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THE ROLE OF PUBLIC LAW IN A DEVELOPING ASIA

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The development of public law is seldom regarded as a *sine qua non* for development. This is especially so in Asia where power and authority are viewed with respect rather than with suspicion, unlike in the west. This is ironic since Asian states have traditionally been very strong, and their roles have expanded greatly over the last forty years. Government intervention in the economy is now a given, and in many states, large bureaucracies, government agencies and government-linked companies have emerged. The expansion of the public sector calls for a legal framework of controls. If public law is to fulfill its function to check on the abuse or arbitrary exercise of executive power, it must grapple with three challenges: (a) Asian legal culture; (b) the need for governments to govern, seek legitimacy and maintain stability; and (c) extensive state intervention in the economy.

> In Asia, … the notion of the 'Asian developmental (or regulatory) state', characterized by social stability, authoritarian governmental structures, and long-term economic planning, is now seen by many as crucial to the understanding of law-and-development in Asia throughout the post-colonial period. Even in this state, public law was seen as important in that it provided a foundation for development.[1]

I. INTRODUCTION

These days, the word 'development' has become a short form for 'economic development'. This is all the more so in the context of Asia, where most countries in the region are classified as Third World states or emerging economies, and where millions live below the poverty line. Of course, development is made possible by a combination of factors—availability of raw materials, stable political milieu, means for capital formation and accumulation, good governance, and a workable legal system. Without these, development—economic or otherwise—would be difficult. The role of law in development is the subject of a whole school of thought that emerged in the 1970s.[2]

The eminent English legal historian Henry Maine saw the development of law 'from status to contract' as a hallmark of law's and humankind's progress towards modernity.[3] Later, the great sociologist Max Weber saw the development of a rational

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1 Andrew Harding, "Comparative Public Law: Some Lessons from South East Asia" in Andrew Harding & Esin Orucu, *Comparativce Law in the 21st Century* (London, Hague and New York: Kluwer Academic Publishers, 2002), 249 at 265.

2 See for example the work of David Trubek, Marc Galanter and scholars of the 'Law and Society' and 'Law and Development' movements in E.M Burg, "Law and Development: A Review of the Literature and a Critique of Scholars in Estrangement" (1977) 25 *Am. J. Comp. L.* 492.

3 See Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relations to Modern Ideas* (1861, Reprinted by Dorset Press).

legal system as a prerequisite for the growth of a capitalist economy.[4] Modern discourse on law and development has largely focused on the need to establish a predictable and stable legal system under which economic activity can flourish.

In this article, I will consider specifically the role of public law in a developmental milieu. The ascendance of Keynesian economics, international aid and an increasingly globalised economy has made government intervention in the economy a given in any modern state. Market imperfections that necessitated heavy state intervention in the economy, resulted in the creation of numerous legal institutions, bureaucracies, government agencies and even government-linked companies. Rules and assumptions that have worked in the private sphere do not readily adapt themselves in the public domain. And it is here that a rigorous understanding of public law becomes important.

I will first argue that although public law is a concept rooted in the western legal tradition, its underlying principles and values are equally applicable in Asia. I will then consider three major challenges to the formation, operation and advancement of these values and principles within the Asian context. The first challenge comes from the traditional Asian respect for authority; the second from the problem of governance and authority in Asia; and the third from massive state intervention in Asian economies by their governments. I conclude that while these challenges have led to many Asian states adopting a form of governance which favours *rule by law* rather than the *rule of law*, the increasingly globalised economy, coupled with increasing prosperity among Asian states may pave the way for a real adoption for public law principles and values in the region.

II. Asia, Development and Public Law: Definitional Preliminaries

The word 'Asia' is of ancient origin, probably from the Assyrian word *asu* meaning 'east'. It has been variously used by the Greeks to describe the lands situated to the east of their homeland. Today, it denotes the world's largest and most populous continent. In this article, I use 'Asia' to define the geographical area bordered by Europe in the west; the Gulf of Aden, the Arabian Sea and the Bay of Bengal in the south, the South China Sea, East China Sea, Yellow Sea, Sea of Japan, Sea of Okhotsk and the Bering Sea in the east; and the Arctic Ocean in the north. Asia is possibly the most diverse continent on earth. As such, we cannot assume that as a whole, the region adopts any particular mode of development or operates in the same way in legal terms.

The words 'development' and 'developing' are derivatives of the word 'develop'. They allude to an idea of enhancement or progress and over the last sixty years have been used to classify countries, usually along economic lines. When describing a country as 'developed' is often contrasted with a 'developing' or 'underdeveloped' one. Unfortunately, this kind of tautologous and negative definition serves little purpose other than to confuse. To make matters worse, the word is parlayed by all

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[4] See Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, Guenther Roth & Claus Wittich, eds., 2 vols (Berkeley: University of California Press, 1978).

sorts of persons pursuing diametrically opposing agendas:

> Development is a standard borne by those who would promote the interests of the affluent and the powerful as well as by those who would serve the unaffluent and the unpowerful; by those who would expand the reach of the most-industrialized states and those who would shield the least-modernized from the nefarious influences; by those who would stress the virtues of entrepreneurship and individualism and those who would nurture community and collective concerns; by those who would pursue strategies of top-down initiative and decision-making and those who nurture community and collective concerns; by those who would pursue strategies of top-down initiative and decision-making and those who advocate a bottom-up, or grass-roots, approach; and finally, by those who would exploit and maim Mother Nature for the benefit of either business or labor in today's world, as well as by those who concern themselves with a bountiful and livable environment for future generations.[5]

Generally, development is equated with economic development. How developed a country is depends in large part on its economic health as measured by its gross national product (GNP) and gross domestic product (GDP). The higher the per capita figure, the more 'developed' it is. 'Economic development' means different things to different economists and therefore eludes definition. Indeed, an author of a leading student text thought that it is perhaps 'easier to say what 'economic development' is *not*.'[6] The United Nations uses three criteria to measure the level of a country's development. Its classification of 'least developed countries' is based on: (a) low income (GDP per capita); (b) weak human resources (life expectancy, per capita calorie intake, combined primary and secondary school enrolment, and adult literacy); and (c) low level of economic diversification. The use of a wider base of indicators to ascertain a country's level of development saw the United Nations Development Programme (UNDP) creating the Human Development Index (HDI) in the late 1980s.[7] The HDI quantifies human condition and ranks countries by their success in meeting human needs. Three criteria are used in the index: life expectancy, literacy and purchasing power.[8] Indeed, Nobel Laureate Amartya Sen adopts a similarly broad-based perspective of development:

> Ultimately, the process of economic development has to be concerned with what people can or cannot do, e.g. whether they can live long, escape avoidable morbidity, be well nourished, be able to read and write and communicate, take part in literary and scientific pursuits, and so forth. It has to do, in Marx's words, with 'replacing the domination of circumstances and chance over individuals by the domination of individuals over chance and circumstances.'[9]

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5 Jan Knippers Black, *Development in Theory and Practice* (Boulder, San Francisco and Oxford: Westview Press, 1991) at 15.

6 See Gerald M Meier, *Leading Issues in Economic Development*, 4th ed. (Oxford, 1985) at 5.

7 See generally, J Malcolm Dowling & Ma. Rebecca Valenzuela, *Economic Development in Asia* (Singapore: Thomson, 2004) at 2-5.

8 See Peter Gall, "What Really Matters—Human Development" in Charles K Wilber & Kenneth P Jameson, eds., *The Political Economy of Development and Under-development*, 5th ed. (Singapore: McGraw-Hill, 1992) 532 at 533. See also *World Development Report 1990* (UNDP, 1991).

9 See Amartya Sen, "Development: Which Way Now?" in Charles K Wilber & Kenneth P Jameson, eds.., *The Political Economy of Development and Under-development*, 5th ed. (Singapore: McGraw-Hill,

In this article, a country is considered to have developed economically if it has made some progress to reduce or eliminate poverty, inequality and unemployment within the context of a growing economy.[10] While this definition is far less holistic than that proposed by some economists,[11] it will suffice for our purposes.

'Public law' is the branch of law dealing the relations between private individuals and the government, and with the structure and operation of the government.[12] It comprises

> … the principles and rules which relate to the structure, activities, rights, powers and immunities, duties and liabilities of the State, of the organized political community, the government and its departments and agencies, save that in circumstances where the State, or a department or agency, enjoys no special rights or powers its relations with individuals are regulated by private law. Public law is accordingly the part of the whole legal system which is applicable to the State and its relations with ordinary individuals, which are different from the private law concerning the subjects of the State and their relations with each other.[13]

In the broadest sense, it sometimes also refers to any law affecting the public. Subjects which generally lie within the province of public law include: administrative law, constitutional law, criminal law, and laws relating to local government, revenue, social security, the military, public administration, public finance, public order, privatization and regulation. In this article, I refer to public law as the branch of law governing the exercise of public *functions* whether by public or private persons or bodies.[14]

III. Public Law Logic and Thinking

I do not propose to go into the whys and wherefores of how we distinguish between public and private law or whether the domain of public law should be determined by looking at the source of power or the nature of power being exercised. Instead, we examine the underlying values, principles and logic of public law. As a preliminary point, it is important to note that most of Asia's legal systems are adopted and hybridized versions of the two main western legal systems: common law and civil law. As such, we will spend some time examining the role of public law as it evolved within that western milieu.

Public law developed very differently within these two legal traditions largely because of differing perceptions and understandings of the 'state'.[15] The public-private law distinction has long been recognized under the European civil law tradition.[16] Indeed, as comparative law scholar John Merryman points out, the

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1992) 5 at 15. Sen's latest musings on this issue can be found in his *Development as Freedom* (New York: Anchor Books, 2000).

10 See Michael P Todaro, *Economic Development in the Third World*, 4th ed. (Longman, 1989) at 87.

11 *Ibid.* at 91.

12 See Bryan A Garner ed., *Black's Law Dictionary,* 7th ed. (St Paul, Minnesota: West, 1999) at 1244.

13 David Walker, *Oxford Companion to Law* (Oxford: Clarendon Press, 1980) at 1013.

14 See Peter Cane, *An Introduction to Administrative Law* (Oxford: Clarendon Press, 1986) at 7.

15 See generally Thomas Fleiner, "Centennial World Congress on Comparative Law: Comparative Constitutional and Administrative Law" (2001) 75 *Tulane Law Review* 929.

16 See John Henry Merryman, "The Public Law-Private Law Distinction in European and United States Law" in his *The Loneliness of the Comparative Law and Other Essays in Foreign and Comparative*

distinction is, for most continental European lawyers, 'fundamental, necessary, and on the whole, evident.'[17] For example, Fleiner argues that in the European civil law tradition, the state is perceived as the 'Leviathan' whose authority and sovereignty is the only and ultimate source of law and justice.[18] Napolean constructed the new realm of *public law* which was not to be controlled by traditional private law but to be separated from it. In doing so, Napolean 'sought to create an efficient administration, which he installed as the state instrument for changing the feudal society into a liberal one.'[19] The public law was intended to give more power to the executive and the administration.[20]

However, what we now regard as *public law* was not a subject that was known to scholars in the common law tradition just 60 years ago. True, constitutional law has been around for centuries, but beyond that, the reach of public law has been confined largely to criminal law and procedure. This is especially because common law made no clear distinction between private and public law. Most common law scholars consider that 'public law', in particular, administrative law, was only forged by the judges over the last 40 years or so.[21] Lord Diplock, whose judgments and writings were significant in defining this field felt that:

> … the distinction in substantive law between what is private law and what is public law has itself been a latecomer to the English legal system. It is a consequence of the development that has taken place in the last 30 years of the procedures available for judicial control of administrative action. This development started with the expansion of the grounds upon which orders of *certiorari* could be obtained as a result of the decision of the Court of Appeal in *Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1952] 1 KB 338; it was accelerated by the passing of the Tribunals and Inquiries Act 1958, and culminated in the substitution in 1977 of the new form of RSC, Ord 53 which has since been given statutory confirmation in section 31 of the Supreme Court Act 1981.[22]

The common law perspective of the state is more 'Lockean' in that the state has limited sovereignty. In such a system, the government, and not the state, is ruled by law and as such, the state is perceived only as a moderator of the social groups seeking the happiness of people.[23] The American idea of public law and of constitutionalism became more prevalent in Europe after World War II when the atrocities committed during the War 'persuaded Europeans that the sovereignty of even the most representative parliament—or of the people themselves—should not be unlimited.'[24]

Public law and its domain operate around several basic values, principles, logic and assumptions which flow from its basic function:

Law (The Hague, London & Boston: Kluwer Law International, 1999), 76 at 78-80 [Merryman]; see also Dawn Oliver, *Common Values and the Public-Private Divide* (London, Edinburgh & Dublin: Butterworths, 1999) at 16-19 [Oliver].

17 Merryman, *ibid.* at 76.

18 *Supra* note 15, at 930.

19 *Ibid.* at 933.

20 *Ibid*.

21 *Supra* note 1 at 254.

22 *O'Reilly v Mackman* (1983) A.C. 237, at 279.

23 *Ibid.*

24 Wiktor Osiatynski, "Paradoxes of Constitutional Borrowing" (2003) *International Journal of Constitutional Law* 244 at 246.

> Public law serves both to define and control power in the hands of government. In defining the power of government, the law also serves to legitimate the exercise of power, particularly discretionary power in the hands of politicians and officials. By authorizing action, the law sends a signal to society that the actions of certain individuals should be respected and be considered as legitimate in the political society. The law then also sets out the condition for the control of power it has legitimated. It may set down procedures before decisions are made, and it may also set out mechanisms and grounds for the review of decisions that are taken.[25]

Today, the distinction between public and private law is fast disappearing. This distinction, or 'mightly cleavage' (as Merryman would have it) is not always an easy one to make. Thomas Poole notes that:

> Public law, by definition, must deal exclusively—or at least primarily—with the realm of the public. But the divisions within and the reclassification of what was once the public sector have made it increasingly difficult to isolate with exactness the 'public' to which public law should now pertain. The divide between public and private has become blurred, some would argue, to the extent that it can no longer serve as a basis for a conceptual and jurisdictional distinction between public and private law. In practice this problem has a number of dimensions. Empirically, it has become increasingly difficult in the wake of privatization, regulation, compulsory competitive tendering … and the like to define with precision the outer limits of public laws' jurisdiction. Normatively, it has become harder to assume that traditional 'public law values' still retain their worth as key Beveridge era ideas like impartiality and equitable public service, consonant with the central notions of traditionalist public law, are replaced (or relegated) by the managerialist values of the market-'value for money' regulation, the 'three E's' and the other trappings of the audit society.'[26]

As Poole pointed out, the blurring of this dichotomy was largely brought about by the changing role of the state and its various entities. Modern governments are so pervasive that they now encroach into what has hitherto been considered 'private' spheres of activity. The reverse is also true. Public goods—like sanitation, utilities and medical care—are increasingly being performed by private entities while governments increasingly engage in commercial and other private activity through government and government-linked corporations and even the military.[27] With the blurring of the private-public law dichotomy, the functions of public law and private law have become increasingly similar. As Dawn Oliver noted:

> Both public law and private law are concerned, among other things, with the control of power and protecting individuals against abuses of power; they are both about upholding important common values of respect for the interests of individuals; this is done either by proscribing activity that interferes with those

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[25] John Bell, "Comparing Public Law" in Andrew Harding & Esin Orucu, *Comparativce Law in the 21st Century* (London, Hague and New York: Kluwer Academic Publishers, 2002), 235 at 237.

[26] Thomas Poole, "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 *Oxford J. Legal Stud.* 435, at 436.

[27] See generally Sin Boon Ann, "Public Law: An Examination of Purpose" in Anthony Chin & Alfred Choi, eds., *Law, Social Sciences and Public Policy: Towards a Unified Framework* (Singapore: Singapore University Press, 1998), 133-166.

> interests, or imposing duties of reasonableness, as in much of the law of tort; equity, especially in fiduciary relationships, imposes very similar controls on certain exercises of private power to those imposed on public bodies in judicial review, many aspects of private law controls of discretionary decision making rest on the same principles as judicial review.[28]

Fundamental to public law logic and thinking is the idea that there should be limits to state and government power and that law and legal institutions should be established and nourished to check the use of such power. This logic emerged in the west, with the creation of the modern state and the concept of a superior law. It arose from the suspicion of state power and authority. It is a tradition forged by revolutionary moments like the English 'Glorious Revolution of 1688, the founding of the American republic in 1787 and the French Revolution in 1789. Law was seen as a means to protect individuals from the arbitrariness and caprice of unbridled power. The liberal understanding of the rule of law, Jayasuriya notes, is premised on the following assumptions:

> … first, that society is composed of individuals and voluntary organizations; 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 that notion that the development of the rule of law can occur only at the expense of a weakening of government or public power.[29]

Dawn Oliver posits five overriding values that pervade both public and private law: dignity, autonomy, respect, status and security.[30] However, for our purposes, I prefer the more detailed categorization adopted by the Council of Europe which divides the underlying principles of public law into substantive principles and procedural principles. These categories are further broken down as follows:

> Substantive principles are related to the very basis of administrative authorities' acts. They include: (a) lawfulness; (b) equality before the law; (c) conformity to statutory aim; (d) proportionality; (e) objectivity and impartiality; (f) protection of legitimate trust and vested rights; and (g) openness.[31]
> … Procedural principles are closely connected with substantive principles which they often complete … several substantive principles which further guarantees the protection of individual rights. The procedural principles identified by the Council of Europe are: (a) access to public services; (b) the right to be heard; (c) representation and assistance; (d) time limits; and (e) notification, statement of reasons and indication of remedies.[32]

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28 Oliver, *supra* note 16 at 11.

29 Kanishka Jayasuriya, "Introduciton: A Framework for Analysis" in Kanishka Jayasuriya, *Law, Capitalism and Power in Asia* (London: Routledge, 1999) 1 at 2.

30 *Ibid.* at 60.

31 Rafael A Benitez, "Administrative Justice in a World in Transition: Pan-European Values in Administrative Justice in a World in Transition." (2001) 30 *Common Law Law Review* 434.

32 *Ibid.*

These principles and values have percolated to the Asian states that have embraced western legal systems. They are equally applicable to these states and it is not my intention to examine the extent to which each of these values and principles functions or is respected in each Asian state. Suffice to say, they apply equally in a developing Asia. State adherence and reinforcement of these values and principles are, however, affected by three main factors: culture, governance and the degree of state intervention in the economy. Let us consider them in turn.

IV. Asia, Culture and the Rule of Law[33]

The extent to which culture affects law and legal institutions is a controversial and difficult subject. Culture is, after all, the product of a society's historical experience and sociological development. As a result, it is dynamic rather than static. This is all the more so in a continent as diverse and heterogeneous as Asia. Even so, the fact that Asia walked a different developmental and historical path from the west makes a great difference to how Asians view power, authority and the rule of law.

In Asia, the state has long been a powerful and omnipresent force. Although Asians have also suffered the tyranny of power, they do not have a natural or traditional aversion to power and authority. Lucian Pye explains this by contrasting differing western and Asian perceptions of 'primitive power':

> In contrast to the West, traditional Asian cultures, with the notable exception of Japan, have generally not located primitive power in the distant past but have thought of it more as an ever-lurking danger in the future. The modern West has placed great value on progress, and hence the Western imagery of history has been one of a steady retreat from primitive power toward ever more refined and delineated forms of authority—to the point that some would say modern democracies are in danger of losing the capacity to rule. In contrast, in much of Asia, again excepting Japan, the dominant view has been that idealized authority existed at the dawn of history and that the main danger of primitive power lies ahead, when there may be a breakdown of established authority.
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> Consonant with this view is the general acceptance by Asians of idealised authority even while they may dislike the practices of those currently in power. The greater Asian acknowledgment of the need for, and indeed the desirability of, authority contrasts sharply with the Western enthusiasm for limiting authority, which is unaccompanied by any fear that result could be the revival of prmitive power. Most Asians respect authority too much to share the Western distrust of authority and power …[34]

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[33] For an excellent selection of essays on the contestation of ideas about the Rule of Law in Asia, see Randall Peeremboom, ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian countries, France and the U.S.* (London & New York: Routledge, 2004); see also, David Clark, 'The Many Meanings of the Rule of Law' in Kanishka Jayasuriya, *Law, Capitalism and Power in Asia* (London: Routledge, 1999) 28-44; and John K.M. Ohnesorge, 'The Rule of Law, Economic Development, and the Developmental States of Northeast Asia' in Christoph Antons, ed., *Law and Development in East and Southeast Asia* (London: Routledge Curzon, 2003) 91-132.

[34] Lucian Pye, *Asian Power and Politics: The Cultural Dimensions of Authoirty* (Cambridge MA: Belknap Press, 1985) at 34.

In developing Asian states, many governments, especially those that emerged from the aftermath of decolonization, found it imperative to first establish their authority to rule. Without this authority, it would be impossible to mobilise state resources. They had to first establish their legitimacy to govern and then secure sufficient legal powers to formulate and implement policy even if this required the coercion of non-state actors. Nobuyuki Yasuda classifies this as 'development law' whose main purpose is to 'authorize a state or government to command people to commit or not to commit certain acts for the purpose of development, a key object of which is to achieve "equality" or redistribution of common wealth among the people.'[35]

An Asian government must be able to accumulate widespread powers and authority to ensure that can intervene sufficiently in the market place to ensure that some form of economic development takes place. As Huntingdon aptly points out, the problem in developing countries is not the limitation of government but the creation of organisations:

> The primary problem is not liberty but the creation of a legitimate public order. Men may, of course, have order without liberty, but they cannot have liberty without order. Authority has to exist before it can be limited, and it is authority that is in scarce supply in these modernizing countries where government is at the mercy of alienated intellectuals, rambunctious colonels, and rioting students.[36]

Naturally, the problem confronting the public lawyer is that this accumulation and centralization of powers runs contrary to the value of a limited government. Public lawyers have long relied on the separation of powers and an independent judiciary to ensure that state power can be limited and checked. So herein lies one of the key dilemmas of development. As Samuel Huntingdon pointed out:

> When an American thinks about the problem of government-building, he directs himself not to the creation of authority and the accumulation of power but rather to the limitation of authority and the division of power. Asked to design a government, he comes up with a written constitution, bill of rights, separation of powers, checks and balances, federalism, regular elections, competitive parties—all excellent devices for limiting government. The Lockean American is so fundamentally anti-government that he identified government with restrictions on government. Confronted with the need to design a political system that will maximize power and authority, he has no ready answer. His general formula is that governments should be based on free and fair elections.[37]

States with weak governments simply cannot govern. It does not matter which school of development one advocates. The interventionist will find it necessary for government to have sufficient powers to mobilise the various economic actors and machinery within the country, to undertake some degree of state planning, and to act as the major economic catalyst for growth. On the other hand, the free-marketeer will find the interventionist state problematic. Even so, he will still require a government

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[35] "Law and Development from the Southeast Asian Perspective: Methodology, History, and Paradigm Change" in Christoph Antons, ed., *Law and Development in East and Southeast Asia* (London: Routledge, 2003) 25-67, at 29.

[36] Samuel P Huntingdon, *Political Order in Changing Societies* (Yale University Press, 1968) at 7-8.

[37] *Ibid.*

to possess sufficient power to ensure that the conditions necessary for basic economic activity. No growth or development can take place in a country in a state of civil war, or where the government changes as quickly as the seasons. This is particularly true in our interdependent world where domestic economies are not governed by what happens internally, but externally as well. As Pye argues:

> In the West, the ideal of progressive modernization, until very recent times, has held that the problem of authority was how to inhibit it so as to allow spontaneous forces to achieve creative goals. Power thus has tended to be taken as a given, which needs to be constantly worked against if there is to be freedom and justice. In Asian societies, the problem of modernization is generally seen as being one of building up enough power to carry out effective programs.[38]

Constant challenges to a government's legitimacy—whether on the political, legal, social or economic front—are potentially destabilising. In the short term, the government has to deliver what it promises, particularly on the economic front. A government must first seek economic or performance legitimacy before it can attain political legitimacy. In a now classic essay, Martin Seymour Lipset argued that:

> The stability of any given democracy depends not only on economic development but also upon the effectiveness and the legitimacy of its political system. Effectiveness means actual performance, the extent to which the system satisfies the basic functions of government as most of the population and such powerful groups within it as big business or the armed forces see them.[39]

Even when legitimacy has already been established, other challenges to government authority arise in the day-to-day administration of a nation. The imperatives of development have led Asian governments and states to aggressively accumulate and centralize power. However, Asians' natural trust of authority has also allowed quite a few Asian governments to turn their states into the personal fiefdoms of their leaders. In Asia, many governments, rulers' families and big business have consorted openly to pillage and rape their respective countries and their economies. With outward trappings of the rule of law and a rational and impartial legal system, most Asian states struggle to control their leaders. As Michael Backman so aptly put it in his exposé on Asian business, auditing is not a process that lends itself 'particularly well to Asian culture.'[40]

As such, one major challenge to public law is the need for the development state to acquire and centralize sufficient power to mobilize its myriad resources. This need, coupled with a traditional Asian respect for power and authority makes it difficult for the development of independent structures and institutions that are seen as legitimately providing a check against state power. Even in Asian societies that recognize the dangers of personalized power, the adoption of public law structures without the necessary acknowledgment of public law values has been symptomatic:

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[38] *Supra* note 34 at 33.

[39] Martin Seymour Lipset, "Some Social Requisites of Democracy: Economic Development and Political Legitimacy" (1959) 53 *American Political Science Review* 69-105, reprinted in Martin Seymour Lipset, *Political Man* (Baltimore: Johns Hopkins University Press, 1981) at 64.

[40] Michael Backman, *Asian Eclipse: Exposing the Dark Side of Business in Asia*, rev ed. (Singapore: John Wiley & Sons (Asia), 2001) at 23.

> In a number of East Asian states, such as China, there has been a recognition that rule by a single man is dangerous … On the other hand, rule by law, that is rule according to known rules rather than arbitrary dictates, is also recognized as essential, both politically and also in order to create a sort of predictability upon which to have economic modernization.
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> 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. 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.[41]

The Asian positivist tendency towards rule *by law* rather than the rule *of law* demonstrates the failure of many Asian societies in imbibing not only the formal structures and rules of public law, but its inherent values. Discretionary law, which has been the hallmark of many developmental and regulatory states gives tremendous power to the rulers and bureaucrats of Asian states and governments. Without a proper structure and legal culture which situates public law ideals above the formal structure and sovereignty of the state's legislative body, the best that Asian states can do is aspire to a simulacra of the rule of law.

V. Governance, Legitimacy and Stability

The second challenge to public law values and principles comes from the three imperatives of governance, legitimacy and stability. Social and political stability are necessary for economic growth for two main reasons. First, man cannot be economically productive unless he has a reasonable expectation of what will happen in the years ahead, and how his actions will be looked at or acted upon. In a state of war (as Hobbes would put it), life would, at best, be unpredictable, and highly stressful—hardly a suitable environment for economic planning or growth. Second, stability, especially political stability, is crucial if any country hopes to attract foreign capital or aid. Multi-national corporations and other foreign investors are hardly archetypal altruists. They only invest in a country if it makes economic sense to do so. In other words, they must expect to make a profit. Likewise, organisations like the World Bank who are responsible for distributing foreign aid would not like to see their aid go to waste. They must be reasonably sure that funds sunk into a country are properly utilised and that some good must come out of it.

Long term stability, and more importantly, the external perception of stability cannot be achieved if governments change hands every few years. The handiwork and policies put into effect by one political party is easily dismantled and replaced by a new government that comes into power. Constant changes in government, rightly or wrongly, give the impression of instability. An illustration of this can be found in

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[41] David Clark, "The Many Meanings of the Rule of Law" in Kanishka Jayasuriya, *Law, Capitalism and Power in Asia* (London: Routledge, 1999) 28-44, at 36.

Robert Wade's description of the economic rise of Taiwan:

> For all its unsavory aspects, Taiwan's exclusionary and authoritarian regime has allowed the country to avoid the political fate of many developing countries, of chronic fluctuation between fragile democratic experiments, incompetent authoritarianism, and demagogues. It has been able to give business-people the confidence that it will do what it says it will do.[42]

Some scholars are convinced that save in certain instances (*e.g.* India and China), state involvement 'was compatible with, and perhaps even conducive to, economic growth.'[43] A legal system that provides for such changes is technically incompatible with the kind of stability necessary for economic progress in a newly-independent state. What governments want to do, or need to do, is to create an environment that is as constant and durable as possible. Challenges to governmental authority are potentially dangerous because they may derail everything the government has been working for. Yet, it is necessary if the state is not to degenerate into authoritarianism, and if the people are to be given a genuine voice to decide their political future. Herein lies the greatest dilemma of government.

The most altruistic of governments still harbour fears that it can be ousted by a fickle electorate during a hotly contested general election. Much less need be said about avaricious governments who are about to plunder their countries' coffers, or those who are only seduced by the trappings of political power. Elections present a very real and unnerving threat for politicians of all ilk. More importantly, elections are legally sanctioned destabilising forces that give outsiders the only glimpse at how the electorate feels about the government and what they are prepared to do to change things if they are unhappy.

Political philosophers as long ago as Socrates recognised the fickleness of the masses. While elections should properly reflect a populace's reaction to issues, the reality is quite different. Most politicians know that people seldom act, much less vote rationally in elections. Too many other factors serve to sway the masses to make elections potentially dangerous to governments. Therefore, to secure a politically secure environment, politicians must obliterate, or at least minimise those factors that are most likely to bring about such instability.

One of the most formidable challenges to any government's legitimacy to rule comes from the dissenting opposition bench. In any form of government—presidential, parliamentary or hybrid—there is an assumption that the people are given a real choice in their elected representatives. This necessitates the formation of political parties with their own agenda for government. After all, the role of the political party in political modernisation is an important one. Historically, political parties have been 'so closely associated with the modernisation of Western societies and, in various forms (reformist, revolutionary, nationalist), have become the instruments of modernization in the developing areas.'[44] There is also an assumption that

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[42] Robert Wade, *Governing The Market: Economic Theory and The Role of Government in East Asian Industrialization* (Princeton University Press, 1990) at 71.

[43] Katharina Pistor & Philip A Wellons, *The Role of Law and Legal Institutions in Asian Economic Development 1960-1995* (Hong Kong: Oxford University Press, 1999) at 10.

[44] David Apter, *The Politics of Modernization* (University of Chicago Press, 1965) at 179.

in order that people may exercise their rights to vote, elections should be held at regular elections.

Alternative choices of political parties and politicians present incumbent problems of instability, especially since they are legalised by the constitution. Organised political opposition, especially those with radically different political or ideological agenda are viewed as destabilisers and frowned upon. In Asia, the situation is compounded by a cultural aversion to opposition and criticism. As Pye noted:

> The problem of tolerating an opposition is a serious problem in the political development of Asia. The psychology of the political cultures that develop strong state authorities produces a profound distrust of criticism of authority and of domestic competition. Through the 1970s and early 1980s the concept of power in most of Asia led to increasingly firm state institutions, and in many cases it caused strong state authority to direct the private sector toward rapid economic growth. And even where impressive growth did not take place, as in South Asia, the role of the state has been strong.[45]

Many individuals consider fundamental human rights to be the most important guarantees enshrined in any constitution. Governments of newly-independent states must accumulate enough power to muster their economic resources. However, in doing so, the state will inevitably have to subjugate those very same fundamental rights to the wider developmental imperative. The subjugation of these rights is then justified in the name of the communitarian interest and individual liberty is sacrificed for the wider community welfare.

What 'community welfare' is or means is again the subject of heated debate. From the state's perspective, this is often defined in the widest possible terms. In some instances, it forms a convenient umbrella under which the abuse of state powers can take place. Social and political stability, racial harmony and alleged plots to overthrow the government are most often cited reasons for suppressing individual rights and freedoms. Asian politicians and those who support the idea of soft authoritarianism have increasingly uttered this line of reasoning.

The most likely freedoms to be subjugated are rights related to political freedom and expression, like the right to hold demonstrations, the right of unimpeded free speech, the right of political lobbying by non-political groups or organisations, and other ancillary rights. Rights curtailed in this respect include suspending the operation of the rule of law. In this last instance, a person may constitutionally be deprived of his right to a fair trial and hearing on the grounds of national security interests or some other community interest-related objective. Emergency powers and preventive detention laws fall squarely within this corpus of rights that may be legally excluded.

Whether a government succeeds in governing and putting its economic agenda into operation depends very much on how it treads the thin line between oppression and a legitimate exercise of its constitutional power in the wider interest. I am convinced that in the early stages of independence, most peoples are quite prepared to accept a fairly authoritarian form of government provided that their economic lot is visibly and substantially improved in the short run. People on the verge of starvation are not really interested in rights or the constitutionality of governmental action. What

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[45] *Supra* note 34 at 337.

they demand are that their basic necessities be satisfied and that there is a hope for a brighter future for their children.

Of course, this phase passes as soon as leaders fail to deliver the promised goods. Every society possesses a limit of tolerance over which politicians cannot step. There comes a point when the people become so disillusioned and so desperate that they are prepared to accept any possible salvation that is promised. At this point, the political and constitutional legitimacy of the government vanishes and in all likelihood, the government will fall.

Any public lawyer schooled in the Western tradition will cringe at the kinds of rights that are being suppressed even in the more prosperous of Asian nations. However, rights in the abstract mean nothing on the ground. The promise of rights means nothing to a starving man. The way to his heart is, to use a cliché, through his stomach. But this is not to say that economic necessities should be an excuse for a blatant abuse of powers and the repression of individual rights and liberties. My point is that in a situation where physiological needs are involved, where a population constantly worries where the next meal will come from, the idea of constitutionalism, rights and liberties are marginalised. And they can remain at the margin so long as the goods continued to be delivered, and until the bulk of the people have reached a standard of living that the politicians call 'middle class' or the 'bourgeoisie'. Only then will further expectations be made for constitutional guarantees. Two aspects of minority interests present problems for government: firstly, racial or religious minorities, and secondly, politically powerful minorities.

Typically, the protection of racial or religious minority rights is entrenched in the written constitution. Stability is maintained when the majority and minorities live in harmony with each other. The question for government is the extent to which it can and should honour these rights. Just like individual rights, it is possible to subjugate these rights to those of the wider community. The problem of course, is the power of the minority lobby.

At the same time, powerful political minorities like landowners can also prove to be major stumbling blocks for a government eager to accumulate power and push through economic reforms. Powerful minorities can and often will mobilise their resources to stymie government action when they feel—rightly or wrongly—that their interests are being threatened.

In a mature political arena, this will take the form of lobbying, protests, demonstrations, and politicians will be asked to repay favours owed to these groups. At the end of the day, some compromise solution will be found, even though all parties will not be happy, and stability is once more restored. Because all this will take place in an environment where protagonists 'know the rules' so to speak, and these include the constitutional rules and conventions, it is unlikely to lead to civil war or violence. On the other hand, antagonising minorities in a new republic can prove fatal. The rules have not had time to sink in and the lack of a democratic tradition often leads groups to look upon issues as a zero-sum game where the winner takes all, and where the loser tucks his tail between his legs and whimpers away. In this kind of environment, government is restricted in its actions and finds great difficulty in governing the country or putting its economic agenda into action.

Freedom and independence of the mass media is the mark of a mature democracy. The mass media serves an important dual role of both informing and educating the public. Without a free flow of information and views, the people cannot make informed choices when they vote, or when they decide on what policies they should support.

At the same time, the mass-media can be disruptive and insensitive to national needs and concerns. Opponents to unbridled freedom of the mass-media argue that the mass-media is concerned first with profit, and then with national or local interests. This means that each media must make itself as attractive as possible to persuade the consumer or advertiser to part with his money. As people are often more easily enticed or seduced by the abnormal and the unsavoury, the media will play these up, distorting facts and sensationalising what might be minor issues.

Any government will find the power of the media discomforting, and in some cases terrifying. While the media may rightfully expose mismanagement in government, it can also stir up dangerous emotions among the people. In the realm of minority rights and interests, this can prove to be particularly trying since social harmony and stability can be affected. If profit motives override national interests, the mass-media can be one of the most destabilising forces in any country.

The typical response of a government in a new state is usually to place strict controls on the press and other mass-media. Television and radio stations are often state-run, and the same can be said about newspapers. Constitutional lawyers cast in the western mould will find this oppressive, and in the long run, it will ultimately depoliticise the people so much so that when called upon to make choices, they may not be able to do so wisely. Yet, the creation of a stable environment for economic growth may require the government to take drastic steps to control the mass-media and to regulate the kind of information the people may receive.

In an underdeveloped state, this might not really matter, especially when few of the people are literate or possess the means to receive the information anyway. In such a state, these moves serve only to alienate the intelligentsia and might not have too debilitating an effect on government. However, in a more developed state, where literacy is high and where televisions and radios abound, such controls may come up against strong resistance from the people themselves, providing another possible destabilizing force.

VI. State Intervention in Development[46]

In this section, we consider the role of state in economic development. As we have discussed, public law has traditionally concerned itself with state-individual relations. The more a state becomes involved in development, the longer its tentacles grow. This poses particular challenges to public law thinking and logic. Public law is concerned with the arbitration of state and individual power, rights, liberties and obligations. The bigger the state grows, the less likely it wants to be fettered by rules, tribunals, courts and judges. This problem is compounded when the state is called to account for its activities through audits and reviews which are publicized.

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[46] For this section, I have drawn heavily on my "Economic Development and the Prospects for Constitutionalism" in Anthony Chin & Alred Choi, eds., *Law, Social Sciences and Public Policy: Towards a Unified Framework* (Singapore: Singapore University Press, 1998) 187-206.

Governments of Asia's developing states, especially those of former colonies, often see modernization as the panacea to the damage and humiliation suffered as a consequence of colonialism and foreign domination. If colonialism and the traditional modes of production and government left them in poverty and backwardness, 'modernisation' would be the cure. Many nascent governments thought that if they could emulate their former masters in having a modern system of government, and a modern economy, then surely they too, would rise out of poverty and underdevelopment; at least, that's how the logic went.

As a consequence, the main imperative of the new states was rapid economic development. Basic physiological needs such as food, shelter and gainful employment had to be met quickly. At the same time, wealth and resources had to be equitably distributed to a wider population. This idea of economic development was, in some instances, read synonymously with terms like 'modernisation' and 'industrialisation'. The need to quickly catch up with the developed world was a pressing one, and most governments saw these as priorities. As Kitching put it:

> When the colonies of the European powers in Asia and Africa became independent in the 1950s and 1960s, they looked firmly away from their past and towards the future. They regarded the colonial past as at least best forgotten, a history of exploitation and humiliation, which had left their people poor—'the wretched of the earth'. Their attention was rather turned to the future, to planning for economic development and prosperity.[47]

Modernisation and development not only meant industrialisation, or a new economic order. To be modern also meant having a modern political system based on a new constitution, preferably drawn from the West. The new constitution would secure the rights of its citizens and ensure that government acted according to a clear set of norms, which have been mutually agreed upon by the people. It would ensure that there would be no more exploitation, or discrimination, and that everyone was equal before the law.

Economic development aims to achieve the material prosperity of the people. It has been the most important agenda for Asian developmental states and often justified the authoritarian nature of their political regimes during the 1970s and 1980s. In order to achieve this objective, innumerable laws were drafted to promote rapid industrialization and to solve the dual economic structure, which was regarded as a major cause of underdevelopment. These legal measures were influenced by the theories and practices of 'development economics,' and vary in accordance to changing theoretical frameworks. It is virtually impossible to examine all aspects of law and economic development, but a short discussion of foreign investment laws, company laws and transfer of techonology regulations will give some indication of the importance of this area.[48]

The impetus for a modernization and a 'modern' form of government and a modernized economy did not come only from decolonizaton alone. Three other

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[47] Gavin Kitching, *Development and Underdevelopment in Historical Perspective: Populism, Nationalism and Industrialization* (Methuen, 1982) at 1.

[48] Nobuyuki Yasuda, "Law and Development from the Southeast Asian Perspective: Methodology, History and Paradigm Change" in Christoph Antons, ed., *Law and Development in East and Southeast Asia* (London: Routledge, 2003) 25-67, at 42-43.

historical factors in the post World War II era provided external stimuli for the development of modernization theories and policies: (a) the rise of the United States as a world leader; (b) the spread of communism; and (c) the disintegration of former European empires.[49] These newly-independent countries were searching 'for a model of development to promote their economy and to enhance their political independence.'[50]

In the twentieth century, the state has emerged as the single most important engine of economic and social transformation.[51] State intervention in the economy is necessary to deal with imperfections in the market system. Public goods such as law and order, education, health and economic infrastructure are needed by all, but may not be provided if left to market forces. There are two main reasons why the state is the ideal apparatus for economic intervention.

First, two key characteristics of the modern state make it a powerful engine for effecting economic changes: universal *membership* of states (unlike in private economic organisations), and the state's powers of compulsion that are generally unavailable to private economic organisations.[52] These two unique characteristics enable the state to play a pivotal role in planning, regulating and charting the course of economic development within its own boundaries.

Secondly, the influence of Keynesian economics literally made it almost mandatory for modern states to intervene in economic matters. The positive reaction to the ideas of John Maynard Keynes following the Great Depression of the 1930s[53] in the industrialized West triggered off a wave of interventionist policies by governments throughout the world. The success of supply-side economics provided the impetus needed for governments to abandon their hitherto laissez-faire attitudes towards the marketplace and its actors.

To develop economically, governments found it desirable, and indeed, necessary to mobilize and adapt the entire machinery of the state and its bureaucracy to form the engine of economic growth within the state. It is thus crucial for us to understand the critical role played by the state and its government in the process of economic development and transformation.

Strategies for economic development and growth varied from state to state depending on their political outlooks and persuasions. Some countries such as India, for example, took the so-called 'socialist' route, where the government played a key role in regulating and organizing the market. Others, like China and Vietnam took

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49 Alvin Y So*, Social Change and Development: Modernization, Dependency and World-System Theories* (Sage Publications, 1990) at 17 [So]. See also, *Vicky Randall & Robin Theobald, Political Change and Underdevelopment: A Critical Introduction to Third World Politics* (Macmillan, 1985) at 12.

50 So*, ibid.*

51 See generally, Stephen WK Chiu and Tai-lok Lui, "The Role of the State in Economic Development" in Grahame Thompson, ed., *Economic Dynamism in the Asia-Pacific: The Growth of Integration and Competitiveness* (London & New York: Routledge, 1998) 137-161; Dietrich Rueschemeyer & Peter B Evans, "The State and Economic Transformation: Toward an Analysis of the Conditions Underlying Effective Intervention" in Peter B Evans, Dietrich Rueschemeyer & Theda Skocpol, *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985) 44-77.

52 Joseph E Stiglitz, "On the Economic Role of the State" in Arnold Heertje, ed., *The Economic Role of the State* (Basil Blackwell, 1989), 11 at 21.

53 See Margaret Weir & Theda Skocpol, "State Structures and the Possibilities for 'Keynesian' Responses to the Great Depression in Sweden, Britain and the United States" in Peter B Evans, Dietrich Rueschemeyer & Theda Skocpol, eds., *Bringing the State Back In* (Cambridge University Press, 1985) 107.

the Marxist route, concentrating on central economic planning while others allowed a free market to operate, albeit with strict controls, like Malaysia and Singapore. Even Japan and South Korea, often held out as shining examples of democratic societies in Asia needed the muscle of their *keiretsus* and *chaebols* to fire up their economic engines. Few newly-independent countries, however, took the truly liberal, *laissez-faire* option of free markets with minimal state intervention and controls.

Over the last 45 years, economic growth in Asia has been nothing short of spectacular. Except for a few blips in the continuum—the OPEC Crisis of 1973-74, and the Asian currency crisis of 1997—many states in Asia posted rates of growth that became the envy of those in the developed world. Between 1981 and 1991, out of the 20 countries registering the highest economic growth in real GDP, 13 were from Asia.[54] For the period from 1991 to 2001, the statistics are only slightly less impressive. Out of the top 20 top performers, half of them were from Asia.[55] In contrast, none of the 20 worst performers from 1981 to 2001 were Asian countries.

Asia's economic achievements were so spectacular that the World Bank issued a now-controversial study entitled *The East Asian Miracle*.[56] Economists have studied the Asian economic growth phenomenon and ascribed several reasons for this high growth: Export-oriented economic policies; high foreign direct investments; state intervention and macro-economic policies; education, labour force growth and productivity; and labour market flexibility.[57] For our purposes, the key factor for consideration is the degree of state intervention in the economy.

Pistor and Wellons have developed a useful typology for understanding the focus of laws in developmental states. This typology helps connect the degree of state intervention and the type of law enacted and in operation:

> To capture change in the legal system, we distinguish two dimensions of legal systems, allocative and procedural. The *allocative dimension* determines whether the power to make decisions over the allocation of resources is vested in the state or is left to the market. The *procedural dimension* reflects whether decisions are primarily rule-based or discretionary. Each dimension is a continuum, but both are cross-cutting and combine in four ways. One may speak of a legal system as (a) market/rule-based, (b) market/discretionary, (c) state/rule-based, or (d) state/discretionary. Each combination is an ideal type into which no economy falls unambiguously.[58]

Pistor and Wellons argue that where state controls are extensive, the legal framework for market transactions and resource allocation played only a marginal role, but where greater latitude was given to market activities, market-based law became more

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[54] They were: China (9.3% increase in real GDP); South Korea (8.7%); Taiwan (7.9%); Thailand (7.9%); Macau (7.6%); Singapore (7.3%); Bhutan (7.1%); Indonesia (6.6%); Hong Kong (6.4%); Malaysia (6.3%); Pakistan (6.2%); Cambodia (6.0%); and India (5.3%). See *The Economist Pocket World in Figures: 2004 Edition* (London: The Economist, 2003) at 31.

[55] They were: China (9.8%); Vietnam (7.7%); Singapore (6.9%); Malaysia (6.4%); Myanmar (6.4%); Bhutan (6.4%); Laos (6.2%); South Korea (5.9%); and Taiwan (5.6%). *Ibid.* at 30.

[56] World Bank, *The East Asia Miracle: Economic Growth and Public Policy* (New York: Oxford University Press, 1993).

[57] See, for example J Malcolm Dowling & Ma. Rebecca Valenzuela, *Economic Development in Asia* (Singapore: Thomson, 2004) at 21-30.

[58] Katharina Pistor & Philip A Wellons, *The Role of Law and Legal Institutions in Asian Economic Development 1960-1995* (Hong Kong: Oxford University Press, 1999) at 4.

important.[59] From the procedural perspective, discretionary law displaced the legal processes for making, administering, and enforcing the law.

> Following World War II, most economies further expanded the state bureaucracy's authority to make rules and regulations. Even where a country followed the principle that basic legal rules had to be established by legislation, the laws rarely limited the bureaucracy's authority to issue interpretative regulations or use administrative guidance to influence business behaviour. Administrative rules, decrees, and informal guidance often prevailed over underlying laws. Moreover, courts were limited in their review of administrative action, whether by their own choice, by law, or by the raw political power of the executive. Economic agents could not choose between two different sets of rules, but had to adapt their business activities to the expanding framework of a more state-allocative and more discretionary law.[60]

As we can see, the relationship between the imperatives for economic growth and the role of public law in checking the abuse of state power is a particularly problematic one. The need for the accumulation and centralization of power, coupled with the wide discretion required for states to perform their allocative functions is deemed necessary in the interests of efficiency. Developing states must, after all, react quickly to market forces and govern accordingly. On the other hand, the public law values of the separation of powers, the need for government and its agencies to conform to the law and be held accountable for their actions requires the establishment of institutions and mechanisms that may slow the state down. Worse still, a state's extensive public law machinery can stymie growth and development. The redistribution of land provides an excellent example of this tension and dilemma. Constitutional guarantees of land rights may bankrupt states compelled to acquire land at market prices. Yet, unless some form of guarantees exist, there is no economic incentive for people in possession of tracts of land to develop them. This tension further stresses public law, especially in a developing Asia.

VII. Conclusion

Several trends pose a major challenge to public law. First, the Asian imperative of development has meant a massively expanded public sphere. The idea of limited government, or one which classical capitalist economists see as minimalist holds little appeal in such circumstances. The expansion of the state through its intervention and participation in numerous other spheres of activity, especially in an effort to correct an imperfect market has also meant that it has a lot more to account for.

Governments generally do not like being told what to do, much less what they cannot do. Asian governments, already used to their public's general trust and respect for authority, like the idea of being told by the courts that what they are doing is illegal even less. To deal with this problem, Asian states have sought to reduce the role of courts and of judicial review of administrative action as much as possible through narrowly-framed legislation, ouster clauses and the aggregation of wide executive

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[59] *Ibid.* at 5.

[60] *Supra* note 58 at 6.

and bureaucratic discretion in administrative decision-making. Judicial discretion is further reduced through the introduction of strict liability, mandatory sentences and even no-fault liability in tort.

Human rights are subject to and limited by state imperatives and concerns such as public health, public order or national security. States increasingly participate in private sector and further blur the distinction between public and private law. This is compounded by the fact that immunity from prosecution or civil suit is often granted to states and governments in the performance of certain duties. Without strong public law institutions and rules to check them, governments can easily transform states into corporation-like structures:

> The story of the government and market that underlies the Asia miracle could still be summed up in one concept: 'Countries, Inc.' The analogy of the country as a firm—often employed by the region's leaders—keenly evoked the orientation toward trade, the quest for productivity, and the recourse to regimented organization. But more, these Countries, Inc. have enjoyed a degree of common purpose few firms can match: a nationalistic drive, molded by living memories of colonization, conquest, secession, civil conflict, subversion, or war.[61]

When states act as corporations and business entities, it is to private law that the individual must find recourse. This is a problem because remedies can only be extracted at a price—that of commencing an action. In such an environment, there is an urgent need to finds ways for public law to ensure state accountability. The problem of governance has led some Asian governments to adopt soft authoritarianism. For want of a better definition, 'soft authoritarianism' may be said to be a kind of benevolent dictatorship, implying rule by an individual, or by an elite class of individuals. What sets soft authoritarians apart from other forms of fascists and authoritarians are their perceived altruism and paternalism. Soft authoritarianism is used to describe the regimes that govern countries with so-called Confucianist traditions, like Korean, Taiwan, Japan and Singapore. The correlation between soft authoritarianism and economic development appears to be fairly strong.

> Most of the Asian success stories involved, at some point, dictatorship, authoritarianism, or at least regulated politics and a *de facto* one-party system … Most Asian governments did intervene—sometimes quite drastically. But they did so to influence the shape of market outcomes, not to replace or roll back markets. The paradox of Asia, then, was that in many ways it was government knowledge, enforced by political structures, that helped bring about 'market-friendly outcomes.'[62]

The soft authoritarian state is highly centralised and powerful. It makes all key political, social and economic decisions and the general population lives relatively happily under this all-knowing leadership. They are politically and socially stable and have performed remarkably well in terms of economic development. Politicians and economists, desperate for solutions to Third World problems have become fascinated by development of Asian states like Korean, Taiwan, Hong Kong and Singapore.

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[61] Daniel Yergin & Joseph Stanislaw, *The Commanding Heights: The Battle for the World Economy* (New York: Touchstone, 2002) at 142.

[62] *Ibid.* at 141-142.

Linking economic progress to their respective governmental systems and political culture, some scholars have argued that having a form of government with massive powers and a culture which subjugates individual freedom to the wider interest might be the best way to secure economic growth and a better life.

The idea of a soft authoritarian state runs counter to everything a constitutional lawyer holds dear to him. The ideas of the separation of powers, limited government and fundamental rights appear to be cast to the wind. But does this mean that a developing Asia also means an increasingly authoritarian one? The future is not entirely grim. Governments must first accumulate enough power to govern. Only then can they begin to put into motion their economic plans and reforms. The form of government suitable to this kind of transformation is, unfortunately the very antithesis of the western liberal democratic model founded on principles of the accountability, impartiality and limited government. Yet, governments who ignore the connections between economic development and constitutionalism do so at their own peril.

Looking forward, I am cautiously optimistic about the continued role of public law. Asian and western legal systems are increasingly converging for several reasons: first, the internationalization of the law since the late 1940s, especially in the normative rules and due process for international commercial transactions; second, the political tides have shifted against authoritarian regimes giving way to greater democracy; third, the trend towards global and international markets; and fourth, the fundamental change in the perception of the state's role in economic development since the 1960s. In last instance, the allocative power of the state has been reduced and the scope of markets has increased, leading to the growing importance of market-allocative rules.[63]

Will soft authoritarianism rule the day? Economic success has guaranteed for many Asian countries a place in history. But whether their peoples will continue to happily live under their respective forms of government is a big question that must remain unanswered. Already, political reforms have taken place in countries like Taiwan,[64] South Korea, and even China. In the long run, when economic success comes to be taken for granted, and when the bulk of the people have satisfied their most important needs, then greater demands will be made for a more liberal constitution and form of government. The highest levels of needs, according to Maslow are the 'self-actualising' needs or 'the desire to become more and more what one idiosyncratically is, to become everything that one is capable of becoming.'[65] When people in a country reach this level of needs, there will be a corresponding cry for less government, and more freedom.

Andrew Harding is optimistic about the health of the rule of law concept, at least in Southeast Asia. He believes that the formation of ASEAN, the emergence of civil society, and the quest for legitimacy in pluralist states[66] all contribute to the strengthening of the rule of law. This hope, when transposed across the whole of Asia

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63 *Supra* note 58 at 14.

64 See Denis Fred Simon & Michael YM Kau, eds., *Taiwan: Beyond the Economic Miracle* (ME Sharpe Inc, 1992); and Tun-jen Cheng & Stephen Haggard, eds., *Political Change in Taiwan* (Lynne Rienner, 1992).

65 Abraham H Maslow, *Motivation and Personality*, 2 ed (New York: Harper & Row, 1970) at 46.

66 See Andrew Harding, "Comparative Public Law: Some Lessons from South East Asia" in Andrew Harding & Esin Orucu, *Comparativce Law in the 21st Century* (London, Hague and New York: Kluwer Academic Publishers, 2002), 249-266, at pp. 258-259.

is slightly more problematic. Asia is home to both the world's largest democracy (India) as well as the world's largest communist state (China). Even where political change is taking place, many Asian states have yet to yank themselves out of the operational paradigm centred on state power, patronage, cronyism and personal power.

Ironically, it may well be that as Asia develops more successfully in economic terms, the state will gradually lose its ability to rely on the kinds of allocative laws that has allowed it to become the behemoth that it is. As Pistor and Wellons note:

> Vesting so much discretion in bureaucrats came to be seen as a mistake. Forces of supply and demand became harder to manage, confronting firms with risks that the old system could no longer resolve. The failings of the old economic policies generated opposition to the system of state-allocative law, and added costs that the emerging economy did not need to bear. Government lacked the fiscal clout to continue to absorb the costs themselves. Trading partners, like the US government, began to pressure specifically for changes toward market-allocative laws, sometimes to the point of specifying the particulars of compliance with an administrative law. Newly powerful groups, such as consumers with wealth and economic power they had lacked in earlier periods, wanted the protection by the legal system that would come with market/rule-based laws. Thus, economic development itself undermined state-allocative/discretionary law.[67]

The need for recognition, to be seen to be a good citizen of the international community, and the fact that an increasingly globalised economy requires developmental states—Asian or otherwise—to plug into the same commercial grid may lead the way to the transformation of public law in Asia. Public lawyers too, have a role to play in this transformation. Too many of the brightest legal minds move into the commercial sphere because of its potential economic rewards. There is insufficient emphasis on public law subjects in many of the region's law schools. Through the effluxion of time and the increasing connectedness of lawyers, scholars, government officials, and governments, I hope that the true values of public law may become more permanently ingrained in the cultures and consciousness of Asians.

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[67] *Supra* note 58 at 11.