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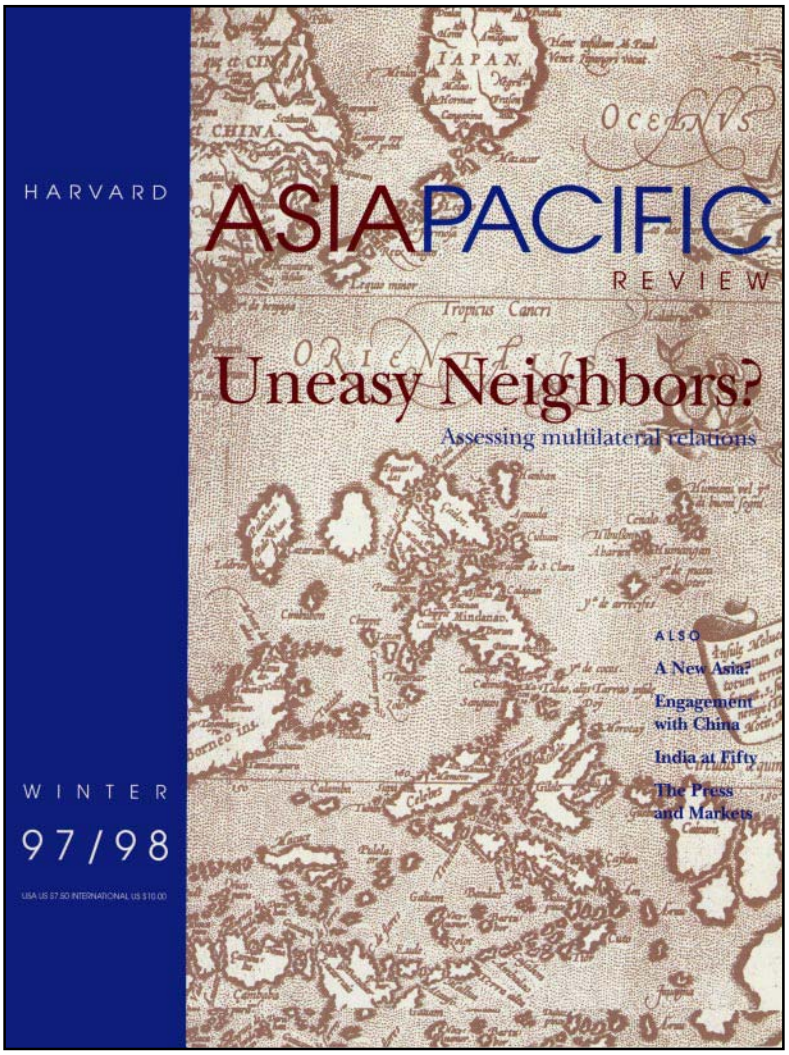

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The Rule of Law

KANISHKA JAYASURIYA

Authoritarian governance in East Asia

The rule of law is all the rage in East Asia. The governments of Singapore and Hong Kong claim it as a distinctive characteristic of their political systems. Major multilateral agencies such as the World Bank and the Asian Development Bank spend considerable resources on 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 their advocacy and study of the rule of law is the assumption that legal institutions are part of a wider package of market and democratic institutions. In fact, this argument is reminiscent of an old maxim of modernization theory that all "good things go together."

The importance placed on the development of the rule of law is backed by those who argue (often using the techniques and tools of rational-choice theory) that stable and prosperous market economies require the construction of effective forms of governance, of which the rule of law is a primary element. For these theorists, the effective establishment of these institutions is seen as more important than the creation of liberal-democratic political structures. In this context, it is not difficult to see why state elites in the region look favorably upon the "governance" rhetoric of the World Bank, while being ill-disposed to the establishment of democratic structures and processes. Indeed, states such as Singapore often use the "effective governance" argument—which provides, not insignificantly, some common ground with neo-conservative analysts in North America and Western Europe—to reinforce illiberal political practices.

These governance arguments have been shaped decisively by the pioneering work of Douglass North on institutional change. For example, in his influential contribution to the study of property-rights regimes, North draws heavily on examples of institutional evolution in England. He regards these institutions as a collective good, the supply and demand of which can be analyzed like any other good. The basic puzzle for researchers is, of course, to explain why a state—which presumably only stands to benefit from an arbitrary property-rights regime—would supply a set of institutions that serve to constrain rent seeking activities. The answer provided is essentially simple: the state relies on the growth of commercial-minded interests whose main purpose is to restrict the reach of the state. Rising commercial interests are willing to strike a bargain in which the state, in return for revenue, supplies an institutional framework (a crucial part of which is the rule of law)—its function is to restrain the arbitrary exercise of state power. An implication of this strategy is that it succeeds in producing a standard liberal view of the rule of law as a set of constraints on the exercise of public power. This interpretation clearly enhances the normative basis of a liberal conception of the rule of law by identifying commercial-minded interests as the catalyst for its emergence. In a similar vein, advocates of the modernization theory would substitute the "middle class" for commercial-minded interest but reach an identical conclusion.

The main difficulty with the "governance approach" is that it regards the establishment of institutions as shaped unproblematically by the operation of market forces and neglects the crucial role of political context and ideological traditions in shaping institutional structures and outcomes. Institutions are not simply the putty of market forces;

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therefore, understanding the emergence of the rule of law in East Asia requires us to adopt an approach that serves to contextualize legal traditions, which in turn shape these structures. This would help explain the paradox suggested earlier as to why the rule of law, in contrast to liberal democracy, produces such a welcoming attitude amongst the East Asian political elites. More importantly, it might explain how the rule of law and legal institutions may end up reinforcing, rather than restraining or subverting, the power of illiberal states.

Critical to this argument is the view that there is a distinctive brand of authoritarian legalism in East Asia such that the rule of law leads not to the diminution of state power (as would be expected from the liberal perspective) but provides an instrument for the expansion of state power. One important manifestation of this is that the development of private-rights entitlements in the economic sphere is disconnected from the growth of the public sphere of political participation. In essence, it can be argued that the rule of law in East Asia needs to be located within the framework of the illiberal political structures that dominate much of the region. In other words, legal institutions, like other institutions, are embedded in a wider ideological context. It is nonsense—though undoubtedly lucrative for many international organizations, private consultants, and academics—to think that liberal institutions and practices such as the rule of law can be simply engineered.

There are three important identifiable elements of authoritarian legalism that warrant mention. First, the emergence of the rule of law—to use Barrington Moore's very useful description—may be seen as a "revolution from above" rather than a "revolution from below." From this standpoint, the catalyst for the emergence of legal institutions (including property rights) is an outcome of the efforts of state elites to rationalize the state and thereby expand its political power. It is a standpoint that contrasts with the view that legal institutions are the outcomes of the actions of commercial-minded interests attempting to restrain the political power of the state. In other words, it is not a revolution from below. Policy-makers often see law as bits of technology that can be deployed to attain very specific ends.

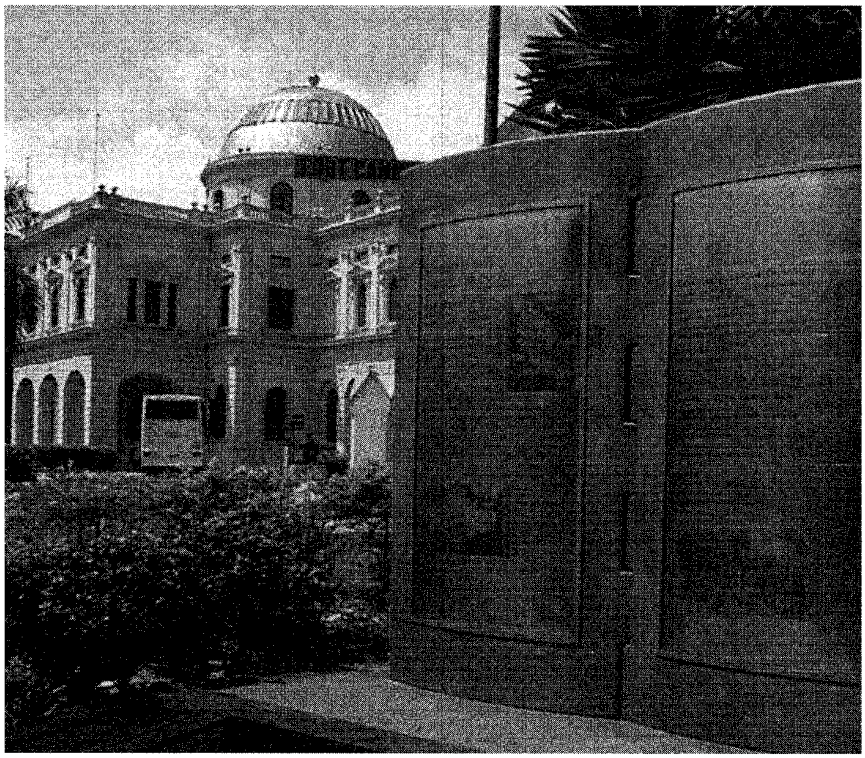
An example of the use of law for state-building purposes is provided by the Economic Law and Improved Procurement Systems (ELIPS) Project in Indonesia, a joint economic law reform effort by the Indonesian and American governments acting through the United States Agency for International Development. The principle counterpart agency is the Office of the Coordinating Minister for Economy, Finance, and Development Supervision. The ELIPS project is intended to develop a more effective system of commercial law and involves the adoption of a new set of business and commercial laws and the organization of legal education for those who will need to work in this new commercial-law environment. Another example can be found in Indonesia's new and comprehensive laws on intellectual property. The impetus for such legal reforms comes not from Indonesia's "commercial-minded interest," but from the bureaucracy and overseas-aid agencies. In a similar manner, there are a number of projects in China which seek to establish credible and functional legal institutions. The widespread adoption of foreign commercial law in China is influenced by a highly instrumentalist approach to law and institution-building; law is seen as bits of technology, dislocated from its broader normative assumptions, to be employed where useful. These examples serve to illustrate the thesis that East Asian legal reform is a revolution from "above" rather than from "below." In other words, legal reform needs to be seen not as a response to a rapidly burgeoning market, but as an instrument to rationalize the state and to provide the state with the machinery necessary to regulate the economy.

The second feature of authoritarian legalism is that the state itself is perceived as an abstract entity above specific social interests. The adoption of such an approach to the state leads to a specific understanding of law as an instrument that can be deployed to stabilize the existing political order. From this standpoint, institutions and laws are not seen as forms taken by the state but rather as structures provided by the state in the general interest. The state, as a legal structure, might guarantee legal equality and civil rights, but these are entitlements granted by the state rather than rights achieved by political actors working through the state. Even when there is movement on issues of human rights, such as in the formation of the Indonesian Human Rights Commission, it is made perfectly clear that these

rights and procedures are granted by the state rather than being general rights or claims of citizens in the body politic. One important reason for the dominance of this notion of the "state" is the importation of Western European ideas of sovereignty that arose from the transplantation of the modern state in East Asia in the form of the colonial state. More importantly, it facilitated the development of notions of executive power rooted in ideas of "state prerogatives" that were formed within the womb of the absolutist state.

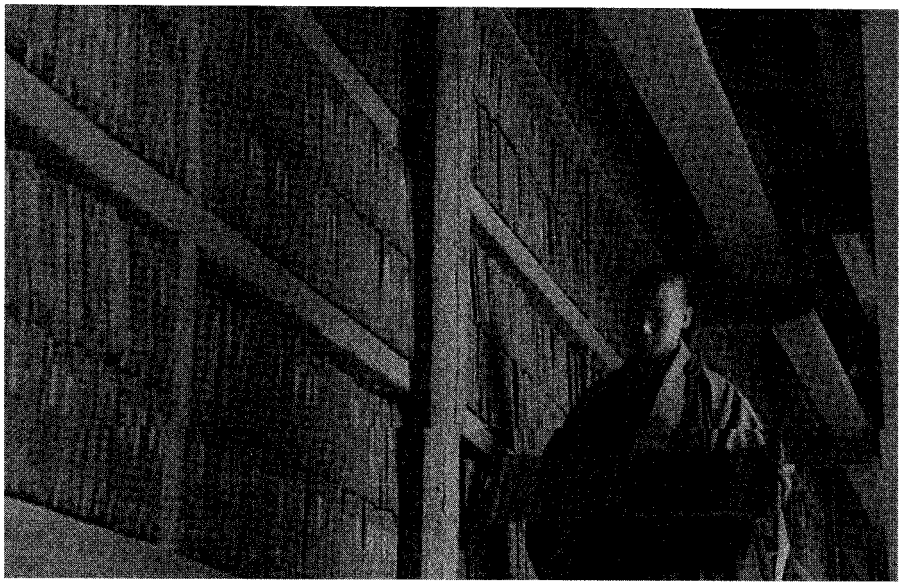
These ideas led to a form of the dual state in East Asia. On the one hand, there is a political or executive arm of the state that is beyond the "law" and acts to protect state-defined notions of security and order. On the other, there is a market or economic sphere that is increasingly regulated by law. For instance, the PRC has witnessed a number of major initiatives in the area of civil and criminal law. The adoption of the civil-procedure code and the economic-contract law in China is again evidence of the increasing legal regularization of the market economy. Likewise, in Indonesia and Vietnam, there has been a veritable explosion of legal reforms in the commercial sphere. More significantly, there is a clear ideological emphasis on the use of the rule of law as a defining feature of the political systems of both Hong Kong and Singapore. Indeed, in the much-contrived Singaporean controversy over the possible remerger with Malaysia, Deputy Prime Minister Lee Hsien Loong enumerated the distinctive features of the Singapore polity that would preclude a possible merger. Prominent on this list was the existence of the "rule of law."

The third significant characteristic of authoritarian legalism, and one which is closely connected with the development of the "dual state," is the disjunction between the development of private law and public autonomy. This link between private and public autonomy has been central both to normative theories of private law as well as to the rational-choice analysis of institutions. In contrast, the distinctive feature of authoritarian legalism is the capacity of the state to provide an arena of private law without any expansion of the public sphere. In other words, the economic arena is depoliticized. As such, legal institutions—contrary to the expectations of theorists and international policy-makers alike—facilitate both authoritarianism and markets. For those looking for historical parallels, the example of Imperial Germany in the late nineteenth century, rather than England, may provide a valuable historical model for the development of authoritarian legalism in East Asia.



Hiding behind the rule book

In this connection, it may be relevant to note that, in the constitution of the People's Republic of China, the grant of legal equality is qualified by the fact that these provisions cannot override the interest of the state (in effect, creating a "dual state"). However, even more pertinent is the fact that legal equality does not extend to the workplace where the organization of labor discipline remains paramount. In other words, because legal equality has limited applicability in the sphere of industrial relations, labor is restricted in its capacity to bargain either individually or collectively. In fact, the Chinese example can be extrapolated to much of East Asia, perhaps with the exception of South Korea and Taiwan, where the legal recognition of the bargaining power of labor remains, albeit highly circumscribed. Furthermore, these examples illustrate the extent to which East Asian states have the capacity to seal off arenas of law so



Which Way to follow?

that, for example, legal rights in the commercial arena are not extended to labor. In Western Europe, it was the political action of labor that enabled the extending of notions of legal equality to the employment contract. Clearly, the extension of these rights to labor neatly illustrates the conjunction between private and public autonomy, so vital to liberal legalism and consitutionalism. 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.

The most striking disjunction, however, is found in Singapore and Hong Kong where the governments boast of the existence of the rule of law and where it is a key factor in legitimating ideology. Indeed, in both colonial Hong Kong (at least until the very short duration of the Patten reforms) and independent Singapore, the rule of law has been used as a particularly effective weapon to depoliticize society. Despite assumptions to the contrary, the new Chinese rulers in Hong Kong may find this form of authoritarian legalism quite handy. In the case of Singapore, the law itself is used to curtail and limit political opposition to the regime. This provides a particularly striking example of "rule through law" rather than "rule of law." Put simply, authoritarian legalism takes politics out of the rule of law.

The evidence from East Asia indicates that there is no simple correlation between the development of market forces and the emergence of the rule of law and liberalism. Institutions are not passive structures waiting to be shaped by the forces of economic development. Legal institutions, like other institutions, are historically woven into a complex web of social and political forces. In the East Asian case, legal institutions need to be understood in terms of their location within the illiberal and statist political traditions of East Asia.

The central features of this authoritarian legalism are: first, the use of law as an instrument of state-building or a set of techniques to rationalize the state; and second, the disjunction between private rights and public autonomy that constitutes an economic arena that is sealed off and depoliticized, helping to produce what we have termed a dual state. It is this combination of a strong state and economic liberalism that makes East Asian polities so attractive to right-wing think tanks and institutions, especially in the US.

This latter feature stands in sharp relief to the liberal conceptions of the rule of law in the West, where there is a close connection between the development of private economic rights and the growth of a liberal public sphere. By contrast, under authoritarian legalism, private and public autonomy are disconnected such that it combines economic liberalism and political illiberalism.

In summing up, it is clear that this argument has significant ramifications for a range of multilateral legal-reform programs because it proposes that the relationship between market reform and legal institutions may be more complex than envisaged by those advocating the transplantation of liberal rules. As such, the neo-liberal strategies advocated by multilateral agencies such as the World Bank may fail to take into account the complex relationships that exist between the bureaucracy and the emerging market economy. In this context, market-oriented legal reform and governance programs may serve to strengthen the state rather than cause it to retreat from economic and political life. We need to rid ourselves of the assumption that rising legal consciousness and the increasing legal regularization of the market in East Asia will eventually overwhelm authoritarian and illiberal political structures. Rather, what is likely to emerge is a legal structure that accommodates both economic liberalism and illiberal politics. Waiting for political liberalism in East Asia is a bit like waiting for Godot. ■