatism is used here in two senses. In one sense, it is used to denote the close consultation and collaboration between the executive and the judiciary—a form of concertation; while the judiciary is not an interest group, the nature of its consultative relationship to the executive shares many important structural features in common with group-state corporatist relationships. In another sense, corporatism is used to identify a form of ideology, and particularly to underscore the role of organic conceptions of state and society that weave through nearly all corporatist discourses; this again, provides another link between this understanding of corporatism and Schmitter's (1979) interest model. Apart from organic conceptions, these ideologies emphasise the common pursuit of state defined objectives and the importance of maintaining public order and security. Judicial behaviour needs to be understood within this corporatist understanding of social life.

This corporatist model of judicial-executive relations is further reinforced by the impact of colonialism on post-colonial state structures. As noted above, the impact of colonialism on state structures lay in the formation of a strong executive with a correspondingly weak civil society—a process that led to the development of the 'executive state'. This pattern of state formation was conducive to the development of particularistic linkages between state and civil society; a strong executive (with a weak civil society) can co-opt or integrate actors within state structures. Therefore, in these types of state structures, legal institutions and judiciaries are embedded within state institutions. Corporatism provides a useful model to understand the nature of co-optation and incorporation of these institutions within the states.

We examine below in more detail judicial—executive relations in three countries: Singapore, Indonesia and China. These countries were selected for two reasons. One is that they have all inherited different legal systems: Singapore, a common law system, Indonesia, a civil law system, and China, a socialist legal system. If, despite these different legal forms, a common set of corporatist patterns can be observed across the countries it would lend strong support to the model of statist legalism. The other reason for selecting these countries is that they have varying degrees of market involvement in their economies. On a scale, Singapore[10] would be the most market oriented with China the least though obviously undergoing rapid economic transformation. These differences

between countries permit us to 'control' for the impact of the type of legal system and marketisation on the nature of judicial independence.

Singapore

Singapore serves as an interesting case study because it is located within a common law tradition usually associated with the notion of judicial independence and autonomy. Nevertheless, as will be clear from the subsequent discussion, the rhetoric of autonomy and independence—central to the functioning of legal institutions—has been deeply permeated by the corporatist ideology, characteristic of the Singapore polity. Moreover, the dominance of corporatist ideology has gone hand in hand with an increasingly bureaucratic and hierarchical judicial system. To be sure, the extent of independence can also be determined by other factors: direct executive interference and the manipulation of appointment process. Nevertheless, the Singapore case is interesting in that it reveals a close and consultative relationship between the judiciary and the executive. This linkage is determined by the process of ideological reasoning within the judiciary as well as the structural incentives in judicial organisation, all of which create appropriate conditions for deference to, or compliance with, a dominant executive.

The independence of the constitutional judiciary became a major political issue in 1986 when J.B.Jeyaretnam, an Opposition Member of Parliament, raised this as a matter of public importance in Parliament. Jeyaretnam referred to the instance where a transfer of judge who had found in his favour in the lower court may have been politically motivated. He also made reference to a similar instance in which there was an adverse finding against him on appeal.[11] In response to this, the government then appointed another judge to preside as the sole Commissioner to inquire into the allegation (Tremewan 1994). This judge who had a reputation for acting in favour of the executive (Tan 1987) concluded that the allegations were unfounded, and on the basis of these findings the Parliamentary Privileges Committee proceeded to convict and fine Jeyaretnam for breach of parliamentary privilege. This led to the disqualification of Jeyaretnam as a Member of Parliament (Tremewan 1994). These actions against Opposition politicians highlight the extent to which the law has been used to entrench the rule of the People's Action Party (PAP).

It is of interest to note that this use of legal processes for political ends reflects a more general trend. In fact, in the last decade, Singapore has shifted from the use of the Internal Security Act to employing civil and criminal proceedings against Opposition politicians, such as Jeyaretnam, and more recently, as for example, in the case of Chee Soon Juan, as well as in actions against foreign newspapers and journalists. For example, former Prime Minister and current Senior Minister Lee Kuan Yew has successfully launched a number of defamation actions against foreign newspapers and Opposition politicians.[12] The actions against Oppositional elements highlight the extent to which the judiciary is a key force in entrenching the political dominance of the PAP. The point to be noted from the foregoing is that there is an ineluctable pattern of judicial compliance to executive power.

Clearly, the structure of Singapore's judiciary makes it prone to executive dominance. Of particular importance in this regard is the granting of shortterm appointments to

judges which may or may not be renewed by the government. The Chief Justice, opening the Legal Year in 1993, stated that Judicial Commissioners would hear:

> long cases which would otherwise upset the normal court hearing schedules; or they will hear a small number of cases, whenever sudden surges in the case load, which the core complement will not be able to dispose of within the normal time-scales, threaten to cause backlogs to build again. Such short-term appointments of Judicial Commissioners would avoid the present difficulty in finding Judicial Commissioners because many are reluctant to take the risk of accepting a fixed appointment of one or two years.
>
> quoted in Pinsler (1995:313)

However, given that most Judicial Commissioners go on to become 'full' Judges, it seems more likely that the appointment of Judicial Commissioners is essentially a process by which a kind of probation is imposed on judges. It is a process that gives the executive an important structural mechanism through which compliance can be monitored even after appointment to the bench. In addition to these mechanisms, at the lower court level 'judges enjoy no tenure and are routinely shuttled back and forth between the judiciary and government service' (Jones 1989:3). As well, the constant movement of lower court judges between the bureaucracy and the bench allows for the inoculation of Singapore's corporatist ideology into the judiciary. Quite apart from executive interference, the structural organisation of the Singapore judiciary creates *incentives* for constant co-ordination and concertation with the executive. It is this concertation with the executive that is the hallmark of a corporatist relationship between the executive and the judiciary.

Equally significant are the structural changes introduced by the current Chief Justice in the organisation of the Singapore judiciary, which, it is suggested, has led to a more 'efficient' judiciary. Law Minister Jayakumar has argued that an efficient judiciary is crucial to economic growth and productivity (*Straits Times* 16 November 1994). Similarly, the Chief Justice has maintained that courts are analogous to a business enterprise which serves as a useful component of Singapore's competitive standing in the global economy (Supreme Court of Singapore 1994:87). These comments serve to reinforce corporatist conceptions of the law and the judiciary as important elements of the state's developmental and economic objectives. In addition, recently introduced organisational changes have ensured that judicial authority is organised in a more bureaucratic fashion and circumscribe the autonomy of individual judges. For example, it has been suggested that a sentencing court be established to rationalise the process of sentencing. This, of course, would further diminish the autonomy of the individual judges (Supreme Court of Singapore 1994). The net effect of these structural changes is to impose, through rationalisation and uniformity, a more bureaucratic system of judicial authority.

The significance of these changes in the way the judicial system operates lies in the fact that these procedural and organisational changes make it more likely that the judiciary functions as a part of the executive to implement state policy and objectives. In other words, it becomes a 'policy implementing' type of legal institution where state interests predominate. Indeed, what is fascinating about the Singaporean case is that

structural forces drive even the Singaporean common law system towards a more bureaucratic organisation of the judiciary. These underlying structural processes—regardless of direct executive action—lead the Singaporean judiciary towards adopting a more bureaucratic role within the executive. Consequently, the judiciary becomes more like the rest of the bureaucracy, and begins to function in a highly technocratic way to maximise efficiency. The technocratic role of the judiciary is entirely consistent with the judiciary performing a specialised function within the bureaucracy.

While executive dominance and structural incentives have shaped judicial independence and autonomy, in recent years corporatist ideology has played a decisive role in shaping judicial attitudes and behaviour. The dominance of this ideology has enabled the judiciary to have autonomy, but it is an autonomy that lies within the bounds of state ideology. Hence, it could be argued that it is an autonomy *within* the executive rather than outside as one finds with customary notions of the 'separation of powers'. An observation of the former Attorney-General of Singapore, Mr Tan Boon Teik, serves to exemplify this corporatist ideology when he notes that judicial review of discriminatory exercise of power should not include an evaluation of the merits of a decision. This principle, he argues, represents:

> a self-conscious deference by judges towards the decisions of persons who have relatively greater technical and substantive expertise and are consequently better equipped to decide.
>
> Tan (1988:75)

Furthermore, he goes on to point out that the notions of:

> deference and competence are grounds on which judges have also consciously avoided adjudicating in certain areas of governmental activity such as foreign relations, national security, and political appointments.
>
> Tan (1988:75–6)

It is clear that this notion of deference to executive competence amounts to the argument that judicial action needs to be in congruence with the interests of the executive. In other words, in suggesting that the judiciary yield to executive competence, it points in the direction of a corporatist relationship between the judiciary and the executive. Obviously, this has important implications for the understanding of the doctrine of a separation of powers within this corporatist framework. As the former Attorney-General points out:

> the problems inherent in separation of powers doctrine may however be regarded as the inevitable open-endedness of linguistic categories and the imperfectability of our mental constructions. The result is that reliance on general ideas of constitutional arrangement is inevitably flawed.
>
> Tan (1988:82)

This gives credence to the observation made earlier that the corporatist relationship between the judiciary and the executive needs to be cognised as a division of power *within* the executive rather than as an aspect of the separation of powers.

Further evidence of the role of corporatist ideology in influencing judicial behaviour can be clearly discerned in recent cases that have established a clear juridical foundation for judicial deference to executive power. This pattern has been accentuated with the abolition of all appeals to the Privy Council. This has enabled the Court of Appeal to depart from previous decisions if they were held to be inappropriate in the Singaporean context (Supreme Court of Singapore 1994:89). It is clear that these changes have enabled both the Supreme Court and the Court of Appeal to chart new juridical ground for the exercise of executive power.

A key case in this regard is the action taken by Senior Minister Lee Kuan Yew, his son, the Deputy Prime Minister, Lee Hsien Loong and Prime Minister Goh Chok Tong in the matter relating to a media comment. This refers to the judicial proceedings against the *International Herald Tribune (IHT)* (2 August 1994) for publishing an article entitled: 'The claims about Asian values don't usually bear scrutiny.' 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 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.
>
> 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.

The *IHT* case was of special significance because the judgment went much further than a simple case of an assessment of injury caused by the article in question to personal reputation (which had already been given a very broad reading in earlier defamation action).[13] 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 detected 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[14] 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 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. 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'. The judgment, 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 preemptive strikes, indicative of the exaltation of Efficiency over all other interests' (1995:88).[15] 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* judgment is the appeal, made in the judgment, 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 conditions is neutral and cannot be said to construe any specific ideological belief. However, in the particular context of Singapore, appeal to the importance of local circumstances has a certain meaning 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 corporatist ideology. It needs to be added that the abolition of appeals to Privy Council has given great recognition to this kind of 'local circumstances' argument which is likely to grow in importance.

Both the *IHT* and the Jehovah's Witness cases underscore the pervasive influence of corporatist ideology on judicial behaviour. The task of the judiciary—as evidenced by these examples—is to act in accordance with the executive definition of the public good, which in the Singaporean case is highly technocratic in form. More importantly, the conception of the good suggests a conception of stateness that places emphasis on the maximisation of efficiency and security. In other words, the notion of the state is that of

an enterprise association seeking to maximise certain values. This serves to reinforce the fact that the understanding of judicial independence needs to be located within broader conceptions of the role of law and government. The structural organisation of the judiciary as well as its corporatist ideology propel the courts to act as a policy-implementing institution, rather than as a conflict-resolution institution, acting in concert with the executive. These ideological influences lend strong support to the argument that the corporatist nature of the relationship between the political executive and the judiciary leads to a functional division of power within the executive.

Indonesia

Indonesia provides an intriguing case study in the understanding of judicial independence in East Asia. The 1945 Indonesian Constitution did not explicitly entrench judicial independence; it merely required that the Supreme Court manage the judiciary in accordance with the law (Indonesian Constitution, Articles 24–25). The elucidation to this section of the Constitution notes that:

> Judicial authority is an independent authority in the sense that it is beyond the influence of the government.
>
> Lubis (1990:95)

This elucidation fails to give any substantive elaboration or meaning to the notion of an independent judiciary, and consequently, these notions have been subject to much debate and discussion. In the Guided Democracy period, the independent judiciary was subject to explicit executive interference through Laws 19/1964 and 3/1965. These respective laws authorised the President to interfere at any time when the national interest or security of the state was at risk. Lev points out that ideas of *negara hukum* or Rechtsstaat[16] were:

> submerged and nearly drowned by the explicit patrimonialism of the regime and its radical-populist ideology, which emphasized substantive rather than procedural justice.
>
> Lev (1978:44)

However, within the New Order, ideas of *negara hukum* began to re-emerge (Lev 1978), and, in fact, during the early New Order period, there was guarded optimism in some quarters that a version of *negara hukum* may hold sway, but this soon proved to be unfounded. The landmark change in this was the enactment of Law 14/1970 which acknowledged, or rather reconfirmed, the principle of an independent judiciary. Nevertheless, it still retained numerous powers within the Executive through the Ministry of Justice to interfere in many judicial functions.

As Lubis (1990) points out, what is at stake in this issue is the understanding of the notion of an independent judiciary. It is useful to quote in full the elucidation of the principle of judicial independence in the Indonesian Constitution (1945):

> The Independence of the Judiciary should imply that there is an independent Judiciary free from interference from other state institutions, free from pressures, directions or recommendations, which originated from extra-judicial authorities except in the things permitted by the Law.
>
> Freedom in implementing judicial authority is in itself not absolute because the function of the judges is to uphold the law and to find justice based on Pancasila through interpretation of law, and findings of its basics and principles through cases leading to decisions that reflect the sense of justice of the Indonesian people.
>
> quoted in Lubis (1990:96)

It is clear from the above elucidation that there are substantial limits to judicial independence, and there are clear juridical grounds on which executive interference within the judiciary can be justified. But, perhaps the most interesting aspect of this is that 'independence' functions within the ideological parameters delineated by the state. As the second part of the elucidation makes clear, the judiciary has to act as a policy-implementing legal institution. Independence, within this framework, implies the independence to carry out judicial functions within the context of a dominant state ideology. This view of independence is consistent with a corporatist understanding of the relationship between the judiciary and other parts of the executive. The civil law traditions of Indonesia tend to accentuate the statist nature of Indonesian legal institutions. Indeed, this is further reinforced by the fact that the Indonesian judges—and here, it differs from the Singaporean case where identity is with the bureaucratic ethos—tend to identify with the bureaucracy, seeing themselves as part of the bureaucracy. One implication of this is that it is 'patrimonially associated with political leadership, to whose will it must always be responsive' (Lev 1978:56). As in the Singaporean case, it is a division of power *within* the executive rather than a separation of power *between* the executive and the judiciary.

Further contributing to this corporatist relationship between the judiciary and the political executive, is the idea of cohesion and harmony embedded in notions of stateness. These notions of harmony and cohesion are well reflected in the ideological tradition of the 'integral state', that has played a key role in constitutional and legal debate in Indonesia. Soepomo,[17] a key proponent of this ideology, strongly emphasised the importance of harmony in a speech to the Investigating Committee for the preparations for Independence (from 29 May to 1 June 1945). Here, he argued that:

> state functionaries are leaders who unite spiritually with the people, and the state functionaries should always maintain strongly the unity and the harmony in society.
>
> quoted in Nasution (1992:61)

These notions of an integral state are premised on the assumption that there is an organic relationship between society and the state. Within this framework, the role of legal institutions was to promote certain conceptions of the collective good, not to allocate private rights amongst individuals. In other words, it falls into the category of a 'statist legal' rather than a liberal set of legal institutions.

These organic ideas of stateness have greatly influenced the understanding of judicial independence. Within this organic framework, judicial independence implies a degree of harmony between judicial power and state interests. These notions of stateness strongly influence the way in which judicial-executive relations are cognised and constituted. As with the Singaporean case, the understanding of judicial independence within the framework of the integral state implies the performance of a specialised function within the bureaucracy. Therefore, this interpretation differs from that of judicial independence as understood within the model of liberal legalism where there is mandatory requirement of a clear separation of power between the judiciary and the executive.

Here again, this points to the fact that the understanding of judicial independence within an organic conception of state is radically different from that which obtains within a liberal framework of a state-society relationship. It needs to be recognised that in the Singapore—Indonesia comparison, the analysis points to the fact that whilst an organic view of the state may remain constant, the political ideologies, characteristic of the two states, place a different emphasis on the maximisation of collective goods. In the Singaporean case there is a strong emphasis on the pursuit of technocratic efficiency and internal security, while in the Indonesian case there is a greater emphasis on the pursuit of harmony and security.

Having made the point that the Indonesian conception of judicial independence is corporatist in nature, it is important to recognise that the history of judicial independence and autonomy has fallen far short of even these corporatist standards. While the legal changes in 1970 foreshadowed a more corporatist relationship between the judiciary and the executive (not unlike the Singaporean case), the reality has been that the relationship can be characterised as patrimonial rather than corporatist. It is reflected in a complete subordination of the judiciary to the executive[18] rather than a corporatist pattern of independence and autonomy within the executive.

Nevertheless, the most significant recent change transforming Indonesia from a patrimonial to a corporatist model of legalism has been the advent of the Administrative Court system. The Administrative Court system portends greater rationalisation within the state, which would signal the emergence of greater autonomy and independence within the executive. This, in turn, enables a more technocratic form of policy implementation by the Indonesian judiciary, which will reflect a transition from patrimonial to a corporatist form of judicial-executive collaboration. The key to this transition is the enhanced power of the judiciary within the executive.

The Administrative Justice Act of 1986 was a landmark in the development of the Indonesian Court system. For the first time, administrative acts—those that were *final, particular and concrete* (Otto 1991)[19]—were subject to judicial review. The preamble to the Administrative Justice Act of 1986 places the Act in the context of the pursuit of the developmental objectives as well as the processes of administration and decision making. The rationale underlying these changes is that development requires efficient administration. The preamble statement is important in that judicial review of administrative actions is placed firmly within an essentially statist and policy-making mode of legalism. It makes explicit the view that the purpose of administrative review is to enable the more effective implementation of developmental goals. This inevitably places greater emphasis on the maximisation of technocratic efficiency. In the Indonesian context, these changes are significant as they represent the development of legal

institutions as technocratic and policy-implementing institutions. In so far as the administrative law can be used to rationalise processes *within* the state, the Indonesian case differs from the Weberian models of legal rationality, which imply a rational procedure governing relationship *between* state and society.

As indicated earlier, these changes reflect the greater sense of autonomy enjoyed by judges in the Administrative Court system, thereby confirming a shift from a patrimonial to a corporatist relationship between the judiciary and the executive. In fact, the more technocratic the judiciary becomes the greater the autonomy it has within the executive. Perhaps, the clearest example of this independence, albeit an autonomy within the executive, was the *Tempo* case. *Tempo*, an Indonesian magazine perceived to be critical of the government, was denied a publishing permit by the Ministry of Information. *Tempo* filed action and the Administrative Court instructed the Ministry of Information to issue a permit. The case was appealed to the Jakarta Administrative High Court and eventually to the Indonesian Supreme Court which found in favour of the executive. Despite the eventual failure of the action, the initial decision by the Administrative Court indicates a degree of judicial independence that seems to be lacking in the other courts.

The explanation for this degree of independence is partly to be found in the fact that Administrative Court judges have in their power the use of considerable and powerful bureaucratic resources and instruments to restrain state agencies (for examples, see Quinn 1995). In other words, it is effective because there is a more symmetrical distribution of 'power resources' between the judiciary and the executive, which in turn, provides the basis for a somewhat more symmetrical relationship between these organs. Furthermore, these changes are likely to be associated with a more technocratic conception of judicial functions. However, technocratic goals are likely to be associated within the prevailing conceptions of stateness.

China

There are two specific features in the case of China that serve to complicate the discussion of the independence and autonomy of the judiciary in the People's Republic of China (PRC). First, is the extent of jurisdictional fragmentation within the PRC. This jurisdictional fragmentation can be detected at both a geographic and intra-bureaucratic level. At the geographic level, various governmental units are vested with their legislative and jurisdictional powers which are complemented by the fact that:

> each superior people's court at the provincial level presides over a regional hierarchy of courts which are not bound by that court's decisions or even allowed to cite them as precedents.
>
> Dicks (1995:84)

The problem, as Dicks correctly observes, is the lack of centralisation, which inhibits the development of an effective system of judicial precedent.

In a similar fashion, judicial structure is complicated because power to interpret legislation is distributed within both judicial and state agencies. As Keller (1994)[20] has pointed out, one source of this difficulty lies in the hierarchy of legislative categories within the PRC. This hierarchy consists of:

- primary legislation usually issued by the National People's Congress (NPC);
- legislation or regulation promulgated by state councils and regional People's Congresses; and
- tertiary legislation consisting of regulations issued by central and local government, Ministries and agencies.

The effect of this complex hierarchy is to blur boundaries between policy and law. In particular, it allows administrative bodies to lay claim to exclusive power to interpret regulations issued by them. While the Supreme People's Court has partial authority (delegated from the NPC Standing Committee) to interpret primary legislation (Keller 1994; Finder 1993), this power does not extend to the interpretation of administrative regulations. Indeed, as Keller rightly notes:

> it is no small feat for an administrative body to enjoy formal rights of interpretation over the regulations it has issued and also to require that the courts enforce these regulations as rules of law.
>
> Keller (1994:742)

In the context of the argument of this essay, it might be noted that the constant blurring of the line between policy and law is a crucial distinguishing characteristic of a statist, policy-making oriented legal system.

The second complicating feature of PRC judicial independence that we need to take cognisance of is the relationship between the party and courts. The party is outside the jurisdiction of the People's Court. While the Constitution of 1982 stipulated that political parties need to abide by the Constitution and the law, it remains the case that the party and its organs cannot be sued in the People's Court, and even:

> the acts and policies of the Party cannot be impeached or questioned even in litigation between other organisations and individuals.
>
> Dicks (1995:96)

Apart from this exclusion of court jurisdiction over the party, there have been instances where the People's Court has consulted or referred matters to the relevant party authorities. Furthermore, there have been instances where Procurate and the People's Court have explicitly used party documents and even the personal authority of individuals as sources of law.[21] Further reinforcing party dominance is the fact that at each level of court, there is a corresponding political legal committee or commission.[22] Although these political legal committees dominated the legal system in the 1960s, they declined in importance with the legal reforms of 1979. But, after Tiananmen, these legal committees have played a more significant role (see Baker 1996).

While this relationship between the party and courts remains a distinguishing feature of the PRC legal system, it should not be overlooked that the formal relationship between these bodies is similar to the corporatist relationship between the judiciary and the executive that was evident in both Singapore and Indonesia. Moreover, it also highlights the importance of organic conceptions linking party and legal institutions. As with the other case studies above, the conceptions of stateness—in this case, ideas of the party

state—influence conceptions of judicial autonomy. But while organic conceptions may remain constant, the state, as with Singapore and Indonesia, seeks to maximise different conceptions of the good.

Despite this special characteristic of the PRC legal system, the relationship between the judiciary and other parts of the state and party structures demonstrates many of the corporatist features observed in the other case studies. In particular, the courts are seen as part of the bureaucracy rather than as an entity constituted outside of the executive. Within this framework, the task of the Chinese judiciary is to consult and co-operate with other agencies.

This consultative function of the judiciary extends to the Supreme People's Court (SPC) interpretation of NPC primary legislation. In:

> interpreting these laws the SPC consults closely with the legislative staff of the NPC Standing Committee as well as the officials of any important administrative body affected by the law in question.
>
> Keller (1994:753)

The form of collaboration or corporatist judicial decision with the NPC extends to other administrative agencies as well. For instance, Dicks (1995) is able to substantiate this form of collaboration by citing a number of cases where the court yielded interpretative authority to relevant administrative agencies. The important point to note is that this propensity to seek interpretative guidance from administrative agencies seems to be evident at all levels of the judicial system. Indeed, according to Dicks, this form of consultation may 'well occur at lower levels of authority and visibility as a matter of routine' (Dicks 1995:100). A revealing feature of this consultation process is the extent to which judicial agencies yield to other bureaucratic agencies that were thought to be more competent. This pattern of yielding to other agencies that are thought to be more competent is also similar to the Singaporean case. This, again, serves to underline the important role of the judiciary as a specialised division within the bureaucracy.

The Chinese case reveals a picture of a judicial system that is constantly enmeshed with other bureaucratic agencies, where, in fact, in recent years, the interpretative powers of the SPG have grown substantially. For example, it has issued commentaries to significant legislation.[23] However, this expansion of power has been within the framework of consultation with key institutions. Indeed, it is possible to speculate that, with the further growth of the non-state economy, the role and power of the courts will continue to expand in a manner not dissimilar to the kind of change that occurred in Indonesia with the introduction of the Administrative Court system. This rationalisation is, however, likely to lead to a more symmetric relationship between the courts and other executive agencies rather than to a fundamental restructuring of executive and judicial power. In other words, it is likely to lead to a restructuring in the *terms* of the relationship between the judiciary and the party as well as with other bureaucratic agencies rather than the constitution of a new relationship.

Apart from these aspects of judicial-executive collaboration, a crucial aspect of the Chinese judicial structure, which contributes to its corporatist character, is the role of 'adjudication supervision'. Adjudication supervision *(Shenpan Jianda)* is a mechanism for additional reviews of final judgments. Adjudication supervision applies to both

criminal and civil cases.[24] After filing a petition *(shensu)* for adjudication review, the court or the procuracy investigates the case and if an error is discovered, the judgment is referred to a judicial committee. Each level of court has a judicial committee that supervises the court's work. If the judicial committee decides that 'the case needs to be re-opened and retried it will direct the court accordingly' (Woo 1991:98). Apart from citizens filing for adjudication review, the procuracy itself, on discovering an error, can seek to have adjudication supervision. Moreover, the president of any level of court can also seek to have reviews of judgments in his court. In fact, the court president has considerable power over the review process by having the power to both review judgments as well as direct the work of the judicial committee. It needs to be pointed out that the law on criminal procedure provides no time limit or grounds for re-opening cases, the only consideration being that there be a significant 'error' of judgment. This gives wide discretionary power to official and judicial authorities as well as providing a degree of flexibility to reverse or reconsider judgments in the light of changing circumstances or policy. This is a significant point because, unlike other review or appeal procedures, adjudication can be instituted by official (party or governmental) and judicial authorities.[25] As Woo points out, while

> an appeal is a procedure primarily driven by one of the parties' sense of justice, adjudication supervision involves the legal system's sense of correctness A case resolved to the satisfaction of the parties may nevertheless be re-adjudicated until the legal system is satisfied.
>
> Woo (1991:101)

In terms of the argument of this essay, these procedures may be said to reflect the dominance of a statist legal system where the predominant concern is with an effort to achieve accurate outcomes rather than fair procedures. Furthermore, the manner in which the judicial committee operates tends to institutionalise the corporatist relationship between the judiciary and the executive. A judicial committee exists at each level of the court and consists of the president, vice president, and the various Chief Judges of each division (e.g., economic chamber). In addition, the Chief Procurater is allowed to sit on the judicial committee as a non-voting member (Woo 1991). The judicial committee is vital in arriving at a decision to subject a verdict to review, and in coming to this decision, both the court president and the procurator have a key role to play.

It needs to be noted that apart from adjudication review, the judicial committee performs an important function in providing guidances in resolving contentious issues before individual judges (Baker 1996). By playing this role, the judicial committee serves to circumscribe the authority of the individual judge. In this context, it should be noted that judicial independence refers to the operation of the court as an organic entity rather than to independence and autonomy of individual judges. This is also consistent with the manner in which administrative agencies operate within the state. Again, we find that conceptions of judicial independence are embedded in specific conceptions of 'stateness'.

Perhaps, over and above other considerations, a key role performed by judicial committees is that they enable other state institutions to play a part in both the court process, and, in the final analysis, in the review of verdicts. In the process, the procurator can play an important role in the deliberation of the judicial committee. On the other

hand, individual citizens are denied a role in these judicial committees. Overall, it would seem that one of the most important consequences of this system is to establish consultation and co-ordination between the judiciary and other administrative agencies. This consultative process may be said to constitute the basis of a corporatist approach to the judiciary and the executive.

Summary and conclusion

From the foregoing, it is clear that from the point of view of the development of legal institutions, it is indefensible to assume that the trajectory of institutional formation in East Asia will follow a West European path. The central argument of this essay has been that in the East Asian context, the liberal image of legal institutions, based as it is on a particular conception of markets and civil society, is problematic. Rather, in East Asia the presence of a regulated economy, strong state structures and a managed civil society will tend to engender legal institutions that reflect and seek to implement state objectives and interests. Therefore, these statist legal institutions are more likely to reflect state interests than conflict within civil society. The corporate state, in contrast to the liberal state, seeks the active promotion of a certain conception of the good and implies a highly managed and regulated civil society, organically linked to the state. Accordingly, legal institutions, influenced by the state as an organic and corporate entity, will be oriented towards the implementation of state policy and objectives. More generally, the approach to institutional choice advocated in this chapter requires us to conceive of institutions within the wider ensemble of state-civil society relations. This approach, in contrast to the abstract and ahistorical perspectives of Weberian and rational choice theories, locates institutions in specific historical settings.

In considering the impact of state and civil society on the general character of legal institutions, it has been suggested that the understanding of judicial independence be related to the character and form of legal institutions. Judicial independence in East Asia is shaped by the statist nature of legalism; the core of the relationship between the judiciary and the executive takes on a corporatist form. Corporatism, in this study, is not used in the conventional theoretical sense to denote a system of interest representation but as a system of concertation or collaboration between the executive and the judiciary. This particular corporatist form is critical for an exposition of the nature of judicial independence in East Asia.

More specifically, the case study analysis of judicial independence in Singapore, Indonesia, and China has isolated four key features of judicial-executive relations. First, is the extensive nature of consultation and collaboration between the judiciary and other executive agencies. In the Chinese case, this was formalised through the actions of judicial committees. In Singapore and Indonesia it was reflected in the strong influence of corporatist ideology on judicial behaviour. Clearly, in the Indonesian and Chinese cases the inheritance of civil law and soviet legal traditions created a structure that could be adapted to a corporatist structure. On the other hand, Singapore provides strong confirmation of this point of view primarily because, despite its common law basis and its rhetoric of independence, it provides the best example of corporatist judicial-executive relations. Second, the corporatist relationship between the judiciary and the executive is

paralleled by a *division* of power rather than a *separation* of power. A separation of power implies a judiciary that stands outside the executive, whereas a division of power suggests a division within the executive. Third, there is a strong tendency for the judiciary to yield to other agencies where these agencies are thought to have greater competence. The deference to greater competence within the bureaucracy is an indication that the judiciary sees its role as one of policy implementation. It therefore demonstrates a tendency to consult with those agencies that formulate state objectives. Finally, it needs to be underscored that these corporatist elements of judicial-executive relations draw sustenance from organic conceptions of the state. The specific formulation of organic conceptions of state may vary—Singapore's technocratic conception of the state, China's notions of the party state, and the Indonesian idea of an integral state. However, they all posit an organic link between the state and civil society. Legal institutions and notions of judicial independence and functions are embedded within these organic conceptions of stateness.

The similarities in the understanding of judicial independence in Singapore, Indonesia, and China should not distract one from the fact that there are a number of important differences between these countries. The most significant difference lies in the degree of judicial autonomy within corporatist relationships. The Singaporean model points to a highly technocratic, policy implementing judiciary that has a degree of symmetry in its relationship to the executive. In other words, it has internalised state goals and objectives into its legal reasoning and court procedures. In the Indonesian and Chinese cases the relationship is much more asymmetrical. Nevertheless, there are indications that with the growth of the market sector in these economies, judicial-executive relations will tend towards the technocratic Singapore model.

In conclusion, it is abundantly clear that the study of legal institutions has to be located within a specific historical and socio-political context. The nature and forms of these institutions are shaped and influenced by state structures and organisations, which include conceptions and images of state-civil society relationships held by key actors. Therefore 'stateness' can be defined in terms of the ideologies, goals and objectives of state élites. These conceptions of stateness serve to describe relationships between state and society, and, in turn, institutions need to be understood and analysed within these constellations of state-society relationships. In East Asia, organic notions of state with the conception of a managed and regulated civil society lead to the constitution of statist legal institutions. Within this perspective, we gain a better understanding of the law which, among other functions, serves as an instrument to achieve state ends or objectives. The statist conceptions of legal institutions characteristic of East Asia point us towards a new perspective in analysing law and legal institutions, and highlight, in particular, the significance of corporatism as a model to analyse the role of courts within the state.

Notes

1 See Trubek and Galanter (1974) for a review of these approaches that go under the rubric of law and development. These approaches were heavily influenced by modernisation theory. Its fortune declined in parallel with modernisation theory. However in recent years there has been a revival of interest in issues of institutional governance in developing countries that has led to a renewed interest in ideas of institutional engineering.

2 For an outline of the state-centric view see Evans, Rueschemeyer and Scokpol (1985).

3 The seminal work in this tradition is North (1981). See Montinola, Qian and Weingast (1995) on quasi federalism in China for a recent application of these rational choice arguments to China.
4 The influential work of Bates (1990) on rational choice approaches to developmental political economy provides an example of this intellectual movement from modernisation theory to rational choice theory.
5 For an example of these efforts see Amsden (1989) and Wade (1990). For Southeast Asia, see Robison (1986) and Rodan (1989).
6 Young (1994) distinguishes between the colonial state in Africa and East Asia. For example, he argues that in Indonesia, the 'actual relationships with present communities was buffered and mediated by an indigenous bureaucracy' (1994:20). This may well be true, but the fact remains that the techniques and language of the colonial state remained fairly similar. See, for example, Lev (1985) on the Dutch colonial state in Indonesia.
7 Indeed, if at all, the colonial state had a relatively more open civil society, for example, the role played by trade unions in the colonial era (see Hewison and Rodan 1996). The difference between the two is that in the post-colonial period legitimisation strategies used by the state circumscribed this civil society.
8 For an analysis of the use of law as technique of rule see Jayasuriya (1996a; 1996b).
9 For a somewhat similar distinction to that of Damaška's see Hayley (1991) who distinguishes between public and private law regimes. Public law regimes emphasise the enforcement of public duty while private law regimes allocate private rights amongst individuals. It differs from Damaška's work in identifying the source of these differences in cultural practices.
10 These markets, of course, still remain highly regulated by the state.
11 The allegation centred on the fact that Senior District Judge Khoo was transferred from the Bench to the Attorney General's Department after a judgment in favour of Jeyaretnam.
12 For a discussion of some of these cases, see Tremewan (1994) and Seow (1994); more generally on Singapore's use of law as a technique of rule see Jayasuriya (1996a).
13 See, for example, the case note by Hor (1992) on the defamation case against Jeyaretnam.
14 Article 15 provided for religious freedom. Of course this article and other constitutional rights in Singapore is subject to the Article 14 (2) (c) derogation clause that permits the regulation of constitutional rights if they were 'necessary or expedient in the interests of the security of Singapore'.
15 She goes on to note that such a pre-emptive approach could 'open wide the door to mala fides as the relevant decision maker has but to point to the low standing of "possibility"' (Thio 1995:88–9).
16 *Negara hukum* refers to a state based on legal foundations (Rechtsstaat). See Lev (1978) for a discussion of the various usages of this concept in Indonesian political discourse.
17 Soepomo (1903–88) was a distinguished scholar of adat law, and held a number of governmental positions. He was a member of the Preparatory Committee of Independence and a Chairman of the Drafting Sub Committee that was part of the larger Drafting Committee of the Constitution of 1945 chaired by Sukarno.
18 For a more detailed exposition, see Lev (1978) and Lubis (1990); ICJ (1987).
19 Otto (1991) provides an overview of the origins of the Administrative Court system.
20 See also Keller (1989).
21 For examples of such cases see Dicks (1995).
22 The close relationship between the party was well illustrated when after Tiananmen, Ren Jian-Xin, President of the Supreme Court sponsored a supreme court telegram to the government calling the student demonstrations a counter revolutionary movement.
23 See Jones (1994), on the interpretation of the general provisions of the civil law.
24 In civil cases party to a lawsuit may petition the court to re-open the case; however, in a criminal case any party victim's family or any other citizen may apply for adjudication review. Moreover, citizens are not given a formal role in the judicial committee.

25 For some examples of the procurate's role in rectifying 'wrong verdicts' see Lo (1995).

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9
BETWEEN LAW AND POLITICS

The Malaysian judiciary since independence*

Khoo Boo Teik

Introduction

Historically the judiciary in post-colonial Malaysia might be said to have truly come of age on 1 January 1985 when the Malaysian judicial system severed its remaining ties to the Privy Council in the United Kingdom. At the same time, the hitherto highest court in Malaysia, the Federal Court, became the final court of appeal in the country, with the new name of 'Supreme Court'.

About two-and-a-half years later, two former Lord Presidents (of the then Federal Court) and the serving Lord President (of the Supreme Court) had occasion to refer to the 'independence of the judiciary' when they addressed two conferences (on law, the judiciary and the constitution), held within four months of each other in Kuala Lumpur. But it was not to the Malaysian judicial system's 'independence' from the Privy Council to which these speakers alluded. In one way or another, each of them spoke on the independence of the judiciary in the commonly accepted sense of a judiciary being free to exercise its duties and powers, separate and without interference from the legislative and executive branches of government. (See Jayasuriya, Introduction, this volume.)

In his Royal Address to the *Fourth International Appellate Judges Conference* and the *Third Commonwealth Chief Justices Conference* on 20 April 1987, for example, Sultan Azlan Shah, Sultan of Perak and former Lord President of the Federal Court, noted that:

> In certain times, the role of the judiciary is misunderstood. In others, it is criticised. Occasionally, even the executive or the legislature is displeased with some of the decisions made by judges. In legal systems which are based on the common law, the judiciary is sometimes accused of usurping the functions of the legislature. Judges are told that their function is not to make laws but merely to interpret them.

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> Judges are also subject to criticisms for interpreting certain laws which are not in accordance with the *original intent* of the executive. But whatever the criticisms and whatever the pressures asserted [sic] on the judiciary, judges should never lose sight of their roles.
>
> Azlan Shah (1988:2–3)

Four months later, Sultan Azlan Shah, in his Keynote Address to the *Conference on the Malaysian Constitution After 30 Years*, roughly repeated his point when he remarked

> That there are dangers in a judicial imperialism I know only too well; judges have one function, politicians another, and each is essential to the harmonious application of the Constitution…
>
> Much then can be achieved when those twin lawmakers, Parliament and the judiciary, work in harmony, united by that common philosophy reflected in the Constitution. It is not for one to trespass into the realm of the other, and improper for the judge to raise expectations that cannot be fulfilled. Between these two essential pillars of the Constitution there must be harmony.
>
> Azlan Shah (1987:8–9)

At this second conference, Tun Mohamed Suffian Hashim, retired Lord President of the Federal Court (and Sultan Azlan Shah's predecessor), surveyed various administrative developments pertinent to the courts and the Malaysian Constitution and briefly recalled that it was only at *Merdeka*, or independence (from British colonial rule) in 1957, that, 'for the first time the Constitution contain[ed] clear provisions securing the independence of' the judiciary. The words "independence of the judiciary" nowhere appear in the Constitution, but several provisions were written into it to in fact secure its independence' (Suffian Hashim 1987:2)

A more sustained comment on the judiciary was made by Tun Mohamed Salleh Abas, then President of the Supreme Court, who observed during the April 1987 conference that

> as a universal principle…the judiciary must be free and independent. It must be free to make a choice amongst different competing values. Law is not a matter of words expressed in the dull language of the statute or in the archaic and formalistic expression of writs, motions and summons, but consists of ideas which embody moral values expressed by words. Whilst there may be differences of opinion on the question of choice of these values, it is what the judges decide that matters and must be accepted. We have to trust the judges because that is the system.
>
> Salleh Abas (1987:6)

However, he continued, it was 'not an easy task' for a 'developing society to maintain this independence', fundamentally because

> The law itself is not indigenous; it is a product of a Western civilisation implanted in most countries in the world including Malaysia irrespective of the native cultures and civilisation. The Western-type legal institutions in these countries are comparatively young and new, in some countries hardly more than 150 years old. The appreciation and regard for the law as well as the benefits derived from it have yet to be felt in all strata of the society.
>
> Salleh Abas (1987:6)

Specifically, though not exclusively, it was because

> politicians whose activities are guided by the law, in their impatience to show results of their policy, sometimes tend to regard law as an impediment to that which they hope to achieve. These perceptions are dangerous and if not properly contained could lead to undesirable results.
>
> For this reason…the judiciary must, in order to retain its freedom and independence and to be of use to the society, steer its course carefully and keep itself within its constitutional bounds, just as the executive and the legislature should keep themselves to their own domains prescribed by the Constitution.
>
> Salleh Abas (1987:6–7)[1]

Reading the comments of these illustrious speakers today, one gets the impression that those comments were very guarded, almost more plaintive than assertive. Naturally the speakers, given their stature, legal training and experience, would express themselves with considerable caution whether before a 'galaxy of distinguished legal luminaries' (Azlan Shah 1988:1) or a broadly composed audience. But already their thoughts couched an underlying concern about the continued independence of the Malaysian judiciary against a background of developing executive-judiciary skirmishes, which were themselves unfolding under uncertain political conditions in the country.

Yet little could they, or practically anyone else, have suspected then that, within one year of those conferences the Lord President, Tun Salleh Abas, would have been removed from office following the findings and recommendation of a special tribunal in an unprecedented case which, in the memory of most Malaysians, marked the very nadir of judicial (mis)fortune in the country. Indeed the removal of Salleh Abas was followed by the dismissal of two of his Supreme Court colleagues when they, together with three other Supreme Court judges sought to come to Salleh Abas's aid.

To add insult to the loss of independence, the eight years since 1988 have seen new controversies that have raised questions about the credibility and impartiality of the judiciary. It is the aim of this essay to explore this issue and arrive at a preliminary evaluation of the position of the Malaysian judiciary today. In doing so it first reviews the history of the Malaysian judiciary from 1957, the year of independence, to mid-1988 when the crisis of the judiciary reached its climax. By so doing, it hopes to contribute to a broader understanding of the relative vulnerability of a judiciary when it is caught

between an unusually tense intrusion of politics into law and a parallel intru sion of law into politics.

Before the mid-1980s: independence and conservatism

Until those fateful days and hateful events of 1988, the Malaysian judiciary was widely held to be an independent institution. Its basic character as a branch of government, separate and autonomous of the legislature and executive, was secured by constitutional guarantees. The judiciary was symbolic of the rule of law, hallowed in principle and respected in practice. No doubt the Malaysian judiciary even then suffered its share of imperfections and shortcomings, but its competence and impartiality were not questioned. On balance, it was not seriously wanting when judged by such doctrines and determinants of judicial independence as judicial immunity, the security of judicial appointment, remuneration and tenure, the exclusion of judges from hearing cases involving themselves, the prohibition of discussion of cases *sub judice*, the protection of judicial conduct and performance from Parliamentary debate (except in accordance with strict procedures), the abstention of judges from political involvement and judicial control over case and court assignment (Suffian 1979a).

One can briefly speculate on the reasons why the independence of the judiciary remained unviolated, or, to put the question differently, why the judiciary did not encounter direct interference or dire challenges by the executive or legislative branches of government which would have undermined its independence. These reasons would, arguably, include the personal and professional respect that the first three premiers of Malaysia, all England-trained lawyers (Tunku Abdul Rahman, Tun Abdul Razak and Tun Hussein Onn), had for the rule of law (Suffian Hashim 1979a:xcviii),[2] a multiethnic élite's ability to maintain 'a democracy without consensus' (von Vorys 1975), and its comparatively successful governance of an ethnically-ridden, class-riven, but relatively prosperous society (Jomo *et al.* 1996).

But, in general terms, constitutional guarantees and the forbearance of the executive or legislature towards the judiciary only make up part of the political and institutional balance needed for judicial independence. Among other factors, the judiciary itself should presumably issue no provocation for interference, at least from the point of view of the other two, and surely more powerful, branches of government. In that, the Malaysian judiciary may be said to have upheld its side of the balance: seeking to stay autonomous of the immediate political process, it consistently 'traversed the path of strict legalism or literalism' (Lee 1995:2), as one expert on Malaysian constitutional law phrased it.

One can sense the 'strict legalism' of the Malaysian judiciary up to the mid-1980s from the occasional pronouncement made by a judge when delivering judgment in a case. For example, the judge, in *Attorney-General* v. *Chiow Thiam Guan* ([1983] 1 MLJ 50), simply said that 'The law may be harsh but the role of the courts is only to administer the law as it stands'. Many variations of this judicial theme, characterised by another legal specialist as 'judicial deference to legislative intent' (Groves 1978:31), may be found and cited.[3] It may suffice here to take a fuller expression of this judicial position, enunciated

by Raja Azlan Shah, CJ, as being broadly representative of judicial sentiment regarding the separation of powers and judicial review:

> The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution… Those who find fault with the wisdom, or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature and not the courts; they have their remedy at the ballot box.
>
> *Loh Kooi Choon* v. *Government of Malaysia* [1977] 2 MLJ 29

It may be said, too, obviously without implying that judicial opinion is monolithic, that the learned judges took doctrinally comparable positions in key cases involving constitutional law which, by their character and legal boundaries, directly pitted litigants against the state. Some of those areas of constitutional law required judicial decisions on matters of potentially far-reaching political ramifications, such as the freedom of speech, right to personal liberty, mandatory punishment, emergency powers, judicial review and amendments to the Constitution. In notable cases involving such matters in Malaysia as the proclamation of Emergency (*Johnson Tan Han Seng* v. *Public Prosecutor* [1977] 2 MLJ 66),[4] sedition (*Public Prosecutor* v. *Oh Keng Seng* [1977] 2 MLJ 206),[5] the right to travel abroad (*Government of Malaysia and Ors.* v. *Loh Wai Kong* [1979] 2 MLJ 33),[6] constitutional amendments (*Loh Kooi Choon* v. *Government of Malaysia* [1977] 2 MLJ 187),[7] official secrets (*Lim Kit Siang* v. *Public Prosecutor* [1980] 1 MLJ 293), mandatory death sentence (*Public Prosecutor* v. *Lau Kee Ho* [1983] 1 MLJ 157), the courts decided in favour of the state. In the process, as a thoughtful assessment of the Malaysian judiciary's 'discharge of its constitutional duty since Merdeka' has suggested:

> the Courts have adopted very strict and literal interpretations of constitutional provisions relating to fundamental liberties and have consistently upheld the validity of Acts of Parliament,…even… where parliamentary action has rendered meaningless, for practical purposes, fundamental liberties enshrined in the Constitution.
>
> Thomas (1987:97)[8]

Certainly 'strict legalism' did not mean that the judiciary was bound to decide in favour of the state and its bureaucracy. In *Selangor Pilot Association* v. *Government of Malaysia and Anor* ([1975] 2 MLJ 66),[9] a case involving the constitutional right to property, for instance, the Federal Court ruled against the state only to have its decision overruled by the Privy Council.[10] The area of administrative law, too, saw several important decisions in favour of individual litigants contesting unfair or unlawful bureaucratic procedures.[11] In *Ministry of Home Affairs, Malaysia* v. *Datuk James Wong Kim Min* ([1976] 2 MLJ 245), the court held that the detention order under Sarawak's Preservation of Public Security Ordinance 1962 was unlawful as it was made at a time when the detainee was

not in Sarawak.[12] The court also set aside the detention orders for three detainees in *Re Tan Boon Liat @ Allen and Anor. Et al.* ([1977] 2 MLJ 108) because of the authorities' failure to comply with legal procedures governing the functioning of the Advisory Board.

For all that, it cannot be said that the executive and Parliament did not give ample provocation to the judiciary, in a manner of speaking, to intervene in 'the very common practice of Parliament taking away by the left hand what the Merdeka Constitution had given by the right hand' (Thomas 1987:97). From Parliament, where the executive and ruling coalition had always held the two-thirds majority necessary for passing amendments to the Constitution, came a battery of new laws, and amendments to existing laws—notably, the Internal Security Act 1960, Essential (Security Cases) (Amendment) Regulations, Sedition Act 1948, Official Secrets Act 1972, University and University Colleges Act 1971, Printing and Printing Presses Act 1984, Societies Act 1966, and Trade Union Act 1959—which cumulatively made it 'incredulous to talk of Constitutional Guarantees of the right against arbitrary arrest, to free speech, election, assembly and association when alongside exist laws wholly incompatible with such rights' (Nijar 1987:201).

The Malaysian Bar Council, the elected representatives from opposition parties, non-governmental organisations, academic staff associations and trade unions frequently protested about the executive and Parliament's tendency to enact harsh statute laws. By the 1980s there was wide opinion that in fact the state in Malaysia had by punitive legislation and police enforcement created an ill-concealed form of legalistic authoritarianism, derided in local parlance as the Barisan Nasional's substitution of 'rule by law' for the 'rule of law'. The judiciary could not, of course, participate in non-exalted forms of protest. But it also refrained from developing common law that might have substantively mitigated against the prevailing regime of repressive statutes.[13] To take a case in point, when the state's use of the Essential (Security Cases) (Amendment) Regulations 1975 was invalidated in the landmark case, *Teh Cheng Poh* v. *Public Prosecutor* ([1979] 1 MLJ 50), it was the Privy Council, not the Federal Court, which decided against the state.[14]

Whatever one calls it, the 'strict legalism' or 'judicial deference to legislative intent' of the Malaysian judiciary led politically to a 'pragmatic conservatism' (Thomas 1987:98). Abdoolcader J, when considering the highly politicised suit brought by the Merdeka University sponsors against the government, supplied an eloquent clarification of what 'pragmatic conservatism' might mean:

> I am not concerned with the political undertones or overtones or whatever that may affect the questions raised in this action, and in this trial I am moved by no considerations other than determining the issues involved purely and strictly within the confines of the Federal Constitution and the law, abjuring any concomitant political or emotional offshoots springing like Athena from the head of Zeus in its wake…. I should add that unconstitutionality and illegality of administrative action and not the unwisdom of legislation or executive discretion is the exclusive and narrow concern of judicial review and control of administrative acts.

Merdeka University Berhad v. *Government of Malaysia* [1981] 2 MLJ 356[15]

And, consequently, if the Malaysian judiciary rejected the 'multi-faced activism and creativism [sic]' (Faruqi 1987:109) which some Malaysian specialists in law believed that courts should adopt, one can advance some explanations, even if these are partly founded on the wisdom of post-1988 hindsight.

The judiciary is composed of individual judges sitting or presiding in courts at various tiers. These judges are not just human beings in the sense of being fallible, as both the supporters and detractors of judicial independence sometimes argue, but, critically, social beings who are conditioned by personal and social circumstances. One may take the first four Lord Presidents of the judiciary in independent Malaysia for illustration. Tun Mohamed Suffian was a government scholar who completed his legal studies in England, spent much of his distinguished career in the Malayan Judicial and Legal Service (the legal counterpart of the prestigious Malayan Civil Service) before being elevated to the bench. Raja Azlan Shah was born of royalty, and had an equally distinguished career, again in government, before becoming a judge and rising to be Lord President. Some time after his retirement as Lord President he became the Sultan of Perak and, subsequently, the Yang diPertuan Agong of Malaysia. Tun Mohamed Salleh Abas, another government scholar, obtained undergraduate and postgraduate degrees in law in England. Almost his entire career in law before he became a Federal Court judge was spent in the Attorney-General's Chambers—as Senior Federal Counsel, Deputy Public Prosecutor, Parliamentary Draftsman and Solicitor-General. He earned the distinction of being the first person 'to be appointed to the highest judicial tribunal in the country who does not already belong to the judicial fraternity' (*Malaysian Law Journal (MLJ)*, May 1979, lxxxvii). Tun Hamid Omar, who replaced Salleh Abas, had been State Legal Adviser to the governments of Trengganu, Penang and Perak, Chief Registrar of the Federal Court and Parliamentary Draftsman before becoming a judge (*MLJ* May 1980:lxxiii–xxxviii). Their individual qualities, credentials and records notwithstanding, these judges spent long years in the corridors of government helping to frame its laws, fight its legal battles and, in short, protect its interests.[16] It would be peculiar not to find in the personal and social circumstances of these men—and, by extension, most of their judicial peers—an easy, if not habitual, affinity with their non-judicial counterparts among Malaysia's ruling élite.

One can go further. In their writings and lectures, conducted away from the courtroom, one finds essentially the ideological premises and deep-seated social and political convictions of the ruling élite. They might have varied in shade, accent and detail but they intuitively accepted 'the country as it stands'. They might not have often spoken on non-judicial matters such as the economy, state policies, or overtly political issues such as religious extremism but when they did, their views were unlikely to differ from 'official' positions. Salleh Abas, for instance, while he was Solicitor-General, once spoke on the desirability of foreign investment at a time when there had been demonstrations against multinational companies in the Southeast Asian region. He was concerned that a code of conduct should be established between foreign investors and the host government to minimise the malpractices by the foreign investor so as to contain the potential resentment of the local populace. That his conclusion was underpinned by moral

concerns was readily understandable for a deeply religious person like him but it did not detract from his basic support for ‘private enterprise’, ‘foreign investment’ and ‘state economic intervention’:

> government intervention is necessary to ensure the attainment of these objectives [of the redistribution of wealth through the New Economic Policy] but a word of caution is needed here because such intervention is always fraught with inherent danger of corruption and nepotism… Ultimately the only solution is that the law must be strong and the rules of law strictly observed. If this is not so, the fabric of society itself will collapse and foreign investment will be of no use.
>
> Salleh Abas (1977:xi–xv)

Faced with an Islamic resurgence in the 1970s, Tun Suffian himself made no secret of his detestation of:

> [recent] events in Iran [which] give encouragement to Muslim extremists in Malaysia who desire the enforcement of Muslim law, criminal and civil, to all Muslims and non-Muslims alike, who applaud the literal interpretation given to Muslim law by their brethren in that oil-rich country—a state of affairs which, if introduced in Malaysia, would mean that the present judicial system would be replaced by Muslim religious courts, all non-Muslim and women judges who have rendered distinguished public service would be dismissed, the word of a Muslim witness would always be preferred to that of a non-Muslim, non-Muslim lawyers would be disqualified; and outside the legal system Muslim women would be denied education and the opportunity to secure economic independence and play a full and satisfying part in the economic, social and political life of the nation.
>
> Suffian Hashim (1979b:lvi)[17]

Tun Suffian was speaking as a jurist no doubt. Yet he could just as well have been raising an alarm over ‘Muslim extremism’ on behalf of Malaysia’s ruling élite—an élite, moreover, whose leading Muslim members had been trying to promote Islam in politically acceptable ways in the country.

For the judges, men and women with professional careers, social backgrounds and personal beliefs not radically different from the Lord Presidents’, the first 30 years of Malaysia’s post-colonial history could be conceived, among others, in two ways. Viewed positively those years were a period of nation-building after the departing colonial authority had bequeathed a serviceable state to a newly independent nation. Other than the politicians who were accustoming themselves to the substance and forms of power, it was incumbent upon those trained in different departments of civil, legal and professional service to build on their collective institutional inheritance—in other words, the three branches of government. Seen negatively the first 30 years of Malaysia’s post-colonial history contained many moments and periods of political turbulence. These arose from a lingering insurrection led by the Communist Party of Malaya, a wrenching secession of

Singapore from the Federation of Malaysia, an unnerving confrontation with Indonesia, a traumatic outbreak of interethnic violence in Kuala Lumpur and several declarations of a state of emergency (including the suspension of Parliament in 1969). Each of these events did not come close to overthrowing established rule. But they were political crises which tried the integrity of the newly-independent state.

Under those circumstances, it would have been uncharacteristic for the judiciary nurtured on English common law to regard itself as one branch of government, to be inclined to lock horns with the other two branches of government. It was more typical to find a consonance of view and sentiment among the three branches of government on critical issues related to 'national interest' and nation-building. Here it is instructive to recall that when the Merdeka University case reached the Supreme Court, Suffian LP (delivering the majority judgment reached by him, Azlan Shah CJ, Salleh Abas J and Abdul Hamid J) remarked:

> it is unfortunate that there is a widespread tendency on the part not only of the Chinese to demand the establishment of this or that institution of learning as part of a campaign to win favour with the electorate. This is especially marked when a general election is looming. An unfortunate effect of this tendency is the need to appeal to racial and linguistic sentiments and the arousing of strong emotions on the part of those whose language is being championed and equally strong reactions on the part of those whose language is thought to be threatened. It is realized that this is a legacy from pre-Merdeka days when the different races were educated in separate compartments. Now that we have been in charge of our own destiny for 25 years, our people should be mature enough to realize the importance as regard sensitive issues of keeping the political temperature down rather than up, they should agree to regard universities and schools as an educational rather than a political problem, and that they are a vital instrument in nation-building.
>
> *Merdeka University Berhad* v. *Government of Malaysia* [1982] 2 MLJ 243[18]

These considerations alone need in no way pre-determine judicial opinion in any single case, which is the safeguard of judicial impartiality. But, in key areas of constitutional law where politics easily joined with law and the legitimacy of state rule is subject to adjudication, they predisposed the judiciary to an empathy (all the stronger for being intuitive) with reasons of state—which helped to lay the basis of strict legalism.

The mid-1980s: independence lost

For any active politician accustomed to the wielding of power, the idea that law should stay above politics, or that politics should not intrude into law, cannot be very convincing. Almost by necessity law and politics are inseparable in the political agenda of an activist executive bent on transforming his society, such as Malaysia's fourth prime minister, Dr Mahathir Mohamad.

That Mahathir would pursue his political agenda right up to the apex of Malaysian society was indicated in 1983 when he tried to pass the Constitution (Amendment) Bill 1983 to curb the power of the Malaysian royalty.[19] By then, Mahathir was already practised in the art of amending the Constitution without much public outcry, but here he met an impasse. The Bill which sought to amend Article 66 of the Constitution in order to remove in effect royal assent to future parliamentary bills roused strong opposition from royalty and their supporters. Simultaneously the proposal of the Bill to amend Article 150—to transfer the power to declare an emergency from the Yang Di Pertuan Agong to the prime minister—met strenuous objections from non-royalist quarters alarmed at the concentration of power in the hands of the executive. In the event, the Malaysian constitutional crisis of 1983–4 was stalemated and later settled by negotiations between Mahathir's party, UMNO, and royalty.

During this political crisis, the judiciary was a mere spectator, there being no legal contestation. But barely three years later came a series of key High Court and Supreme Court cases in 1986–7 which were decided against the government. In *J.P.Berthelsen* v. *Director-General of Immigration, Malaysia and Ors*. ([1987] 1 MLJ 134), the Supreme Court allowed Berthelsen's appeal against the cancellation of his employment pass.[20] The High Court rejected the government's reasons for turning down Aliran's application for a permit to publish a fortnightly magazine in Malay in *Persatuan Aliran Kesedaran Negara* v. *Minister of Home Affairs* ([1988] 1 MLJ 440).[21] Despite earlier setbacks, Lim Kit Siang, the leader of the parliamentary opposition, was granted *locus standi* in *Lim Kit Siang* v. *United Engineers (M) Sdn. Bhd. (No. 2)* ([1988] 1 MLJ 182)[22] to bring suit against United Engineers (M) Sdn. Bhd. and the government, and an interlocutory injunction restraining these parties from signing the RM3.4 billion North-South Highway project contract. In *Inspector-General of Police, Malaysia* v. *Tan Sri Raja Khalid bin Raja Harun* ([1988 1 MLJ 182), the Supreme Court reaffirmed a High Court decision that police had wrongfully charged Khalid under the Internal Security Act. In *Public Prosecutor* v. *Data' Yap Peng* ([1987] 2 MLJ 311), the Supreme Court upheld a High Court decision that the public prosecutor's transfer of the case from the Sessions Court to the High Court encroached upon judicial power which was vested in the courts under Article 121(1) of the Constitution.[23]

Several of these cases hinged on procedural and administrative matters. In the Berthelsen case, the Supreme Court concluded that the Director-General of Immigration was wrong not to have granted Berthelsen an opportunity to make representations against the cancellation of his work permit as 'the rules of natural justice' required.[24] When deciding that the Home Affairs Minister's reasons for rejecting Aliran's application were invalid, Harun J remarked that 'the granting of a permit to print and publish a magazine under the 1984 [Printing Presses and Publications] Act should be made as a matter of course provided of course that all the requirements for such a permit have been complied with'.[25] In *Inspector-General of Police, Malaysia* v. *Tan Sri Raja Khalid bin Raja Harun*, the court held that the mismanagement of a bank with which the accused was allegedly connected gave no evidence to suggest that he had acted in a manner prejudicial to the security of the country.

The issues were more substantive in *Lim Kit Siang v. United Engineers (M) Sdn. Bhd. and 3 Ors. (No. 2)* ([1988] 1 MLJ 50), not least because the court seemed to incline towards liberalising *locus standi* for public interest litigation. For example, when United

Engineers and the government wanted Lim Kit Siang to post an 'undertaking in damages', part of the judgment by V.C. George J responded:

> To my mind, in this kind of public interest litigation, to insist on imposing an undertaking in damages is to thwart 'the public-spirited citizen from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped'. The Court should be vigilant to see that its process is not being abused by frivolous or vexatious claims or claims that are not brought *bona fide*. But once satisfied that there are *bona fide* serious questions to be tried in respect of a genuine public interest litigation, it seems to me that the objective of the Courts having the jurisdiction to entertain such litigation would be neutralized if meaningful undertakings in damages have to be provided by the plaintiff.
>
> *Lim Kit Siang* v. *United Engineers (M) Sdn. Bhd. and 3 Ors. (No. 2)* [1988] 1 MLJ 50

Lim Kit Siang's victory was shortlived, however, since United Engineers and the government quickly won their appeal in *Government of Malaysia* v. *Lim Kit Siang* ([1988 2 MLJ 12).[26] Judicial power, manifesting in court assignment, lay at the crux of *Public Prosecutor* v. *Dato' Yap Peng*. There again, the executive claimed the last word: it responded to its loss by the drastic measure of amending the Constitution to excise the vesting of judicial power in the courts (Lee 1995:50–2).

Several of the above judgments held the executive to a strict accounting over procedural provisions and administrative rules 'in accordance with law'. They were not insignificant but substantively they meant that those who had successfully sued the government had made the most of the inefficiency, laxity, presumption or arrogance of the executive and its bureaucracy. Others 'signalled that some members of the judiciary were prepared to exercise judicial control over executive actions and were not prepared to countenance procedural expedients, such as *locus standi*' (Lee 1995:50).

Had these decisions been spread out over a number of years, they would probably have belonged with the occasional pre-mid-1980s' decision against the government and not aroused excitement outside legal circles. But telescoped into the very short and extremely tense period of 1986–7, the court decisions which went against the government gave the government's opponents much exuberance and caused the executive great vexation. Both sides came to believe that the judiciary had arrived at a novel liberalism and a 'fierce independence' (Jayasankaran 1988:8).

If there was some truth to that it was mostly conferred by the political tension and public disaffection of 1984–7. Throughout that period, Mahathir, his administration, his party and his coalition partners, were besieged by financial scandals, political crises, intra-party factionalism and intra-coalition disputes (Khoo 1995:209–31). The government had many opponents—in the opposition parties, press, non-governmental organisations and intellectual circles—who were increasingly frustrated by corruption, maladministration, lack of public accountability and the concentration of executive power. Mahathir himself had many opponents within UMNO who charged him with economic mismanagement, cronyism and an autocratic style of leadership.

The 1980s' politico—juridical dissent against the executive bore no resemblance to the communist insurrection, Indonesian confrontation, Singapore's secession or the 13 May 1969 interethnic violence. The security and integrity of the state were not at stake: Mahathir even led the Barisan Nasional to victory in the 1986 general election. But the urban middle-class voters, those most exercised over the scandals, overwhelmingly supported demands for 'public accountability', 'transparency' and 'freedom of information'. These were demands which could find sympathy among 'men of integrity', such as former premier Tun Hussein Onn, former Lord President Tun Suffian,[27] and former Auditor-General Tan Sri Ahmad Noordin Zakaria.[28] Within UMNO, Mahathir's opponents, who included almost half of the Cabinet, wanted an end to his leadership of party and government. In other words, the ruling élite was split.

Arguably, the judiciary, too, was split. The politically charged cases of *Lim Kit Siang* v. *United Engineers and 3 Ors.*, and *Government of Malaysia* v. *Lim Kit Siang*, as well as the constitutionally significant case of *Public Prosecutor* v. *Data' Yap Peng*, had successively turned on 3:2 majorities, with the executive winning only one out of the three decisions.[29] Strictly speaking, the courts continued to steer clear of the immediate political process. And, undoubtedly, the judges needed no reminder that 'to say that the law is buried deep in the hearts of judges and will only manifest itself according to the emotional and psychological attitude of judges is, to say the least, not only a misconception of what the law is but also an unfair criticism' (Salleh Abas 1989:146). Under the circumstances of the mid-1980s, however, even the most politically disinterested Malaysian judge would have found it enormously difficult to remain impenetrable to the public mood, as George J intimated when he quoted a remark made by Abdoolcader SCJ a few years earlier:

> Even if the law's pace may be slower than society's march, what with increased and increasing civic-consciousness and appreciation of rights and fundamental values in the citizenry, it must nevertheless strive to be relevant if it is to perform its function of peaceful ordering of the relations between and among persons in society, and between and among persons and government at various levels.
>
> *Lim Kit Siang* v. *United Engineers [M] Sdn. Bhd. and 3 Ors.* [No. 2] [1988] 1 MLJ 50[30]

However, an executive, smarting from several setbacks, chose to interpret each quickening of 'law's pace' behind 'society's march' as fresh evidence of an attempted judicial usurpation of executive prerogative.[31] Since anyone can sue the government, the government can no longer decide on anything with certainty. Every decision can be challenged and perhaps overruled. Thus the government is no longer the executive. Others have taken over that function (Suhaini 1988:27).

The judiciary was in a dilemma. Outside the courts, the law had progressively been transformed into the very substance of politics. The Constitutional crisis of 1983–4 had shown how the executive could employ law to tilt the prevailing balance of power between itself and the monarchy. Later on, in the mid-1980s, Parliament added amendments to existing legislation or passed new laws which successively diminished the scope of civil liberties. The most draconian of the new laws was the Official Secrets

Act. But its passage in 1986 encountered broad-based protest when a large number of very different organisations formed a solidarity front to press instead for a Freedom of Information Act (Gurmit Singh 1987). But all that came to a climactic end in October 1987 when the executive crushed the popular dissent of the mid-1980s. Employing the Internal Security Act, it arrested over a hundred of its political opponents (Khoo 1995:271–86).

Inside the courtrooms, politics appealed to law. Even before the UMNO split of 1987 occurred, there had already been 'a rash of political cases which have recently engaged the attention of our Courts in the Federal Capital, in Ipoh and in Penang'.[32] The 'rash' had surfaced in the mid-1980s with the Malaysian Chinese Association crisis of 1984 when Tan Koon Swan challenged the incumbent party president Neo Yee Pan, in a highly acrimonious battle which at a critical juncture extended to the court. The case of *Kok Wee Kiat* v. *Chong Hon Nyan* ([1985] 2 MLJ 130), and related suits, supplied Tan Koon Swan and his allies the court relief which helped them eventually to defeat Neo Yee Pan and his faction. The 'rash' culminated in 1988 with *Mohamed Noor bin Othman* v. *Mohamed Yusof Jaaafar* ([1988] 2 MLJ 129) when Harun J judged in the High Court in February 1988 that UMNO, by contravening the Societies Act, was an illegal party (Khoo 1995:286–94). He ordered the party to be deregistered. In a tactical departure from the executive's previous practice, Mahathir, as UMNO President, declined to appeal the High Court decision. Instead he formed a new party, UMNO (Baru) (or 'New' UMNO) which excluded his staunchest opponents. Politically outmanoeuvred, the latter once more took battle to the independent terrain of the court. They sought to overturn the High Court deregistration of UMNO. They wanted only that the party's 24 April 1987 election which Mahathir had won by a mere 43 votes, should be declared null and void to pave the way for new party elections.

In January 1988, when the first UMNO case was impending, Mahathir had warned: 'Don't get me wrong. If [the suit] goes to the courts… I don't care what the result is' (Jayasankaran 1988:6). Now that political struggle and legal contestation had fused at the highest level, he would not—at least not yet—let the appeal go to court. Salleh Abas, scheduled a full panel of nine 'King's Judges' to hear this all-important case in the Supreme Court on 13 June 1988. He never did hear the case. Instead the King, after consultation with the Prime Minister, ordered Salleh Abas' impeachment for alleged misconduct by a special Tribunal (Salleh Abas 1989; Hickling and Wishart 1988–9:47–79; Lee 1995:53–77; Rais Yatim 1995:322–58). The Tribunal found against Salleh Abas who was dismissed from office on 8 August 1988. The next day, the UMNO appeal was heard and dismissed.

After the fall: the judiciary in the 1990s

Soon after his dismissal, Salleh Abas lamented that 'our judiciary is in a shambles; it will take a whole generation to rebuild it; but even then no one can say with certainty that it will be the same again' (Salleh Abas 1989:50). In a short essay one is tempted to accept that and conclude that the rest is judicial history. Still, if 'things will never be the same again', it is necessary to ask: 'What has been lost?'. It is hoped that the preceding

discussion already provides an answer. But a clue to answering that question more fully was offered by perhaps the only bright spot in the shambles of 1988.

Between the end of May, when Salleh Abas was suspended, and early July when the Tribunal prepared to hear the charges made against him, there were many domestic and international protests against the impeachment. But no public objection or protest issued from the ranks of the judges. Yet it was only on 26 March that 20 judges, meeting in Kuala Lumpur, with Salleh Abas presiding, had agreed that the Lord President should send a letter to the King to protest the prime minister's criticisms of the judiciary (Salleh Abas 1989:16).[33]

In retrospect, it is not difficult to imagine that many of the judges were paralysed by the unprecedented turmoil and its manifold implications. Constitutional guarantees were no longer any immunity against executive assault: impeachment of Salleh Abas in the wake of mass arrests only seven months before, proved that. Law, like war, had become the pursuit of politics by other means: the motives behind the impeachment showed that. One could not be sure of being tried before one's peers: the assembled tribunes were mostly not the professional and judicial equals of Salleh Abas. There being an even number of six tribunes, the chairman of the Tribunal might even have a casting vote. The principle that one should not preside over 'one's own case' did not hold: Tun Hamid Omar, Chief Justice of Malaya, next in line to be Lord President and one of the 20 judges present at the 26 March meeting, was Chairman of the Tribunal. That charges should be accurate in fact and basis was not observed: the documentation of the charges contained mistakes and errors. And whereas justice must be seen to have been done, the Tribunal decided to close its proceedings to the public. With judicial norms being cut to their very bone, what manner of judge, raised on constitutional law to be 'the channel through which His Majesty's justice is dispensed to his people', and heir to a tradition of strict legalism which none the less held that 'the courts must…necessarily be the ultimate bulwark against the excesses of the executive',[34] would not have felt that his or her judicial world was fast collapsing?

It is a uniquely limiting feature of the judiciary as a branch of government that the rule of law can offer no relief unless or until a case is presented to a court. But the Malaysian courts were reduced to being spectators to the case that would now determine the fate of the Lord President, and with him the judiciary itself. Fearing that he would not receive a fair trial, Salleh Abas refused to attend the Tribunal's hearing. On the eve of the commencement of the Tribunal's proceedings, lawyers for Salleh Abas applied to the High Court for a stay order against the Tribunal. Despite the urgency of the application, Ajaib Singh J twice adjourned the hearing without giving a decision. Lawyers of Salleh Abas, being convinced that the Tribunal was pushing its closed hearing to a speedy conclusion, now applied to the Supreme Court for a similar order. At this critical juncture, five Supreme Court judges bestirred themselves. Tan Sri Wan Suleiman, Datuk George Seah, Tan Sri Mohamed Azmi, Tan Sri Eusoffe Abdoolcader and Tan Sri Wan Hamzah convened—against the instructions of Acting Lord President Hamid Omar, and in the face of bizarre obstructions—and granted a stay order (Rais Yatim 1995:335–7).[35]

Salleh Abas later called this moment the 'finest hour of the Supreme Court' (Salleh Abas 1989:26). But as so often happens in history, one's finest hour is apt to arrive at one's last stand.[36] Four days later, on 6 July 1988, the five Supreme Court judges were suspended on the recommendation of the Acting Lord President to the King. By

September the five judges had been impeached by a second Tribunal which recommended the dismissal of Wan Suleiman and George Seah (Hickling and Wishart 1988–9; Lee 1995:66–73; Rais Yatim 1995:351–8).[37]

On the occasion of his elevation to the Federal Court in 1979, Salleh Abas quoted Justice Cardoso of the United States of America thus: 'The great tides and currents which engulf the rest of man, do not turn aside in their course, and pass the judges by' (*MLJ* May 1979:xc).[38] The Malaysian judiciary's 30 years of 'separation of powers', 'judicial independence' and 'strict legalism' had been so engulfed. Should one therefore think that what the tides leave behind—a hollowed judicial edifice, shattered norms of judicial conduct, ravaged principles of juridical neutrality, and subverted ideas about judges' impartiality—is merely legal flotsam and jetsam which make unreliable foundations for the legitimacy of law?

In truth some of their concrete manifestations have been seen within the Malaysian judiciary in the 1990s. Hamid Omar succeeded Salleh Abas as Lord President in what can only be described as an unhappy tenure of office. The Malaysian Bar Council passed no-confidence resolutions to impugn the credibility and standing of the new Lord President, sought to commence contempt of court proceedings against him, and took pains to ostracise him, if only by severing the social ties which used to exist between the Council and former Lord Presidents.[39] Hamid retired from the judiciary recently but not before being embroiled in a controversy over alleged professional impropriety arising from his private meeting with a litigant while a case involving the latter was pending before the Supreme Court.[40]

When another civil case involving two public companies reached the Court of Appeal, the presiding judge reprimanded:

> the plaintiffs, through their legal advisers have abused the process of the High Court…by manipulating it in such a way that it becomes manifestly unfair to the defendants. By doing what they did, these unethical lawyers have brought the administration of justice into disrepute among right-thinking people.[41]

Since then some of the corporate figures involved and their lawyers have filed libel suits against other parties, including lawyers and journalists, for voicing their suspicion over alleged bias in case assignment in that corporate battle. Whatever the merits of the individual cases may be, situations such as these tend to feed 'allegations that the judiciary has been subverted by big-business interests', or, as Tun Suffian put it, 'There is a public perception that some parties who find themselves in court cannot lose' (Kulkarni *et al.* 1996:21).[42] Judicial standing was scarcely improved when a *surat layang* (poison-pen letter) was widely circulated. The *surat layang* supposedly contained allegations of corruption, replete with incidents, details and names of delinquent judges. The Attorney-General's investigations—which the Attorney-General had characterised as 'a pre-emptive strike' intended 'to ensure that the judiciary and the legal profession be cleansed of these treacherous elements who, by their vile, insidious, devious, and scurrilous allegation in this pamphlet, had sought to undermine the integrity of the judiciary and administration of justice in this country'—revealed the writer of the *surat layang* to be a High Court judge.[43] But the judge retired with no further action taken against him.[44]

These developments cannot all be directly laid at the door of the executive which has probably decided that it is unnecessary, maybe even dangerous, to make further attacks on the judiciary. Much of the popular dissent of the mid-1980s that served as the backdrop of the crisis of the judiciary in 1988 has dissipated. If anything, the 1995 general election showed that popular support for the ruling coalition increased in the 1990s, largely because of an extended period of economic growth and prosperity. After 1988 it is plain that in Malaysia's 'semi-democratic', 'semi-authoritarian' polity the judiciary is a 'fragile bastion', not a co-equal branch of government capable of providing checks on executive prerogative and power—at least not for long. Beyond that—as surely the non-prosecution of the author of the *surat layang* suggests—it may even be risky to impair the judiciary to the extent that the rule of law is not just attenuated but universally held in contempt.[45]

As part of an attempt to restore some sense of normalcy to the post-1988 judiciary, the executive reorganised the courts in real and symbolic ways. There is no longer a Supreme Court; the highest court bears the pre-1985 name of Federal Court. A new Court of Appeal was introduced between the Federal Court and the High Court.[46] There is no longer a 'Lord President'; in his place, there is a 'Chief Justice of Malaysia'.

By certain administrative acts the executive has signalled that the judiciary must comply with requirements imposed on the civil service. In principle, the English language is no longer the pre-eminent language used in the courts; it has been supplanted by the Malay language, the sole official language of the nation, but one which most practising lawyers and judges, given their training, experience, and their customary reliance on a body of English law, are not quite proficient in. The policy of using Malay in the courts had been introduced in the early 1980s but not earnestly pursued. Under Hamid Omar there had been a more strenuous attempt to implement the language policy up to the level of the High Court. Judges, too, can presumably no longer come and go as they please: they are now required to use the punchcard in their daily routines.[47] Another suggestion, not yet implemented, is to open up membership in the Malaysian Bar Council, long a source of resistance to executive and legislative manipulations of the law, to government lawyers.[48] Presumably, the intention of the suggested move is to shift the control of the Bar to lawyers more sympathetic to the executive.

If in fact it is sufficient, *from the executive's perspective*, that there should be a generalised understanding of the limits to judicial review of executive action, then there is every possibility of the executive permitting the judiciary to return to its pre-mid-1980s position of strict legalism, albeit without the judiciary retrieving its previous aura of a full judicial independence. Three recent politico—juridical developments seem to confirm this.

The stalemated constitutional crisis of 1983–4 resurfaced over different issues in 1992–3. This time the monarchy and the Malay royalty were defeated (Kershaw 1993). Subsequently, Parliament passed the Constitutional (Amendment) Act 1993 which, among other things, removed royal immunity for offences committed in Malaysia and for cases by or against the King and the Malay Rulers. The royalty had been curtly told that if royal assent to the legislation was not forthcoming, the executive would gazette it anyway and leave it to the courts to determine its constitutionality. There was no such challenge, which led a constitutional specialist to observe that:

> The failure by the Conference of Rulers to prevent the erosion of judicial independence during the 'Salleh affair' now left them hoist with their own petard; they were not prepared to place their faith in the judiciary to resolve the matter.
>
> Lee (1995:94)

On the other hand, three natives of Sarawak sought a court injunction to stop Ekran Berhad from proceeding with the Bakun Hydro-Electric Project (HEP) which has the unstinting approval of the Prime Minister despite years of wide opposition to the project. The Environmental Impact Assessment (EIA) for the project was approved by the Sarawak Natural Resources and Environment Board in accordance with the Natural Resources and Environment (Prescribed Activities) Order 1994. Among opponents of the project, there was a general suspicion that this Sarawak Order made it easier for the Bakun HEP EIA to be approved than if the EIA had been submitted to the Department of the Environment in accordance with the Environmental Quality Act 1974. The plaintiffs sued Ekran, the Director-General of Environment Quality, the Government of Malaysia, the Sarawak Natural Resources and Environment Board and the Sarawak State Government on grounds that, among other things, the approval of the Bakun EIA had violated the provisions of the Environment Quality Act.

Probably to the surprise of many, James Foong J, in the High Court on 19 June 1996, decided for the plaintiffs. Part of his judgment, dealing with the legal requirement of allowing the public to review the EIA, read:

> it is relevant and indeed mandatory for the authorities to hear the views of the public first, before granting its approval. Even if the views of the public are rejected, of which they are entitled to do so, at least the law as promulgated by the elected representatives of the people is being followed. It makes a mockery of the whole issue to say that the EI A can be approved first and if the public has any constructive ideas, they can submit later. This certainly is illogical, and is a deprivation of good sense and sound reasoning.
>
> *Keying Tubek and 2 Ors.* v. *Ekran Bhd. and 4 Ors.* ([1996] 2 All Malaysia Reports 2441)[49]

The Prime Minister responded, predictably, that, 'If the court wants the Federal Government to deal with it, we will do so' (*New Straits Times*, 28 June 1996).[50] Shortly thereafter the High Court ruling was effectively undone by an *ex parte* suspension ordered by the Court of Appeal on 29 June 1996. The suspension, in the words of Ekran's lawyers, had restored the pre-19 June status quo. On 17 February 1997, the Court of Appeal overturned the High Court ruling on grounds that the Environmental Quality Act did not apply to the Bakun HEP, the original three Sarawakian plaintiffs lacked 'substantive locus standi' and that 'public and national interest' was better served by the rejection of the suit brought by them.

Finally, Mahathir had a closed-door meeting with 65 judges and eight Judicial Commissioners, on 24 April 1997, in Kuala Lumpur. During a press conference held after this meeting—Mahathir's 'first face-to-face dialogue with judges since he became Prime

Minister'—Chief Justice Tan Sri Mohd. Eusoff Chin noted that 'The Prime Minister said he is happy with the judiciary and the functioning of courts' (*New Straits Times*, 25 April 1997). And when asked about the independence of the judiciary, Eusoff Chin was reported to have replied that 'judges were independent to make decisions according to law'—which meant 'in other words [that] a judge cannot make decisions based on his own whims and fancies'—and that 'Dr Mahathir was happy that so far the judges had been making decisions according to law' (*New Straits Times*, 25 April 1997). That shift in emphasis in the meaning of the independence of the judiciary was consonant with an earlier statement of the Prime Minister's that 'the freedom of judges was, like others, restricted' because 'judges are also subjected to laws and cannot impose sentences as they wish' (*New Straits Times*, 16 March 1996).

In these recent instances lies a many-sided appreciation of the limits of judicial independence in Malaysia.

Notes

1 It should be added that in Salleh Abas' unabridged paragraph, the other source of the 'dangerous perceptions' he referred to was the 'sense of helplessness and ignorance amongst the poor and the rural communities. There is sometimes suspicion and fear on their part that the law is not for their benefit but rather it is a burden imposed on them. The only time when they come into contact with the law is when a policeman is executing a warrant of arrest or a lawyer serving a writ.'

2 Many observers of Malaysian politics have made this point. But it is refreshing to find it presented by the Lord President of the Federal Court, Tun Mohamed Suffian: 'Every Government subscribes to the doctrine of the independence of the judiciary, but, it has been said, some governments work quietly to undermine that doctrine. We in Malaysia have been lucky: the Government has faithfully maintained and supported the doctrine. Partly this is because our first three Prime Ministers have been lawyers, and in the current Cabinet we have 8 lawyers' (Suffian Hashim 1979d:xcviii). The same point is often suggested, but with a critical difference, when Mahathir's non-legal experience is cited as an important reason for his impatience with or lack of understanding of the intricacies of law; for example, 'The truth is, Dr. Mahathir is a logical politician untrained in the niceties of the law who expects to find the law all of a piece, constructed logically over several thousand years' (Hickling and Wishart 1988–9:65).

3 Groves' point was made in discussing *Arumugam Pillai* v. *Government of Malaysia* (1974) 2 MLJ 29, in which Gill CJ said: '…whenever a competent Legislature enacts a law in the exercise of any of its legislative powers, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking Article 13 (1) of the Constitution, however arbitrary the law might palpably be'.

4 Here Suffian LP said: 'With respect I would say that the law of Malaysia is the same as that in England and India, that is it is a matter for the executive to decide whether or not a proclamation of Emergency should or should not be terminated, and not the courts'. On the other hand, Arulanandom J, in *Lin Ah Yong* v. *Superintendent of Prisons, Penang* was moved to say: 'I do not need any authority or need to cite any particular precedent when I enunciate that the provisions of any statute, be they penal or otherwise are not intended to be cruel, oppressive or inhuman' ([1977] 2 MLJ 226).

5 This case overturned an earlier acquittal (without the defence being called) on a charge of sedition. The judgment found that two passages in a public speech by the respondent 'are not legitimate criticism of the sort permissible under section 3 (2) of the Act, but utterances having a seditious tendency of the sort envisaged in both sections 3 (1) (a) and 3 (1) (c)'. In a

reference to the speech which was made at a public rally during election campaigning, Wan Suleiman J, who delivered the judgment, added that, 'Here there was a crowd of a few hundred, but I should think that words having a tendency to being about hatred or contempt etc. of any Ruler or against any Government, or to promote feelings of ill-will and hostility among the various ethnic groups etc., can be uttered before a handful of persons and yet be seditious' (p. 211).

6 It was judged that 'a citizen has no fundamental right to leave the country and travel abroad, and…he does not have a right, not even a qualified right, to a passport…[but] though the citizen does not have a right under our constitution and our law to a passport, the Government should act fairly and *bonafide* when considering applications for a new passport or for the renewal of a passport and should, like the Government in the United Kingdom, rarely refuse to grant them'.

7 Wan Suleiman J concluded that 'there is thus persuasive authority that whilst abrogation of the fundamental rights may not come within the ambit of our Article 159, reasonable abridgment of such rights [is] constitutional; that Parliament should decide whether such amendment is necessary and it is not for this court to question the wisdom or need for such amendment'.

8 Thomas added that, 'The courts' reluctance to follow Indian cases on civil liberties and constitutional law, has resulted in lesser rights being enjoyed by a Malaysian citizen than his Indian counterpart' (Thomas 1987:97).

9 One specialist in Malaysian constitutional law has suggested that this case 'illustrated the independence of the Malaysian judiciary, and its insistence on following an impartial construction of the Constitution, and not necessarily any government arguments thereon' (Hickling 1978:19) while another praised the Federal Court decision for its 'protection of the right to property' (Thomas 1987:87).

10 In *Registrar of Titles, Johore* v. *Temenggong Securities Ltd.* ([1976] 2 MLJ 44), however, it was the Privy Council which eventually decided in favour of individual property rights.

11 Thomas observed that 'it is heartening to note that the Judiciary has endeavoured to keep in check maladministration and has not hesitated to exercise supervisory jurisdiction over administrative discretion' (Thomas 1987:91). In particular, he cited *Pengarah Tanah and Galian, W.P.* v. *Sri Lempah Enterprise Sdn. Bhd.* (1979) 1 MLJ 135, 148H, which prompted Raja Azlan Shah to say that: 'The Courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the citizen; so that the courts can see that these great powers and influence are exercised in accordance with law.'

12 Suffian LP commented that 'the laws affect the liberty of the subject and in the case of doubt or ambiguity they should be interpreted against Authority and in favour of the Citizen'.

13 In *Lim Kit Siang* v. *Public Prosecutor* ([1980] 1 MLJ 293), Raja Azlan Shah CJ observed that 'we have to remember that our function is judicial, not legislative and that we ought not to use our office to legislate under the guise of exercising our judicial powers and functions. In particular we have no power to create a right for any person to ignore the provisions of the Official Secrets Act or any other law of the land.'

14 In *Teh Cheng Poh* v. *Public Prosecutor* (1979) 1 MLJ 50. The import of this ruling was enormous. As the then Lord President noted: 'The Government accepted the ruling by the Privy Council that all regulations made under clause (2) of Article 150 after 20th February, 1971, were void, but there were about 1,000 other trials that had been held under them. In view of this, the Government in Parliament sought to validate the regulations and trials held under them by an Act of Parliament, the Emergency (Essential Powers) Act 1979 which was expressed to take effect from 20th February, 1971' (Suffian Hashim 1979b:lxiv). For the state's legislative response to the Privy Council's ruling, see Minister of Law Hamzah Abu

Samah's speech while introducing the Emergency (Essential Powers) Bill in Parliament, 17 January 1979 (MLJ, April 1979, lxx–lxxv).

15 The suit arose from the much politicised Chinese community's proposal to establish a private university ('Merdeka University') to provide tertiary education to many qualified Chinese students who were not admitted into existing public universities which, under the New Economic Policy, had greatly increased the proportional intake of Malay students. The government had rejected the proposal. Political issues related to national education and language policies, affirmative action and ethnic discrimination lay at the heart of the Merdeka University proposal.

16 As a contrary example, Tan Sri Eusoffe Abdoolcader practised at the Malaysian Bar for 24 years before being elevated to the bench.

17 Salleh Abas' view on the Islamic resurgence is strikingly similar: 'We have known of no other system than the British common law system after our own native system, that is, the Islamic law system had been replaced during [the] colonial period. The common law system was introduced and applied during the colonial period and when we achieved independence we had no other choice except to continue with it as a matter of course, making modifications when necessary to accord with constitutional changes. With this system which has now become part of our way of life, Malaysia has gained much progress and prosperity. Therefore it behoves those who agitate for a change to think seriously of the implication of the change and the spectre that would follow such change. Is the change worth our while if it is going to result in misery and disturbance?' (Salleh Abas 1987:290).

18 George Seah J dissented on largely utilitarian grounds.

19 An analysis of the 1983 Constitutional crisis is given in Khoo (1995:202–9).

20 In light of the Supreme Court decision, the government conceded the application by Berthelsen's colleague, Raphael Pura to the High Court to set aside Pura's expulsion order, and revoked the *Asian Wall Street Journal's* suspension.

21 Aliran had applied for a permit to publish a monthly magazine in Malay as far back as November 1983. Its first application was rejected in March 1984. Aliran did not take further action until November 1986 when it applied to publish a fortnightly magazine. The second application was rejected in April 1987.

22 An earlier application for an injunction failed in *Lim Kit Siang* v. *United Engineers (M) Sdn. Bhd. and 3 On*. (1988) 1 MLJ 35.

23 For an analysis of this case and its constitutional implications, see Lee (1995:50–2).

24 'If having done all this the [Director-General of Immigration] then gives consideration to [Berthelsen's] representations, the requirements of natural justice will have been satisfied and it would be for the [Director-General of Immigration] to make his decision whether or not to cancel the employment pass in exercise of the discretion conferred upon him' (*J.P.Berthelsen* v. *Director-General of Immigration, Malaysia and Ors.* (1987) 1 MLJ 134; Lee 1995:45–7).

25 *Persatuan Aliran Kesedaran Negara* v. *Minister of Home Affairs* (1988) 1 MLJ 440. Harun J concluded: The 1984 [Printing Presses and Publications] Act is a regulating Act and generally intended to police publications available to the public by requiring a person to print and publish so that the authorities know who the printers and publishers are and the desirability of such publications being exposed to the general public…. Except in obvious cases, the discretion to refuse to grant a permit cannot be exercised in anticipation that the applicant is likely to publish material which may offend against any law.

26 For a criticism of this judgment, see Lee (1995:48–50).

27 Suffian even graced the Reflections on the Malaysian Constitution: 30 Years After Merdeka conference which was organised by Aliran, one of the executive's harshest critics (although Suffian's paper dealt with 'The Role of the Monarchy').

28 Ahmad Noordin headed the committee appointed—but harassed—by the government to investigate the largest financial scandal of all, the Bumiputra Malaysia Finance collapse. In the above context, see his 'Foreword', in Gurmit Singh (1987).

29 There was another constitutionally important case decided by a 3:2 judgment against the government, namely, *Mamat bin Daud* v. *Public Prosecutor* (1988) 1 MLJ 119, for a discussion of which see Rais (1995:182) and Salleh Abas (1989:11)

30 Abdoolcader's remark, which 'endorsed the concept of liberalizing the scope of individual standing', was made in *Tan Sri Haji Othman Saat* v. *Mohamed Ismail* (1982) 2 MLJ 177.

31 In a similar vein, the government and its dominant party, UMNO, took exception to the participation of Tun Suffian and Sultan Azlan Shah at the University of Malaya Law Faculty conference *(The Malaysian Constitution After 30 Years),* of Tun Suffian's presence at the Aliran-organised conference *(Reflections on the Malaysian Constitution: 30 Years After Merdeka),* and of Harun J's presence at a Universiti Kebangsaan Malaysia law seminar (where Harun suggested that the composition of the Senate ought to be altered [*The Sunday Star,* 6 September 1986] and was very nearly cited for impeachment in Parliament).

32 As Edgar Joseph J began his judgment in *Lee Liong Chan and Anor.* v. *Tan Sri Teh Ewe Lim and Anor.* (1985) 2 MLJ 138, a case involving Parti Gerakan Rakyat Malaysia.

33 According to Salleh Abas, only Tan Sri Hashim Yeop Sani, SCJ disagreed with the decision to send the letter. That letter itself became one of the accusations made against Salleh Abas.

34 The quotes are from Abdoolcader J, in *Merdeka University Berhad* v. *Government of Malaysia* (1981) 2 MLJ 356.

35 Since Hamid Omar, and Tan Sri Lee Hun Hoe, Chief Justice, Borneo, were both members of the Tribunal, Wan Suleiman, next in seniority, convened the Supreme Court under section 9 of the Court of Judicature Act 1964.

36 For a sense of how proud the five judges were that they acted thus, see the personal tributes paid to Abdoolcader (following his suicide) by Wan Suleiman, Wan Hamzah, Mohamed Azmi and George Seah (*Aliran Monthly* 1995, 15, 11 and 12:9–11).

37 An immediate critical response to this Second Tribunal report was contained in the 'Press Statement by the [Malaysian] Bar Council in respect of the findings of the Second Tribunal' (*Insaf,* November 1998, XX, 5:78–81).

38 Salleh Abas had said: 'Judges…should be brave enough to depart from established precedents and create new ones. This process of change has been the life blood of the common law system by which it has grown and developed from being the law of rural communities to that of the present day industrially sophisticated societies. Such changes were fashioned by the courage of some eminent Judges who took care to weed out outdated rules in order to suit them to the changes that are continuously taking place in the societies.'

39 The Bar Council was particularly angered by what it saw to be Hamid's blatantly partisan action on behalf of the executive in the suspension of the five Supreme Court judges. Until that happened, the Bar Council had limited itself to calling upon Hamid to disqualify himself from sitting in the first Tribunal. Part of the resolution adopted at an Extraordinary General Meeting of the Malaysian Bar, held in Kuala Lumpur on 9 July 1988, read: '…by his recent actions, the acting Lord President, Y.A.A.Tan Sri Abdul Hamid Hj. Omar has shown himself to be unfit for judicial office and the Malaysian Bar no longer has any confidence whatever in Y.A.A.Tan Sri Abdul Hamid Hj. Omar as a Judge or Chief Justice or acting Lord President and therefore calls for his immediate resignation and/or removal from the Bench…' (*Insaf,* XX, November 1988, 5:8).

40 Hamid had received Loy Hean Heong, Chief Executive Officer of the Mbf Group, at his office. Mbf had obtained a court injunction to stop Wee Choo Keong, an opposition Member of Parliament, from making allegations of 'impropriety, irregularity and illegality' against Mbf Holdings and its subsidiary companies. Wee was subsequently found in contempt of court. Wee's appeal against the contempt order was dismissed in *Wee Choo Keong* v. *Mbf Holdings Bhd. and Anor. and another appeal* (1993) 2 MLJ 217, which was heard before

Hamid Omar LP, Eusoffe Chin SCJ and Mohamed Dzaiddin SCJ. Wee also lost in other suits filed by Mbf against him, namely, *Mbf Holdings Bhd and Anor.* v. *Houng Hai Kong and Ors.* (1993) 2 MLJ 516, (1994) 1 MLJ 135. Wee then appealed to the Supreme Court. The case was pending when he discovered Loy's visit to Hamid; the latter insisted it was a 'social visit'. For an account of this episode, see N.N.P., 'Jumpa Tun', *Aliran Monthly*, 14, 4, April 1994, pp. 2–3.

41 The legal contest was between Insas Berhad and Ayer Molek Rubber Co. Bhd. It was first tried in the High Court. The remarks (and some other critical ones about the High Court judge sitting in the case) made by the President of the Court of Appeal were ordered by the Federal Court to be expunged from the judgment of the Court of Appeal. See *Insas Bhd.* v. *Ayer Molek Rubber Co. Bhd.* (1995) 2 MLJ 734, and (1995) 2 MLJ 833.

42 Daim Zainuddin, Economic Adviser to the Malaysian government, conceded that 'perception is very important. It's very worrying and (Mahathir) is very unhappy' (Kulkarnir et al. 1996:21).

43 Press Statement by the President of the Malaysian Bar, reprinted as 'Investigation into Poison Pen Letters', in the Bar Council's monthly magazine (*Infoline*, June 1996:19–20).

44 Perhaps the Attorney-General's earlier enthusiasm for a 'pre-emptive strike' was fuelled by his pre-investigation suspicion that a lawyer rather than a judge was the likely author of the *surat layang* (ibid.).

45 In Parliament, Datuk Mohamed Nazri, Deputy Minister in the Prime Minister's Department, reportedly argued that 'to ensure that there was no further erosion of public confidence in the judiciary and seeing that those who had been named had been cleared following investigations by the police and the Anti Corruption Agency, it would be better not to prolong the matter' (Zainur Zakaria 1996b: 45–6).

46 There is now a Special Court which has exclusive jurisdiction to try offences committed in Malaysia by the King or a Malay Ruler, or civil cases by or against either of them (Lee 1995:86–99).

47 Part of a statement issued by the President of the Bar Council read: The Bar 'disagrees with the implication that Judges should be treated like any other member of society or as civil servants. The Judiciary is, under the Constitutional Law Doctrine of the Separation of Powers, a separate, distinct and independent body which must act *without fear or favour*. Whilst they are not above the law which they administer in the public interest and in the interest of justice, they should not be subjected to the same clocking-in requirements of the civil servant—because they are not civil servants' (*Infoline*, February 1996:19). A contrary view was offered by the Prime Minister: 'As members of ordinary people, whatever is accepted by society must also be accepted by judges. If Government staff must punch in and even use name tags, the same practice cannot be considered degrading by any other member of society' (*New Straits Times*, 16 March 1996).

48 The suggestion, which included a criticism of the existing Bar Council for 'taking positions by public statements and open criticisms of the Judiciary and the Government', was made by the Attorney-General, Tan Sri Dato' Mohtar Abdullah in his speech at the Annual Dinner of the Medico-Legal Society of Malaysia, Kuala Lumpur, 19 July 1996. The President of the Bar Council responded to this suggestion vide her letter of 2 August 1996 to the Attorney-General (*Infoline* August 1996:7–10).

49 One of the issues of the case was whether the Minister, under the Environmental Quality Act, could delegate the power to approve the Bakun EIA to the Sarawak Natural Resources and Environment Board. There is no requirement under the 1994 Sarawak Order—unlike the Environmental Quality Act—'that the public have a right to be heard and to make representations before the approval of the EIA is granted' (p. 2443). James Foong J concluded (p. 2471) that while the plaintiffs (and affected natives) were 'waiting to exercise their rights, and being assured of the executives through their leaders, including those directly in charge that the relevant procedures of the EQA will be adhered to, the Minister

suddenly strikes a mortal blow by gazetting PU(A) 117' (which excluded the application of the EQA to the Bakun project).

50 For a critical response to the Prime Minister's statement, and various other statements themselves scornful of the High Court decision, see Zainur Zakaria (1996a).

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10
MAGIC MEMOS, COLLUSION AND JUDGES WITH ATTITUDE

Notes on the politics of law in contemporary Indonesia

David Bourchier

Few would have predicted that two of the most popular public figures in Indonesia in 1996 would be senior judges. Judges have typically been seen as gormless and corrupt functionaries who do the government's bidding in the government's courts. Yet in May 1995 Administrative Court judge Benyamin Mangkoedilaga became an instant celebrity after his historic ruling that President Soeharto's powerful Information Minister had acted beyond his powers when he banned the popular weekly magazine *Tempo* a year earlier. Benyamin's courtroom in Jakarta erupted in jubilation at the decision, and the judge was for months in hot demand for appearances and interviews. More recently, the spotlight has turned to Adi Andojo Soetjipto, the Supreme Court judge whose bold denunciations of high level judicial corruption have severely embarrassed Indonesia's top legal authorities. An unprecedented move by the Chair of the Supreme Court to dismiss Adi Andojo in June 1996 only increased the level of public admiration, if not adulation, for the 'honest judge' who continues to speak out against his colleagues with impunity. Between them, Benyamin Mangkoedilaga and Adi Andojo have been responsible for reviving hopes among the urban middle classes that the judiciary may one day take their place, implied in the constitution, as an independent power within the state.

This chapter examines recent legal developments in Indonesia with an eye to locating them within a broader framework of the changing dynamics of capitalist development and pressures for political and legal reform. Although it does not subscribe fully to the state centred vision of institutional change described by Jayasuriya in the 'Introduction' in this volume, it does strongly support his contention that notions of the independence of the judiciary and the rule of law have to be understood in their ideological, as well as historical context. As in several other East Asian states, the Indonesian ideological context is essentially a communitarian one which has at its centre a notion of the 'public good' which it is the state's role to look after. The chapter also provides a clear example of the way in which states can move some way, in their own interests, towards judicial autonomy while maintaining, or attempting to maintain, a grasp over the judicial system as a whole.

After outlining the political and ideological parameters within which the Indonesian legal system operates, the chapter describes what is widely seen as the most significant and exciting innovation in the past two or three decades, the establishment of a system of Administrative Courts. On one level, the chapter argues, the new courts are important

because of the highly controversial cases they have taken on. But they also help to highlight structural imperatives for greater institutional autonomy within a state system that has hitherto emphasised the indivisibility of authority. Such imperatives, the chapter argues, are in part the product of forces outside the state, including foreign investors and Indonesia's rapidly growing middle classes. No less important, however, are pressures from within the state for greater administrative efficiency and professionalism. Not surprisingly, the work of the Administrative Courts has led to contradictions within Soeharto's 'New Order' regime as the 'decentralising' effects of creating a more autonomous, and assertive judiciary come into conflict with old habits, and patterns of central control manifest most clearly in the government's continuing grip on the nation's highest legal authority, the Supreme Court. It is this tension, these conflicting priorities, which this chapter is concerned to explore.

Law, judges and the state

Given that law and legal systems are the products of specific political and historical trajectories, it is important to start with some background on law in Indonesia and the standing of the judiciary within the legal system. The rulers of independent Indonesia inherited a complex legal system from their Dutch colonial forebears, combining elements of indigenous customary law, Islamic law, and Dutch law. This legacy of legal pluralism was the product of the Dutch policy of indirect rule that allowed local traditional rulers considerable legal authority within their jurisdictions, and was reinforced by the Ethical Policy of the early twentieth century, which preserved aspects of customary law among indigenous Indonesians. Elements of this pluralistic system persist in private law, but the country's rulers since independence in 1945 have tried to bring all Indonesians under a single, secular, legal system based on the continental European civil law model.

Kanishka Jayasuriya, in the 'Introduction', drew our attention to the need to look beyond Anglo-Saxon models of the rule of law if we are to understand the logic of legal change in East Asia, highlighting in particular the importance of the German positivist tradition. This is particularly relevant in our case because mainstream Indonesian constitutional philosophy is heir, via the colonial Dutch law schools, to precisely this tradition.

The doctrine of legal positivism, most fully developed in the late nineteenth and early twentieth century when Germany was emerging as a major economic and imperial power, gives great weight to the importance of a strong state and very little to citizens' rights. Authority is treated very much in top-down terms: rights inhere in the state rather than the individual (Turner 1993:7). According to this philosophy, which is associated with figures such as Georg Jellinek and Hans Kelsen, state authority derives ultimately not from any notion of social contract or popular sovereignty but from power.

The authoritarian potential of legal positivism is typically constrained by its heavy emphasis on rationality and internal consistency. States are regarded, in this school of thought, as constituting a hierarchy of laws (or legal norms), each law deriving its authority from a higher level of law. Once these laws are in place, the government is just as bound by them, at least in theory, as are citizens. This has seen positivism linked

historically to the notion of the Rechtsstaat, which can be translated as a 'legally accountable state' or, more appropriately in the present context, 'a state that rules by laws' (Berman 1991:3). The internal logic of the state the Indonesians inherited from the Dutch was positivist, a legacy evident not only in Indonesia's legal architecture but also in the state-centric, top-down approach which characterises Indonesian institution building.

Yet the Indonesian state is far from an internally consistent *Rechtsstaat*. It is, rather, marked by legal confusion and a lack of constraints on the executive. There are several reasons for this, not the least of which is that the Indonesian government has embraced an organicist ideology philosophically at odds with the strict legal hierarchies characteristic of positivist legality and with the safeguards on the abuse of power associated with the *Rechtsstaat*.[1] This ideology, usually referred to in Indonesia as integralism, 'kekeluargaan' (family-ness) or, more broadly, 'Pancasila', is a central referent of political discourse.[2] The present system of government is officially known as 'Pancasila Democracy' and its labour relations system as 'Pancasila Industrial Relations'. In essence, Pancasila ideology stresses the need for harmony, co-operation and communal-mindedness in all spheres of life. State and society are treated in this discourse not as opposing forces, but rather as part of a big family or village, with the president (and his representatives in the administration) in the role of the wise father or village head who listens to all points of view and takes a decision in the interests of the whole. Government ideologues claim that 'Pancasila Democracy' is grounded in the indigenous constitutional order and routinely contrast it with 'Western' or liberal conceptions of political philosophy based on individualistic notions of rights, and, importantly for our purposes, the separation of powers (Bourchier 1996).

Soon after Soeharto seized power in 1965, parliament passed legislation ensconcing Pancasila as 'the source of all sources of law'.[3] Crowning an essentially positivist state structure with a master concept defined very much in organicist terms may seem illogical from a positivist perspective, because while positivism stresses the importance of strict legal rationality and consistency in the running of the state apparatus, organicism favours a much more fluid and totalistic concept of authority which does not easily accommodate the notion of checks and balances. But it is precisely this flexibility, this ability to freely override legal constraints on its power, which the Soeharto government desired in order to carry out its crash programme of political demobilisation and economic development while proclaiming Indonesia a Rechtsstaat. A long serving domestic intelligence chief put it bluntly: 'Pancasila is the legal basis of authority. Hence, any political action based on the norms of Pancasila ideology is in accordance with the law and legitimate' (Yoga Soegomo 1986:16). Soeharto's government, then, might be seen as having used the rhetoric of Pancasila to help realise the state absolutistic potential of positivism.

The subordination of legal institutions to the will of the executive did not begin, however, with General Soeharto's rise to power. It is largely the doing of his predecessor Sukarno, who, with the backing of the army, swept aside Indonesia's liberal democratic constitution in 1959, replacing it with a populist dictatorship he called 'Guided Democracy' based on the revived wartime '1945 Constitution'. The 1945 Constitution, which remains in force today, was drafted hurriedly by a group of nationalist intellectuals in the last months of the Japanese occupation. Extremely short and loosely worded, it bestows enormous powers on the President and provides only weak mechanisms for

supervising or limiting state authority. Articles 24 and 25 dealing with the judiciary read, simply:

> The judicial power shall be exercised by the Supreme Court and other courts as may be established by statute. The organisation and authority of those courts as well as the conditions for appointing and dismissing judges shall be determined by statute.

The official Elucidation of the Constitution is more specific, stating that 'Indonesia is a state based on law (a Rechtsstaat)', and that 'the judicial authority is an independent authority in the sense that it is beyond the influence of the government'. As Lubis (1994:97) has pointed out, however, the meaning of 'independent authority' here is very much dependent on the government's interpretation of what constitutes a Rechtsstaat.

Sukarno had little time for legalism. It was, for him, part and parcel of the system of parliamentary democracy that he condemned for having led to endemic party political conflicts, and for having brought Indonesia to the brink of disintegration in the late 1950s. His recipe for revitalising the country, for reawakening a sense of revolutionary idealism and national purpose, was to do away with the trappings of 'Western' democracy in favour of political forms and methods of decision making more in tune with the consensual, communalistic spirit of the 'national personality'. What this meant in practice was the establishment of a fully appointed parliament and the dismantling of institutional checks on his own power, including legal ones.

The Basic Law on Judicial Power (Law No. 19, 1964) sealed the sharp decline in the prestige of the judiciary during the Guided Democracy period (1959–65).[4] This legislation declared law to be 'an instrument of the revolution' and authorised the President to interfere at any stage of the judicial process 'in the interests of the revolution'. Not only did it remove all obstacles in the way of the President to intervene in the administration of justice; it formally and explicitly abolished the doctrine of the separation of powers, usually referred to in Indonesia as *trias politico*. Administration of the judiciary was brought under the Justice Ministry and judges were treated, and for the most part came to regard themselves, as part of the regular civil service.

One of the key promises Soeharto made to his Muslim and middle-class constituency after toppling Sukarno was that his New Order regime would correct the deviations of the Sukarno years and return Indonesia to the true path of the 1945 Constitution, Pancasila and the rule of law. Despite the regime's sponsorship of the slaughter and imprisonment of hundreds of thousands of suspected communists and show trials of prominent figures associated with the old regime, there was initially a good deal of optimism among independent lawyers and reform-minded elements that the Soeharto regime would indeed usher in a new era in which legal norms would be respected.

While the regime continued to promote itself as standing for the *Rechtsstaat*, the years between 1968 and 1970 saw the defeat of reformist elements both inside and outside the government. After two years of intensive debate, the parliament passed the Basic Law on the Judiciary (Law No. 14, 1970), which set in place the basic legal architecture that exists today.[5] The law contains many noble statements of principle, including a commitment to the independence of the judiciary from government interference. Yet reformers and most judges were deeply disappointed by the fact that it did not contain

any provision for judicial review and by its determination that responsibility for the administration and promotion of judges would remain in the hands of the Justice Ministry.[6] The government's decision to preserve the system of judicial administration inherited from Guided Democracy was a major blow to career judges and is regarded by many judges as the single most important impediment to judicial autonomy in Indonesia. It means in practice that judges have a very strong incentive to please their superiors in the Justice Ministry if they want to advance their careers.

There are other important ways in which the Soeharto regime has controlled the legal apparatus. One has been to appoint trusted military figures or politically compliant civilians to key legal posts. In June 1966 Soeharto appointed his chief intelligence assistant, Major-General Sugih Arto, as Attorney General. As Justice Minister he chose Prof. Oemar Seno Adji, an old associate with no judicial experience and, according to Pompe, 'no appreciation for [the judiciary's] specific needs or constitutional relevance' (Pompe 1996:101). The position of the Chair of the Supreme Court, Indonesia's top legal job, has been entrusted to a succession of outside appointees politically beholden to the government and to judges with a track record of political loyalty.[7] At the same time, the government concentrated control over the legal system in the hands of the Supreme Court, giving it wide powers to reach down and correct 'judicial errors' in the lower courts (Pompe 1996: Chapter 7).

The result of the New Order's legal engineering is a legal apparatus wired to the will of the executive. Emblematic of this is the national level—albeit non-formalised—body called the 'Mahkehja', an acronym combining the Indonesian terms for the Supreme Court, Justice Ministry and the Attorney General's office. Since March 1983 the heads of these institutions have held regular meetings aimed at 'establishing closer harmony and cooperation between the Supreme Court, judges, and public prosecutors'. The Mahkehja represents the highest level of an Indonesia-wide network of regional and sub-regional Leadership Councils (Muspida) which normally involve local government and police authorities as well as judges and prosecutors. According to sociologist Loekman Soetrisno, the Muspida system has been a key factor in the decline of the judiciary because it has bound local judges to the directives of the council's leaders, who almost invariably are members of the army's territorial apparatus (*Kompas* 12 August 1981).

Close co-operation between the government and the judiciary is justified by government officials with reference to state ideology. Explaining to members of parliament in 1985 the 'priority on togetherness and consultation between the government and the judiciary', Justice Minister Lieutenant-General (Ret.) Ismail Saleh claimed that the government was 'applying integralistic principles in accordance with the spirit of the Pancasila and the 1945 Constitution'.[8] The emphasis on co-operation between branches of the government has seen that section of the Elucidation of the Constitution which stipulates that the judiciary should remain free of government interference as implying not the separation of powers but rather the division of powers.[9] This is a significant distinction and has often been highlighted by government officials in response to pressures arising from inside and outside the judiciary for greater judicial autonomy.

A final general point about the judiciary is that it is demoralised and unpopular. The judiciary's absorption into Indonesia's large and often predatory bureaucracy has seen a deterioration of its *esprit de corps*. Fewer and fewer judges retained the sense of

professional pride and idealism which had characterised the institution in the democratic 1950s; more and more succumbed to the glittering opportunities for self-enrichment provided by their privileged positions. Retiring Supreme Court judge Prof. Asikin Kusumaatmadja estimated in 1995 that 'about 50 per cent' of Indonesian judges are corrupt (Forum Keadilan 19 January 1995). This figure was challenged by senior Surabaya lawyer Trimoelja Soeryadi, who said that Asikin was probably afraid of risking offending his colleagues in making such a low estimate. Trimoelja put the figure at over 90 per cent (Republika Online Minggu 21 April 1996). Judging by a confidential report by a Deputy Chair of the Supreme Court Major-General Djaelani on the eve of his retirement in August 1996, the latter figure is likely to be closer to the mark. Djaelani painted a devastating picture of malaise, mismanagement, nepotism and deeply ingrained corruption in the Supreme Court. He condemned its leadership for having 'no understanding of internal control or supervision', leading to a situation in which collusion was rife, with the trading of cases (percaloan perkara) going on at all levels of the justice system. Discipline problems, he despaired, affected 'all legal personnel at all levels in all jurisdictions' (Djaelani 1996). This evaluation accords with popular perceptions that there is little but grief to be had from tangling with the justice system. Many would agree with the writer Goenawan Mohamad's statement that: 'The worst aspect of the past thirty to forty years of modern Indonesian history has been the breakdown of law' (1997).

The Administrative Courts: a revolution in the law?

Against the background of this rather gloomy portrayal of the Indonesian legal system, let us now turn to what many observers see as a harbinger of real change: the establishment of a nationwide system of Administrative Courts (Pengadilan Tata Usaha Negara or PTUN). The first Administrative Court opened its doors in 1991 and at the time of writing there were 14 first instance courts and four provincial level Administrative Appeal Courts in operation.[10]

What are the Administrative Courts? Briefly, they are a new two tier system of courts established under the supervision of the Supreme Court alongside the three existing court systems: the General Courts, the Religious Courts and the Military Courts. They are designed to allow private citizens or private legal entities to challenge the legality of written decisions made by government officials acting in their official capacity. Prior to the creation of the Administrative Courts in 1991 people could claim damages against the government in the civil courts, but could not apply to have official decisions nullified.[11] The courts make it possible for the first time for a private citizen to test the validity of a decision, for instance, of a provincial government to demolish a house for a road-widening project. In this instance it would be up to the judge to decide whether the order of the provincial government conflicted with superior legislation, and if it did, to direct that the provincial authorities revoke their decision. Under the terms of the Administrative Justice Act, promulgated in 1986, judges may also rule an administrative act null and void on the grounds that it is an abuse of power or that it is arbitrary (Article 53 Section 2, Law No. 5, 1986).[12]

The powers of the Administrative Courts are very circumscribed compared, for example, with administrative courts and tribunals in most European countries. They can

examine only relatively low level written decisions by state officials, and cases can be lodged with the Administrative Courts only where other avenues of administrative appeal exist and have been exhausted. They are not empowered to examine administrative acts which can be defined as within the realm of private or criminal law, or which deal with certain strategic matters such as armed forces operations and election results (Lotulung 1996:3–4). Furthermore, Administrative Court judges have no power to enforce their decisions directly.[13] They are also limited by their subordination to the highly politicised Supreme Court, the court of final appeal for administrative law cases.[14]

But in the Indonesian context, they heralded a minor revolution. Government officials, who had hitherto tended to behave as though they could do no wrong, began to be brought to book by ordinary civilians. One of the first cases to hit the headlines involved a Bogor woman who in December 1990 received a letter from the local Housing Agency evacuating her from the house she had lived in for many years. An order from Amarullah Salim, the Chair of the Jakarta Administrative Court, postponing the evacuation was ignored by the Housing Authority, which proceeded to cart away her household goods. Amarullah Salim reacted furiously and was supported vociferously by outraged parliamentarians and lawyers who demanded that the head of the Bogor Housing Agency be made to suffer harshly for undermining the authority of the courts (Otto 1991:2–3). The same judge received strong public backing again in 1993 when he successfully compelled the attendance at the Administrative Court of Jakarta's Deputy Mayor (Quinn 1995:44).

The victory which did most, however, to make the jaded public sit up and take notice came on 3 May 1995, when Jakarta Administrative Court judge Benyamin Mangkoedilaga and his two associate judges upheld a challenge against Information Minister Harmoko's Ministerial Decision withdrawing *Tempo* magazine's publication permit in June 1994. Most observers saw the case, launched by *Tempo* editor, Goenawan Mohamad, and a group of former *Tempo* employees, as a quixotic gesture. Harmoko was, after all, the Chair of the. government's party Golkar, a media mogul and one of the President's closest allies. According to the three judges, however, who claim to have concentrated purely on the facts of the case, Harmoko's withdrawal of *Tempo's* publishing permit amounted to a ban of the magazine and was therefore illegal, because the Basic Law on the Press (Law No. 21, 1982) does not give the Information Minister the authority to ban publications.[15]

The *Tempo* verdict was a watershed not only for Goenawan Mohamad and his elated crowd of well wishers, but also for Indonesian law as a whole. 'This is a new chapter in the history of the administration of justice in Indonesia,' editorialised the English language Jakarta Post. 'With this decision, Judge Mangkoedilaga and his two colleagues not only proved their integrity, but also breathed new life into the process of democratisation in this country.'[16] Never before had a Ministerial Decision been examined by a court and ruled out of order. The verdict was in fact doubly unprecedented in that it also found that the Ministerial Regulation (No. 1, 1984) from which Harmoko's Ministerial Decision (No. 123, 1994) drew its authority, conflicted with the 1982 Press Law. In doing so the Administrative Court was adjudicating on the validity not only of the Ministerial decision to withdraw *Tempo's* publication permit, but also on the superior regulation on which it was based. It was thereby, for the first time, asserting a right on the part of the courts to review the validity of a written law. 'Given that the executive has

traditionally produced regulations in conflict with superior law without any institutional restraint, Australian lawyer Julian Millie observed, 'the *Tempo* decision provides a stark contrast by affirming the separation of powers between the judiciary and the other branches of the state' (Millie 1995:32–3).

Benyamin Mangkoedilaga's decision seemed so miraculous that many suspected that it was simply a flash in the pan. But when Harmoko appealed and the case was re-examined in November 1995 by a panel of five judges of the Jakarta Administrative Appeals Court headed by Charis Soebianto, Benyamin's findings were upheld. This, and the fact that neither judge was punished in any obvious way, did much to generate a sense of momentum.[17]

The *Tempo* verdict led to many other plaintiffs deciding to use the Administrative Courts to take action against even higher officials. Most dramatic have been the groundbreaking challenges launched by prominent Opposition figures Sri Bintang Pamungkas and Megawati Sukarnoputri. Sri Bintang, an outspoken former parliamentarian with the Muslim-oriented United Development Party (PPP) attempted to sue President Soeharto through the Administrative Courts on two counts in 1995: first, for approving the Attorney General's decision blacklisting him; and second, for issuing a Presidential Decision 'recalling' him from parliament (Kastorius Sinaga 1995).[18] Megawati and her husband Taufik Kiemas followed suit in March 1997, challenging not only Suharto, but the Minister for the State Secretariat, the Attorney-General and the South Jakarta area Police Chief in connection with the failure of these officials to produce a written order signed by the President technically required before they, as members of parliament, could be legally interrogated (Suara Independen No.4/III 1997). Each of these cases was rejected, however, by the Jakarta Administrative Court on the grounds that they did not fall within its competency.

In the light of the proven potential of the Administrative Courts to embarrass government officials and to provide political litigants with a new podium, the obvious question is: Why did the government go to the trouble and expense of establishing them?

The standard response to this question among legal officials in Indonesia is that the creation of the Administrative Courts was the logical culmination of a long process of legal evolution, a long overdue step in the realisation of a modern Rechtsstaat. Most West European states, it was pointed out, set up administrative courts in the aftermath of the Second World War and several former French colonies, including Algeria, Tunisia and Morocco followed in France's footsteps (see, e.g., Lopa and Hamzah 1993:28).

According to Benyamin Mangkoedilaga there had been plans to establish a system of administrative courts in Indonesia as early as 1948 (Yayasan Almuni *Tempo* 1995:221). An attempt was made in 1960, but this died an early death because it flew in the face of Sukarno's preoccupation with concentrating power in the executive and his disdain for law in general. The reform-oriented National Legal Development Institute drew up a draft law on administrative courts in early 1966 (Lopa and Hamzah 1993:28–9) which several members of parliament tried to have promulgated in 1967, but this also failed, for broadly similar reasons. Although Soeharto relied heavily on legal and constitutionalist rhetoric, and on the services of military lawyers, he was not interested in building mechanisms which might have curbed his power.

A system of administrative courts was, nonetheless, foreshadowed in the 1970 Basic Law on the Judiciary, and in the decade that followed, the first preparations were made to

investigate European models and to produce a draft law on administrative justice. A series of seminars and consultations were held in the mid-1970s and a rough draft was produced in 1982 by a government-appointed committee of administrative lawyers, most of them French and Dutch trained. According to Baharuddin Lopa, one of its drafters, hammering out the draft was 'a long, tortuous process, full of struggles and memories' (Lopa and Hamzah 1993:33). Lopa says that opponents of the draft legislation had three main worries. First, that it was too derivative of European systems and would introduce 'individualistic philosophies' which conflicted with Pancasila. Second, that it would provide for 'excessive supervision of state agencies and would therefore obstruct effective and efficient government'. And third, that it would 'complicate the political process, especially decision making' (Lopa and Hamzah 1993:32).

Given these objections, it is not sufficient to argue that the establishment of the Administrative Courts was simply the fulfilment of promises made and plans laid in the early years of the New Order. If proposals to establish the courts had been successfully quashed in the past, why did this not happen again? Three related dynamics will be considered here, the first two 'external' to the state, the third 'internal'.

According to Lintong Siahaan, one of the judges who helped pioneer the Administrative Court system, the primary reason for the establishment of the courts was to improve Indonesia's image abroad (Interview, Fremantle, 9 November 1996). The driving force in cabinet, he said, was Ismail Saleh, Justice Minister between 1984 and 1993. A retired military judge who played a major role in the first years of the New Order promoting Soeharto's government to the outside world, Ismail Saleh reportedly convinced the President that establishing them would go a long way towards dispelling foreign criticism that the rule of law did not prevail in Indonesia. This was necessary, he apparently told Soeharto, if Indonesia was not to be left behind in the 'era of globalisation'. The main legal architect of the New Order, retired Lt-General Sudharmono, also highlighted the legitimation value of the Courts, telling the author that 'If anyone accuses us of not respecting citizens' rights, human rights, well, they are wrong! We are indeed ahead of other countries! We have the Administrative Courts!' (Interview, Jakarta, 13 November 1997).

This is certainly part of the story. Soeharto's far reaching economic deregulation measures since the early 1980s indicate that he was prepared to take political risks in order to enhance Indonesia's appeal to the global community *vis-à-vis* its regional competitors. If, as Jeffrey Winters (Winters 1996: Chapter 4) argues, the reforms to Indonesia's banking, customs and tax systems in the 1980s were an effort to keep pace with changes in other East Asian economic regions, the establishment of the Administrative Court system might be seen as an attempt to portray Indonesia as a country with as much respect for legal process as, say, Malaysia.

There is certainly no question that foreign investors and multilateral institutions have brought pressures to bear on Indonesia to reform its ramshackle and graft-ridden legal system. Since the early 1980s the World Bank, informed by a rational choice institutionalist perspective, has repeatedly stressed the urgency of legal and administrative reform, pointing out that Indonesia fell 'far short' of having 'a well functioning legal system that is an important pre-requisite if the shift towards a less government-regulated environment for the private sector is to be successful' (Vatikiotis 1993:48). Strengthening the legal and supervisory framework was also a key demand of

the International Monetary Fund following the collapse of the banking system in 1997. It should be remembered, though, that the lack of a 'well functioning legal system' did not prevent foreign, or for that matter, domestic financiers investing heavily in Indonesia and profiting handsomely through the 1980s and early 1990s. While there are a growing number of business people who operate independently of the government, political connections are still important determinants of economic success. In such an environment the most powerful have the least to gain from a more 'rational' and transparent legal system.

Australian lawyer Bernie Quinn, likewise positing a linkage between economic modernisation and legal rationality, has argued that the establishment of the Courts may have come in response to pressures on the state from the domestic middle classes to provide an environment in which private property rights are respected, and private investments are protected from arbitrary actions by government officials. He reached this conclusion by analysing 57 of the most publicised cases to come before the Administrative Courts in their first two years of operation. Quinn found that most of these cases fell into one of five categories: property disputes (almost half), public sector employment disputes, provision of services disputes, disputes involving human rights issues and tax disputes (1995:34).[19] Since it is 'the middle class which owns property, requires essential services to be provided to this property, works in the civil service, is expected to pay tax' and has tended to be most vocal in support of human rights issues, Quinn concluded that the interests the Courts serve to protect are 'essentially middle class interests'.

This argument seems to fit well with contemporary evidence of support among the professional and business classes for greater transparency in government and for the rule of law generally (see e.g. Budiono Kusumohamidjojo 1988). But although the Administrative Courts appear to benefit the middle classes disproportionately—and the government no doubt took note of this—there is little to suggest that they, or indeed any group outside the state, were clamouring for the establishment of the Courts. The main initiative, indeed, came from above, not from below.

This leads us to consider how the establishment of the Courts might have served the government's interests. The best answer to this is that the government hoped that the Courts would serve to enhance the quality of bureaucratic decision-making and help tighten control and supervision over state officials. Supporting this explanation is the preamble to the 1986 Administrative Justice Act which stresses the need to 'foster, improve and reform the state apparatus in order that it will be efficient, effective, clean and authoritative' for the sake of carrying out national development. Looked at from this perspective, the establishment of the Administrative Courts is consistent with the government's overall development priorities, and with past efforts—largely unsuccessful—to control corruption and inefficiency in the bureaucracy.[20] These involved setting up *ad hoc* anti-corruption teams, authorising the internal security agency Kopkamtib to form special 'Operation Order' (Opstib) units (1977), establishing supervisory mechanisms such as 'Close-up Supervision' (Waskat) (1988) and creating a confidential 'Post Box 5000' under the authority of the Vice President to which people were encouraged to send their complaints about government corruption. Allowing individuals outside the state to initiate legal actions against particular decisions by government officials and the issuing of directives requiring government departments to

abide by the decisions of the Adminis-trative Courts suggest a move towards providing, as Quinn has noted (1995:47), some level of genuine bureaucratic accountability.

It is in this area of bureaucratic rationalisation where the Administrative Courts have perhaps had their biggest impact. Where officials were prone to issue low level regulations with little thought to their compatibility with superior regulations, they now double check first for fear that their decision will be nullified by an Administrative Court. By all accounts, there is now a real fear among government officials of being 'di-PTUN-kan' or 'Administrative Court-ed'.

Judges with attitude

There were, then, a number of internal and external imperatives for the government to strengthen the institutional autonomy of parts of the judiciary. What the government does not appear to have foreseen was that strong public support for Administrative Court judges who dared to annul decisions by senior officials would stir judges in other courts, most notably the Supreme Court, to flex their muscles. Despite the Supreme Court's subordination to the Soeharto government—especially since the appointment of Oemar Seno Adji as its Chair in 1974—it has nursed a sense that it has been deprived of its constitutional right to play a much more powerful and prestigious role in the life of the state. Although such links are rarely made explicit, there appears to have been a direct connection between the rising public popularity of Administrative Court judges and a tendency on the part of Supreme Court judges to seek public backing as a means of strengthening the autonomy of their institution.

This has been manifest in a number of overtly populist decisions, beginning in mid-1992 with the well publicised Kedung Ombo case involving a claim for compensation by villagers displaced by the World Bank financed Kedung Ombo dam project in Central Java. Deputy Chair of the Supreme Court, Judge Asikin Kusumah Atmadja, awarded the plaintiffs seven times what they were asking. Instead of Rp10,000 (then approximately A$5.50) a square metre, the judge, only two days away from retirement, awarded them Rp70,000 (approximately A$38) to take into account the intimidation suffered by the villagers.[21] This decision, according to Dutch legal expert Sebastiaan Pompe, was utterly unexpected and 'shook the Indonesian political establishment to the bottom' (Pompe 1996:121). Central Java military commander Lt-General Soejono, Pompe wrote, 'was unable to conceive of a…judiciary that didn't protect government interests' and at first refused to accept that the Supreme Court decision was genuine.

In another extraordinary case the same year, a Supreme Court judge awarded Irian Jayan tribal leader Hanoch Hebe Ohee and his community Rp18.6 billion (approximately A$10 million) in damages—almost the equivalent of the province's annual budget outlay—to be paid by the provincial government which was found to have illegally occupied his tribal land since Irian Jaya was incorporated into Indonesia in the 1960s.

It soon became clear that Soeharto would not put up with such assertions of independence from Supreme Court judges, and moved to overturn both decisions. Supreme Court Chair Poerwoto Gandasubrata was summoned to the palace where the president told him that the Kedung Ombo project was for the good of the nation and that he hoped that a more just decision would be made (Pompe 1996:122). Poerwoto duly

ruled on 29 October 1994 that the government was not liable to pay damages to the villagers on the grounds that there was no law that allows a judge to award more than is claimed. This decision was widely seen not only as mean spirited, but also very damaging to the authority of the Supreme Court because its Chair was seen to be acting at the blatant behest of the president (Pompe 1996:120–1).

Worse still for the reputation of the Supreme Court, was Poerwoto's successor Soejono, who quickly became known after his appointment in November 1994 for his proclivity for countermanding decisions—even supposedly final decisions—by Supreme Court judges. In one case Soerjono shocked legal observers by summarily reversing a Supreme Court ruling in Medan after it had already been implemented. Not long afterwards, in April 1995, he annulled the Hanoch Hebe Ohee decision on what were widely seen to be very weak grounds, depriving the plaintiffs of any compensation for their years of expensive legal battles. Many legal practitioners were dismayed, with one senior Supreme Court judge commenting privately that 'The Ohee case was a disaster. The court should have upheld the law and forced the local government into a settlement' (Pompe 1996:125). Surabaya advocate Trimoelja Soeryadi went further, publicly declaring that Soejono's practice of issuing 'surat sakti' (magic memos), were 'destroying the legal system' (Republika Online 21 April 1996). In the wake of these events it came as no surprise when a Council of Supreme Court judges headed by Soerjono met on 13 June 1996 to overturn, on a point of law, the Administrative Courts' *Tempo* verdicts, ensuring that *Tempo* remained banned. Harmoko was vindicated (albeit belatedly) and the status quo was maintained.

This may have been the end of the story had it not been for Adi Andojo Soetjipto, the Supreme Court judge whose harsh criticisms of the legal system, and of Soejono in particular, have elevated him to the status of a popular hero.[22] Adi Andojo joined the Supreme Court in 1981, where he became known for his opposition to corruption and for exposing a 'court mafia' in the 1980s. It was only after 1994, however, when he was passed over for the job of Supreme Court Chair by his former underling Soejono, that he began to attract serious public attention with a string of daring and popular decisions. Adi Andojo made headlines in May 1995 when he freed Mochtar Pakpahan, the independent union leader arrested on charges of having helped incite riots in Medan in April 1994 involving tens of thousands of workers. More dramatically, in June 1995 he freed all the accused in the murder case of the young union organiser, Marsinah. Marsinah had been raped and killed in 1993 after being detained by the military authorities in Surabaya. The civilians accused of her murder appealed to the Supreme Court after having been sentenced to long prison terms. Adi Andojo ordered that they all be released, citing gross irregularities in the trial process and 'because there was physical and mental pressure applied during the interrogations' (Republika 3 June 1995). This decision was popular with the public but bitterly resented by the Surabaya military authorities whom Adi had implicitly accused of torturing innocent people to cover their own tracks.

Both of these decisions were overshadowed, however, by the case of the Gandhi Memorial School and its aftermath. There was nothing unusual about the case itself, which involved a dispute over the control of two prestigious and wealthy Indian private schools in Jakarta. A court of first instance had found that one of the parties, Vaswani Ram Gulumal, had forged legal documents and had sentenced him to a year's prison, reduced on appeal to eight months. The case then went to the Supreme Court where in

June 1995 Ram Gulumal was cleared of all charges by a court headed by Samsoedin Aboebakar. In April 1996, Adi Andojo wrote a letter to the Attorney General's office alleging that there had been high level collusion in the Supreme Court in connection with the case, which had seen it shunted to a certain group of judges in return for bribes of Rp1.4 billion (then over A$750,000). This letter was somehow leaked to the press and instead of playing it down, Adi Andojo decided to talk, alleging that high level collusion of this type was rampant in the Supreme Court. This outraged Soerjono, who accused Adi of 'fouling his own nest'.

In order to clear his name, Adi Andojo urged that an independent investigation be launched into the Gandhi Memorial School case, but this was rejected by the Justice Minister who proposed instead that the Supreme Court carry out its own investigation. When a special committee put together by Soerjono found no evidence of collusion, Adi made a plea for the public to dismiss the findings of the committee as tainted. In response Soerjono publicly denounced Adi and appealed to the President to dismiss him. This unprecedented public standoff saw similarly unprecedented demonstrations at the Supreme Court by lawyers and law students, and prompted at least three groups of university students in Sumatra and Java to launch hunger strikes in support of the beleaguered judge. Aware that Adi Andojo had become a beacon of hope in the eyes of the media, Soeharto decided to put off any decisions about his future until after he was due to retire in May 1997. This did not prevent the president, however, making it clear where his priorities lay by appointing Sarwata, the head of the judicial committee which had failed to find any evidence of collusion in the Supreme Court, as Soejono's replacement on 1 November 1996.

In the meantime Adi Andojo used his popularity, and the platform provided by a willing press, to argue the case for reforms to the Supreme Court to make it more effective and independent. His main proposals, apart from getting tough on corruption, were to reduce the number of judges from 51 to 17 and to end the practice of appointing outsiders to the Supreme Court (Matra September 1996:20). This latter demand is a long-standing issue among career judges anxious to preserve their institution from political interference.[23] The outspokenness of Adi Andojo and others in recent times, then, can usefully be interpreted as an attempt by judges to develop, as Quinn put it, 'some independent source of prestige and recognition' (Quinn 1995:45) from which to reassert their institutional interests.

Conclusion

Recent developments in the justice system discussed above reflect the Indonesian government's struggle to reconcile two broad priorities. One is the need to curb patrimonial practices that work against business confidence, against the property interests of the increasingly important middle and business classes and against effective management of its large and inefficient bureaucratic machinery. The other is its continuing desire for centralised control, represented here by its apparent unwillingness to loosen its grip on the Supreme Court, despite allowing the Administrative Courts some leeway. Seen in this light, the government's dilemmas over legal reform have clear parallels in the realm of economic policy, where the New Order leadership has at once

sponsored moves towards greater regularisation and transparency while reserving for itself the right to break the rules with impunity. Similarities might also be found in the government's creation of the Human Rights Commission in 1993 at the same time as sanctioning administrative torture in Aceh, Irian Jaya and East Timor. The crucial question is whether the imperatives which underlay these apparently conflicting priorities threaten the existing order or can be accommodated within it. This in turn begs the question of where the main pressures for reform, in our case, legal reforms giving citizens greater right of redress against the bureaucracy, are coming from. I have argued that while the government hoped the Courts would improve its image, the most important factor behind the establishment of the Administrative Courts appears to have been the desire of senior government officials to improve the efficiency of the bureaucracy.

This should not be the end point of our analysis however, because as I have sought to show, reforms initiated from above can have unintended consequences, taking on a life of their own, and, with sufficient public support, carve out a space for themselves in the body politic. What appears to have started out as an effort to rein in errant bureaucrats soon became an important vehicle not only for critics to challenge the government leadership but also for judges in the Administrative Courts and beyond to take advantage of public support to press for greater institutional autonomy. While extra-state forces then, may not have been instrumental in bringing the Courts into existence, they certainly played a major role in determining what they became. The weakness of civil society in Indonesia notwithstanding, the overwhelming public support for figures such as Benyamin Mangkoedilaga and Adi Andojo demonstrate a significant groundswell of support for the strengthening of legal institutions which are capable of extending their writ up the hierarchy of power as well as downwards.

Taking a broader view, it is clear that the overall character of legal structures in Indonesia can best be understood in the context of the country's unique history. Inherited from the Dutch colonial state, legal institutions were subordinated by Sukarno's militant anti-legalism and re-harnessed by Soeharto's dirigiste state in the service of political control and large-scale state-led capitalist development. While espousing the rule of law, Soeharto's New Order remains as opposed to the principle of the separation of powers as Sukarno had been. The regime's ideological emphasis on harmony, cooperation and obedience is amply reflected in the various mechanisms I have described, which circumscribe the powers of the judiciary and enclose them in a web of dependence on the executive. In forming the Administrative Courts, the government demonstrated that it was prepared to allow a division of powers, granting one part of the judiciary the autonomy to perform an important, albeit limited, supervisory function. But as we have seen, this attempt to create 'autonomy within dependence' had unintended consequences in the form of strong public support for judges who opposed the very system they were part of. It is worth considering whether, instead of increasing the power and authority of the government, the Administrative Courts may, as conservative critics of the Administrative Justice Act feared, constrain it.

Notes

1 I have argued elsewhere (Bourchier 1996: Chapter 2) that organicism in Indonesia owes a considerable intellectual debt to a stream of European organicist theory developed mainly by German philosophers including Adam Müller and von Savigny (and transmitted to Indonesia

through the influence of the legal scholars of Leiden University in the 1920s and 1930s) in strong opposition to positivism.

2 Pancasila is Indonesia's state ideology, formulated by Sukarno in 1945. It comprises five basic affirmations: Belief in one supreme God; A just and civilised humanity; National Unity; Democracy led by the inner wisdom of unanimity arising out of deliberations among representatives; Social justice for the whole of the Indonesian people. There is of course nothing intrinsically organicist about Pancasila; my linking of the two notions here reflects the dominant interpretation as constructed by Soeharto's ideologues. For an extended analysis of how the New Order regime adapted Pancasila to its purposes see Bourchier (1996: Chapter 6).

3 MPRS Resolution No. XX/1966. For the full text see Ketetapan-Ketetapan MPRS (c. 1967:45–62).

4 The relevant sections of this and a similar law (Law No. 13, 1965) are translated in Mulya Lubis (1994:97).

5 On the hard fought campaign for a thorough reform of the legal system before 1970 see Lev (1978) and Pompe (1996: Chapter 3).

6 This applied to the General Courts only. The routine administration of the Religious courts is in the hands of the Religious Affairs Ministry and the Military Courts are under the Ministry of Defence and Security. When they were created in 1991, the Administrative Courts were managed by the Justice Ministry (Lotulung 1996:1–2).

7 Oemar Seno Adji was appointed Chair of the Supreme Court in 1974, after which time he worked together with the justice minister 'to ensure the political loyalty of the judiciary using arbitrary court administration as both carrot and stick', Pompe (1996:101).

8 Cited in Mulya Lubis (1994:88). Both the translation and the emphasis are Mulya's.

9 See e.g. Besar (1972:501–2, 522–4). See also Seno Adji cited in Mulya Lubis (1994:104).

10 The Administrative Appeal Courts (Pengadilan Tinggi Tata Usaha Negara or PTTUN) are in Jakarta, Medan, Ujung Pandang and Surabaya. There should ultimately be 27 Administrative Appeal Courts (one for every province) and a first instance Administrative Court in each of Indonesia's approximately 240 districts (kabupaten) and 56 urban municipalities (kotamadya).

11 There remains a separation of competence between the Civil Courts and the Administrative Courts, with the former still handling many of the complaints against the government which do not fall within the fairly narrowly defined jurisdiction of the latter. Lawsuits against the government can be filed through Article 1365 of the Civil Code, but it is unclear how widely this Article has been used. See Otto (1991:4–9) and Lotulung (1996:12–13).

12 For a discussion of the grounds for testing the legality of an administrative act see Otto (1991) and Lotulung (1996:4–8). The full text of the Administrative Justice Act and its official elucidation can be found in Lopa and Hamzah (1993:175–281). Any translations of the Act are my own.

13 Article 116 of Law No.5/1986 allows the court to make a request of the superiors of the decision-maker to compel compliance. The lack of contempt of court laws, though, makes compliance with the court's decision dependent on the attitude of the executive body concerned (Millie 1995:31). According to the Head of Administrative Law at the University of Indonesia Yusril Ihza Mahendra, this has meant that adverse Administrative Court decisions are often ignored by the government institutions involved (Republika Online 15 January 1997).

14 This arrangement contrasts with European administrative courts which are organised quite outside the regular legal system, and are responsible not to the Supreme Court but to a separate body: the Conseil d'Etat in France and the Bundes-verwaltungsgericht in Germany (*Derham et al.* 1986:61–2).

15 The best source on the details of the *Tempo* case is the collection of articles in Yayasan Alumni *Tempo* (1995).

16 Cited in an article by Dirk Vlasblom in NRG Handelsblad (6 May 1995) translated in a posting to http://www.Indonesia-1@igc.apc.org/: In: 'Hakim Menjadi Pahlawan', 7 May 1995.

17 Benyamin's transfer to become head of the Administrative Appeals Court in Medan shortly after the *Tempo* decision was technically a promotion but was generally seen as a mild reprimand.

18 For details of this challenge see chapters 4 and 5 of Sri Bintang Pamungkas' arrestingly titled 1996 book Saya Musuh Politik Soeharto (I am a Political Enemy of Soeharto).

19 More comprehensive figures were provided by Lintong Siahaan, the Chair of the Jakarta Administrative Court at the Legal Institutions and the Rule of Law in East Asia workshop, Fremantle, 9 November 1996. According to Lintong, the breakdown of cases in the Jakarta Administrative Court between 1991 and September 1996 was as follows: Matters relating to land: 24 per cent, Housing: 19 per cent Employment: 15 per cent, Matters relating to permits and licences: 38 per cent.

20 An embarrassing reminder of the government's failure to adequately tackle the corruption problem was the 1995 report of the Berlin-based Transparency International, an independent body of aid advisers and academics, which ranked Indonesia's government as the world's most corrupt (*Der Spiegel* 10 July 1995:21).

21 Asikin retired on 28 July 1992 but his decision was dated 18 July 1993.

22 My information on Adi Andojo has been compiled from a number of sources, two of the most comprehensive being a book by Hadely Hasibuan entitled Adi Andojo: 'There is definitely "Collusion" in the Supreme Court' (1996) and a long interview in the September 1996 issue of Gatra magazine.

23 But as Pompe has pointed out, political appointments may in fact be the price the Supreme Court has to pay for greater autonomy, given that independent judiciaries in other parts of the world tend to be political appointees. As the experience of the New Order attests, it is also quite possible for the government to control the courts through the appointment of compliant career judges.

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11
A COMMUNITY CHANGES
Taiwan's Council of Grand Justices and Liberal Democratic reform

Sean Cooney

Introduction

In contrast to many of the other societies examined in this book, Taiwan has, over the last decade, been dismantling its authoritarian political structure. This process has had a major impact on judicial decision-making. In this chapter, I examine this impact with an account of the Council of Grand Justices, the *de facto* constitutional court in Taiwan.[1] I first provide a description of the constitution in Taiwan and the role of the Council, and then contrast the approach of the Council to constitutional issues before and after the democratisation process. Finally, I seek to place this development in a theoretical context. I cast doubt on whether Jayasuriya's 'East Asian judicial condition' model (Jayasuriya's 'Introduction', this volume) can be applied to Taiwan. I also reject an analysis based on the ideal of 'judicial independence'. I offer instead, an interpretation of the Taiwan experience based on an understanding of the relationship between judges and the 'political-legal community' with whom they interact.[2]

For the reasons Penelope Nicholson gives in her chapter in this volume (see also Taylor 1997; Frankenburg 1985:445–8), I make no claims for this analysis other than it is how I, as an Australian with an interest in many aspects of Taiwanese society, including the legal system, understand the change. My analysis is informed by my reading of decisions of the Council of Grand Justices and studies written chiefly by Taiwanese commentators.

The Republic of China (ROC) Constitution and the Council of Grand Justices during the martial law period

The ROC Constitution

The current constitutional framework of Taiwan is set out in a document entitled 'Constitution of the Republic of China' *(Zhonghua Renmin Xianfa)*. This was drafted on the Chinese mainland, principally by the Nationalist or *Kuomintang* (KMT) government, and entered into force on 25 December 1947. It was initially intended to apply to all of China. After the KMT's retreat to Taiwan in 1949, Taiwan has been the only area in which the Constitution has been effective.[3]

The Constitution establishes a unitary state called the 'Republic of China' (ROC). Its boundaries in no way reflect existing geo-political realities and include not only Taiwan and mainland China but also Outer Mongolia, and some parts of the new Central Asian republics.[4] The substantive chapters of the Constitution cover the structure of the central government, the relationship between central and provincial/local authorities, rights and duties of the people and fundamental national policies (see generally Hwang and Yeh 1997:292–304).

The political theory underlying the Constitution's organisation of the central government reflects the doctrines of Sun Yat-sen (1990). He attempted to meld elements of the Western liberal democratic and socialist traditions with what he perceived to be effective governmental institutions from China's political past. Thus, the Constitution separates government powers into five rather than three branches (or *Yuan*)—the so-called 'five power Constitution' *(wuquan xianfa)*. The Yuan exercise judicial, legislative, executive, examination and control powers. The last two are inspired by governmental organs in dynastic China. The Examination Yuan is charged with determining entry standards for the public service and certain professions, while the Control Yuan exercises the supervisory powers of impeachment, audit, and censure.[5]

The Constitution also established a National Assembly *(guomin dahui)*. This is distinct from the Legislature and was intended to be an over-arching supreme representative organ. As originally conceived, it had the power to amend the Constitution, to appoint and recall the President, and to both revise and initiate legislation. At present, its powers are limited to amending the Constitution and confirming the appointment of key non-elected positions in the other Yuan.[6]

The distinction between the Legislature and the National Assembly is a product of Sun Yat-sen's division between the political powers *(zhengquan)* of election, recall, initiative and referendum, which belong to the people, and governmental powers *(zhiquan)* exercised by the five branches of government (Sun 1990:130–49). The National Assembly represents the people exercising their political power (since, it was thought, it would be impossible in a country of China's size for them to exercise this power directly). Some Taiwanese scholars (e.g. Li 1994; Xu 1994) have indicated a conceptual difficulty with this structure. They argue that it is inconsistent to consider the elected Legislature as a governmental organ whereas the elected National Assembly, whose functions overlap with the Legislature, is considered as a political organ.

Chapter 4 of the Constitution provides for a President and Vice-president. Originally elected by the National Assembly, they are now directly elected by popular vote (Additional Articles,[7] Article 2), the first such election occurring in March, 1996. The President is the Head of State, representing the 'Republic of China' (Article 25). What is unclear from the Constitution is the extent to which this function translates into the direct exercise of executive power. While from one point of view, the President's role should be construed as largely symbolic, the history of the position has resulted in the President actively participating in executive decision-making. This has generated some uncertainty, for the Constitution also provides for a 'Head of the Executive' *(Xingzheng Yuanihang)* often translated as 'Premier', who heads the Cabinet. The division of responsibility between the Premier and the President has yet to be definitively resolved (Hwang 1995:240–6).

In addition to structuring the central government, the Constitution also purports to guarantee a range of political, economic and social rights. These are set out in Chapter 2 and include, for example, equality before the law regardless of sex, religion, race, class or party affiliation, freedom of speech, teaching, writing and publication, freedom of assembly and association, the rights to subsistence, work and property and the right to an education. These rights may be restricted 'to prevent infringement upon the freedom of other persons, to avert an imminent crisis, to maintain social order and to advance public welfare' (Article 23).

In addition to these fundamental rights, the Constitution contains a statement of fundamental national policies in Chapter 13. Unlike the Chapter 2 rights, it is generally agreed that these policies are not justiciable (Lin 1993:145–67), but rather provide guidance to the Legislature and the Executive on matters including defence, foreign relations, economic affairs, social security, education, culture and the status of indigenous peoples.

Finally, the Constitution provides for the appointment of 'Grand Justices' who are empowered to interpret it (Articles 78, 79 and 171; see generally Lin 1993; Mendel 1993:167–76; Lin and Ma 1992:113–16; Liu 1991; Fa 1991). The Grand Justices meeting together as Council to interpret the Constitution form a *de facto* rather than a formally constituted constitutional court. They do not enjoy all the same privileges as other judges (compare Article 81). Although they must be above partisanship and enjoy protection from political interference (Article 80), they do not have life tenure but are appointed for nine-year terms *(jie)*.

The 'ROC Constitution' establishes a system of government in which there are checks on the concentration of power effected through the five Yuan framework and provision for the control of government through elected representatives. However, the Constitution has never operated in its original form in Taiwan, and until this decade most of its democratic processes, in so far as they applied to the central government, were suspended.

The Council of Grand Justices 1949–87

From its establishment in 1947 to the mid-1980s, the Council of Grand Justices did not limit the exercise of power by the other arms of government. Indeed, in its Interpretation 31, it permitted the suspension of national elections, enabling the Nationalist Party (*Guomindang*, 'KMT') to maintain its rule indefinitely. I will explain the context of that case.

In 1948, in response to the Chinese Civil War, the National Assembly, dominated by the KMT, adopted the 'Temporary Provisions Effective during the Period of Mobilisation for the Suppression of the Communist Rebellion'. These granted extraordinary powers to the President of the Republic of China (then Chiang Kai-shek) and enabled him to declare martial law in Taiwan in 1949. Constitutional freedoms, including those of assembly, association, and speech, were subject to suspension by the executive (Temporary Provisions, Article 11) so that, for example, the media were tightly controlled.

These measures were, however, not sufficient to ensure KMT dominance. The Constitution provides that members of the Legislature and the National Assembly are to

be subject to regular elections. If these elections had been held in the early years of KMT rule on Taiwan, they would quite likely have seen its defeat. The KMT members had been elected on the mainland, and in the years immediately after the flight to Taiwan, lacked a popular base on the island. The loss of the KMT majority in the National Assembly could well have led to the downfall of President Chiang himself since, according to the Constitution, he was appointed, and could be recalled by, that body. It was therefore clear to the KMT leadership that, if the electorate was to be confined to Taiwan, elections for the central organs of government had to be avoided.

This posed a dilemma for the regime. If elections were simply suspended by the KMT leadership, their rule would be unconstitutional—and transparently dictatorial. In order to resolve this situation, which Hwang and Yeh describe as a 'crisis of legitimacy' (1997:283), the KMT turned to the judicial system. It requested that the Council of Grand Justices resolve the issue. The Council was controlled by mainland judges sympathetic to Chiang Kai-shek's rule since the Grand Justices had been appointed by him (Liu 1991:518). Chiang and his advisers could therefore be reasonably confident of a decision in his favour on the election issue.

The Council's decision on the composition of the representative organs of government during the martial law period was handed down in 1954. In Interpretation 31,[8] the Council held that it was not possible to conduct elections for national governmental organs since the mainland electorates of the Republic of China were in the hands of the Chinese Communist Party. Accordingly, general elections were to be suspended until these electorates were recovered. Of course, they have never been recovered. Indeed, Tsang (1993) argues that the KMT authorities knew by the end of the 1950s that they could not realistically be retaken. Nevertheless, the ruling continued in effect until 1990, and the national KMT leadership remained unaccountable to the Taiwanese population for forty years.[9]

According to Professors Jau-Yuan and Yeh Jiunn-Rong of National Taiwan University, this decision greatly undermined the standing of the judiciary:

> The fragility of the judiciary in reacting to political invitation was evident. In hindsight, one can easily draw the conclusion that the Council suffered a serious blow that posed tremendous damage to the reputation of the judiciary and hence to its function of channelling constitutional change in a period of political transformation.
>
> Hwang and Yeh (1997:285); see also Hwang (1995:44–7)

The view that the Council operated essentially to legitimate, rather than constrain, the excesses of KMT rule is strengthened by its record in other cases during its first three terms (ending in 1976). Liu (1991) has shown that during this period the Council did not once exercise its power to declare legislation unconstitutional. During the fourth term (1976–85), the Council began to be more assertive, insisting that its interpretations reviewing the constitutionality of legislation and regulations were binding on other branches of government (e.g. interpretations 185, 188; see generally Mendel 1993:178–84; Liu 1991:528–34). It was nevertheless careful not to challenge directly those branches.

However, since the political reform process began in the mid-1980s, the Council has radically changed; it has made frequent declarations of unconstitutionally. This change will be explored in the next part.

The Council of Grand Justices 1987–97

The democratisation process

The political reforms commencing in the 1980s are generally referred to by both Taiwanese and Western scholars as a 'democratisation process'. It involves the gradual transformation of a state from an authoritarian form towards a liberal democratic form of government. Key elements of the process have included:

- the legalisation of opposition parties, especially the large Democratic Progressive Party (DPP);
- the lifting of martial law, permitting greater enjoyment of freedoms of assembly, association, publication and speech;
- the abolition of the 'Temporary Provisions';
- constitutional amendments confining the electorate for central government elections largely to Taiwanese residents and providing for direct elections for the President and Vice-president; and
- the resumption of national elections in accordance with those amendments.

The pace of the reforms has until recently been controlled by the KMT (Haggard and Kaufman 1995:299) which still retains massive resource advantages over its rivals in party membership, media access and financial assets. Its candidates won the Presidential elections in 1996. However, since 1994 the KMT's dominance of governmental institutions has substantially weakened. It has lost the mayoralty of Taipei to the DPP, its legislative vote has fallen below 50 per cent (it retains a bare majority) and it no longer has decisive control over constitutional change. This is because the National Assembly can only pass a constitutional amendment if three quarters of members (the quorum being two thirds) consent.[10] The DPP has a third of the seats and can thus block any amendments to which it objects.[11]

It may be concluded that a multiparty liberal democratic system is gradually being established in Taiwan. To be sure, the legitimacy of this system may be undermined by corruption (including vote buying, links with organised crime, and the influence of business élites) and its survival may be undermined by deteriorating relations with the mainland (leading to a state of emergency or even war). Nevertheless, whatever its future direction, it is clear that the operation of the political system in Taiwan has been fundamentally transformed over the last decade.

I will not discuss these political changes in detail since they are examined extensively in other studies (e.g. Hwang and Yeh 1997; Haggard and Kaufman 1995: Chapter 8; Hwang 1995; Tozzi 1995; Tien and Chu 1994; Tien 1993; Feldman 1991; Tien 1989; Winckler and Greenhalgh 1988). I will concentrate rather on the Council and examine how political change has affected the decision-making of the Grand Justices.

The Grand Justices' new activism

Asserting judicial authority and autonomy

The Council was almost irrelevant for most of the martial law period, except in so far as it legitimated Chiang Kai-shek's authoritarian rule. It has now become a far more consequential institution. During its fourth term, the Council began to assert its authority (see above) but it was not until the fifth term (1985–94) that a fundamental change in approach became evident.

The Grand Justices' decision in Interpretation 261 to order national elections marked the beginning of a new, more activist phase in the Council. This landmark decision, delivered in 1990, overturned Interpretation 31 and resulted in fresh elections for the National Assembly (held in 1991), and by implication, for the Legislature (in 1992). At about the same time, it began to exercise its power to enforce the Constitution by declaring laws invalid. The first cases of this kind related to minor tax regulations (e.g. Interpretations 210, 218 and 224), but then in a more far-reaching decision, a provision of the Civil Code was declared unconstitutional (Interpretation 242, decided in 1989).[12]

Following this decision, the Grand Justices of the fifth term, and now the sixth term (beginning late 1994) have on many occasions struck down both legislation and administrative regulations on the basis of unconstitutionality. For example, in Interpretation 371 they highlighted the limitations in the extent of legislative power over the judiciary by striking down a provision in the Grand Justices' Adjudication Law (Cooney 1997a:173; Hwang and Yeh 1997:307–8). The provision prevented lower courts from referring cases involving constitutional issues directly to the Grand Justices and the Council held that it was an unconstitutional constraint on judicial review.

Interpretation 371 was also an opportunity for the Grand Justices to indicate how they saw their role in the new, democratised, Taiwan. They referred to constitutional review systems in established liberal democracies including Japan, Germany and the United States (which they described as 'modern countries observing the rule of law' *(xiandai fazhi guojia)*). They then explained that the function of judicial review was

> safeguarding the Constitution's [status] as the highest normative level [of the legal system, *baozhang zai guifan cengji zhong zhi zuigaoxing*] and protecting judges' independent exercise of their powers in order that during a trial they observe only the Constitution and legislation, and are subject to no other interference.
>
> (Page 2 of the unreported judgment)

Interpretation 371 widened citizens' access to judicial review and is likely to accelerate the already very significant increase in the number of petitions (i.e., applications) by private citizens coming before the Council (Cooney 1997a:172–3). This increase suggests a change in public attitude; the Council now seems to be perceived as a significant check on executive and legislative power.

Characteristics of Taiwan's legal system in the post-martial law period

The combination of the Council's preparedness to exercise its powers of constitutional review far more extensively than in the past, and the much improved access to it, created the conditions for the Grand Justices to intervene significantly in the reform process. Given that the comprehensive statement of rights contained in Chapter 2 of the Constitution can be interpreted so as to invalidate a wide range of legal provisions, the potential impact of the Council's decisions on the legal system is very great. The Council has made use of its powers to reform three features of the legal system which were characteristic of the authoritarian period. I first describe these features, and then examine several cases which illustrate the Council's approach.

One of the most pervasive characteristics of Taiwan's legal system is the loose drafting of much of the legislation, which provides little normative guidance on administrative action. The legislature has tended to word statutes very vaguely, leaving the executive arm of government free to determine substantive policy.

Statutes have also contained few limitations on the exercise of discretionary powers by these authorities (see Cooney 1996 for example in the context of labour law). Professor Yeh Jiunn-rong has linked this maximisation of executive authority to the KMT emphasis on social stability and centralisation of power:

> Thanks to Taiwan's relatively small territory, the state was able to penetrate every aspect of life on the island. A more intrusive governmental regulatory regime was thus established, while the power of private regulation declined.
>
> Yeh (1990:92)

The problem of structuring the discretionary powers of administrative organs is common to very many contemporary legal systems, and greater detail and availability of judicial review mechanisms do not necessarily reduce discretionary powers as intended (see e.g., Hawkins 1986; Baldwin 1990). Nevertheless, many Taiwanese laws on the surface allow much wider scope for unfettered executive action than their equivalents in Australia or the United States, for example, and have not been subject to the same degree of formal judicial review.

A second feature of many laws may be viewed as a subset of the first, but because of its particularly severe impact on the personal freedom of citizens, needs to be highlighted separately. This is the availability to the police of explicit and extensive coercive powers.

Third, many laws have arguably been designed to reinforce what Thomas Gold calls the KMT's 'authoritarian corporatist' strategies. He explains these strategies as follows:

> Bolstered by its Leninism as well as traditional Chinese authoritarianism, the KMT built a corporatist structure to control and permeate nominally private organisations in a much more explicit and thorough fashion than one would expect in a typical capitalist society. This was especially strong in the political, cultural (ideological) and social spheres, where all

> organisations, regardless of their class composition had party leadership or supervision.
>
> Gold (1994:51)

The existence of wide discretionary powers is consistent with this strategy, as it enabled the KMT-dominated administrative organs to both support KMT-sponsored organisations and hinder or prevent the growth of autonomous rivals. However, the laws have also directly prohibited the formation of associations independent of the KMT. While restrictions on the establishment of some kinds of organisations, such as new political parties, have been lifted, some are still in place (for example, those on new union federations).

I will now examine how the Council has dealt with each of these features in turn.

Dismantling authoritarianism

Curbing administrative discretion

The Council has been active in establishing a new normative framework for administrative rule and decision-making. The Grand Justices have repeatedly stated that an exercise of discretionary power by the executive which encroaches on constitutional rights will be unlawful if it lacks a clear legislative basis. A recent decision, Interpretation 394, illustrates their approach.

Interpretation 394 dealt with rules made by the Ministry of the Interior in relation to the construction industry, pursuant to a delegation under the Building Law 1938. The authorising provision, Article 15, was extremely broad. It provided that:

> Regulations for the administration of the construction industry shall be made by the Ministry of the Interior.

On the basis of this provision, the Ministry of the Interior issued rules which *inter alia* enabled provincial or municipal government authorities, with the approval of the responsible authority at central government level, to cancel the registration of any person who within a three year period had violated the regulations or the Building Law more than three times.[13] The Ministry also issued an administrative interpretation[14] which stipulated that certain specialist building technicians registered under the Regulations would be subject to an administrative reprimand if they were unable to carry out their responsibilities for more than one month, ‘as a result of leaving the country or another reason’.

This is a clear example of the legislature delegating sweeping rule making and enforcement powers to the bureaucracy without providing any normative guidance on how the powers were to be exercised. The Council ordered the Ministry to cease applying both the relevant rules and the administrative interpretation. In doing so, the Grand Justices made plain the principle underlying their approach to administrative regulations:

> These administrative sanctions restrict people's [constitutional] rights. The constituent elements *[goucheng yaojian]* and legal effect of the sanctions must therefore be stipulated by statute. If the statute authorises an administrative organ to issue regulatory orders setting out standards for compliance, it must do so in specific, clear terms *[xu wei juti mingque zhi guiding]*. Only then will the purpose of Article 23 of the Constitution, which provides that rights can only be circumscribed by statute, be complied with.[15]

In other words, the authorisation in the Building Law, expressed in the broadest terms, could not be relied on to support the Ministry's rules. It was unconstitutional for the Ministry to exercise discretionary power to determine the nature and extent of the sanctions it would impose.

The reasoning in this case is also to be found in many other decisions in which the Council has invalidated administrative rules because they lacked sufficient statutory basis. These have included regulations concerning passenger aircraft (Interpretation 313), the levying of business tax (Interpretation 368), university courses (Interpretation 384) and the registration of factories (Interpretation 390). Although most Interpretations concern the imposition of penalties, the requirement for a clear statutory basis for regulations is not confined to provisions containing a sanction, but applies generally:

> If a law authorises the making of supplementary rules, the purpose, content and scope of the authorisation must be specifically and clearly set out. Only then will there be a basis upon which the rules can be promulgated.[16]

The significance of these interpretations lies not simply in their redefinition of the legal limits on the executive power of the state.[17] The interpretations also, albeit indirectly, redefine the function of the legislature. It must now play a more active role in formulating policies which may be considered by the judiciary to affect constitutional rights since such policies must be determined through parliamentary processes.[18]

The protection of personal liberty

The Grand Justices have also given a new meaning to a constitutional provision, Article 8, which provides safeguards for citizens subject to criminal procedures. This provision was largely ignored during the martial law period but is now being relied on by the Grand Justices in order to reform the arrest and prosecution process.

There have been two recent cases dealing with Article 8. The first, Interpretation 384, involved four aspects of the 'Provisions for the Eradication of Hoodlums'. Articles 6 and 7 of these regulations empowered the police to compel a person, whom they had previously designated a 'hoodlum' *(liumang)*, to attend for questioning without the need for any judicial authorisation. These Provisions also allowed the police to use secret witnesses who were not subject to cross-examination by the suspected hoodlum in judicial proceedings (Article 12). Hoodlums who had been sentenced on a previous occasion to compulsory reform work could be subsequently reassigned to reform work

without a conviction under the Criminal Code (Article 21). Finally, a person who wished to contest his or her 'hoodlum' status could do so only through administrative, not judicial appeal (Article 5).

The Council found that all these provisions violated Article 8. First, even though the provisions were not, strictly speaking, criminal in nature, the Council held that they were subject to Article 8, since it applied to 'all dispositions which limit freedom of the person, regardless of whether the person is characterised as a criminal accused' *(fan-xianzhi renmin shenti ziyou de chuzhi)*. This implies that legislation may be read as invalid even if it characterises detention or sanctioning powers as administrative rather than criminal. Second, the Council restated the general principles, derived from Article 8, that procedures used by state organs must be based in law, must uphold 'substantive legitimacy' *(shizhi-zhengdang)* and must comply with Article 23 of the Constitution (an important aspect of which is, as we have seen, that they must not involve an impermissible invasion of rights by administrative regulations). Third, the Council examined each of the challenged provisions in the light of these principles. The Justices held that the questioning power violated Article 8 because it amounted to detention without a court hearing. The power to use secret witnesses violated the right of an accused person to cross-examine hostile witnesses and impeded the court's pursuit of the truth. It therefore lacked 'substantive legitimacy'. The power to compel further reform work violated the right to freedom of the person. Finally, the inability to challenge a declaration that a person was a hoodlum through the courts, violated Article 16 of the Constitution, which guarantees the right of instituting legal proceedings (Article 16).

A second example involving Article 8 is Interpretation 392 (see Hwang and Yeh 1997:310–11). This case concerned the power of prosecutors to arrest or detain civilians without court warrants. Before this decision, prosecutors had argued that they were empowered to authorise the arrest, detention, release, or renewed detention of a suspect pursuant to the Code of Criminal Procedure and other relevant laws. However, in 1995 several lawyers, academics, and parliamentarians contested this interpretation and brought the matter before the Council. They argued that the relevant legislation violated the requirement in Article 8 that any person carrying out an arrest must bring the arrested person before a 'court' within 24 hours. The prosecutors responded that the reference to a 'court' included them, because, in Taiwan, prosecutors are generally viewed as formally part of the judicial branch of government.

The Council of Grand Justices overturned this view. The majority of the Council decided that the reference to a 'court' in the Constitution referred to a judicial body in the strict sense, that is, a body presided over by one or more judges and empowered to conduct a full hearing into the circumstances of a person's detention. The Grand Justices made it clear that the 24 hour limit on detentions not authorised by a judge could not be increased by any means other than a constitutional referendum.

Interpretation 392 has required a fundamental reorganisation of criminal procedure, including the amendment of the Code of Criminal Procedure and several other laws. It necessitates a far greater degree of judicial supervision of the police and the prosecutors than there has been in the past. Together with Interpretation 384, it makes plain that the modes of exercising coercive state power developed during the martial law era must be restructured.

Dismantling authoritarian corporatism

The Council has in several decisions compelled the revision of laws originally designed to buttress corporatist strategies. Two are discussed here (for more detail see Cooney 1997a:177–81). The first concerns academic freedom (see Hwang and Yeh 1997:311–12). During the martial law period, the KMT closely monitored universities to ensure that its own doctrines were upheld on campuses and dissenting views marginalised, or, where they posed a serious threat, removed. One way in which this strategy was supported was through provisions regulating universities. Article 22 of the University Law Implementation Provisions, issued by the Education Department pursuant to the University Law, empowered the Department, in consultation with the Universities, to prescribe compulsory subjects. Students who failed to take these subjects would not be permitted to graduate. This power was designed to achieve uniformity in the curriculum and could be used to compel students to take certain ideological courses, such as the study of Sun Yat-sen's 'Three Principles of the People' *(Sanminzhuyi)*.

In Interpretation 380, delivered in 1995, the majority of the Council found that the Provisions were unconstitutional. They were not authorised by the University Law and so violated the principle prohibiting excessive administrative discretion, as discussed earlier. The majority of Grand Justices supported their conclusion by a consideration of the meaning of the freedom to teach, which is protected in Article 11 of the Constitution.

The second example is chiefly concerned with control over trade unions (see further in Cooney 1996:50–3). During the martial law period, the KMT sought dominance over organised labour by drawing workers into a union federation—the Chinese Federation of Labour (CFL)—which it sponsored and controlled (Li 1992). To minimise the potential for the establishment of rival and autonomous unions, the KMT placed tight restrictions on union organisation in the Trade Union Law. For example, Article 4 of the Law provided that in those sectors which posed the greatest political risk to the KMT—governmental administration, education and defence industries—unionisation was totally prohibited. However, the ROC Constitution contains several provisions protecting and fostering collective labour relations and these were relied on in a recent challenge to this provision as it applied in the education industry.

In Interpretation 373, the Council determined that this ban on the formation of trade unions was unconstitutional, at least in so far as it related to certain non-teaching education workers. The majority of the Council based its reasoning on Article 14 which provides for freedom of assembly and association. They maintained that the Legislature could place restrictions on industry sectors where labour rights might conflict with other constitutional freedoms, such as the right and duty to receive an education, but these could not amount to a total ban. The reasoning in this interpretation, and particularly the reference in it to the labour relations systems of 'modern countries subject to the rule of law' (in other words, the industrialised liberal democracies), is inconsistent with the maintenance of the current Taiwanese labour law framework, which is still largely based on authoritarian corporatism (Cooney 1996).

Analysing the Council's changing approach to judicial review

In the final part of this chapter, I want to explore different ways in which the transformation in the Council's behaviour which I have just outlined may be theorised.

Simultaneously dependent and autonomous?

In the 'Introduction' in this volume, Kanishka Jayasuriya develops an analysis of the relationship between the nature of legal and political institutions in East Asia, as well as the connection between economic development and law. This analysis includes an examination of judiciaries in the region. Jayasuriya contends that the relationship between the judiciary and other parts of government (particularly the executive) in capitalist nations does not follow a universal pattern, but rather reflects state structure, ideology and history. He goes on to maintain that judiciaries in East Asia do not operate in accordance with certain liberal models of judicial independence but instead experience 'simultaneous autonomy and dependence'.

Jayasuriya is correct, in my view, to point out the limitations of universalist claims about the nature of judicial independence. However, his East Asian model sits uneasily with the Taiwanese experience (and also, it would seem, with the similar changes in judiciary-executive relations following democratisation in South Korea: Yang 1993; Holland 1997).[19] There is an obvious difference between the operation of the Council of Grand Justices before and after democratisation. To describe the Council as simultaneously dependent and autonomous during both periods without further qualification, would obfuscate this difference (except in so far as *any* court system could be described as both dependent and autonomous—see below).

Jayasuriya maintains that his analysis should be understood in a dynamic sense, and this, together with his emphasis on ideological, historical and institutional factors provides the basis for an approach which can give greater recognition to the distinct aspects of the Taiwan case. Such an approach implies that the nature of relationship between the judiciary and other arms of the state in East Asia is not fixed but rather historically contingent. However, Jayasuriya does not develop his analysis in this direction. I will seek to do so later in this chapter.

Judicial independence?

Another approach is to turn to Western liberal notions of judicial independence and argue that they explain the transformation in Taiwan. The argument would run that as a result of Taiwan's transition to a liberal democratic society, the Grand Justices, who during the authoritarian period were subordinate to the KMT regime, have come to enjoy judicial independence. This is why they are now prepared to restrain other arms of the state. I believe that this approach, although attractive, is not convincing in some versions at least, because of its essentialist account of judicial independence. I will illustrate what I mean by reference to a recent article by Larkins (1996) on judicial independence and democratisation.

Larkins starts from the proposition that judges in a democratised society restrain arbitrary exercise of state power by means of judicial review and by compelling the state

to observe its own laws. In order to restrain the state in this way, judges must be independent of those parts of the state which exercise executive and legislative power. He goes on to maintain that judges are independent when the judiciary possess three characteristics. First, they are impartial, that is to say that 'they decide cases based upon the objective principles of the law, and not the social and political standing of the disputants' (Larkins 1996:608). Second, they are insulated, that is, shielded from retaliation from other arms of the state, through safeguards such as judicial tenure, stable remuneration and stringent appointment and dismissal procedures. Third, they have the authority to determine whether other arms of government have acted unlawfully and, if they have, to restrain them.

There are problems with all three of Larkins' characteristics. Turning first to insularity, Larkins does not sufficiently acknowledge that this is a relative, not an absolute, idea. Clearly, in societies where judges face dismissal if they decide against the government in an important case, there is very little insularity (see Khoo Boo Teik, Chapter 9 this volume). However, even if judges' tenure and remuneration are secure, they are usually appointed by the executive and/or the legislature. Even in liberal democratic states, these institutions can and do fundamentally affect the composition of the courts. Appointments thus become politicised, although in only a few cases do they attract widespread controversy (e.g., Murphy J. and Barwick C.J. in Australia and Bork J. and Clarence Thomas J. in the United States). Judges are, therefore, rarely if ever, fully insulated.

Second, in relation to Larkins' comment about the capacity of the judiciary to constrain government, it does not follow that, because judges have greater capacity to review government action, they are therefore, other factors being equal, more independent. This is because the scope of judicial review is the product of a particular society's view of the appropriate balance between the arms of government. There is no 'ideal' balance; indeed there is a very wide variation, even in liberal democracies, in the extent to which executive or legislative action is subject to judicial review. The contrasting positions in the United Kingdom (emphasising parliamentary sovereignty) and in the United States (greater emphasis on judicial review of constitutionality) is only one illustration of this.

The shortcomings in Larkins' reliance on the indicia of insularity and judicial review are illustrated if we attempt to apply them to the formal constitutional framework in Taiwan. The constitutional provisions concerning the insularity and review powers (and indeed impartiality) of the Grand Justices before and after democratisation are largely the same (Articles 77, 78, 80 and 81; see also Organisation Law of the Judicial Yuan). Grand Justices were and are required to be above party affiliation and 'carry out their work independently without any interference'. They were, and are, appointed for nine-year terms by the President, who has always been from the KMT party. They were formerly confirmed by the Control Yuan but now by a simple majority of the National Assembly (Additional Articles, Article 4). This change, if anything, increases the possibility of political interference. During the appointment process for the current term (which took place in 1994), the National Assembly rejected one of the candidates for the Sixth Council, whose husband was an active DPP member (*Zili Zaobao* (The Independence Morning Post) 3 September 1994). She was the only candidate rejected; others with strong KMT connections were accepted.

Finally, the Grand Justices have had, both before and after democratisation, the power to interpret the Constitution. It is true that the precise nature of this power has been controversial and procedural limits are placed upon it (Mendel 1993 168–76; Liu 1991:544–52). However, it has largely been the Grand Justices themselves (rather than the Legislature) who have clarified and enlarged their own powers (see e.g., Interpretations 154, 175, 185, 188, and 371, the last discussed above).[20]

The reasons for the greater preparedness of Grand Justices to restrain the state since democratisation must therefore be found outside the formal legal arrangements. Larkins allows for this, recognising that the judges' perceptions of their own role and the informal interactions between the judges and other state actors is important. This suggests that in some cases (such as Taiwan), judicial independence is ultimately a question of a judge's state of mind—whether or not they are biased in favour of the government. In other words, the criterion of impartiality is the crucial one.

This, though, raises a further question: when are judges impartial? Larkins claims that they are so when they interpret the Constitution or other laws in accordance with the 'objective principles of the law'. This position is consistent with the Grand Justices' own declaration, in Interpretation 371 (see above) of when they act independently. However, Larkins does not explain what he means by 'objective principles of the law'. He seems to be adopting the formalist position that a constitution has an inherent meaning which may be determined by judges acting impartially (presumably impartial judges would not distort constitutional provisions for their own, or state, ends).[21]

This formalist account of judicial decision-making[22] has been sharply criticised by many legal scholars, such as those adopting American Realist, Critical Legal Studies, Feminist and/or Post-structuralist theoretical perspectives (for an excellent introduction to these perspectives see Davies 1994:120–8, 143–276). They contend that judicial decision-making is never an impartial process; judges do not, in deciding cases, simply identify the fixed, objective, meaning in a legal text. Judges rather interpret texts in the light of their socially constructed, contingent assumptions (or ideology).

I will develop this idea in the next section, explain why I believe that it is preferable to Larkins' concept of impartiality, and then go on to apply it to the experience in Taiwan. Lest my argument here be misunderstood, I emphasise at the outset that by questioning the concept of impartiality, I am *not* denying the change in character of judicial decision-making in Taiwan, nor the importance of the change for citizen-state relations in Taiwan. I very much welcome the transformation in the Grand Justices' approach, as do very many Taiwanese. I am instead concerned with how that transformation is to be described.

Judges, their ideology and their community

I think the critiques of judicial 'impartiality' suggest a more fruitful approach to analysing judicial behaviour than Larkins. They draw attention to the ideological context in which decision-making occurs. This takes us back, in part, to Jayasuriya's initial arguments about the importance of history, ideology and the wider institutional context of the court system. I agree with these observations although, as I have said, not the way Jayasuriya finally develops them. I think changes in judicial decision-making can be usefully understood by identifying how the wider society shapes judicial attitudes. Some legal writers refer to the part of society which most directly moulds judicial attitudes as

the 'interpretative community' (in particular, the poststructuralist Fish 1989; see generally, Millon 1992). Since this term is understood in different ways, I prefer to explain my approach by reference to the concept of the 'political-legal community'.

For present purposes, the 'political-legal community' consists of judges, lawyers, politicians, academics, bureaucrats, and other citizens (often organised into formal institutions), who define what counts as reasonable and acceptable judicial decision-making; in other words, the dominant legal ideology. Judges' assumptions about what the law is, and how it should be interpreted, are radically affected, indeed generated, by this ideology. It constrains their decision-making (Balkin 1991).[23] For example, when interpreting a constitutional text, judges are not identifying its 'true meaning' in an absolute sense, but rather finding a meaning which is accepted by the community around them, since they have the authority within society to determine whether the interpretation is legitimate, whether it counts as law. Viewed from this perspective, when judges set out their reasoning, they are really seeking to persuade the political-legal community (Katz 1986:54).

The political-legal community should not, in my view, be thought of as something which denies individual thought and action to judges. The community and individuals are interdependent (this approach is explained well by Balkin 1991:1139–45). The community cannot exist without its constituent individuals; it is not a monolith and is subject to change. Further, since these individuals have different beliefs, there will be different approaches to law within it, and hence, for example, dissenting opinions. On the other hand, these individuals cannot think and act independently of the community since the latter gives their thoughts and acts meaning so that even the dissenting opinions will be reflective of one of the tendencies (perhaps a minority one) within the community. Furthermore, the political—legal community is not, of course, hermetically sealed off from the wider society in which it is located. Change in perspectives held by the wider society will also result in conceptual changes within that community.[24]

It follows from this approach that, first, judges are *always* simultaneously dependent (because their ideas are derived from the political-legal community) and autonomous (because they retain individual thoughts and identities which partly produce that community). It also follows that absolute 'judicial independence' is impossible because it implies that judges can interpret the law in isolation from the assumptions and beliefs shared in the community around them. In particular, judges cannot be absolutely independent from state actors and major political parties since they are a significant component of the political-legal community. However, because the nature of the community and the relative importance of state actors and political parties within it can alter, the judicial attitudes whose formation is influenced by them may also change.

The Grand Justices and their political-legal community

I think these ideas can shed light on judicial behaviour in Taiwan. In interpreting the ROC Constitution, the Grand Justices, like judges anywhere in the world, have always been constrained by the political-legal community of which they are a part. However, the nature and ideology of that community has changed in step with the broader democratisation process occurring in Taiwanese society.

During the martial law period, the community in which the Grand Justices were located was dominated by KMT politicians, academics, and lawyers and the KMT ideology at that time was to maintain control through authoritarian corporatist strategies. Moreover, since the KMT marginalised opposition voices, these voices could not be heard by the Grand Justices. The Grand Justices needed to persuade the KMT élites, not the marginalised groups, of the legitimacy of their decisions. They could (and did) disregard the latter. Again, since the KMT wished to avoid challenges to their dominance, the Grand Justices discouraged judicial review by their non-interference with executive and legislative action.

The Council's refusal to challenge the KMT in any way can be explained either on the basis that they thought the same way as the KMT élites, or because, although they personally disagreed with the regime's conduct in a particular case, they assumed that a judicial challenge would be unacceptable to the political-legal community and hence, ineffective. As both Mendel (1993) and Liu (1991) argue, the quiescence of the Council during this period is at least partly attributable to the Grand Justices' knowledge that decisions against other branches of the government could be ignored, or could even provoke retaliation.[24]

However, since the 1980s, the democratic reforms—as well as the inclusion, and eventually predominance, of non-mainland voices in the KMT—have reconfigured this community. KMT corporatism has been weakened. Many lawyers, academics and even judges who are sympathetic to the anti-KMT forces are now viewed as a legitimate part of the legal profession, not a radical threat (Winn and Yeh 1995). Furthermore, while the KMT influence within the community may still be the strongest, it encompasses a broad range of opinions; it no longer speaks with the one voice. Consequently, since democratisation, the 'community' surrounding the judges includes a wider variety of perspectives (although some perspectives, such as those of women and labour remain relatively marginal). Increasingly, perspectives committed to, or at least using the rhetoric of, liberal democratic ideology are becoming dominant.[25] Thus, this ideology has come to permeate judicial reasoning. When interpreting the Constitution, the Grand Justices now seek to legitimise their decisions before this wider community and appeal to liberal democratic concepts to do so. At the same time, since the Grand Justices constitute part of the legal community as well as being constituted by it, the Grand Justices' appeal to liberal democratic views reinforces the belief in the community that liberal democratic views are reasonable and appropriate.

The post-democratisation cases outlined above, which restrained state power in three areas, are in my view, the product of the reconfiguration of the political—legal community. First, the decisions on administrative discretion, criminal powers and social organisations, are justified in terms of the liberal democratic ideology of that community. Second, the reasoning in them is legitimated by reference to legal principles adopted in other liberal democracies. As I indicated above, there are frequent references to constitutional cases in major liberal democratic nations such as Japan, the United States and the major European nations (a tendency supported by the fact that many Grand Justices have studied in those countries, and so their attitudes have been shaped by those legal communities as well).

Third, the decisions generally respond to groups in society which had previously been incorporated into, or suppressed by, the state during martial law but now enjoy

considerable autonomy and influence. Business interests, whose political power has been increasing at the expense of the bureaucracy (Chu 1994), are the beneficiaries of the decisions on administrative discretion. Opposition groups, who have bad memories of arbitrary arrest, sponsored the challenges to criminal law procedures. Non-state institutions, which seek to escape state corporatism, support the Council's decisions dismantling legal vehicles for state control. All these groups have advocates in the legal profession, academia and political parties (Winn and Yeh 1995:564–5, 578–83, 591–5). It is not surprising then, that their views are well reflected in the political-legal community.

Fourth, formerly dominant voices in the community, such as KMT politicians committed to authoritarianism, have been greatly weakened by democratisation and 'Taiwanisation' within the KMT. While they would be likely to oppose the interpretations I have described, their ideology has been marginalised and their opposition is no longer powerful enough to delegiti-mise the Council's decisions.

The Grand Justices are careful to remain within the bounds of what the political-legal community, or the major parts of it, consider acceptable. So, while striking down some laws deriving from the martial law era as unconstitutional, they have preserved the authority of the legislature by confining their interpretations to short statements of general principle, accompanied by a direction to amend the offending law within a specified time period (Hwang and Yeh 1997). This allows the legislature to determine the most appropriate content and form of the new laws.

Furthermore, the Grand Justices are not always at one. Since the political-legal community includes varying tendencies within the liberal democratic spectrum (as well as some members retaining an authoritarian tinge), and individual Grand Justices may be more influenced by one or other of these tendencies, they come to different conclusions about the 'best' interpretation. This is illustrated by the fact that many of the judgments described above were by majority.

It should be clear that I am not arguing that the Grand Justices are now interpreting the Constitution correctly, whereas before they were not because they were biased in favour of the government. What I am saying is that their interpretations are correct, or at least legitimate, *according to the liberal democratic assumptions of the political—legal community*. This is not a neutral position, and, in so far as some members of society are excluded from that community, the interpretations of the Grand Justices will tend not to reflect their perspectives. It is, however, certainly a position inclusive of, and responsive to, a far wider range of social perspectives than was the case in the authoritarian era.

The analysis I offer is illustrated particularly clearly in two decisions involving matters of great political sensitivity. The first, Interpretation 328, involves the highly controversial independence/reunification debate. This case arose when DPP members challenged the orthodox view that the boundaries of the ROC included the mainland. They argued that they were now confined to Taiwan. The relevant constitutional provision is Article 4:

> The Territory of the Republic of China according to its existing national boundaries shall not be altered except by resolution of the National Assembly.

Various judicial interpretations of this provision could be offered in response to the DPP arguments. One is that since the National Assembly has never voted to alter the boundaries of the Republic of China, the DPP case is without foundation. Another is that the Constitution should be interpreted in accordance with political realities (as occurred in Interpretation 31). Since the KMT government in Taiwan has neither governed nor held elections on the mainland (let alone Mongolia) for more than 40 years, it is absurd to hold that the Constitution extends to these areas.

While the Grand Justices may have been attracted to the first interpretation during the martial law period, to have done so after democratisation would have delegitimised them in the eyes of the opposition forces, who had become too large a part of the political-legal community to ignore. Not surprisingly then, the Council evaded the issue altogether by holding that the extent of national boundaries was a 'political question' *(zhengzhi wenti)*.

The second, Interpretation 419, handed down in late 1996, dealt with several controversial issues but for present purposes it will suffice to focus on one. This arose because of events following the presidential elections of 1996. The KMT's successful Vice-presidential candidate, Mr Lien Chan, was the Premier prior to the election. After the election, Lien Chan refused to resign as Premier.

The two main opposition parties, the DPP and the New Party (which split from the KMT in 1993) contended that it was unconstitutional for one person to hold the position of Premier (the head of the Executive Yuan) and Vice-President simultaneously. The KMT argued *inter alia* that the Constitution did not specifically prevent this, although they agreed that it did not permit the Premier to be the President (see Articles 51 and 55). The opposition responded *inter alia* that the Constitution clearly implied that a person could not hold the two offices. This was clear, they argued, from the fact that the Vice-President succeeded to the office of President if the incumbent vacated it before his or her term expired. If this occurred when the Vice-President was also the Premier, then it would clearly be unconstitutional, and government would become unworkable. The Constitution therefore should be read as excluding this possibility from the outset.

This case placed the Grand Justices in a very difficult position. If they held against Lien Chan, then the KMT would be forced to make a humiliating admission that it had endorsed, indeed encouraged, unconstitutional behaviour on the part of its second most powerful politician. On the other hand, if it held for Lien Chan, the Grand Justices risked being portrayed by the opposition parties as simply assisting in the KMT's manipulation of the Constitution to further the ambitions of its leaders.

Confronted with this predicament, the Grand Justices, in an exceptionally long interpretation, provided an unusually vague response. This preserved the status quo while allowing all sides to claim a victory. The majority held that while holding the offices of both Vice-President and Premier was not strictly speaking unconstitutional, it 'did not entirely accord with the real intention of the constitution *(yu xianfa…zhi benzhi wei jin xiangfu)*'. Certainly, if the Vice-President became President, he or she would have to resign as Premier immediately.

I do not think the results in either of these cases can be explained as the 'correct' (or 'incorrect') interpretation of the Constitution, even in terms of liberal democratic ideology (though the constraint of that ideology would prevent an interpretation which, for example, rested on obvious authoritarian corporatist concepts). Arguments from both

sides in both cases would be sufficient to justify, in liberal democratic constitutional terms, a decision in favour of either one of them.

Both these cases, it seems to me, are better understood using the concept of the political-legal community. The Grand Justices sought to 'persuade' the major parts of the community, particularly, given the sensitivity of the cases, the main political tendencies. They strove to appear impartial *as between the major parties*. This is not to say that any of them did this as part of a cynical strategy. Knowing some of them, and believing them to be people not only of very great intelligence but also conscientiousness, that is, in my view, quite unlikely. It is much more probable that: 1 they sought to preserve the stability of the new and relatively fragile political system, as well as confidence in the courts by being relatively even-handed; and/or 2 they considered that they actually did act impartially (because they share the dominant liberal democratic ideology of their political—legal community, which maintains the possibility of 'judicial independence').

Conclusion

I have argued in this chapter that a fundamental change has occurred in the nature of judicial review in Taiwan. Since Taiwan's transition to a liberal democratic society, citizens who challenge governmental decisions and laws have a real chance of success. Such challenges are generally not futile, as they would have been under martial law, when the judiciary affirmed almost all actions of the regime.

I have suggested a way of understanding this change, which rests neither on the concept of an 'East Asian judicial condition' nor on an idealised notion of judicial independence. In my view, Jayasuriya is right to focus on the historical, institutional and ideological context in which judges make decisions. In order to indicate more specifically the relationship between judges and their social context, I have drawn on certain approaches within critical legal theory to develop the idea of a 'political-legal community'. The composition of and ideologies within this community create and shape judicial beliefs, and judges, as members of the community, in turn, shape the community's thinking. Democratisation in Taiwan changed the character of its political-legal community so that its dominant ideology is now liberal democratic. I have indicated a number of judicial interpretations which reflect this ideology.

As a political-legal community changes, patterns in the judicial decision-making which occurs within it are not fixed. Taiwan's judges, like their counterparts in Western societies, have not arrived at an endpoint of objective 'judicial independence'. Judicial thinking in Taiwan is shaped by a far wider range of views than under martial law, but some remain marginalised, such as those of women and/or the less wealthy (Cooney 1997a:177–9; Hwang 1995:184–8; You 1994). The reform has been an extraordinary achievement, especially for those who fought against the abuses of the Chiang Kai-shek regime. But I do not think we are at the 'end of history' of the judiciary on the island.

Notes

1 Taiwan is not formally recognised as a state by the United Nations, or most of its members. Nor does its government claim that it is a state—it insists that Taiwan is a 'political entity' *(zhengzhi shiti)*. However, it is of course treated by most nations as a *de facto* state (Attix 1995). It is therefore treated as a state here (see generally Jiang 1996; Hwang 1995; Cooney 1997b).

2 The approach here is different in several respects to that in my earlier study of the Council (Cooney 1997a).

3 The Constitution applies to the so-called 'free-area' which includes Taiwan itself, the Pescadores Islands and Matsu and Kinmen, two small islands off the coast of Taiwan, which are technically part of Fujian, rather than Taiwan province.

4 Article 4. The boundaries are those areas claimed to be part of Chinese territory by the KMT at the time the Constitution entered into force.

5 At present, only the Legislative Yuan is directly elected; the other organs are staffed by persons appointed by the President with the consent of the Legislature (in the case of the head of the Executive) or the National Assembly (in the case of the other branches). The Constitution in its original form provides that the Control Yuan is also subject to direct election (Article 91).

6 See Article 27 (the condition precedent to the exercise of the initiative and referendum powers cannot be fulfilled unless the Constitution applies to all of China) and Additional Articles, Article 1.

7 The 'Additional Articles' are *de facto* constitutional amendments made in 1991, 1992 and 1994.

8 Decisions of the Council are known as interpretations *(jieshi)* and are cited by number. They are published by different companies in collections of laws known as *Liufa-Quanshu*. They have not been translated into English as far as I am aware. Translations here are my own.

9 Elections were, however, held for local government positions, and for a number of supplementary positions in the Legislature, National Assembly and Control Yuan during the martial law period.

10 Constitution, Article 174. Alternatively the Legislature can pass a resolution for the National Assembly's agreement, but this requires a three-quarters majority of Legislators (the quorum is also three-quarters) and the KMT is unable to obtain this also.

11 Consequently, in the current round of constitutional amendments, the KMT has had to develop drafts in consultation with, and agreement of the DPP. This process began at the all-party National Development Conference held in Taipei 23–28 December 1996. The KMT and the DPP, despite objections from the New Party, reached agreement on issues such as the relationship between the various branches of government, reforming the method of election and powers of the National Assembly: Yu 1997:1. The National Assembly is meeting in May 1997 to debate the proposed amendments.

12 This case dealt with a provision preventing the remarriage of people who had been separated from their spouses on the mainland since 1949.

13 Regulations for the Administration of the Construction Industry Article 30 (1) (1) (9).

14 Ministry of the Interior, 17 December 1985, *Tainei Yingzi* Number 357429.

15 Such statutes will only be constitutional if they 'prevent infringement upon the freedom of other persons, avert an imminent crisis, maintain social order or advance public welfare' (see above).

16 This phrase occurs in Interpretation 390, but similar wording is to be found in the other decisions. Apart from the Constitutional basis for this principle, the Grand Justices have also pointed to Article 5 of Law Concerning Standards for Central Government Rules and Regulations *(Zhongyang Fagui Biaozhun Fa)* which requires that matters concerning rights and duties must be stipulated by statute.

17 In asserting that the Grand Justices are requiring a fundamental change in the nature of legal regulation in Taiwan, in the direction of the modes of regulation typical of industrialised liberal democracies, I am *not* asserting that the operation of legal regulation in Taiwan will, as a result, necessarily resemble more closely the operation of law in those countries. Formal law itself arguably has, at least until now, had much less normative effect in Taiwan than it has in the West (see Winn 1994). What I am claiming here is that the character, not the effect, of formal regulation is being changed. It may be that this change will in itself also change the normative status of law. I suspect that it may strengthen the capacity of the legal system to provide norms for social relations in the long term, but an exploration of this issue would take me well beyond the scope of the essay.

18 Obviously, the executive arm of government will continue to play a key role in advising the Legislature on basic policy and indeed can sponsor bills. The final form of the legislation will, however, clearly be for parliamentarians to determine. This change is likely to lead to far greater delay and compromise in policy-making for at least two reasons. First, as has already been mentioned, the number of laws drafted during the martial law period which the Council may find confer unconstitutionally broad discretions, is likely to be high. The Legislature will have to spend considerable time revising them. Second, the fate of individual reform bills in the Legislative Yuan is uncertain, given the finely balanced state of the parties and their consequent (often unpredictable) deal-making. There are likely to be many occasions on which bills are deliberately delayed, or amended so as to be unacceptable to the originator, or completely rejected. Many bills have made very slow passage through the Legislature. For example, a number of Equal Employment Opportunity Bills have been before Legislature for more than six years.

19 Proponents of Jayasuriya's position may point to Japan where there is some evidence that the judiciary have deferred to the Liberal Democratic Party (LDP). For example, Ramseyer and Rosenbluth (1993) using a choice-theoretic approach, argue that LDP leaders have manipulated the institutional framework regulating judges in order to reduce 'agency slack' (judicial autonomy). Thus judges who obstruct LDP objectives run the risk of being 'punished', for example by retarding their progression through the career judiciary. This analysis is susceptible to the general criticisms made of rational-choice perspectives (see Bottomley and Parker 1997:358–76) and has been strongly challenged on its specific findings by other scholars on Japan. Haley (1995) for example, has replied that the Japanese judiciary is in fact *as a whole* structurally highly independent from the other branches of government. However, even if the basic approach of Ramseyer and Rosenbluth is correct, it does not lend support to the notion of an East Asian pattern of judicial behaviour. In fact, these authors themselves reject such an approach because their rational-choice models are applicable to at least most industrialised societies. What is significant for them is the configuration of institutions, and the resulting incentive structures. The configuration in Japan is different from the United States but it is also different from Taiwan. The Grand Justices have in fact been far more ready to make declarations of constitutionality than have the judges of the Japanese Supreme Court (see Ramseyer and Rosenbluth 1993:150–1).

20 The law regulating the procedures of the Council, the Grand Justices Adjudication Law, was substantially revised in 1993. This extended the *locus standi* rules of the Council. The revisions enabled applications to be made by members of the Legislature (if more than one third of members supported the application) and by the superior courts. It also reduced the majorities required for an interpretation from three-quarters to two-thirds (see Hwang 1995:226–7). While the enactment of this law indicates that the Legislature has played a role in liberalising access to the Council, it also provided an opportunity for the Grand Justices to assert control over their procedures. In Interpretation 371 (discussed above), the Council ruled that the revised law was still too restrictive and declared parts of it unconstitutional. Specifically they held that the lower courts, not just the superior courts, were entitled to make an application for an interpretation.

21 An alternative interpretation of ‘objective’ would be in the conventionalist sense, a meaning implicitly accepted by members of the legal community (see Millon 1992). If this is the meaning Larkins intends then it is more similar to the one I adopt. However, his use of the term ‘impartial’ implies a more absolute sense of impartiality consistent with a formalist position.

22 For a famous (non-formalist) account of judicial interpretation which argues that a judge can and indeed is obliged to choose an interpretation which ‘best fits’ the text of the law.

23 This makes clear that denying that there is an objective meaning for a text is not thereby saying that judges decide cases any way they like—they are constrained by the political-legal community.

24 For example, the Grand Justices did attempt a more interventionist stance in 1960 when in a case involving court organisation (Interpretation 86), they hinted at unconstitutionality. However, their concerns were not addressed for 20 years (Liu 1991:527). Again, Interpretation 76, which offended the Legislature, led to the Legislature restricting the jurisdiction of the Council (Liu 1991:525; Mendel 1993:174–5). In the current climate the Council would probably be able to declare such retaliation unconstitutional, and make its judgment ‘stick: Compare Interpretation 371 (discussed above).

25 Winn and Yeh point out that the appeal to Western liberal democratic concepts does not mean that there is in practice a commitment to realise a political system whose institutions operate along Western lines (Winn and Yeh 1995:595–9). They suggest that many Taiwanese may understand liberal democratic concepts in the light of traditional Chinese ideas about government and law. For example, ‘democracy’ may refer more to the obligation of the rulers to respond to complaints of injustice rather than to the nature of political structures. Further, even if the proponents of liberal democratic rhetoric do understand the terms in their ‘Western’ sense, it remains uncertain whether a liberal democratic system can be fully established while the KMT remains in control of the main governmental institutions. Whether an effective multiparty system emerges in Taiwan may be apparent in the next legislative elections (due in 1998) in which there is a strong possibility that the KMT will lose their majority.

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12
‘INDEPENDENCE’ AND THE JUDICIARY IN THE PRC

Expectations for constitutional legality in China*

Mark Findlay

Introduction

Five years ago I wrote: ‘The focus on the judiciary as part of the latest period of institution building in China provides an insight into the conflicting values the (Chinese) legal system embodies, within the tangled imperatives of Chinese modernisation’ (Findlay 1992).[1] A concern for this chapter is the expectations of those who would focus on judicial ‘independence’ as an indicator of the health and utility of the emerging Chinese ‘socialist legal system’, in the context of global democratisation. Rather than advancing the argument that aspirations for judicial independence fail to advance beyond ideology in the PRC, and this is evidence of the chimera of Chinese constitutional legality, this chapter will explore the place of the judiciary in the reform of the Chinese legal system, and its appreciation of ‘independence’. From this perspective I will examine the potential for the judiciary in the PRC to influence, participate in, and perhaps direct legal reform. Further, the possibility that a constitutional legal system compatible with Western notions of good governance might be advanced through the judiciary in the PRC is analysed.

At the outset it needs to be emphasised that judicial ‘independence’ both as a crucial and select identifier of justice ideology, and as a significant qualifier of political frameworks, is culturally relative and historically contingent. This essay explores one of the key themes articulated in Jayasuriya’s ‘Introduction’ in this volume: the need to locate notions of judicial independence within local understandings of governance, rather than rely on abstract models of judicial organisation. This is not to deny the essential themes of judicial independence, celebrated in Western jurisprudence and discussed in this chapter. Rather, it recognises that for judicial independence in the PRC to have any actual, identifiable impact on the nature of justice and the operations of government, it will exist and only be understood within the context of contemporary China.

Judicial independence in the PRC has moved from a vague constitutional dogma into being a legislative and administrative pre-condition, co-incidental with the judiciary’s

*I recognise the significant assistance of Associate Professor Ian Dobinson, Law Department, City University of Hong Kong, in the collection of materials for this chapter.

emergence as a significant organ of government. Evidence of this, explored in the essay, is the recent activity of the Supreme People's Court in judicial interpretation. While this power was granted the court by the National People's Congress (NPC) in the 1950s it has only recently gone beyond political discourse into judicial practice.

Along with commending a 'contextual understanding' of judicial independence in the PRC, one should concede its difficulty. The 'legal double-speak' which characterises the official discourse on socialist legality and the socialist market economy makes any such understanding problematic. Even so, the challenge in contextual analysis may, as here, be essential to the context and revealing of the object for analysis (see 'Introduction' this volume).

Judicial independence

As Lubman says of the comparative measurement of Chinese legal reforms:

> Comparative legal study in general has been conspicuously unsuccessful in developing concepts that aim at cultural neutrality. Some observers generalize from Western law and are quite willing to assume the universality of Western legal forms and legal ideas regardless of the risks of cultural bias.
>
> Lubman (1995:9)

Such an observation is particularly relevant for the manner in which the Chinese judiciary and judicial decision-making is held up to review outside the PRC in terms of their 'independence'.

Tan reminds us that 'while the enunciation of the principle that judicial independence is an essential aspect of democratic government following necessarily from the presence of judicial power in the powers of the state' (Tan 1994:661), and China cannot be exempt from this, judicial independence in a Chinese sense, 'though to some extent recognised in constitutional and statutory provisions in China today, it is by no means an established practice in the operation of the legal and political systems (of the PRC)' (Chen 1992:117).[2]

This realisation cannot be dismissed as another example of political propaganda, or the inherent duality, if not duplicity, between the theory and function of the Chinese legal system.[3] Chen argues for a 'contextual approach' to understanding the place of judicial independence within the institutions of justice in the PRO. While modern Western notions of judicial independence are integral components 'of the political and legal thought associated with the ideology of liberalism, as well as a result of power struggles within specific historical circumstances' (Chen 1992:117), in China the theory of youji zhengti, or judicial *independence as an organic whole*, prevails. This may be understood at two levels: where the 'organic whole' is the judiciary operating in compliance with the policies enunciated by the Communist Party of China (CCP) (the protectors of socialist revolution), or where the organic whole is the people's court in its fullest sense (the embodiment of socialist legality). Either way, this is independence which relies for its reality on recognition of the Party and the people.

The Western liberal notion of judicial independence is located directly within theories of politics and government. It is an essential element of the 'separation of powers', said to produce a system of checks and balances so that one branch of government is incapable of arrogating powers to itself at the expense of the other two. Although the rule of law reliant on this separation of powers, inherent in Western systems of legality, 'may arguably disguise the true realities of power at the same time, they may curb that power and check its intrusions' (Thompson 1975 quoted in Tan 1994:661).

As for China, the traditional theory was, and is, that the courts are either a part of the executive, or at least subservient to the legislature; '…the courts, together with the other judicial organs, are 'weapons' of the people's democratic dictatorship to be used against class enemies' (Chen 1992:107).[4] This was recently confirmed through the manner in which the courts were used to legitimate the crushing of democracy protests in China in 1989 (Findlay 1989).

Following the reaffirmation of legality in the form of the legislative boom out of the second session of the fifth NPC in 1979, the Organic Law of the People's Courts (Article 4) provided that the courts will conduct adjudication independently, and subject only to the law. This provision was amended in 1983 by adding the provision that the courts' independence in this regard 'shall not be interfered with by administrative organs, social organisations or individuals', so bringing the Organic Law of the People's Courts in line with Article 126 of the 1982 Constitution. However, despite legislative pronouncement and the issuing of Instructions from the CCP Central Committee against the examination of cases by Party committees, these aspirations 'were never fully observed in practice' (Chen 1992:119).

As Chen indicates, the question of judicial independence in China is not merely dependent on relationships between the courts, the Party, the government and a variety of its administrative organs. It may be within the structures of decision-making themselves where independence is further challenged. The collegiate bench, the adjudicative committees, and the relationships between the lower and the higher courts may all challenge the independence of the judge and his decisions.[5]

Overall, judicial independence in China may refer to the independence of the judicial organs, and even of the judiciary, but certainly not of the judge. In this respect it might be said that it is the People's Courts rather than their judges which are independent: 'The People's Courts are part of the state organ and judges are part of the state's government functionaries; they are no different from other state cadres in identity and status' (Yang Kaixiang 1993:28).

Structures of dependence

Another way of approaching a contextual analysis of the present role of the judiciary in the PRC is to investigate at a structural level the interdependence between the People's Court and significant institutions of the state. In so doing we may be able to recast an appreciation of judicial independence within the operations of the Chinese courts.

Historical precedents for the People's Court

The Court began its operations in 1950 with the promulgation of the first Organic Law of the People's Courts in 1954. The focus of the work of the Court was criminal and it relied heavily on Party policy to achieve its aims. The origin of the Court in terms of its initial personnel and perspective was military.

From 1959 to 1978 the Court and its staff suffered repeated revolutionary attacks. The Court's staff was removed during the anti-rightist movement. During the Cultural Revolution, most of the Court staff were sent into the countryside, with only a gradual return beginning in 1972.

Changes in the Court came with the Party's 1978 decision to focus on economic reform and establish a socialist legal system. In 1979 the organic law was modified and the Court was given a range of newly drafted and significant legislation with which to work. Under the present constitution the Court achieved greater status. With the expansion of the Chinese economy into joint venture enterprise and private capital the Court became involved in civil and economic jurisdictions. This has expanded the work of the Court and its impact.

The Court and the Party (CCP)

In Chinese legal systems the courts have never been independent of the state or of political leadership (see Chiu, Dobinson and Findlay 1991). Despite the reference in Article 126 of the present constitution to the independent exercise of judicial power by the People's Courts, the preamble to the constitution emphasises that the CCP leads the country in the improvement of the socialist legal system. As an organ within that system the Court is therefore led by the Party.

The Court has a Party organisation, and is subjugated to the Central Committee of the Communist Party. The Court's Party organisation is subject to the leadership by the Communist Party organisation at a central level because the principle of 'dual leadership' (shuang chong lingdao) operates in the courts (see Gaige, Ganbu Tizhi, Jiaqiang Guanli Gongzuo, Boazheng Renmin Fayuan Yifa Duli Shenpan: 1990). Within the political lexicon of Chinese politics 'dual leadership' denotes the accountability of judicial organs to both other governmental organs as well as to the appropriate level of the Communist Party Committee. Most Party and state organs operate under this principle. The current Party Constitution provides that the Party leadership is primarily concerned with organisation, ideology and policy (Finder 1993).

Supervision of the judiciary

In CCP parlance supervision of 'organisation' means control of personnel.

> The Central Political-Legal Committee, in co-ordination with the Party Organisation Department, monitors the personnel of central legal institutions, including the court. The Committee is more concerned with the leadership of the court than with ordinary judges, but all are vetted by the Central Committee's Organisation Department before their nominations are placed before the Standing Committee of the National

> People's Congress, as required by the constitutionally stipulated appointment procedure. Because of the political sensitivity of the work, virtually all judges selected to the court are Party members.
>
> Finder (1993:149)

Court and the National People's Congress (NPC)

The Court is also not independent of the NPC, and in particular of its Standing Committee. Both the Constitution (art. 128), and the Organic Law (art. 17) require that the Court is 'responsible to and reports on its work to the NPC and its Standing Committee'. Article 67 of the Organic Law provides that the Standing Committee 'supervises' the Court. The President of the Supreme People's Court is required by law to deliver a report on the court system to the NPC annual session.

The 'supervision' of the NPC can be as specific as where NPC members inquire into Court adjudications. More generally, the NPC can be seen as supervising the Court in two ways: by referring constituent letters sent to the federal bureaucracy, and by submitting proposals in respect of a particular case. In addition, the two bodies co-operate frequently in the drafting of legislation prepared by the Legislative Affairs Commission of the Standing Committee of the NPC. The Court may solicit the views of Commission staff regarding certain legislative interpretations, as the Standing Committee may of judicial interpretations. A Vice President of the Supreme People's Court recently put the relationship this way:

> The political system of China is that of the people's congresses. The State's Constitution stipulates that: 'All powers of the People's Republic of China belong to the people' and that: 'The institutions by which the people exercise the power of the state are the National People's Congress and the local people's congresses…the making, amendment and interpretation of the laws are major powers of the state'. In accordance with the Constitution, the exercise of these powers is originally vested in the highest power organ of the nation. But the highest judicial organ has been formally authorised by the highest power organ of the state to exercise the power of judicial interpretation.
>
> Wang Jingrong (1995:65)

Court and other government organs

Since the establishment of the PRC, the People's Courts have been considered as part of the public security organs, which also include the police and the procuratorate. These have also been known as the political—legal organs and are expected to work in harmony within the ideology of the socialist legal system. The Party's political-legal committee endeavours to ensure this both at the level of ideology, and where possible, function.

The People's Court structure itself is heavily cross-referenced to organs of the national government, committees of the CCP, down through its provincial and local levels. So this interconnection between state and party organs, and the Court can be viewed across

comparable levels of government and administration as well as descending the geographical and bureaucratic hierarchies in China.

'A sense of cooperative relationship between the court (Supreme People's Court), the Ministry of Public Security, and the Supreme People's Procuratorate can be inferred by Article 135 of the Constitution and Article 5 of the Criminal Procedure Law… Due to the complexities of the relationship between the State Council and its departments and the court' (Finder 1993:154). This may be best understood by examining the functions of the Court and its comparative status. For example, while the Constitution gives the Court a status equivalent to the State Council, the Court is nevertheless bureaucratically ranked at one level below it. Rivalry between the Court and other state organs is not simply a matter of jurisdictional overlap and complexity; '…when the courts are presented with issues that involve the jurisdiction of other agencies as well as their own, they may negotiate joint interpretations, follow administrative interpretations or refuse jurisdiction altogether and defer to an administrative agency to decide questions involving the interpretation of a law or regulation' (Lubman 1995:5). This may be a factor of the Court's traditionally subservient position before other significant state organs, its inherent policy of compromise, or the consistent limitations placed on the Court when it comes to any interpretive function.

The law of judges of the PRC

During the twelfth meeting of the Eighth Plenary Session of the Standing Committee of the NPC in 1995, the Law of Judges was examined and scheduled for implementation in July of that year. It has been described by a member of the Consultative Committee of the Supreme People's Court as:

> the first legislation since the founding of the New China to comprehensively and systematically stipulate on the system of judges, representing a major step in the reform of China's system of judges and an important move to perfect China's judicial system.
>
> Zhou Daoluan (1995:75)

The principles around which the new law is said to be constructed are:

- competition in selection and employment of judges;
- merit measured on performance;
- integrity and ability in the discharge of judicial functions; and
- the administration of judicial functions according to law.

The way in which these principles are to materialise through the influence of the new law is:

- by following a 'scientific' management classification of officials in the state judiciary;
- by introducing a 'scientific' mechanism, through examination and evaluation, reward and punishment, whereby judges are ranked, rewarded or removed;
- by ensuring the performance of duties according to the law;[6] and,

• by providing a disciplinary mechanism to ensure the honest and proper performance of duties.

The Law identifies 'obligations' and 'rights' for judges, and within the legislation the concept of obligation[7] is given precedence over claims of right. Regarding the rights to be enjoyed by the judiciary these include: the rights and working conditions needed for performing judicial duties; the right to handle a trial without interference from administrative organs, social groups or individuals; the right of not being removed or demoted, dismissed, or punished without legal cause or legal procedure; the right to obtain pay for his labour and to enjoy insurance and welfare benefits; the protection of the judge's personal safety and that of his property and home; the right to receive training; the right to complain or sue;[8] and the right to resign.

As to the supervision and control of the judiciary, the Law has this resting with the Committee for the Examination and Appraisal of Judges. Article 46 stipulates that such a committee shall be established in the People's Court at all levels to supervise training, examining and appraising of judges, and 'takes part' in the personnel management of judges. The committee is specifically responsible for organising the uniform national examination for judges, which precedes entry to the job. It then has influence in the training of judges, their ranking system, and in their removal. On the latter concern, Article 30 of the Law identifies as a ground for discipline and removal, 'making or spreading remarks detrimental to the fame of the State. Put against the selection criterion for judges, that they must have the right political attitude as well as moral qualities and judicial temperament (Article 9), the 'politicisation' of judicial office remains.

Trends towards judicial independence in the PRC

Bearing in mind the qualifications discussed above, one might argue that there are certain universal indicators of institutional and operational 'independence', wherever cited within the structures of the state, and developments in these may provide indications of its emerging significance within any bureaucratic system. The reasons behind such a trend and its interpretation will be examined later. At this point the following indicators of independence are discussed in relation to the PRC judiciary: transparency, professionalism, accountability, autonomy and functional review.

The institutional stages or levels demonstrating these characteristics may range from the judge, processes of judicial decision-making as well as the judicial organs. In demonstrating 'independence' it should be recognised that this is a relative and transitional measure. Having said this, contextually sensitive analyses of judicial independence does not preclude the use of universal indicators. Provided these indicators 'rise above the exclusive use of Western categories of legal concepts' (Lubman 1995:9) and work out of a methodology concerned with the functions of the particular legal institutions in question, then some useful comparative analysis of an otherwise 'value laden' term such as 'independence' is possible.

Transparency

By any measure, and until recently, the courts in China have been anything but open and accessible to external analysis and understanding. Therefore, the activity of its judiciary has not been apparent and available for analysis in terms of those influences which prevail over its decision-making.

It is the documentation which emerges from a court which provides the most accessible insights into the operation of the judiciary.

> Among the various classes of legal documents which have become publicly available in China in recent years, few are more interesting than the growing body of reported decisions[9] by courts and other institutions. Usually resulting directly, or indirectly, from litigation or some similar process, these interpretative rulings and decided cases have appeared in increasing numbers in the nine years following the first publication of the Supreme People's Court's own gazette.[10] Since then a number of general collections of judicial interpretations and abstracts of court decisions have been brought out, some of which pre-date the Cultural Revolution. The Supreme People's Court now supplements its gazette with periodic collections of court cases, and more specialised collections of interpretations and cases have been published to meet various specific needs, academic and professional.
>
> Dicks (1995:82)

As Dicks indicates:

> although most of the cases and decisions which are published emanate from the higher levels of the legal hierarchy, they bring the reader closer both to the practical workings of the legal system and to the thought processes which guide it. The question which inevitably arises is whether these newly available materials should be regarded as providing more than just a heightened awareness of Chinese society and its legal system…. In more general terms, is a system of judicial precedent taking recognisable shape in China?
>
> Dicks (1995:82)

Professionalism

Before 1983, the minimum qualifications for appointment as a judge in the PRC were that the candidate must be over 23 years of age, be able to vote, be able to stand for election to public office and not to have been previously deprived of his or her political rights. The amendment in that year to the Organic Law of the People's Courts added the requirement that the person to be appointed must have legal professional knowledge (Article 34).

The authors of the new Law of Judges have significantly amended the expectations for judicial appointees, and potentially overturned the earlier system where 'most incumbent

judges are long-standing party cadres who have recently gained some legal experience in court work. Because of the low prestige and low pay of judges, law graduates are reluctant to work in the courts, especially the local ones' (Song Bing 1994:16–17). The reason for the change is that the old system 'was a product of a highly centralised system of planned economy, and could no longer suit the needs for the development of a socialist market economy' (Zhou Daoluan 1995:75).

After the CCP's decision in 1978 (see Finder 1993:147) to strengthen the courts, personnel were transferred from the military and other 'non-law' engagements to fill judicial posts. This meant that the courts at all levels remained largely in the hands of bureaucrats without legal training. The non-legally trained core of judicial officers remains a feature of the Chinese judiciary.

Chinese universities began producing law graduates in the 1980s. In 1988 a plan was announced to provide legal education to judges so that by 1991, 60 per cent of the nation's judiciary would have received legal training equivalent to a tertiary qualification. By 1995 this figure was intended to rise to 80 per cent (Editorial Board 1990). However, in a legal profession generally where 'barely one fifth of Chinese lawyers have earned law degrees, and many of those studied law for a centrally planned economy' (Alford 1990:231), it is unfair to be too critical of an untrained judiciary. With lawyers acting largely as state legal workers it is difficult to create a professional atmosphere within the courts where judges will be adequately assisted by an analytical and independent bar. Alford is pessimistic about the prospects for the development of an ethical legal profession in China, in that even if the Ministry of Justice attains its goal of producing 100,000 new lawyers by the year 2000, only half of them will have law degrees.

Recently, there have been determined efforts to ensure a greater degree of legal professionalism within the Chinese judiciary.

> As of September 1990 the National Judicial Cadres Part-time University has produced 35,000 graduates, and 40,000 students were enrolled with it in 1991. The Senior Judge's Training Centre established jointly by the Supreme People's Court, and the State Education Commission produced its first class of graduates in 1989, and it had 180 students in 1990. Eight high courts in the provinces have also established their own training centres for judges.
>
> Chen (1992:122)

The Law of Judges (Article 9) expands on the earlier expressed aspiration that judges should possess legal professional knowledge. The Law sees this as being obtained either through education prior to appointment, through work experience, or as a product of in-service training. To become a judge in the PRC it is now a requirement—amongst others—that the successful applicant has graduated from an institute of higher learning with professional law courses, or from an institute of higher learning without such courses but having acquired professional knowledge of the law and two years working experience. If the applicant holds a bachelor's degree in law he/she needs only an additional one year's experience, or with a master's or doctorate in law then the experience requirement is waived.

Court hierarchies often present evidence of the recognition accorded the court as a whole. The prestige of the President of the Supreme People's Court, and the gradual elevation in the status of the incumbent says something for an improved attitude by the Party and the government to the significance and solemnity of the post. The current President is also Secretary of the Political Legal Committee of the Central Committee, a position which places him in charge of major policy initiatives. He is also Secretary of the Secretariat of the General Office of the Central Committee, and Secretary of the Central Committee for the Comprehensive Management of Social Order, a Party/government/army committee. 'His enhanced status indicates the greater importance of professional competence in the formulation of Party policy' (Finder 1993:150).

Despite moves towards recognising the significance of senior judges, the terms of service which relate to the Chinese judiciary at large may militate against the promotion of professionalism. Before the Law of Judges they possessed no tenure either of term or office, and despite the assurances in the Law of Judges that tenure is confirmed and judges are protected against capricious dismissal, they are still reliant on the appraisal and discipline of Party-influenced committees for continuance and promotion.

Prior to 1995, as government cadres, judges could be transferred by Party committees. Therefore, if they come into conflict with, or resist the interference of local Party or government officials they are likely to be removed. In addition, the salaries of judges were relatively low, as is their ranking in the hierarchy of the Chinese civil service, and this makes it difficult to rest their power and authority on their social prestige. The Law of Judges extracted

> the adjudicating officials from the mass of the State's public servants and established a separate system for judges… The Law of Judges now includes special clauses on judges' salaries, insurance and welfare benefits. Article 34 stipulates that 'the salary system and salary standards of judges shall be specified by the State according to the special characteristics of adjudication work'. It marks the first time ever of the set up of a judges' salary system by legislation and separates the judges' salary system from the salary system of the State's personnel administration.
>
> Zhao Duoluan (1995:78)

Accountability

It is the structures of accountability rather than accountability *per se* which provides some indication of independence. For instance, developments in the process of adjudication supervision (see Finder 1993; Findlay 1992), might suggest some new developments in the relationship between the state organs and the court, as well as the structures and personalities of judicial decision-making within the court.

The courts have had the authority to institute and practise adjudication supervision and review since their inception, and in some respects it runs counter to the principle of the finality of court judgments. Nevertheless it is said to harmonise the conflicting judicial values of efficiency and accuracy identified by the Constitution. In reality, the close

relationship between judicial decision-making and political movements in China is likely to lead to wrong judgments needing supervision and review.

This system of internal accountability for decision-making, also provides further transparency in court proceedings wherein petitioners or their families can make application for review. In addition, Party officials and state and provincial leaders may refer cases to the court for supervision.

In 1987 the Supreme People's Court established a Petitions and Appeals Division to handle the work for adjudication supervision and guide petition and appeal work in the lower courts. This division receives several thousand letters daily as well as visits from aggrieved persons, which it either deals with itself or transfers on to the substantive divisions of the Court.

> Judging from all available evidence, adjudication supervision is likely to remain a responsibility of the court. The trend of greater proceduralization of adjudication supervision is likely to continue. The future may see limits placed on at least three of the 'four limitless' persons, evidence, and courts. In the area of criminal law, however, concerns about substantive justice are likely to militate against placing time limits against petitions.
>
> Finder (1993:208)

Regarding the professional accountability of the judiciary itself, the Law of Judges establishes a system for challenging a judge and his/her decision. The distinction is made between a 'public duty challenge' where the relationship between the judge and parties interested in the case is impugned, and an 'office challenge' where judges with kinship or blood ties shall not take up certain interconnected posts within the Court.

Autonomy

No one could argue that the courts and judges in China are autonomous. However, one judicial function in which a semblance of autonomy is growing in the PRC relates to interpretation (see Chen 1992:95–102).

In the West, as legislative activity increases so does the requirement on the judiciary to exercise its interpretative function. Traditionally in China interpretation has not been the province of the judiciary, and in the PRC it has been criticised as a usurping of the law-making function; '…in China ideology, constitutional theory and administrative practice have all denied the courts authority to interpret legislation, which is usually characterised as a legislative rather than a judicial function' (Lubman 1995:4).[11]

In 1981 the NPC Standing Committee adopted the Resolution on Strengthening the Interpretation of the Laws which further defined the extent of the division of authority and responsibility for the interpretation of laws. In particular, the resolution provided that: 'all issues arising from the actual application of laws and decrees in court trials, the Supreme People's Court is responsible for providing interpretations, and for all issues arising from the application of laws in prosecutions by the procuratorates, the Supreme People's Procuratorate is responsible for providing interpretations'. Wang Jingrong (1995) estimates that more than 3,000 documents on judicial interpretation have been issued by the Supreme People's Court, the Supreme People's Procuratorate, or jointly

since 1978. ‘Such judicial interpretations have played a significant role in strengthening and improving the socialist legal system in China’ (Wang Jingrong 1995:64).

An example of the Court’s recent role in judicial interpretation occurred after the General Principles of the Civil Code of the PRC was promulgated in 1986. The Supreme People’s Court published its ‘Views on Certain Issues Arising from the Implementation of the General Principles of the Civil Code of the PRC’ wherein it commented on a provision of the 1985 Inheritance Law, which was widely criticised as restricting the applicability of its provisions. The Supreme People’s Court had earlier made stipulations for the suspension or extension of the time limit for litigation under the law. In its ‘Views’ document, it further held that ‘the time limit for a law suit on inheritance is applicable in accordance with its definitions in the Inheritance Law and the suspension, termination and extension of the time limit for such a law suit are applicable in accordance with the relevant stipulations in the General Principles of the Civil Code’.

The emergence of an aggressive and creative role for the Supreme People’s Court, which, for example, issued implementing regulations for the General Principles of Civil Law that are much like the regulations usually drafted by the Legislative Bureau of the State Council to explicate general legislation, confirms recent comment on the growth of the Court’s interpretative and law-making functions (see Nanping Liu 1991; Finder 1993). These developments are in the face of what Dicks refers to as ‘legal fragmentation’ which permits different parts of the bureaucracy to interpret the same rules causing the multiplication of ‘logically inconsistent rules of substantive law’ (Dicks 1995:93).

Wang Jingrong identifies the distinctive Chinese characteristics of judicial interpretation arising out of ‘China’s actual national conditions’. These include:

- the legality of the exercise of power to judicially interpret by the highest judicial organ;
- the limitations on the authorisation to judicially interpret, from the highest power organ of the state;
- regularisation of judicial interpretation; and
- the public nature of judicial interpretation.[12]

As an example of the restrictions on authority to interpret, the Vice-President of the Supreme People’s Court takes the Constitution:

> In some countries the highest judicial organ even enjoys the power to interpret the constitution and annul laws and regulations that contradict the constitution. In comparison, the highest judicial organ of China enjoys a much more limited power of judicial interpretation. In China only the NPC and its Standing Committee enjoy the power of interpretation of the constitution…[and] the power to supervise judicial interpretation.
>
> Wang Jingrong (1995:65–6)

If the Court develops its intentions for a role in interpretation then this will bring it increasingly into conflict with traditional Chinese legal culture which did not recognise or promote a separation of powers, as well as with Marxist-Leninist insistence that Law is for the legislature only. The present approach of the Court and the NPC to judicial interpretation reflects the formal structures of state power in the PRC along with what

appear to be instances of compromise in practice. Dicks (1995) suggests that economic and legal reform are likely to continue to create both the need and the pressure to expand the interpretative power of the Courts, but their current ability to respond to the challenge appears to be restrained. The lower courts in particular are without a clear understanding of pronouncements on interpretation; nor are they always professionally able to appreciate and apply such pronouncements.

Functional review

Since the implementation of the Administrative Litigation Law in October 1990 the courts have been vested with novel powers of judicial review. It created a legal channel for redressing people's grievances against unfair administrative actions. While judicial review is an essential feature of judicial power (and the protection of good government) in common law jurisdictions, even limited review powers over the decisions of other state organs is quite foreign within the Chinese legal tradition. However, 'the fact that the Chinese Communist Party (CCP) holds supreme and unchallengeable power and that party organisations at all levels are involved in bureaucratic decision-making will certainly adversely affect the efficacy of a judicial review system' (Song Bing 1994:1), one from which Party organisations and committees are largely protected from review. Song Bing observes that:

> on the part of individuals fear is still wide-spread when it comes to direct confrontation with administrative organs which have been wielding unrestricted powers over individuals for decades in China… In short the current political system [in the PRC] has circumscribed the effectiveness of the judicial review system in China.
>
> Song Bing (1994:1)

Despite such reservations it is a judicial review protection nonetheless, and one which takes on much more significance through its existence and potential in a totalitarian political structure. More than perhaps any other recent legislative initiative the Administrative Litigation Law signals a new rhetoric and reality for the socialist legal system. For instance, the Law claims jurisdiction over administrative enforcement measures restricting personal freedom. Such enforcement measures which were unavailable for review prior to the Administrative Litigation Law, include detention under public order regulations (detention up to 15 days), education through labour (detention up to 4 years), and 'shelter and investigation' (detention up to three months). Of the applications for administrative review which have reached the Court's administrative litigation division the greatest number of complaints have been against the public security organs, who administer these enforcement measures.

> The availability of judicial review for administrative detention is very significant, particularly the third category, 'shelter and investigation', which is not defined in any law but is widely used by public security organs when they cannot find enough incriminating evidence at the

> beginning of an investigation to charge the person detained. Several cases in this category have been successfully challenged by some of the courts.
>
> Song Bing (1994:4–5)

In relation to judicial review, concerns for judicial independence in an operational sense are high.

> Dealing with administrative cases puts the judge in direct confrontation with administrative organs. The extent of independence exercised by a judge affects the outcome of the case directly. Although judges in China are said to be responsible to people's conferences, in reality it is a different matter. Judicial personnel are actually nominated and appointed by governments at all levels and budgets are also decided by governments at all levels. Therefore it is hard for judicial personnel to ward off the influence of administrative organs.
>
> Song Bing (1994:17)

Conclusion: expectations for independence and constitutional legality

In another context, I argued that a significant reason for the Chinese government adopting a discourse of constitutional legality which was compatible with understandings and expectations in the West was for the sake of international legitimacy (Chiu and Findlay 1991:67–82). The argument rested on the belief that such a discourse was in fact false because of its dissonance in a Chinese context, and its contradiction with contemporary political action in the PRC. Since that time, the context has changed radically, and the argument requires modification.

Judicial independence in the PRC, and claims for it within the socialist legal system cannot be dismissed as fraudulent, even when crudely contrasted with the expectations of the West. Evidence exists in the recent law reforms coming out of the NPC, and in the activities of the Supreme People's Court, that a contextualised independence is emerging. Obviously this is not enough for those who argue that the rule of law, and the good governance on which it relies, and which in turn relies on the judiciary, demands universal minimum standards of independence that the Chinese system is yet to meet.

> To say that the courts [of the PRC] are at best only co-ordinate with those other bureaucracies [which make up the Chinese state] is only another way of expressing how far away China is from establishing a notion of the supremacy of law, at least as that concept is conceived in the west.
>
> Lubman (1995:2)

And what are these expectations for constitutional legality, endorsed and protected by an independent judiciary? These are that:

- judicial independence is an essential aspect of democratic government following on necessarily from the essential presence of judicial power within the powers of the state;
- judicial independence allows for a system of mutual checks and balances against the excesses of one branch of government; and
- judicial independence ensures that judges are free to do justice in their communities.

Such expectations do not appear entirely foreign within the new Chinese socialist legal system. In fact, they are to some extent compatible with the expectations for judicial interpretation in the hands of the People's Court to:

- ensure the proper application of the laws;
- supplement the deficiencies of the laws;
- maintain consistency within the legal system; and
- promote the effectiveness of the legislature.[14]

However, it is the recent admission of the government in China that their legal institutional and legislative initiatives are driven by the commitment that the reform and development of the socialist legal system is inextricably bound up with the socialist market economy, which reveals the true motivation towards judicial independence in the PRC. The inexorable truth of a Western notion of the rule of law has not finally dawned in China. Nor has the PRC government become more dissembling in its marketing of Westernised constitutional legality Chinese style. It is the economic and commercial needs for the law and judges in the modern China, which are reshaping the legal system there, socialist or otherwise. However, the caution in all this climate of 'reform' must be:

> If the function of legal professionals is to reconcile public and private interests, the absence of clear, broadly shared understandings of what these interests are at a time when the contents of the Party's core ideology and morality itself are increasingly open to contestation and manipulation leaves lawyers without more than a highly personalised basis for framing such reconciliations.
>
> Alford (1990:36)

Notes

1 The references consulted for that paper provide a foundation for the present work.

2 For a detailed discussion of the development of constitutional and legislative recognition of judicial independence in the PRC see Chen (1992:117–19; Findlay (1992:75–6); and Tan (1994:663–7).

3 It is a crude analysis which says that because the constitutional provisions on judicial independence may not be realised through the practice of the Chinese judiciary this reveals either a contradiction between ideology and practice in the legal system, or is a recognition of the profound contradictions on which Chinese legality is based. 'Chinese constitutions have not played a Western role of circumscribing the forms and powers of governmental institutions; instead they are statements of policy signaling political and ideological change. This phenomenon shall become apparent as one analyses the historical record of judicial development against a background of ideological flux' (Tan 1994:663).

4 In his annual report to the National People's Congress in 1991, the President of the Supreme Court, Ren Jianxin reiterated that it was necessary to strengthen the state machinery for the people's democratic dictatorship, and that the Courts were a main instrument of such dictatorship.

5 See Chen (1992:120–1: also Findlay (1992:77–86).

6 In this regard the law states that 'a judge provides his/her duties in accordance with the law and is protected by the law'. The Law offers protection to judges in four aspects: security of adjudication, security of tenure, security of the person and security of salary and welfare benefits.

7 Article 7 identifies the following obligations: to strictly abide by the Constitution and the laws; to use facts as the basis and laws as the criteria when conducting trials, and handle trials impartially, and not to distort the law for the benefit of certain parties out of consideration of personal interest; to protect according to law, the rights of parties to litigate the suit; to safeguard the interests of the state and the public, and to protect the legal rights and interests of citizens, legal persons and other organisations; to remain honest and clean and to be faithful to his duties and observe the disciplines; to keep confidence of state secrets and works in the trial; to accept supervision of the law and supervision of the people.

8 In the Chapter on Complaints and Prosecution the Law provides: 'a judge is entitled to bring a law suit against the act of any state institution or its officials which infringes on the judge's rights as stated in Article 8 of the Law…in the event of any administrative organ, social group or individual interfering with the judge's adjudication of a case, legal measures shall be taken to ascertain and pursue their legal liabilities'.

9 These should not necessarily be equated with either official law report series which arise out of most common law courts, or even critical commentaries. The *China Law Reports* series, presently being published by Butterworths is an attempt to emulate the official law reports model.

10 Zonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao (Gazette of the Supreme People's Court of the PRC).

11 See also Guiguo Wang (1993:6).

12 See Wang Jingrong (1995:65–6).

13 For a discussion of these and other administrative enforcement measures see Chiu *et al.* 1991: chapter 5.

14 Wang Jingrong (1995:64–5).

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13
VIETNAMESE LEGAL INSTITUTIONS IN COMPARATIVE PERSPECTIVE

Contemporary constitutions and courts considered

Penelope Nicholson

Introduction

The core issue this essay explores is the challenge, to Western cross-cultural legal researchers, to produce both sensitive and acute research. Part one of the essay includes a very broad, but nonetheless essential, comparison of courts and constitutions in Australia and Vietnam to outline the differences perceived as central to a comparative discussion of legal institutions in these two countries. The second part of the essay summarises Western commentary, defined as writing by those in capitalist democracies, on the constitutional systems in both the Democratic Republic of Vietnam (DRVN) and the Socialist Republic of Vietnam (SRVN)[1] to outline how foreign researchers obscure difference. A similar approach is taken to the material concerning the Vietnamese court system in part three, noting that there is much less written about the courts than the constitutions. Part four of the essay briefly explores the theories and methodologies informing comparative law. Reference is made to the work of both Western and Soviet comparativists and this is compared with multidisciplinary research of Asian legal systems. This section suggests that to maximise the utility of research of foreign legal systems it is essential to incorporate theories and methodologies not previously embraced by comparativists. Part five briefly considers the Vietnamese constitutions and courts since 1945 in an attempt to demonstrate the essential contribution of other disciplines to cross-cultural legal research and the importance of going beyond text to explore the operation of courts in Vietnam. The conclusion suggests that cross-cultural legal research is difficult, but may be enhanced by the adoption of postmodern theories, specifically reflectivity. The significance of political culture and history, specifically recognition of colonial histories, is also noted.

In an effort to confine the chapter to the issues faced when analysing the constitutions and courts of the DRVN and its successor the SRVN, the paper does not consider these institutions under the Republic of Vietnam, nor the commentary on them.[2]

Jayasuriya summarises the thesis of this book in the following terms: that a causal connection between capitalism (especially its growth) and legal institutional change cannot be assumed. Instead, he argues that indigenous state structures and local ideology are ‘prominent’ factors influencing the interplay between executive and judicial relations. This chapter concurs with this assessment. Through an analysis of research concerning the Vietnamese court and constitutional systems, the essay demonstrates that assumptions

about the role of law have traditionally formed a part of much of the comparative research on Vietnam. It is argued that the perspective from which a legal system is analysed must be articulated and the ensuing perception of the court or legal system must be situated within a theoretical and political framework. As with other analyses of Asian court systems in this publication, the Vietnamese court system is ultimately described as resulting from an amalgam of indigenous politics (both ideological and practical) and culture. It is beyond the scope of this chapter to discuss what it is that has generated the political and cultural mix of the period under study.

Legal institutions and systems of governance: Australia and Vietnam

Before moving to a study of scholarship on the Vietnamese constitutions and courts it is useful to outline where this author perceives differences between Vietnamese central and Australian federal legal institutions in order to place the ensuing commentary about the constitutions and courts of Vietnam within their political—legal framework. A discussion of the different meanings of the terms 'democracy' and 'independence' in each country also assists to identify differences between the systems that might otherwise remain obscured. Throughout this essay, Australia will be used as the comparative perspective through which the writing about the Vietnamese system is analysed.

'Democracy' is a term used in both countries to describe their political arrangements, but with a particular meaning within each context. Australia is referred to as a democracy in the Western tradition where free elections and freedom of speech are protected. The use of the word 'democratic' is extensive in the Vietnamese constitutions. It is used to mean the development of the revolution and the quashing of the colonial regime (see Preambles, DRVN Constitutions 1946, 1959; and Preambles, SRVN Constitutions 1980, 1992). It does not connote the freedoms conceived as basic to the West.

Central to a discussion of Australian democracy and Vietnamese socialism is the issue of how governments come to hold power. In Australia we have a system of pre-selection within political parties and then the candidates selected by those parties, together with any independents, contest the elections (Jaensch 1994:38–62; Aitkin and Jinks 1982:121–85). The party with a majority of seats in the House of Representatives then forms a government. In Vietnam there is no contest over which party will hold power as candidates will either be endorsed by the Vietnam Communist Party (VCP) or be independents permitted to contest the elections. In both cases, the Vietnam Fatherland Front advises the VCP on the suitability of candidates (Thayer 1993:56). For example, in the 1992 elections in Vietnam, 89.5 per cent of the candidates were members of the VCP (Thayer 1993:56).

While both countries have constitutions, the role and function of the respective constitutions differ. Australia's Constitution is interpreted by the courts.[3] If legislation contravenes the Constitution the High Court may rule it invalid, providing the matter is justiciable.[4] Further, recent High Court decisions have implied some rights, based on interpretations of the Constitution.[5] This not only increases the potential significance of court decisions,[6] but contributes to the development of new rights and the strengthening of existing rights (Saunders 1995:9). In Vietnam, the Constitution is a policy document setting out government's policy framework and outlining institutions that form a part of

the State's administrative apparatus (Nicholson and Phan 1997; Thayer 1993:50; Osakwe 1977:155). It is not enforceable in a court although debates about the establishment of a constitutional court took place in 1995 and 1996 (Nguyen, N P: interview). The Vietnamese Constitution cannot be enforced in the courts, but it has considerable power as a statement of government policy which, in turn, can be used to argue for certain practices.[7]

Under the Australian Constitution, courts and the executive (sitting in the parliament) operate independently of one another, at least in theory, and the people have the right to seek judicial review of both laws and government decisions. Contrast this with the position of ultimate authority held by the Vietnamese National Assembly (Bui Kim Chi 1995:257) or the VCP. Therefore, the courts of Australia and Vietnam have different roles. Both courts are described as independent. It is important to consider what the courts are independent of; the answer reflects the political and administrative arrangements of each country. Arguably the term 'independent', when used as a description of the Vietnamese court system by the Vietnamese, traditionally refers to independence from colonial and bourgeois powers (Preambles of the 1946 and 1959 Constitutions of the DRVN, Preambles of the 1980 and 1992 Constitutions of the SRVN). Recently, debate in Vietnam has arisen about the role of law and the suggestion of court independence from the government (Nguyen, N P: interview). In Australia an independent court is one that is independent from government.

Commentary on Vietnamese constitutions

I have completed a study of the writing on the constitutions of Vietnam.[8] Research and commentary on these constitutions—other than by Vietnamese within their own country—by political scientists, lawyers and historians, can broadly be split into three categories of writings by:

- Westerners, taken to be those authors writing from within liberal capitalist states (without adopting a Marxist approach);
- Vietnamese who have moved out of Vietnam as a result of the establishment of the Communist government, who will be included in the definition of Westerners referred to above; and
- People from other Socialist/Communist countries, who write from the perspective of Vietnam.

This chapter will commence with a study of the analyses of the Vietnamese constitutions by Western legal researchers, those living within democratic and capitalist legal systems. As a lot of the commentary on Vietnamese constitutions is by Western political scientists and historians, reference to these commentaries is also included. Brief mention will also be made of the work done by the Vietnamese and commentators from other socialist countries where it assists to develop more sensitive cross-cultural analysis.[9] However, this is not a study focusing on Vietnamese commentary on Vietnam's four constitutions.[10] The search here is for a framework for Western legal commentators to use when analysing Vietnamese constitutions.

Most Western studies of the Vietnamese constitutional system, stemming from the period since 1945 when the Communists took over in the North, have been analyses of institutional development or more broadly framed historical pieces. These consider the changes to the Constitution reflecting changes in the political environment and are conducted by lawyers and political scientists adopting a comparative framework. The foreign commentary on law emanating from Northern Vietnam 'has long been weak and fragmented' (Sidel 1996:705).

Examples of work on the design of the various Vietnamese constitutions include Bernard Fall's 'Constitution Writing in a Communist State' (Fall 1960a:157–68), and his article 'North Vietnam's Constitution and Government' (Fall 1960b:280) and notes on the introduction of the new 1992 Constitution (Nguyen and Burke 1992:34). Each of these, although by very different authors—the first being a political scientist who has extensively studied Vietnam and the second a commercial law group—is produced by authors who are not within a socialist legal system. They produce work that analyses the system by distinguishing it from an American or Western capitalist one.[11] In the case of Nguyen and Burke (1992) this distinction is implicit rather than explicit. Fall notes the differences, carefully pointing out that his discussion is of an emerging communist state, but this acknowledgement is not accompanied by a re-assessment of the role and function of the Constitution. Fall's analysis does not challenge a Western reader's assumed understanding of the role of a constitution. Other work assumes a preference by readers for democratic principles, possibly to the exclusion of meaningful analysis (Massonori 1994:19).

These are examples of a general tendency for the work of Western legal scholars to be largely comparative, although sometimes the comparative element is implicit (Massonori[12] 1994:19; Vecchi 1985:834; Nguyen and Burke 1992:34; Osakwe 1977:155). The early work of political scientists is also primarily comparative (Fall 1956:13; Hammer 1947:36), although some commentary trying to adduce reasons for the differences in role and function of a Vietnamese Constitution from, for example, an American one does exist (Waddell 1972:98). Whether expressly or implicitly comparative, socialist legal systems are frequently explained by being distinguished from Western systems. The comparative exercise, with few exceptions, assumes that the Western notions of democratic freedoms, human rights, commercial rights and private ownership are the parameters for an analysis of any other legal system (Kim 1981:483). Equally, opposite assumptions appear to underlie the work of Marxist authors.

The works of Carlyle Thayer (Thayer 1993:50) and Levian Do (Do 1993:116) on the SRVN Constitution of 1992 are not primarily comparative papers, but single country studies focusing on the 1992 Constitution of the SRVN. Clearly, elements of comparativism are sometimes evident, when authors implicitly compare the Vietnamese situation to Western Constitutional systems. Nevertheless, the focus of the work is decidedly single country rather than comparative. Writing on the Vietnamese Constitution of 1992, Thayer (1993) traces the political debates that culminated in the new constitution. In this way he teases out Vietnamese policy debates, highlighting the issues that preoccupied the Vietnamese. This work is very informative. It recognises the role the Constitution actually plays in Vietnam as a policy document and results in an exploration of Vietnamese political culture. Do (1993) distinguishes the SRVN Constitution of 1992 from Western constitutions and explores the language of the 1992

Constitution, comparing it with its predecessors, to identify the developments within it that might signal change for foreign investors. The comparative work of Chin Kim needs to be added to this list as an example of a Western lawyer attempting cross-cultural legal analysis of the Vietnamese Constitution while seeking to avoid judging it as less democratic than a Western constitution (Kim 1981:483).

Legal comparativists, with the exception of Do and Kim, have preoccupied themselves with a limited study of the operation of a constitution as a legal document, giving it the significance it would usually have in a Western democratic state, rather than attempting to analyse what role the Constitution actually plays within Vietnam's political system. Even where an attempt has been made to see the Vietnamese constitutions as part of a family of socialist constitutions, a 'Western' bias can still be detected (Osakwe 1977).

A review of the existing English language[13] literature describing constitutions of the Democratic Republic of Vietnam after 1945 reveals that these studies do not make explicit the normative positions of the analyst and largely avoid addressing issues of cultural context (including the political culture). This is not to be taken as saying this is so for all writing on Vietnam's legal system. It is not. However, it is beyond the scope of this essay to consider more wide-ranging writing on the Vietnamese legal system.[14]

Commentary on the Vietnamese courts

As with the commentary on the constitutions, it is possible to divide the sources of non-Vietnamese research on the Vietnamese court system into the three categories outlined in part two of the chapter. Again I will focus on the work done by Western authors.

There is very little scholarship indeed on the Vietnamese court system after 1945 by Westerners.[15] Fall (1956) includes notes on court development in his monograph. This study attempts to identify the role of the Vietnamese courts within the newly established state. After setting out the major court developments between 1946 and 1953, Fall concludes that there was a shift 'towards the use of the courts as a tool of executive policy' (Fall 1956:34). This is the most informative piece on the court's work, while also remaining critical of its political role. George Ginsbergs has written two bibliographic articles that comment on Soviet sources on the law of North Vietnam (Ginsbergs 1973a; 1973b). These include references to Russian-language court related commentary. Recently completed consultancy reports on the training needs of Vietnamese lawyers, including judges, briefly mention court structure and work (Sidel 1996; Blanchi 1996).

In short the English language writing by non-Vietnamese on the court system is so limited that it neither proves nor disproves a thesis that the writing of Westerners is lacking in sensitivity and understanding. All that can be said is that the work on the court by Fall, as with his work on constitutions, fails to distinguish the American and Vietnamese context sufficiently.

Comparative law: help or hindrance?

At the outset this essay does not accept that no person from culture A can write about culture B. To confine commentary to a situation where the author is culturally (or

geographically) connected to his or her subject would prevent a range of insightful work being done, some of which is valuable precisely because it is done by 'others'. This is not to say that some lessons cannot be learnt about authors being conscious of their 'otherness'. The issue is how the Western researcher can maximise insight when researching a legal system that is foreign to his/her own. In this section we will consider the work of Western comparativists and subsequently refer to the scholarship from comparativists from socialist or previously socialist states.

Legal scholarship can be either comparative or a single country study drawing on a range of disciplinary approaches. The editor and many of the contributors to (Taylor 1997) argue that sensitive cross-cultural research cannot be achieved using comparative law as it is traditionally conceived (Taylor 1997; Lindsey 1997; Hassall 1997; Marfording 1997). Instead they argue that there is a need for country studies in which the legal system is considered in light of the political, cultural, economic and philosophical practices of the relevant nation (Smith 1997; Taylor 1997; Lindsey 1997; Marfording 1997). The latter approach involves comparative work, if only to the extent that the researcher will conduct the study from a particular perspective which is usually foreign to that of the subject of the study. There is no neat divide between country studies and comparative law. Both approaches admit to the necessity of referring to local influences, for example, history and politics, on laws and legal institutions; both are in some ways comparative. However, I suggest there are differences in emphasis which can be significant.[16]

There are links between ethnographic approaches and the need to re-think comparativism as advocated by Gunter Frankenberg (see below). In both cases the methodology requires researchers to understand their position as a negotiated one (between themselves and the subject of interest). Further, both methodologies acknowledge the researcher is capable of partial, but nevertheless important, truths (Clifford and Marcus 1986:1–26). Anthropological studies essentially call for an investigation of an ethnic group, rather than an investigation of a particular law or institution.[17] Thus if a general study is possible or desired, legal anthropology offers the researcher of a foreign legal system a great deal. However, if the researcher wants to explore a particular aspect of legal or social relations, then the methodologies of Frankenburg and cultural studies theorists are more appealing. These latter methodologies allow the selection of a focus of the research, such as courts or constitutions, providing researchers commit themselves to self-reflectivity, both about the subject and themselves.

There is a debate about whether comparative law is a methodology (meaning only a process—perhaps descriptive or perhaps juxtaposing different legal systems) or a theory that includes a 'foundational frame for the study of critical comparativism' (Legrand 1995:263). It has been suggested that there is no single definition of comparative law and that it must be seen as a generic term which can be further classified into various types of comparative law (Khan 1971:4).

Cappelletti (1992) defines comparative work as the analysis of a societal problem across cultures with an assessment of the juridical solutions offered in the countries under study and their relative merits for each country. There-fore he sees comparative work as purposive (done with the aim of recommending a 'best' solution) and methodological, noting that the method requires an analysis of the cultural context (which can also be seen

as a sociological component). Many comparativists argue that it is essential that an expert comparativist strive for objectivity and neutrality in his/her reporting on any foreign legal system while also taking into account the social, historic and cultural context of the study (Cappelletti 1992; Osakwe 1987:1257; Osakwe 1985:875; Cohen 1978:190). The rationalist and modernist implications of this are clear. First, Cappelletti assumes there are universal sociological problems that have been addressed in a variety of ways. Second, borrowing from scientific discourse, he positions the expert as 'neutral'.

The relationship between comparative law and history is clearly set out by Roebuck (1992), who argues that comparative law and history are complementary and that comparative law can include a historical component but not vice versa. In short, it seems that comparative law can have a historical aspect, but to some, at least, it must be focused on the comparison across cultures of a societal problem, viewing aspects of legal systems to select the best juridical solution and making recommendations.

More recently it has been argued that comparative law is characterised too narrowly when defined as a methodology, even when it is defined as a method employed for a particular purpose (Legrand 1995:262; Frankenberg 1985:411). Gunter Frankenberg argues that there is a need for 'distancing and differencing' (Frankenberg: 1985:414) in comparative law by which he means the comparativist must be self-conscious. He argues that if the author is self-reflective and also not logo-centric (meaning not confined to the intra-legal context of the issue under consideration) the result is that difference is allowed to emerge and is not explained away (Frankenberg 1985:442, 448). Frankenberg concludes that this change would eradicate the fallacies of neutrality that comparativists have traditionally sought.

Frankenburg's approach suggests some steps towards what we might call a postmodern[18] Western analysis of a legal system. The example Frankenberg uses to illustrate his theory that comparative work is flawed, is a comparative analysis of abortion decisions. He argues studies of abortion generally fail on three counts. First the comparativist must avoid characterising the phenomenon being studied as a legal question. To do so, according to Frankenburg, results in a private-public dichotomy being applied without regard to other dimensions of the study (Frankenberg 1985:450). Equally important to Frankenburg is the need to allow the 'variety-in-law' to emerge (Frankenberg 1985:451). This step requires the researcher to avoid seeing similarities and to allow differences, perhaps in political context, to emerge. Finally Frankenberg suggests there is a need to move from traditional conceptions of legal discourse, such as rights and duties, to the politics of the subject being studied. In the abortion example used by Frankenburg, he suggests the politics of reproduction might be central to a comparativist study.

Clearly Frankenburg's approach requires a commitment to self-reflectivity and an acknowledgement of subject position in the researcher. In addition, the researcher must explore understandings of the participants, institutions and doctrines studied. The difficulty lies in how to succeed in doing such a textured analysis of a country to which one is foreign. Frankenburg's criticisms of comparativists are persuasive, but when studying a foreign legal system it is hard to conceive of researchers capable of meeting his requirements.

Let me give an example of the challenge Frankenburg poses for the legal comparativist. The greatest risk with the comparative approach, when talking of

constitutions, is that the Western constitutional system[19] can be highlighted or cast as the ultimate solution within the scheme of constitutional development—the bench mark, in effect, for measuring constitutional 'development'.[20] This comes about as a result of the Western conception of a constitution embodying universal and essential rights enabling the rule of law to remain unchallenged in these comparative studies. This assumption can mean that the system being compared to the Western system is devalued, whether explicitly or implicitly.[21]

In 'The Common Core of Constitutions of the Communist-Party States' Osakwe carefully outlines and explains how constitutions are policy documents rather than binding laws on the exercise of power in Communist Party states (Osakwe 1977:155). In a great proportion of the paper he does this implicitly, not criticising the phenomenon, but explaining it. When talking about what are categorised as the declarative provisions of Socialist constitutions, Osakwe says that: 'The practical application of this doctrine of popular sovereignty [meaning that the peasants elect their leaders], however, results in the elected government getting fatter and the people thinner […] and tends to keep the people […] in perpetual political bondage' (Osakwe 1977:172). Clearly, he is criticising socialist administrations for producing a system where those in power benefit at the expense of those who are not. Osakwe is explaining the impact of the socialist state on the individual and also highlighting that in his view the 'reality', unlike the theory of socialism, does not empower the masses but ensures their subordination.

This is only a part of the story. I suggest that for the Constitution of Vietnam, for example, to be more usefully analysed, it is necessary to consider how it works for the Vietnamese. The fact that the Constitution has varying roles and that its impact depends on the group of Vietnamese considered, has to be noted. For example, individuals, peasants, party officials, commercial and political élites could all have different relationships with the Constitution and it with them. For instance, an analysis of how the Constitution does or does not affect the family/individual relationship or the community/individual relationship is a valid area of inquiry. Furthermore, one needs to go beyond analysis of the Constitution. Otherwise, all one achieves as a comparativist, is the juxtaposition of constitutions in two different countries. What needs to be explained are the possible roles the Constitution plays in manifesting the power of the government, if at all. To this end the Constitution must be considered, not only according to its written terms, but in the light of its history and existing political and legal culture.

If we remove the assumption that constitutions can be the basis of legal challenges to government action (an assumption valid when considering the Australian system), it enables the researcher to ask where power is held in Vietnam and how it is held. I would like to suggest that the story to be told and the research that needs to be done to attempt to answer this question, involves close examination of the role and practice of the Communist Party and how this is affected by other institutions, people or practices. Arguably, some of the groups that might need to be examined would include the National Assembly, the President, the Prime Minister, the Women's Union and the Vietnam Fatherland Front (Thayer 1993:50).

Continuing with the example from Osakwe's work we see that he acknowledges the influences of 'the pains and sufferings of that particular state of its ethnic and national peculiarities' in the formation of any constitution. However, having raised these as valid concerns they are not pursued. Perhaps this is fair in an article striving to present the

'common law' of Communist states. The problem is that the approach is present in most Western legal writing on Vietnamese Constitutions that I have read, with the exception of the work of Thayer, Do and Kim mentioned previously.

It is beyond the scope of this chapter to explore why Westerners have largely failed to perceive how their research is affected by their preconceptions, but it is interesting to speculate that because comparative work has traditionally focused on systems analysis and explanation rather than a theory of comparative legal study, this line of inquiry is underdeveloped (Legrand 1995:264; Hill 1989:102; Alford 1986:948; Frankenberg 1985:424). Hall perceptively suggests that because 'most comparative legal studies have been written on modern law by Western legal scholars for Westerneducated legal readers; […] the result is often of parochial significance' (Hall 1963:5).

Perhaps the most useful lesson from Frankenburg's thesis is the freedom for the researcher to acknowledge that his or her comparative work only produces one of many possible readings of the institution or law being studied. The claim to have produced a definitive understanding about a legal system is no longer valid. For the comparativist to perceive him or herself as a translator of 'other systems', rather than the authoritative voice, is central to developing understandings of foreign legal systems.

Tumanov (1985) argues that comparative work can be 'inter-typal', meaning a comparison of legal systems where the role and function of law may be fundamentally different (Tumanov 1985:71). Szabo (1977) uses the term 'external' comparison, arguing that when researchers look at a system different from their own they are analysing an 'external' system—one that is outside their system. Both argue that Western comparativists should approach socialist law as a different model from Western law, reflecting an understanding of the different socio-political systems central to the role for law in any society, and this would enhance the researcher's sensitivity to difference. Whether or not one subscribes to the view that systems of law are fundamentally different,[22] the approaches of Tumanov and Szabo share an affinity in the questioning and searching of the self-conscious postmodern comparativist which requires him or her to inquire about the 'larger context of basic philosophical, historical, sociological and political premises' (Tumanov 1985:71).

There is at least one difference between the postmodern approach and the analysis of the socialist comparativists. Whereas the former requires scrutiny of the assumptions influencing all aspects of any study (both assumptions taken by the researcher to any study and assumptions built into the system being studied), the latter primarily calls for the Western researcher to analyse the confusion between the roles for law in different types of legal systems.

In summary, one limitation of traditional comparative law is that the work produced frequently assumes that merit of analysing a foreign system while still using the framework of a Western system to set out the questions and analysis. In addition, historical and cultural analysis has been largely omitted from the comparative work on Vietnam's constitutions. It simply does not exist within the English language work concerned with the Vietnamese court system. Finally, comparative work often assumes one reading or interpretation of the system being studied will be definitive, failing to note the theoretical assumptions implicit in such an authoritative analysis.

Comparative legal studies can be more relevant and sensitive if assumptions are articulated so that the reader can appreciate the nature of the exercise the writer is

undertaking. For example, if the assumption about the supremacy of democratic systems is to be retained, it should be made explicit and reasons given for it (Hassall 1997:113). If the notion of the Western constitution is to be challenged, either as an ideal in itself or as the benchmark by which to assess other constitutions, this too should be explained. When the author expressly states his or her conceptions of the system being studied, it helps to place the work in its context and to identify the translation of the other culture offered by the researcher.

Arguably, history of a legal system foreign to that of the researcher must go beyond the text of legal documents.[23] Further, it needs to counter allegations that it ignores the colonial experience. Vietnam is a nation that was regularly colonised: by the Chinese, the French, and, arguably, in recent times by the capitalists of Western countries. This perspective has been under-developed by Western researchers of Vietnamese courts and constitutions. A post-colonial critique, meaning one that is written in full consciousness of the Vietnamese experience of colonisation and also attempting to unravel what this might mean for its constitutional and court development, may be helpful particularly if one seeks to understand the position from which some of the earlier French histories were written.

For example, Bernard Fall's court history talks of the post-revolutionary court system as a powerful political tool. Such a conclusion is consistent with theories of socialist law (Osakwe 1987) and Vietnamese commentators (interview 1996). However, where these conclusions do not refer to the pre-revolutionary history of the courts, the implication is that before the revolution, the court system was a less political, and therefore better, institution. If Fall's history had also noted the narrative describing the French courts as a political tool of the colonial regime (Tran Tu Binh 1985:41), the reader would not have been inexorably led to assume that the courts were previously 'better'. There are live questions about the politics of the author and of the subject that are left dormant if the colonial history of Vietnam is omitted. In addition, the complexity of influences coalescing in modern Vietnam's legal system is undermined if the pluralism of the system is ignored (Hooker 1975).

Constitutions and courts

In the context of an analysis of Vietnamese constitutions and courts, a post-modern approach would require the author not to be confined by modern liberal assumptions made about Western constitutions and courts and prejudicing the work of those analysing socialist institutions. This approach would enable the analyst to ask: What does this Constitution seek to do? Who wrote it? Who reads it? Who is it seeking to protect or educate? Who is behind the Constitution? It would also enable the Constitution not only to be analysed in terms of its institutional role, but also to be seen in its varying impacts on a range of people with a multiplicity of subjectivities. Finally, it would allow the researcher to go behind the Constitution, to see where power is held in Vietnam and how its exercise is regulated, if at all. In effect because one is writing as a foreigner to the system being analysed and there is, therefore, likely to be a degree of comparativism, this is a process of positioning comparative work within the postmodern framework, making

the researcher who interprets a foreign legal system explicitly address the theories and assumptions of his or her work.

Research about the Vietnamese court system could also benefit from being positioned within a postmodern framework. How are institutions sustained? What institutions, if any, are used to resolve disputes? Assuming bodies resolve disputes, where is the power to determine cases held—judges, conciliators, politicians, the Party? What sort of conventions, if any, do they require? What sort of subjects are invented by them? What does 'to determine' a case mean? Are decisions enforced? If not, what, if any, sanctions are applied? Issues of power and procedure can be examined from a variety of perspectives—again arguably the postmodern approach.

Clearly in a chapter of this length such a textured study of courts and constitutions is not possible. What follows is an analysis of the preambles[24] of the constitutions and those sections of the constitutions dealing with the court system. This discussion enables an interpretation of the political framework in which the courts emerged. Obviously the constitutions are only one source and many others, such as scholarship, media reports and legislation, exist. However, a consideration of the constitutional framework enables the 'official' policies to be explored and this can then be contrasted with the perceptions offered by interviews with judges, barristers and academics.

The introduction of a new Vietnamese constitution is a high-profile national event, with the media running not only commentary on the progress represented by any changes, but also publishing a new constitution in its entirety. The great exposure the Constitution receives is clearly sanctioned. In Vietnam, where the media are usually state owned and always vetted by the state, it is clear this level of exposure reflects the will of the government. Therefore, the Constitution is written for Vietnamese as well as for international, public consumption. This propagandist function needs to be considered when interpreting the meanings of changes to the Constitution. The use of the word 'propaganda' here reflects my understanding of its Vietnamese meaning, namely, that propaganda is synonymous with education.

I note that I offer only one of many possible interpretations of the preambles and chapters dealing with the courts. Although some may suggest that it is very simplistic to commence a study of courts and court-related constitutional provisions with reference only to the text, I suggest that the way the text is read is crucial to its usefulness. In this case the constitutions are explored to see how the state conceives its political culture. Further, a reading of Vietnamese Communist Party (VCP) court policies is offered. Since the VCP ultimately approves the Constitution,[25] its seems reasonable to believe illumination on these two points can result from analysis of the four constitutional preambles and the chapters on courts. By exploring the constitutions as political texts, and noting their propagandist function, the differences between Vietnamese and other Western constitutions are made clearer.

Essentially, the Constitutional preamble of 1946 indicates that Vietnam was a nationalist state, aspiring to friendship with other communist states, but also committed to democratic principles and independence. Nationalism is conceived as freedom from colonialism: 'After 80 years of struggle, the Vietnamese nation has freed itself from the colonialist yoke' (DRVN Constitution 1946: Preamble). The authors of the preamble also chose to link the revolution in Vietnam with those in other socialist/communist countries. The government is described as 'marching forward on the path of glory and happiness, in

the same rhythm as the world progressive movement' (DRVN Constitution 1946: Preamble). Yet connection, rather than integration, with other communist/socialist states is emphasised. Historians of the period argue that Ho Chi Minh deliberately failed to declare communist objectives, at this stage, wanting to maximise the appeal of the revolution both internationally and domestically.[26] If this is the case, the constitutional preamble is consistent with these objectives. The democratic principle to which the Preamble refers is defined as 'the union of all people irrespective of race, sex, class or religion' (DRVN Constitution 1946: Preamble). This is the government's assurance that its democracy is inclusive and not class- or race-based—in contrast both to other democracies and the race-based policies of the French colonial government in Vietnam.

In contrast, the 1959 Preamble directly attributes military success of the DRVN to the leadership shown by the Vietnamese Workers' Party and the Government of the DRVN. Thus the Government and the Vietnamese Workers' Party are directly connected, a relationship that was left unstated in the earlier preamble. In addition, the preamble positions the success of the Vietnamese people of the North within the 'common success of the liberation movement of the oppressed peoples, of the world front of peace and the socialist camp' (DRVN Constitution 1959: Preamble). Here the preamble places Vietnam's struggle as part of the wider struggle for freedom from the bourgeois and to that end embraces socialism. The preamble also speaks of 'democratic freedoms' and 'democratic revolutions', but it does so within an overt socialist agenda. These terms are now explicitly used within a revolutionary discourse that proclaims socialism as its objective. This has been characterised as:

> The Constitution of 1959, in spirit and in normative content, is the Constitution of the first stage in the period of transition to socialism in North Vietnam, while at the same time it expresses the determination of the Democratic Republic as a national entity to fight for the reunification of the homeland.
>
> Pham Van Bach and Vu Dinh Hoe (1984:110)

The 1980 preamble details the strength of Vietnamese nationalism and its numerous victories. According to the Preamble the 'staunch and indomitable traditions' (SRVN Constitution 1980: Preamble) of Vietnam defeated both the French colonialists and US Imperialists and gave birth to one Vietnamese nation, the Socialist Republic of Vietnam. As with the preamble of the 1959 Constitution, the 1980 preamble aligns Vietnam with other socialist countries, in particular with the Soviet Union.[27] In addition to locating Vietnam within the family of socialist countries, with the exception of China, the preamble briefly explains the many successes of the Vietnamese Communist Party. Having 'creatively applied Marxism-Leninism', the Party is congratulated for implementing the revolution within the old Democratic Republic of Vietnam (SRVN Constitution 1980: Preamble). This preamble proclaims Vietnam as socialist. The change of the nation's name from the Democratic Republic of Vietnam to the 'Socialist' Republic of Vietnam is perhaps the ultimate reminder of this transition.

The 1992 preamble is a delicate combination of revolutionary zeal and renovation policies. The latter reflects the VCP's decision, at its Sixth Party Congress, to abandon a central economy and introduce a market economy. Nationalism is emphasised, with

unification epitomising its success. Vietnamese traditions are listed as 'unity, humanity, uprightness, perseverance and indomitableness' (SRVN Constitution 1992: Preamble). This catalogue of skills does not refer to the revolution directly and reflects the delicate, and perhaps uncertain, political commitments of the VCP. Vietnam has also repositioned itself as a member of the international community, rather than continuing to confine international friendships to those of socialist/communist countries.

Tracing the political environment in this way assists the foreign researcher to perceive the government's endorsed view of itself. This is not to say the government was actually first nationalist (1946) becoming socialist, albeit cautiously (1959), socialist (or communist?) (1980), and then pursuing a mix of socialist and capitalist economic policies with other policy matters less clear (1992). Instead, what appears is that the VCP and National Assembly carefully drafted the state's policies, enabling them to be disseminated in what was perceived as an acceptable form. Similarly those provisions dealing with courts operate as a publication for a community audience.

Certain provisions dealing with the courts are common to each of the chapters in the four constitutions.

Table 13.1 indicates the similarities in the articles concerned with courts, although their position, and arguably therefore their priority, changes. Table 13.1 is a comparative analysis that focuses on the constitutions of Vietnam across different time periods. By plotting the similarities in a table, the risk of obfuscating differences emerges. In order to alert the reader to the possible complexity of the comparison, an asterisk indicates that although provisions concerning people's assessors and the right to self-defence occur, they are in a different form in each constitution. For instance the powers of people's assessors increase over time. The right to self-defence is differently expressed. For example, in the 1980 Constitution there is a right to have a

Table 13.1 Features of the changing Vietnam Constitution, 1946–92

Provision	*1946*	*1959*	*1980*	*1992*
Must have people's assessors[28]*	Art. 65	Art. 101	Art. 133	Art. 132
Right to use ethnic language in court	Art. 66	Art. 102	Art. 134	Art. 133
Right to public trial, except in special circumstances	Art. 67	Art. 101	Art. 133	Art. 131
Can defend oneself or hire a barrister*	Art. 67	Art. 101	Art. 133	Art. 132
Judges to obey only the law	Art. 69	Art. 100	Art. 131	Art. 130

case pleaded before the court, but by whom is not specified. The 1992 Constitution enables defence by a barrister.[29]

In addition, Chapter VI of the 1946 Constitution provides that there shall be a Supreme Court, Courts of Appeal, and Courts of second and first instance—the genesis of a court hierarchy (DRVN Constitution 1946:63). Judges are to be appointed and people's assessors are to assist with criminal cases (DRVN Constitution 1946:64, 65). Article 68 prohibits acts of 'torture, violence and persecution'.

It is necessary to analyse the terms of the articles in Chapter VI to see how local events might have coloured the description of the courts at this time. For instance, the fact that ethnic languages are to be used in courts might perhaps reflect the political commitment made to ethnic groups by Ho Chi Minh. General Vo Nguyen Giap records the close relationship that emerged between the revolutionaries and the ethnic groups located in the high mountainous, border regions of Vietnam (Vo Nguyen Giap 1970:52–78). The support of these groups was vital to the revolutionary cause as they provided food and shelter to guerrilla fighters (Lacoutre 1968:78–85). The prohibition on acts of torture and violence could have various causes. There is little doubt that French courts were seen by the Vietnamese as arbitrary and violent (Tran Tu Binh 1985). This article may be included to assure the people that the new regime is committed to non-violent dispute resolution and therefore distinguished from courts in existence under the colonial regime.

The very scarcity of provisions in the Constitution about the court system leaves the structure of courts and their responsibilities to be determined. This reflects the reality of a society at war with very limited resources. However, the early attention given to courts by the legislature,[30] indicates their importance in the period of the first constitution 1945–59. The government sought to retain close control over the establishment of courts and therefore perhaps deliberately left court detail vaguely expressed in the Constitution. Despite having so few court-related articles in the Constitution, the Party included sufficient principles, concerning fair hearings, to reassure Vietnamese citizens of their protection from violent and arbitrary decision-making.

If we accept that the Constitution of 1959 advocated socialism in its preamble, it is interesting to consider whether there are any changes to the chapter concerned with courts. The 1959 Constitution introduced named courts at the local and provincial level and notes the requirement that courts be bound by law (DRVN Constitution 1959: Articles 97 and 100). This article, dealing with the role of law in courts, is moved forward in the 1959 Constitution and is therefore given greater emphasis than in the Constitution of 1946. Again judges have to work with people's assessors, although they now have equal power to judges in all matters. There are many possible reasons for the introduction of a more formal court hierarchy including greater involvement of people's assessors. One possible interpretation is the need to reduce the incidence of violent or erratic decision-making (or at least the perception that it is endorsed by the state), which existed through the land reform era.[31]

Chapter 10 of the 1980 Constitution contains 11 articles to guide the operation of the court system, three more than the equivalent chapter of the 1959 Constitution. This chapter commences with a provision requiring the courts and the People's Control Commission (a body which prosecutes where it is notified of or uncovers a breach of the law) to:

> protect the socialist legal system, the socialist system, the working people's right to collective mastery, and socialist property and to ensure respect for the lives, property, freedom, honour and dignity of citizens.
>
> SRVN Constitution (1980: Article 127)

Chapters in the earlier Constitutions, dealing with the courts, have not included provisions about the responsibilities of the courts. Article 127 is novel and questions must be asked about why it is introduced. In the first instance it seems clear that the Government wanted to articulate the responsibilities of the legal system, in particular the courts. These actions are consistent with the 'Decree on People's Courts and People's Procuratorates' dated 15 March 1976 which required the courts to assist with the revolution. Policy changes seem to indicate that, whereas at a time earlier in the life of the revolution party organisations were responsible for security, a part of this responsibility now rests with the court system. What remains unclear, from the Constitution, is to what extent the Party and courts are dependent.

This same section of the Constitution of 1980 includes a direction to look to the effect of any act on the state or on legitimate or collective interests of citizens and to deal with any such act according to law. However, what does a direction to act according to law mean? To translate law as 'socialist legality' is consistent with the policies enunciated by both Ho Chi Minh and many Vietnamese commentators. This can be interpreted to mean that the law is characterised as a tool to be used for the benefit of many or the state (Ngo Ba Thanh 1993:85). A court then must balance the public and private interests to any dispute, noting that the public interest is paramount.

There are two further new articles within the 1980 Constitution. Article 132 states that decision-making in courts is collective, with the majority determining the outcome in any matter. Article 137 requires organs to respect and implement decisions of the courts. Each of these new articles formalises the role of the courts. The public is informed, through the Constitution, about both who makes decisions and how they are to be made, and that once made, determinations must be given effect.

Interestingly the duration of the appointments of people's assessors is prescribed under the 1980 Constitution and permission is granted for 'jurist organisations' to be 'formed to give legal assistance to the defendants and other persons concerned'. Each of these additions to the Constitution appears to suggest an attempt to control the personnel in the courts a little more. Alternatively, it might be argued that policies on these issues are more settled and therefore can be publicised as uniform requirements. The fact that the term of the assessors is less than that of judges would imply that assessors ought to hold the jobs for relatively short periods. This may be explained by their vulnerability to pressure from the community or by the need to demonstrate to the community that a large number of people are equipped to be people's assessors.

The chapter on courts in the 1992 Constitution diverges very little from its predecessor. However the relatively long article about the duties of courts in the 1980 Constitution is reduced by omitting the reference to socialist legality. Perhaps this reflects the adoption of *doi-moi* and a subtle shifting of the role of the courts to reflect the VCP's changed economic policies. Another distinction between the 1980 and the 1992 Constitutions is that the latter provides for the appointment, and not the election, of judges. People's assessors remain elected. However, since previous election of judges was by the National Assembly, this is not such a fundamental change. Rather it suggests a repackaging of the policies.

What we see from this brief overview of the constitutional provisions is that the government appears to respond to criticism of the courts. The tight control over the courts is never renounced. But when courts have been seen as particularly destructive, *vis-à-vis*

the government's relationship with its revolutionary supporters, their powers have been curtailed in this public document. For example, the introduction of further provisions relevant to courts in the 1959 Constitution reflects reforms arising out of criticism of the Land Reforms of the early 1950s. Further the introduction of the courts' 'duties' to the state in 1980, retained in 1992, reinforces the role of the courts and clarifies possible ambiguities about their position in the government's structure.

However, the text of the Constitution tells only part of the story. Oral histories will be used to illuminate debates about the role of the courts over the fifty-year period 1945–95. These oral histories enable different Vietnamese perceptions of the courts to emerge. They also challenge the official view of the courts as depicted by the constitutions. According to the 1946 Constitution there was a court system in Vietnam. Yet as we shall see, those interviewed referred only to the work of the Military, Land and Army courts between 1945 to 1959. They preferred to describe a court system emerging after the introduction of the 1959 Constitution.

The names of the interviewees will not be disclosed as, at the time of writing, permission to identify those interviewed was not to hand. Instead, fictitious names are used. Writing using oral material and hoping not to identify the interviewee restricts reflectivity. However, an attempt will be made to describe the interviewees without compromising them. In particular, the

Table 13.2 Background of interviewees (names are fictitious)

Given name	*Birth date*	*Education*	*Work experience*
Mr Quang	1920s	Revolutionary legal training[1]	Judge
MrTri	1920s	French legal training[2] and revolutionary training	Judge and researcher
Mr Minh	1950s	Vietnamese legal university training[3]	Researcher and teacher
Mr Chi	1920s	French legal training	Barrister
Mr Van	Perhaps 1930s	–	Judge and researcher

Notes: 1: Legal training organised by the new, revolutionary government[32]
2: Graduate in law from a French-run university before the revolution
3: In 1979 the Vietnamese resumed formal legal training at universities

education the jurists received will be considered when analysing their view of courts.

Table 13.2 presents a summary of the age and education of the interviewees.

Some of those approached for interviews[33] simply commenced their histories in 1960. These interviewees suggested that pre-1959 was a chaotic period in Vietnamese legal history that is better forgotten or, at least, if not forgotten no time should be spent scrutinising it. It was suggested that with the introduction of the 'Law on the Organisation of People's Court 1960' a formal court system was established and that the

court system introduced in 1959 had no real predecessor. If one is technical about the structure of the court system, it is correct to note that the structure largely still in use today was introduced in 1959. However, it belies the fact that the Military and Land courts definitely made decisions affecting people from 1945 onwards. Others interviewed did not shy from commenting on the history of the court before 1960.

The ensuing interpretation, of the interviewees' recollections, has been organised around my perceptions of the courts' role(s). This means detail about the operation of the courts is omitted. Again it must be noted that there are a great many other sources that assist in developing a reading of the courts' work. Not only the relevant Decrees and Orders, but also court journals, views of those who have been to court, and media reports give a range of insights into court work.[34] There is simply insufficient space here to consider the range of sources and consider how each contributes to an understanding of court work in Vietnam. The decision to focus on the general discussion, in interviews, of the role and work of the courts reflects the issues most debated at the workshop held in Perth in 1996, the papers from which form the basis of this book.

Both Mr Quang and Mr Tri talked about the role for law after the Vietnamese revolution. They indicated the need to appreciate that law was a vital part of the revolution. Mr Quang pointed out that the new state brought with it a new legal system, an integral part of which was the Military Court—a court in which crimes against the new state were tried. Mr Quang talked of the Military Court existing to 'defend this new regime against the French when they return' and at a later time stated that:

> The First Vietnam Communist Party or government wanted to enforce strictly against the people who were against the Fatherland and therefore the courts were entrusted to protect democracy in society and socialist legislation […] The Court shot people against the Fatherland.

Mr Tri explained the introduction of the Military Court on the basis that the old French courts had been destroyed and there was a need for a body that could 'adjudicate crimes'. Without overstating the differences in explanation offered by these two interviewees, it appears that Tri, a revolutionary who graduated from the French-run law university, sought to place the courts within a 'legal' system. While Quang, trained only as a judge after the revolution, did not see the need to ascribe to the courts a role other than that of making decisions consistent with the objectives of the revolution. Effectively, both interviewees saw the Military Courts as part of the emerging legal system, introduced to keep order. Mr Quang was clearer about characterising courts themselves as revolutionary.

Mr Tri talked at length about the independence of the courts and the complex relationships courts developed with other administrative agencies. He indicated that debates about judicial independence existed within the masses, continuing until 1950. He identified 1950 as the time when debate receded as a result of the increasing pressures of the war. He described the relationships courts developed with other agencies in the following terms:

> Courts had independence and within that independence also had good relationships with other organs. The same as today.

This reference to the interconnectedness of courts to other state organs is exquisite in its ability to say so much so simply. To this researcher, Mr Tri was giving a rare insight into the dynamic that pervaded his dealing with other state organs. His account suggests diplomacy was central to their working relationship, acknowledging that agreement may not exist on all issues. What remains unclear is where the balance of power lay in any negotiations with other institutions.

Mr Tri introduced the importance of the War Administrative Committee *(uy ban khang chien hanh chinh).* These Committees, introduced in 1950, existed at the inter-zone level.[35] It is clear that these committees wielded substantial influence within the courts as Tri explained:

> They could participate in decision making. They could express an opinion to the prosecutor about policy or serious crimes. The War Administration Committee can explain their opinion to judges or the inter-zone and judges could agree or disagree with it. If they disagreed they must have a good reason.

Tri suggested that the War Administrative Committees were usually comprised of six or seven people and included respected political figures. For example Do Muoi, past Chairman of the VCP, was Chairman of the InterZone Nam Dinh War Administration Committee. Tri explained that the War Administration Committee had influence over all courts.

Tri also mentioned that senior courts, particularly the Supreme People's Court, issued guidelines for lower level courts to explain how adjudicating should be done. He indicated that the guidelines were issued either as circulars or as statements promulgating their own decisions. He noted that the mechanism—outlined in the various laws on the organisation of people's courts—that senior courts had to review decisions of lower courts, also assisted them to guide lower courts in 'correct' decision-making. What was left unclear is on what basis a decision was deemed correct. The preliminary articles of 'the law on the organisation of People's Courts 1959' suggest that decisions were considered to see if they protected the 'people's democratic regime, protected social order, public property and the legitimate interest of the people and generally contributed to socialist construction' *(Law on the Organisation of People's Courts 1959:* Article 1). These are broad criteria by which to assess judgments and the power and role of discretion is evident.

Mr Chi, a barrister in private practice in Hanoi, was much more direct about the tension he perceived between independence of the judiciary and a government with absolute control. He stated that the reality for judges was a lack of independence. Mr Chi explained that 'a member of the Party at district and provincial level should not be on the court, yet usually they are involved with the trial activity'. He went on to say that if they refused to cooperate they would be dismissed. Mr Chi also pointed out that not only was membership of the court connected to the Party, but so too was decision-making. Mr Chi asserted that Vietnamese court structures were 'illegal under the Constitution'.

Both Mr Tri and Mr Quang stressed the importance of people's assessors to adjudication. Their presence was explained as resulting from an effort on the part of the Vietnamese Government to 'extend the power of the Vietnamese citizen'. People's

assessors were introduced by the *'Order on the Organisation of Courts and Status of Judges'* dated 24 January 1946. At this time people's assessors could only discuss minor criminal charges with the judge. They had no power to vote on the outcome, although with serious crimes people's assessors could vote on the result so long as the issue did not relate to process, bail, compensation or a civil or commercial case. Subsequently, as both Mr Quang and Mr Tri point out, the powers of people's assessors were increased to include voting on civil and commercial matters. This extension of their powers was, according to Mr Quang, the result of a perception by the Vietnamese of a need to distinguish their courts from those that existed under the French.

The oral histories drawn on in this section bring out aspects of the courts' operations that are largely obscured when the analysis is confined to the legislation. This would occur with a study of any country's court system. However, what is interesting here is that the key theme that emerged was the courts' political role. The courts were uniformly characterised as a tool of the revolution and, to a certain extent, a voice for the masses. Yet there was not agreement about the extent to which this is a good characteristic of the court system. Perhaps the differences between the private barrister Chi and the academic Minh best highlight the extent of the debate. Mr Minh reported courts only eradicated 'bad' people while Mr Chi argued an intellectual tension between the rhetoric of independence and one party rule. Both are legal graduates, one from the French university before the revolution and one from a Hanoi-based university after 1979. Perhaps the extent to which Chi intellectualised this tension can partly be explained by his familiarity with other legal systems, such as the French.

The differences in expression of ideas also leads to speculation about the relative position of those interviewed to speak critically of court work. Causes for this difference are speculative. It is worth considering that exposure to other legal systems of law impacts on how laws and legal institutions are conceived. In the case of Tri and Chi it seems clear that their French legal education has resulted in their discussion of the court system in terms a Western researcher easily accesses—the significance of independence as an issue. The unquestioning political role and practice of the courts, articulated by Quang, and to a lesser extent Minh, may reflect their freedom to discuss courts as political institutions and not to engage in arguments about the merits of this. It also highlights a very interesting debate among lawyers in Vietnam about the role for their own court system. The interviews indicate that a balance between policy implementation and independent decision-making seems a live issue in Vietnam at this time. There is ample evidence of diversity of opinion within Vietnam about the role of courts. I have attempted not to debate the merits of court independence, but rather to chronicle the reactions to this issue gleaned from the jurists with whom I spoke.

Conclusion

From the discussion of theoretical frameworks, four essential aspects to strengthening cross-cultural legal research emerge, especially when undertaken by an Australian on Vietnamese constitutions and courts. First, the fundamentally different political system in which the Vietnamese courts and constitutions operate must be explored. The role of a constitution cannot be assumed, and nor can the role for the courts. As we have seen, this

awareness is advocated by comparativists from socialist backgrounds. Second, post-modern methods, if incorporated, assist by requiring the researcher to challenge the assumptions that inform his or her own background and to question what assumptions might form a part of the material being studied (for example, the role of Vietnamese constitutional commentary in fostering confidence in the Vietnamese Government or the propagandist function of the courts). The work of Frankenburg is important as it signals the possibility of being a comparativist and incorporating self-reflectivity to enhance the sensitivity of research. Third, the need for research to incorporate history and draw on other disciplines as appropriate, is restated, primarily because it has so rarely occurred with Western analysis of Vietnamese legal institutions. Finally, it is important for comparativists to embrace the notion that their scholarship provides only one of many possible interpretations of the subject of their study. In this case, all that was attempted was to report the lack of consensus in Vietnam about the role of the courts, and the inadequacy of looking only at the constitutional provisions establishing the courts.

Notes

1 The DRVN existed in the North of Vietnam, above the seventeenth parallel, until 1976 when, with the defeat of the Republic of Vietnam, the introduction of the SRVN was announced. Throughout this essay use of the term Vietnamese constitution/s or court/s refers to constitutions or courts, promulgated in Hanoi, either by the DRVN or the SRVN.

2 Examples of commentary on the constitutions of the Republic of Vietnam include: Grant (1958); Corley (1961–2); Devereux (1968); and Secretariat of the Asian-African Legal Consultative Committee (1968).

3 The High Court usually interprets the Constitution; however, other federal and state courts have authority to interpret the Constitution (Caleo 1995).

4 For a matter to be justiciable it must be capable of determination by recognised legal, rather than political, principles (Caleo 1995 and Lindell 1992).

5 The High Court implied a right to freedom of communication about government and political affairs in *Australian Capital Television Pty Ltd and Others* v. *The Commonwealth of Australia* (1992) 177 CLR 106 and *Nationwide News Pty Ltd* v. *Wills* (1992) 177 CLR 1. It is important to note that these cases are not the first where personal freedoms have been debated. See also *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth of Australia* (1943) 67 CLR 116.

6 There is extensive debate about the role of the High Court, particularly the extent to which it can make law without compromising its objectivity (Craven 1992 and Mason 1986).

7 The Constitution is not legally enforceable in a court of law. However, the extent of state rhetoric that refers to rights in the Constitution arguably affords protection in particular areas. For example, the government has given numerous public assurances that land will not be seized, if it forms a part of a foreign investment project, without compensation. See for example, Phung Van Tuu (1994) and Vo Van Kiet (1994).

8 In the North of Vietnam there have been four Constitutions since Ho Chi Minh came to power in 1945. The first Constitution was introduced in 1946 and subsequently this was amended in 1959, 1980 and 1992. In the South the first Constitution was introduced in 1956; it was amended in 1965 and then after unification, in 1975, the South was included in the Northern Constitution of 1980.

9 For a general discussion of the role of Vietnamese research institutions, their current pre-occupations and the emerging core issues confronting Vietnam's legal development see Sidel (1993; 1994).

10 There is extensive Vietnamese commentary on the role of the constitutions over time. Ho Chi Minh wrote about the government system of Vietnam mentioning the role for the Constitution. Vietnamese periodicals have also included commentary. Researchers can consult *Nha Nuoc Va Phap Luat, Hoc Luat, Vietnam Law and Legal Forum, The Vietnamese Law Journal*, Party Congress Publications, FBIS and JPRS materials to locate examples of Vietnamese constitutional commentary.

11 An interesting attempt to break from assuming that a single Western system should be the bench-mark against which to contrast the Vietnamese system is the work of Ta Van Tai, an American author, who completed a comparative study of the Vietnamese tradition of human rights (Ta Van Tai 1988). This study argues that it is best to compare the Vietnamese tradition of human rights with the endorsed practices set out in the United Nations Convention for Human Rights, rather than to use a single country to evidence the norm. The result nonetheless, is to juxtapose Vietnamese practice with that of endorsed Western best practice.

12 Some may debate whether or not Massonori, a Japanese Scholar, is 'Western'. Certainly he was arguing for democracy as it is understood in the West in this article. Further as Taylor has pointed out, the Japanese do not necessarily see themselves as a part of Asia (Taylor 1997:58).

13 There is also extensive writing on the Vietnamese constitutions done by Soviet authors. Where the Soviet commentary is in English, I have used it. Readers of Russian are referred to George Ginsbergs' fulsome bibliographies describing this source (Ginsbergs 1973a:659, 1973b:980).

14 For a review of commercial law development within the Vietnamese context see Gillespie 1994:325. For an account of differences between orthodox Western concepts of the rule of law and the role for law ascribed by the Vietnamese administration see Fforde (1986:60).

15 There is much more scholarship about the changes to the court system under the French and some general discussion about courts and their work under the Le and Nguyen dynasties. See, for example, the work of: Dureteste (1938); Ordonneau (1909); Antoine-Loius (1903); Miraben (1896).

16 In addition to debates about the relative merits of comparative law and one country studies of other legal systems there are obviously various disciplines that offer particular benefits in the study of foreign legal systems: history, anthropology, ethnography and the impact of postmodernism generally to name only a few. It is beyond the scope of this essay to canvass all the alternate methodologies and theories to see what each offers a cross-cultural legal study.

17 A reference to legal anthropology, the study of an ethnic group and their relationship to law, laws or legal institutions is not culture bound, nor does it 'arbitrarily carve out from human culture a segment […] but conceives and studies human culture as an inter-related whole' (Pospisil 1971:x). See also Knafla (1994).

18 It is delightfully understated to say that postmodernism is a thorny issue. It means so many things to so many different people. Needless to say within the study of law there are many who believe it is an approach that undermines the very foundations of legal rationalism and threatens the rule of law. However, I would like to suggest that in the context of a study of law across cultures, when the legal system being analysed rather than the 'law' as we understand it becomes the focus, we may gain an insight from postmodern approaches that helps to produce sensitive and acute research.

19 This is not to say that authors from socialist countries do not engage in an equally loaded analysis of Western systems.

20 An interesting example of comparing some Asian constitutions, although not the Vietnamese Constitutions, with the American Constitution and with each other, exists in *Constitutionalism in Asia*. To avoid the pitfalls of cross-cultural legal research, each of the authors writes about their own country (Beer 1979:8).

21 Although culturally specific notions of constitutionalism arguably contaminate some of the research concerning the Vietnamese Constitution, there is detailed scholarship outlining the distinguishing features of socialist legal systems (Glendon *et al.* 1994:395).
22 There is substantial debate within legal comparative circles. For an example of the debate see Tay and Kamenka (1985:217).
23 Knafla argues that text is perhaps a valid starting point for the historian of British (or white Australian) legal history but its relevance cannot be assumed for studies of other legal systems (Knafla 1994).
24 The preambles are not used to assist with statutory construction in determining the meanings of articles of constitutions as in the Anglo-American tradition (Pearce and Geddes 1996).
25 An example of the role the Party plays in drafting the Constitution is outlined by Ho Chi Minh in his report to the National Assembly, 11th Session (Ho Chi Minh 1962:399).
26 For debates about Ho Chi Minh's politics see Lacoutre (1968); and Bernard Fall's introduction in (Ho Chi Minh 1967:8)
27 Vietnam's Declaration of Independence is described as 'following the defeat of fascism by the Soviet Army' and reference is made to the militant solidarity and 'great and effective aid of the Soviet Union'. In short the references to the Soviet Union are laudatory portraying the USSR as both the role model for an emerging socialist nation and a generous one at that. In contrast China is described as the 'hegemonist on the northern border' (see Preamble, Constitution of the Socialist Republic of Vietnam 1980:83–5).
28 People's assessors are frequently equated with jurors. However, unlike jurors they receive evidence without formal guidance from the judges.
29 This reading leaves aside the very relevant issue of language and how translation affects any reading.
30 The Military Court was introduced on 3 September 1945 by Order No. 33. This was a day after the Declaration of Independence on 2 September 1945.
31 Ho Chi Minh initiated a campaign called 'land to the tillers' which aimed to redistribute land to the peasants and workers. The land reform courts were *ad hoc* and quite often brutal institutions. In 1953 the land reform campaign was the subject of great criticism and the Secretary of the Communist Party, Truong Chinh, resigned over the issue (Gittinger 1959).
32 Mr Quang provides a description of the legal training of revolutionaries. They participated in a three month judicial training course in Hanoi. This took place in the early 1950s. Originally participants in the course had to have the secondary certificate, but over time this criterion for inclusion was abandoned and workers and farmers became judges providing they had the right moral qualities, defined by Mr Tri as 'political dignity and professional skill'.
33 Interviewees were contacted through informal networks I have developed over time. Each interviewee was given a question sheet, but only some chose to respond to it, others preferring to speak about topics they selected. All interviews were with Northern Vietnamese resident in Hanoi in 1995 and 1996.
34 Official attempts made to interview people who had been through either the criminal or civil court systems were unsuccessful. This may be possible shortly.
35 After the revolution, Vietnam was divided into nine military zones. An Inter-Zone Committee therefore had authority in more than one zone.

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