Constitutional Values in Turbulent Asia*

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Asia has a rich heritage of democracy-oriented philosophies and traditions. Asia has already made great strides towards democratisation and possesses the necessary conditions to develop democracy even beyond the level of the West . . . Asia should lose no time in firmly establishing democracy and strengthening human rights. The biggest obstacle is not its cultural heritage but the resistance of authoritarian rulers and their apologists . . . Culture is not necessarily our destiny. Democracy is.

Kim Dae-jung, 'Asia's Destiny',
The Weekend Australian, 31 December,
1 January 1994–95, at p 16

There is nothing new in Third World governments seeking to justify and perpetuate authoritarian rule by denouncing liberal democratic principles as alien. By implication they claim for themselves the official and sole right to decide what does or does not conform to indigenous cultural norms.

Aung San Suu Kyi, *Freedom from Fear*,
(Penguin Books, 1995), at p 167

INTRODUCTION

The question that is explored in this article is the tenability of the proposition that notions of democratic rule and human rights are not appropriate for the shaping of the constitutional systems of Asian countries. This stand is maintained by a number of Asian political leaders on the ground that these notions are based on 'western' values and are therefore incompatible with Asian countries which are nourished by 'eastern' values. The leading exponents of this proposition are the articulate and highly impressive former Prime Minister of Singapore, Mr Lee Kuan Yew, and the very vocal Prime Minister of Malaysia, Dr Mahathir Mohamad.[1] As a number of Asian economies surge forward at unprecedented levels, the debate over Asian values has also

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[1] See generally: 'Do Asian values trump the West?', *The Economist* and reproduced in *The Australian*, 2 June 1994, 11; 'Democracy v. Dictatorship', *The Economist* and reproduced in *The Weekend Australian*, 3–4 September 1994, 30; K Dae-jung, 'Asia's Destiny', *The Weekend Australian*, 31 December, 1 January 1994–95, 16; Andrew Adonis, 'Determined trend towards Asian values', *Financial Times*, 24 February 1995, viii.

intensified.[2] It is argued in this article that the trumpeting of Asian values has obfuscated the debate and that the attempts to highlight the East-West dichotomy in the analysis of notions of democracy and human rights misses a vital point — that certain values are not characterised by their East-West values, but by their universality.[3]

THE TRUMPETING OF ASIAN VALUES

Two main factors can be attributed to the prominence given to Asian values in the current debate.[4] The first main factor was the ending of the Cold War. Prior to that event, international priority was accorded to the defeat of communism. In many Asian countries, many governments sought to retain political power by adopting anti-democratic means. As long as these governments invoked anti-communistic rhetoric, the United States and other concerned western democracies were prepared to turn a blind eye to the authoritarian rule of these governments. With communism no longer regarded as a threat to national security, these governments have to justify authoritarian rule on other grounds. The urgency for a new justification is spurred on by the booming economies of a number of Asian countries. The Asian Development Bank (ADB) had predicted that economic growth in a number of Asian countries, stretching from Korea in the north down to Indonesia and westwards to Pakistan, would register a growth rate of 7.6 per cent in 1995 and 7.4 per cent in 1996.[5] Professor Tommy T.B. Koh, Singapore's Ambassador-At-Large, has highlighted the phenomenal growth of the economies of East Asia. He said:

> Barring a major catastrophe, the World Bank and International Monetary Fund (IMF) are optimistic about East Asia's future. They have predicted that East Asia's combined GDP should continue to increase by 5–6 per cent per annum, on average, over the next few decades. The growth rate would be even higher, at 7 per cent, if Japan is excluded.
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> The increase will amount to US$13 trillion (in 1990 prices) over the next two decades (by 2015) or an increase that is roughly twice the current size of North America. Even if North America and Europe were to see sustained

[2] J Wanandi, 'Human Rights and Democracy in the ASEAN Nations: The Next 25 Years' (1993) 21 *The Indonesian Quarterly* 14; C E Welch, Jr & V A Leary (eds), *Asian Perspectives on Human Rights* (1990). M C Davis (ed), *Human Rights and Chinese Values* (1995); S S C Tay, 'Human Rights, Culture and the Singapore Example' (1996) 41 *McGill LJ* 743.

[3] See Hans de Jonge, 'Democracy and Economic Development in the Asia-Pacific Region' (1993) 14 *Human Rights Law Journal* 301. The article described the discussions at a colloquy held on 22 and 23 October 1992 at the House of Parliament in Canberra. One of the main points reached at the colloquy was: 'In spite of such differences, a number of universal values on which each democracy must be based can be identified. Whilst there are many models of democracy, there is a clear core of values or a bottom line to be observed in the search for democracy and freedom' (at 306). See also book review by L M Freidman in (1993) 13 *Boston College Third World Law Journal* 189 of D P Forsythe *The Internationalization of Human Rights* (1991).

[4] D Davies, 'Neo-Confucian ploys just a cynical abuse of power', *The Weekend Australian*, 31 December, 1 January 1994–95, 16.

[5] 'Asian economies tipped to keep on surging', *The Age*, 7 April 1995, 11.

growth at moderate rates, East Asia's GDP should be almost as large as the combined GDP of North America and Europe three decades from now (2025).[6]

With increased national wealth and a growing educated middle-class, the tensions between national affluence and tight political controls in many of the Asian countries will become more acute. New found wealth revives self-confidence, which is then deployed to downgrade the influence of Western values. This is typified by the sentiments expressed by Mr Lee Kuan Yew in a speech on 5 February 1995. Mr Lee pointed to the economic success in East Asia and its flow-on impact on other Asian countries, such as the ASEAN countries, China and Vietnam. Mr Lee went on to predict:

> Singapore's life-styles and its political vocabulary have been heavily influenced by the West. I assess Western influence at 60 per cent, compared to the influence of core Asian values at 40 per cent. In 20 years, this ratio will shift, as East Asia successfully produces its own mass products and coins its own political vocabulary. The influence of the West on our life-styles, foods, fashions, politics and the media, will drop to 40 per cent and Asian influence will increase to 60 per cent.[7]

The new international concern for human rights is translated by Dr Mahathir into a campaign by western democracies to create a new form of western hegemony. In an address to a human rights conference in December 1994, Dr Mahathir said:

> Much later the Cold War ended and the Soviet Union collapsed leaving a unipolar world. All pretence at non-interference in the affairs of independent nations was dropped. A new international order was enunciated in which the powerful countries claim a right to impose their system of government, their free market and their concept of human rights on every country.
>
> All countries must convert to the multi-party system of government and practise the liberal views on human rights as conceived by the Europeans and the North Americans.[8]

Dr Mahathir went on to highlight a key deficiency of a multi-party system, namely, that it can result in no party being able to get a sufficient majority to form a government. He added:

> 'Developed countries can do with weak governments or no government. But developing countries cannot function without strong authority on the part of government. Unstable and weak governments will result in chaos, and chaos cannot contribute to the development and well-being of developing countries. Divisive politics will occupy the time and minds of everyone, as we can witness in many a developing country today.'[9]

[6] T T B Koh, *The United States and East Asia: Conflict and Co-Operation* (1995) 2–3.

[7] Speech by Senior Minister Lee Kuan Yew at Tanjong Pagar and Tiong Bahru Lunar New Year Get-Together at Silat Community Centre on Sunday, 5 February 1995, 3.

[8] Speech by Dr Mahathir Mohamad at the Just International Conference on Rethinking Human Rights at the Legend Hotel, Kuala Lumpur, on Tuesday, 6 December 1994, 4.

[9] Id 4–5. Cf. Y Osinbajo & O Ajayi, 'Human Rights and Economic Development in Developing Countries' (1994) 28 *The International Lawyer* 727.

Dr Mahathir, in a later part of his speech, complained about the 'tirade of accusations against Asian recalcitrance' as a result of unwillingness by Asian nations to accede to the 'double standards' practised by western governments in relation to human rights. He said:

> 'It would seem that Asians have no right to define and practise their own set of values about human rights. What, we are asked, are Asian values? The question is rhetorical because the implication is that Asians cannot possibly understand human rights, much less set up their own values.[10]

CLEARING THE UNDERGROWTH OF CONFUSION

In order that a clear analysis of the debate can be undertaken, it is necessary to dispel certain assumptions or inferences that are harboured by those who trumpet Asian values to confront the notions of democracy and human rights.

In the first place, the very expression 'Asian values' is highly ambiguous, and at worst, highly misleading. The expression projects an image of a monolithic Asia with homogeneity of population, language, religion and culture. Nothing is further from the truth. Asia spans a spectrum of races, languages, religions and cultures. In a number of Asian countries, a volatile mixture of elements of the spectrum has generated a turbulence in the fabric of society. A quick glance across the region illustrates this point. India, the world's largest democracy, has to grapple with internal Hindu-Muslim antagonisms, Sri Lanka with its Sinhalese-Tamil problems, Philippines with its Muslim insurgents. Professor Yash Ghai describes the situation very succinctly:

> All the world's major religions are represented in Asia, and are in one place or another state religions (or enjoy a comparable status: Christianity in the Philippines, Islam in Malaysia, Hinduism in Nepal, and Buddhism in Sri Lanka and Thailand). To this list one may add political ideologies like socialism, democracy or feudalism which animate peoples and governments of the region. Even apart from religious differences, there are other factors which have produced a rich diversity of cultures. A culture, moreover, is not static, and many accounts given of Asian culture are probably true of an age long ago. Nor are the economic circumstances of all the Asian countries similar. Japan, Singapore and Hong Kong are among the world's most prosperous countries, while there is grinding poverty in Bangladesh, India and the Philippines. The economic and political systems in Asia likewise show a remarkable diversity.[11]

Professor Yash Ghai thus concludes: 'It would be surprising if there were indeed one Asian perspective, since neither Asian culture nor Asian realities are homogenous throughout the continent'.[12]

The second misconception stemming from the invocation of Asian values by some government leaders who 'speak as if they represent the whole

[10] Id 9.
[11] Y Ghai, 'Asian Perspectives on Human Rights' (1993) 23 *Hong Kong Law Journal* 342.
[12] Ibid.

continent' is to treat notions of democracy and human rights as if they were alien to Asian culture and traditions. The branding of such notions as western values denigrates the contributions of Asian civilisations to the underpinning of these notions. This point will be dealt with at a later stage in the article.

CONSTITUTIONAL VALUES: SPECIFIC INSTANCES

For a meaningful discourse to take place, it is essential that the parameters of this topic should be clearly defined. In advocating the upholding of core constitutional values in any nation it is not suggested that there should necessarily be an imitation of the forms and trappings of democracy as practised in western nations.[13] What is asserted is that there are certain values which are characterised by their universality. The discourse is a less valuable exercise if it is confined to a highly theoretical plane; it becomes very instructive if specific contexts are provided.

States of Emergency

One disconcerting feature which is highly conspicuous when the constitutional systems of Asian countries and the western democracies are compared is the fairly frequent resort to emergency powers by the governments of Asian countries. Emergency powers are generally those exceptional powers invoked to deal with exceptional circumstances. A common feature of the constitutions of emergent nations is the provision of an elaborate scheme for the declaration of a state of emergency.[14] The constitutional framers built in safeguards to prevent a government from abusing the panoply of extraordinary powers. Constitutional values consonant with the rule of law are that emergency powers should only be invoked in cases of a genuine emergency and that there should be strict judicial and parliamentary supervision over executive exercise of such powers. Such constitutional values are not western or eastern values. They are universal values. When critics condemn a government for blatant abuses of emergency powers they are not western stooges seeking to perpetuate western values. They are simply demanding an adherence by a government to constitutional values which accord with the trust of the people. The cynical exploitation of emergency powers in a number of

[13] Professor T T B Koh quoted the following from the report of the Commission for a New Asia, entitled 'Towards a New Asia':

> If democracy that is resilient and durable is to take strong and permanent root in Asian societies, it must be deeply embedded in Asian values and mores and embrace institutions and processes special to specific culture. This must not be made into an excuse for foot-dragging and for the adoption of democratic forms without democratic substances. We must see through attempts to equate regime stability with national stability . . . Yet the proposition holds: each society must find the most fitting form of democracy for its peoples.'

T T B Koh, op cit (fn 6) 98–9.

[14] See, generally, C V Das, *Governments & Crisis Powers* (1996); I Omar, *Rights, Emergencies and Judicial Review* (1996).

Asian and other developing countries reflects simply the desire of a government to cling to power at all costs. The experience in India and Malaysia will be looked at to illustrate this point.[15]

On 25 June 1975, the President of India signed a Proclamation of Emergency declaring that a grave emergency existed whereby the security of India was threatened by 'internal disturbance'. When the political context was examined, it was widely believed that the impetus for this proclamation was the agitation by opposition parties calling for the resignation of the then Prime Minister, Mrs Indira Gandhi following a decision by the Allahabad State High Court which, unless overruled on appeal, would invalidate her election to Parliament and her office as Prime Minister. The extensive abuse of power in the wake of the proclamation has been described as follows:

> The immediate consequences were the increased use of preventive detention against political opponents and economic offenders and suspension of the right to apply to the Courts for enforcement of fundamental rights. Twenty-seven organisations were banned immediately. The elimination of access to the Courts had the foreseeable effects: ill-treatment of prisoners, increased corruption and nepotism, and insensitive implementation of government programmes (notably slum clearance and population control). A rigid and unprecedented press censorship was imposed, applying also to the foreign press. Fundamental rights under the Constitution ... were suspended.[16]

The period of emergency rule was described by H.M. Seervai: 'With every week that passed, the dark pall of tyranny seemed to descend inexorably over India'.[17] Fortunately for the people of India, Indira Gandhi decided to order and did order the holding of fresh elections. The subsequent events and the state of emergency are now matters of history. The reaction of the Indian populace provides inspiration to those in other countries who advocate the cause of constitutionalism. Indira Gandhi was swept out of Parliament and of office. Her party was dealt a crushing electoral defeat. Seervai observed:

> Fearing that the weapon of the emergency which she had forged, and used, against her opponents might be turned against her and her associates, she advised the President to withdraw the emergency before she left office.[18]

The Malaysian experience provides a neat illustration of how safeguards which are carefully drawn up are watered down by a government seeking to enlarge its powers. Space constraints prevent a comprehensive analysis of all

[15] See International Commission of Jurists *States of Emergency* (1993) 169–191 (India) and 193–215 (Malaysia); W E Conklin, 'The Role of Third World Courts During Alleged Emergencies' in Marasinghe & Conklin (eds), *Essays on Third World Perspectives in Jurisprudence* (1984), 69–104.

[16] Id 180.

[17] H M Seervai, *The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism* (1978) vii. See also H M Seervai, *Constitutional Law of India* (2nd ed, 1979) vol III.

[18] Id viii.

the changes effected to Article 150 of the Malaysian Constitution.[19] Article 150 empowers the King to issue a proclamation of emergency; it prescribes a form of accountability to Parliament by requiring the laying of a proclamation of emergency and emergency ordinances before both Houses of Parliament; it enlarges the scope of executive authority and the law-making powers of the Malaysian Parliament while a proclamation of emergency is in force.

The watering down of the safeguards started in 1960. Article 150(3) had originally provided that a proclamation of emergency shall remain valid only for two months and that an emergency ordinance shall cease to have force fifteen days after the date both Houses are first sitting. A constitutional amendment in 1960 changed the requirements so that both the proclamation and the emergency ordinance would cease to have effect only when revoked or annulled. Professor Jayakumar commented:

> This was a significant change. Originally Parliament would have to address its mind to the continued justification of the Proclamation and the ordinance. The change meant that both Proclamation and Ordinances have indefinite life unless expressly revoked or annulled.[20]

In 1981, an amended Article 150(2) enabled a proclamation of emergency to be issued even before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof 'if the [King] is satisfied that there is imminent danger of the occurrence of such event'. Other changes were also made which diminished the role of Parliament in its oversight role. However, the most fundamental change was the making of a new clause (8) which provides as follows:

> Notwithstanding anything in this Constitution —
> (a) the satisfaction of the [King] mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and
> (b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of —
> (i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);
> (ii) the continued operation of such Proclamation;
> (iii) any ordinance promulgated under Clause (2B); or
> (iv) the continuation in force of any such ordinance.

Whether emergency powers should be provided in a constitutional framework is a debatable proposition. Even if it is conceded that such powers are necessary to preserve the stability of a nation confronted by extraordinary circumstances, it does not follow that these powers should be manipulated for

[19] For a detailed analysis, see S Jayakumar, 'Emergency Powers in Malaysia' in T M Suffian, H P Lee and F A Trindade (eds), *The Constitution of Malaysia — Its Development: 1957–1977* (1978) 328–368; H P Lee, 'Emergency Powers in Malaysia' in F A Trindade and H P Lee (eds), *The Constitution of Malaysia — Further Perspectives and Developments* (1986) 135–154.

[20] Id, S Jayakumar, 334.

an improper purpose or invoked to confront an imaginary emergency. A clear constitutional value is that judicial supervision of the use of such powers is fundamental to a democratic constitutional system. Ong Hock Thye FJ in *Stephen Kalong Ningkan* v *The Government of Malaysia*[21] said:

> If those words of limitation [in article 150] are not meaningless verbiage, they must be taken to mean exactly what they say, no more and no less, for article 150 does not confer on the Cabinet an untrammelled discretion to cause an emergency to be declared at their mere whim and fancy.[22]

The new clause (8) leaves all questions concerning emergency powers to the absolute discretion of the government of the day. The excision of the courts' jurisdiction in relation to the validity of a proclamation of emergency or an emergency ordinance poses a threat to constitutionalism in Malaysia for the excision creates a situation whereby 'the Cabinet have *carte blanche* to do as they please'.[23] It is quite astonishing that the states of emergency which were declared in 1964 to counter the launching of an intensive 'confrontation' by Indonesia during the Sukarno era and in 1969 to cope with the outbreak of racial riots have not been revoked. It can hardly be asserted that the factual bases for those states of emergency still exist today.

Preventive Detention

A core value of any democracy is the right of its citizens to go about their lawful business unhindered. If they should engage in illegitimate activities, they could be brought before a court of law and charged. However, in a number of countries, administrative detention has become a convenient way of by-passing the judicial process and has been employed as a powerful tool to suppress political dissent.

The notorious *Internal Security Act* (or 'ISA') in Malaysia was enacted in 1960 upon the termination of the state of emergency which the British colonial government had declared in 1948 to counter the communist insurgency. The man responsible for the introduction of this Act was Tunku Abdul Rahman, the first Prime Minister of Malaysia. Tunku Abdul Rahman in 1987 said:

> The ISA introduced in 1960 was designed and meant to be used solely against the communists ... My Cabinet colleagues and I gave a solemn promise to Parliament and the nation that the immense powers given to the government under the ISA would never be used to stifle legitimate opposition and silence lawful dissent.[24]

The central provision of the ISA empowers the Minister of Home Affairs to detain any person without trial if he is 'satisfied' that the detention is necessary to prevent that person from 'acting in a manner prejudicial to the security

[21] [1968] 1 MLJ 119.
[22] Id 128.
[23] Ibid.
[24] Tunku Abdul Rahman's affidavit at the habeas corpus hearing of Dr Chandra Muzaffar and quoted in 'Operation Lalang ISA Arrests October 27, 1987 — The Real Reason' (1988) 8.

of Malaysia . . ., or to the maintenance of essential services thereof or to the economic life thereof.'[25]

Prior to 1960, Article 151 of the Malaysian Constitution provided that a Malaysian citizen could not be detained longer than three months 'unless an advisory board . . . has considered any representation made by him . . . and has reported before the expiration of that period, that there is in its opinion sufficient cause for detention'. If the advisory board decided that there was no sufficient cause for the further detention of a citizen, he must be freed. The power of the advisory board was, as a result of a constitutional amendment in 1960, reduced to simply making 'recommendations'. Furthermore, in 1976, another amendment 'no longer linked the period of three months with the detention but instead linked it to the time period within which his representation must be considered'.[26] The government is also empowered to extend the three months period, if necessary.

The use of the preventive detention powers in Malaysia and Singapore has attracted considerable international concern.[27] Those who argue in support of preventive detention powers tend to be those who are in government. No doubt they will change their tune if they sit on the opposition bench. A 1990 'Asia Watch Report' reminded us of what Mr Lee Kuan Yew had said during a 1956 debate on emergency regulations:

> If you believe in democracy, you must believe in it unconditionally. If you believe that men should be free, then they should have the right of free association, of free speech, of free publication. Then no law should permit those democratic processes to be set at naught, and no excuse . . . should allow a government to be deterred from doing what it knows to be right, and what it must know to be right.[28]

Assaults on Judicial Independence

A constitutional value which is also subsumed under the rubric of the rule of law is the principle of judicial independence. The Chief Justice of Western Australia, Chief Justice David Malcolm, said:

> Since the early 1980s, development of the concept of judicial independence at the international level, in particular by the enumeration of its key features, has proceeded apace through instruments such as the International Bar Association's *Minimum Standards of Judicial Independence* (1982) (New Delhi Standards) and the United Nations', *Draft Principles on the Independence of the Judiciary* (1981) (Siracusa Principles), *Basic Principles on the Independence of the Judiciary* (1985) (Basic Principles) and *Draft*

[25] T Rajamoorthy, 'Preventive Detention in Malaysia' in *Tangled Web — Dissent, Deterrence and the 27 October 1987 Crackdown in Malaysia* (1988) 82–88.

[26] S Jayakumar, op cit, 351.

[27] For a personal account of detention under the ISA in Singapore, see F T Seow, *To Catch a Tartar* (New Haven, 1994). Mr Seow was a former Solicitor General of Singapore. See also S Husin Ali, *Two Faces (Detention Without Trial)* (1996). The legal aspects of preventive detention laws in Malaysia and Singapore are discussed in Tan, Yeo and Lee, *Constitutional Law in Malaysia & Singapore* (1991) 461–535.

[28] See *Silencing All Critics: Human Rights Violations in Singapore* (1990) 11. For original source, see L K Yew, Singapore Legislative Assembly, 22/4–7/6/56, cited in *Geneva Report of International Mission of Jurists to Singapore July 1987* (1987) 3.

Universal Declaration on the Independence of Justice (1989) (Singhvi Declaration).[29]

The universal status of the concept of judicial independence is reaffirmed by a resolution adopted on 19 August 1995 by the chief justices at the 6th Conference of Chief Justices of Asia and the Pacific. This resolution is now known as the 'Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region'. Joseph Raz elaborates:

> The rules concerning the independence of the judiciary — the method of appointing judges, their security of tenure, the way of fixing their salaries and other conditions of service — are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law. They are, therefore, essential for the preservation of the rule of law.[30]

Related to the principle of judicial independence is the doctrine of separation of powers. It was the eloquence of Montesquieu which captured the spirit of the doctrine:

> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
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> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[31]

Vital to the preservation of democracy and the protection of human rights are the principles of separation of powers and judicial independence. There is a clear breach of the separation of powers doctrine if the executive, through its domination of the parliament, were to arrogate to itself the judicial power. Sometimes the breach is more subtle. By manipulating the rules concerning the independence of the judiciary, a government can weaken the separation of powers doctrine. One extreme scenario is where a government blatantly appoints party lackeys or stooges to important judicial positions. Another scenario is where a government seeks to expunge from the judiciary, judges who subscribe faithfully to their judicial oath and the principle of judicial independence.

The Indian Experience

The Indian Supreme Court has earned immense acclaim for its innovative and courageous approach to constitutional interpretation. In the realm of constitutional interpretation, bold decisions inevitably would have the effect of constraining the legislative capacity of the legislature. The independence of

[29] D Malcolm J, 'The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region' (1996) 70 ALJ 299.
[30] J Raz, 'The Rule of Law and Its Virtue' (1977) 93 LQR 195, 201.
[31] Montesquieu, *The Spirit of the Laws* (T Nugent (trans), 1949) 151.

the Indian judiciary takes pride of place in its constitutional system. It stands out as a shining example to refute the claim of those Asian leaders who assert that judicial independence is incompatible with Asian values. The Indian experience provides an illustration of the importance of maintaining vigilance against attempts by the executive to undermine judicial independence.

The independence of the Indian judiciary was buffeted by the 'supersession' crisis of 1973.[32] The crisis came in the wake of a landmark decision in the '*Fundamental Rights Case*'.[33] The decision was handed down on 24 April 1973. A day after the decision, Chief Justice S.M. Sikri retired. In the evening of that same day, the government announced the appointment of Justice Ray to the position of Chief Justice. In the process, three members of the Court who were more senior to Justice Ray were superseded. This apparently was contrary to the well established convention in India: the retiring Chief Justice in conformity with this convention had recommended the next senior-most judge for appointment as Chief Justice. However, the government did not accept the recommendation. The unprecedented supersession of the three senior judges provoked widespread condemnation. It was pointed out that these three judges had rejected some of the contentions asserted by the government in the *Fundamental Rights Case*, while Justice Ray had completely accepted them.[34] K.S. Hegde, a former judge of the Supreme Court observed:

> A large section of the public considered that the supersession of the three senior judges was not an isolated act, nor was it merely intended to punish the three judges for not being subservient to the Government, but the Government had deeper motives in taking the step it did. There was widespread feeling that the Government was out to denigrate the judiciary and that the appointment of the new Chief Justice was politically motivated. It was felt that the wrong done to the three judges, bad as it was, was of small significance compared to the damage done to the independence of the judiciary and to the cause of democracy. The general feeling was that by one single stroke the Government had shaken the confidence of the people in the independence of the judiciary. The press, with rare exceptions, severely condemned the Government's action.[35]

Another significant attempt to undermine the independence of the judiciary occurred during the emergency proclaimed on 25 June 1975 by the President of India on the sole advice of Prime Minister Indira Gandhi. During the state of emergency, sweeping powers of arbitrary censorship and unlawful preventive detention were invoked. However, the courts continued to maintain the rights of aggrieved applicants to show that the detention orders were either not in accordance with the law or were *mala fide*. H.M. Seervai described the governmental response:

[32] For a detailed account, see K S Hegde, *Crisis in Indian Judiciary* (1973).
[33] *Kesavananda* v *State of Kerala* AIR 1973 SC 1461. See N A Palkhivala, *Our Constitution Defaced and Defiled* (1974) 147–150.
[34] K S Hegde, op cit (fn 32) 1.
[35] Id, 2–3.

> Consequently, steps were taken to "soften up" the judiciary. Although as far back as 1962, the Law Minister . . . had told Parliament that the Government accepted the principle that a High Court judge should not be transferred without his consent, a list of 56 judges was prepared in 1976 for transfer of judges *without their consent* because their judgments were not to the liking of Government; and to overawe judges who were not on the list there was a calculated leak of the names on the list.[36]

H.M. Seervai pointed out that orders for the transfer of 14 judges without their consent were passed in May 1976. However, in a challenge brought by one of the affected High Court judges, a Full Bench of the Gujarat High Court invalidated the order of transfer. The threatened compulsory transfer of judges was clearly an attempt 'to coerce judges into giving judgments which the government wanted them to give.'[37] A compulsory transfer would result in grave personal, domestic and financial hardship to the judges affected by the orders of transfer.

Another threat directed at the Indian judiciary was more subtle, and had it been carried out, would have been most damaging to judicial independence. Seervai said:

> It was given out that two alternative amendments to the Constitution were under the consideration of Government. The first was to set up a body superior to the Supreme Court. The other was to remove, or greatly curtail, the powers of judicial review of the Supreme Court, and the High Courts.[38]

The defeat of the Indira Gandhi administration at an election called by her is recorded in history, but the episode remains as a constant reminder of the need to maintain vigilance to ensure the protection of judicial independence.

The Malaysian Experience

In 1988, the Malaysian judiciary was subjected to a convulsion which attracted international publicity. The highest judicial officer of the land, Tun Salleh Abas (Lord President of the then Supreme Court of Malaysia) and two senior Supreme Court judges were removed from office. The crisis is well documented.[39] I do not propose to recite all the details of the whole affair except to highlight some main aspects.

Over a period of time, members of the judiciary had rendered a number of judgments which were clearly unpalatable to Dr Mahathir Mohamad, the Prime Minister of Malaysia. Dr Mahathir was extremely critical of these

[36] H M Seervai, *Constitutional Law of India*, (2nd ed, 1979) Vol. III, 1586.
[37] H M Seervai, *The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism* (1978) 123.
[38] Id, 125.
[39] See T S Abas, *The Role of the Independent Judiciary* (1989); T S Abas and K Das, *May Day for Justice* (1989); A Harding, 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 ICLQ 57; R H Hickling, 'The Malaysian Judiciary in Crisis' (1989) *Public Law* 20; F A Trindade, 'The Removal of the Malaysian Judges' (1990) 106 LQR 51; H P Lee, 'A Fragile Bastion Under Siege — The 1988 Convulsion in the Malaysian Judiciary' (1990) 17 MULR 386; Lawyers Committee for Human Rights, *Malaysia: Assault on the Judiciary* (1990).

judgments. One such criticism led to a contempt of court action initiated by the Opposition Leader against Dr Mahathir, an action which was eventually dismissed by the High Court and, on appeal, by the Supreme Court. A more significant factor which provided the political dimension to the crisis was the fact that the political fate of the Prime Minister hinged on the outcome of an appeal in what was known as the 'UMNO 11' case.[40]

UMNO (which stands for 'United Malays National Organisation') is the dominant political party in Malaysia. The President of the UMNO inevitably becomes the Prime Minister of Malaysia. The 1987 general assembly election saw a highly factionalised UMNO. The team headed by Dr Mahathir narrowly defeated the team headed by Tengku Razaleigh Hamzah.[41] Eleven dissatisfied members brought a court action challenging the validity of the election. The High Court judge who heard the case simply held that, given the infringement of the *Societies Act* 1966, UMNO had become an unlawful society but he did not go on to nullify the general assembly election. Tun Salleh decided to empanel all nine Supreme Court judges to hear the appeal. On 23 May 1988, Tun Salleh instructed the Senior Assistant Registrar to fix the case for hearing on 13 June 1988.

On 25 March 1988, Tun Salleh convened a meeting to decide on how to respond to the Prime Minister's continuing attacks on the judiciary. Twenty judges, including the then Chief Justice (Malaya), Tan Sri Abdul Hamid, and Supreme Court Judge, Tan Sri Hashim Yeop, attended the meeting. The meeting decided that a letter should be sent to the Malaysian King.

The letter was used to trigger off a chain of actions which culminated in the removal of Tun Salleh Abas from his position as Lord President. His removal was effected through the tribunal process provided by the Malaysian constitution.

Article 125 of the Malaysian Constitution provided that a Supreme Court judge could be removed if the Prime Minister, or the Lord President after consultation with the Prime Minister, represented to the King that the judge should be removed 'on the ground of misbehaviour or of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office' and a recommendation for removal was made by a tribunal appointed by the King. The choice and composition of the Tribunal and the procedures adopted by it led many to believe that the odds were stacked against Tun Salleh.

The Tribunal was chaired by Tan Sri Abdul Hamid Omar who was then the Chief Justice (Malaya). The other members of the Tribunal were Tan Sri Lee Hun Hoe (Chief Justice (Borneo)), Ranasinghe CJ (Chief Justice of Sri Lanka), Sinnathuray J (a judge of the Singapore High Court), Tan Sri Abdul Aziz (a retired judge of the then Federal Court of Malaya), and Tan Sri Mohd. Zahir (a retired judge of the High Court of Malaya). Except for Ranasinghe CJ, the other members were not of equivalent status to Tun Salleh. The

[40] *Mohamed Noor bin Othman* v *Mohamed Yusof Jaafar* [1988] 2 MLJ 129.

[41] Dr Mahathir Mohamad received 761 votes while his rival, Tengku Razaleigh Hamzah, received 718 votes.

Malaysian Bar Council pointed out that, in appointing the members of the Tribunal, they should as far as possible be more senior in rank than the person facing the proceedings. Indeed, the Council had brought to the notice of the government that there were available at the time two retired Lord Presidents, at least one retired Chief Justice and a number of retired Supreme Court Judges who could have been appointed.[42] In the case of Tan Sri Abdul Hamid Omar, he should have disqualified himself not only from chairing the Tribunal but also from the Tribunal itself. He was regarded as next in line for the Lord President's job and thus stood to gain from Tun Salleh's removal. Moreover, Tan Sri Abdul Hamid Omar had attended the meeting of 25 May 1988, which led to the decision to send the letter to the King.

When every move taken by Tun Salleh to ensure a fair hearing was stymied he turned to the courts of law. Eventually, five Supreme Court judges responded and granted an oral application to restrain the Tribunal from submitting its report, recommendation and advice to the King until further order.[43] These five Supreme Court judges paid a heavy price for their courageous stand. Pursuant to a recommendation by Tan Sri Abdul Hamid Omar to the King, they were all suspended and placed on trial before a second tribunal. The net result was the removal of two senior Supreme Court judges.[44] I do not intend to discuss all the deficiencies in both Tribunal reports. In reference to the First Tribunal report, Geoffrey Robertson, a Queen's Counsel, has aptly described it as one of 'the most despicable documents in modern history'.[45]

In sketching the convulsion which occurred in the Malaysian Judiciary in 1988 my primary aim is to point out that assailing the independence of a once highly-regarded judiciary is never a recognised feature of western or eastern philosophy or culture. The hard reality which is generally unpalatable to authoritarian regimes used to getting their way is that an independent judiciary stands as a bulwark between citizens and their government. How can a vigorously independent judiciary be an impediment to national economic development? On the contrary, such a judiciary bolsters confidence of both domestic and foreign investors that disputes can be adjudicated fairly in an institution with untarnished integrity. The lesson of the Indian and Malaysian experience is that judicial independence is not incompatible with Asian values, but rather, it represents a threat to politicians more concerned with their political survival.

An independent judiciary is a check on the growth of authoritarianism. As the Hon.P.N. Bhagwati lucidly puts it:

> The judiciary is [an] institution on which rests the noble edifice of democracy and the rule of law. It is to the judiciary that is entrusted the task of keeping every organ of the state within the limits of power conferred

[42] 'A Report by the Bar Council on the Report of the Tribunal Established in Respect of Tun Mohamed Salleh Abas'.

[43] The five Supreme Court judges were Tan Sri Wan Suleiman, Datuk George Seah, Tan Sri Azmi Kamaruddin, Tan Sri Eusoffe Abdoolcader, and Tan Sri Wan Hamzah.

[44] Tan Sri Wan Suleiman and Datuk George Seah.

[45] G Robertson, 'Justice Hangs in the Balance', *The Observer*, 28 August 1988, 22.

upon it by the constitution and the laws and thereby making the rule of law meaningful and effective.[46]

Judicial independence is a constitutional value which is vital to all democratic nations. Some Asian leaders treat it as a dispensable luxury. On the contrary, it is fundamental to ensuring that they operate in accordance with the rule of law.

Developments in Australia

The Australian experience is instructive in how the judiciary should jealously guard its powers. It is established doctrine in Australia that federal judicial power cannot be invested in a court that does not satisfy the tenure requirements of Chapter III of the Australian Constitution, and that a non-judicial power cannot be invested in a Chapter III court.[47] Legislation which violates this doctrine will be held to be invalid.

Fundamental to the operation of the separation of judicial power doctrine in Australia is the distinction between a judicial and non-judicial power. The classic definition which is constantly invoked draws on the words of Griffith CJ in *Huddart Parker* v *Moorehead*[48]:

> I am of opinion that the words 'judicial power' as used in s.71 of the Constitution mean the power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[49]

It has been rightly pointed out that the doctrine expounded in the *Boilermaker's* case[50] can lead to 'excessive subtlety and technicality' in the operation of the Constitution.[51] The Australian High Court has sought to ameliorate the situation by recognising certain 'exceptions' to the rule.[52]

[46] P N Bhagwati, 'Pressures on and Obstacles to an Independent Judiciary', *The Centre for the Independence of Judges and Lawyers (CILJ) Bulletin* (No. 23).

[47] L Zines, *The High Court and the Constitution* (4th ed, 1997), 154–202.

[48] (1909) 8 CLR 330.

[49] Id, 357.

[50] *R* v *Kirby; Ex p. Boilermakers' Society of Australia* (1956) 94 CLR 254, affirmed in *Attorney-General for Australia* v *R.* [1957] AC 288.

[51] *R* v *Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 90; per Barwick CJ who said:

> The principal conclusion of the *Boilermakers'* case was unnecessary, in my opinion, for the effective working of the Australian Constitution or for the maintenance of the separation of the judicial power of the Australian Constitution or for the protection of the independence of courts exercising that power. The decision leads to excessive subtlety and technicality in the operation of the Constitution without, in my opinion, any compensating benefit. But none the less and notwithstanding the unprofitable inconveniences it entails it may be proper that it should continue to be followed. On the other hand, it may be thought so unsuited to the working of the Constitution in the circumstances of the nation that there should now be a departure from some or all of its conclusions.

[52] *Harris* v *Caladine* (1991) 172 CLR 84; *Hilton* v *Wells* (1985) 157 CLR 57.

However, there are strong warnings given by the Court against any attempts to usurp the judicial power.

The Australian High Court in a case called *Polyukhovich* v *Commonwealth*[53] showed an unease with retrospective criminal laws. There is no express constitutional provision prohibiting Parliament from enacting such laws. Three of the High Court judges,[54] whilst upholding the right of Parliament to enact retrospective laws, indicated that a Bill of Attainder would be invalid as it would amount to a usurpation of the judicial power. More interestingly, two of the High Court judges[55] were even prepared to go further and invalidate any retrospective criminal law, whilst another judge would invalidate offensively retrospective laws.[56]

In 1995, the Australian High Court in *Brandy v Human Rights and Equal Opportunity*[57] created an impediment which discourages legislative attempts to permit more and more matters to be adjudicated in forums which lack the security of tenure of federal judges. A complaint alleging breaches of certain provisions of the *Racial Discrimination Act* 1975 (Cth) resulted in a determination by the Human Rights and Equal Opportunity Commission. The Act provided for registration of a determination of the Commission and its enforcement as if it were an order of the Federal Court. This, according to the High Court of Australia, constituted an exercise of judicial power by the Commission. In 1996, the Court further held the *persona designata* doctrine could not validate the conferral of a non-judicial function in a federal judge if that was incompatible with the performance of the judge's duties as a member of the Federal Court. In such a case, the consent of the judge to the vesting of the non-judicial function would be irrelevant.[58]

The Australian experience underlines the determination of the High Court to guard very strictly the federal judicial power. The High Court was able to infer a strict separation of judicial powers doctrine from the manner in which the Commonwealth Constitution has vested the different legislative, executive and judicial powers in the different arms of government. According to the Court, even if there had been no Montesquieu, the structuring of these different organs of government and their powers into different chapters of the Constitution gives rise to this inevitable inference.[59]

Unfortunately, the position in the Australian states is less satisfactory. It has been openly acknowledged by the High Court and State Supreme Courts that the separation of powers doctrine is not guaranteed by the State

[53] (1991) 172 CLR 501.
[54] Mason CJ, Dawson and McHugh JJ.
[55] Deane and Gaudron JJ.
[56] Toohey J.
[57] (1995) 183 CLR 245.
[58] See *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220, *Grollo* v *Palmer* (1995) 184 CLR 348, 364–365.
[59] *R* v *Kirby; Ex p. Boilermakers' Society of Australia* (1956) 94 CLR 254; [1957] AC 288 (PC). See generally: G Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 ALJ 177; G Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in G Lindell (ed.), *Future Directions in Australian Constitutional Law* (1994), 185–208.

Constitutions.[60] In consequence, a State government can, without constitutional impediments, erode the jurisdiction of the Supreme Courts of the States. Such a tendency led the Supreme Court of Victoria to voice its concern in its 1988 *Annual Report*.[61]

> The existence and nature of the body politic of the State depend upon the capacity of the Supreme Court to exercise its function as the State's court of general jurisdiction. It must follow that any whittling down of the Court's jurisdiction tends to impair that capacity.
>
> To deprive the courts of jurisdiction in favour of others who do not have the independence of the judiciary must weaken the rule of law.[62]

The Annual Report added:

> Since 1975 many Acts have conferred jurisdiction on tribunals whose members do not have the permanency of appointment of judges but rely on the Executive for reappointment at the end of a period. Some of these members are liable to summary dismissal by the Executive. We draw attention to the fact that jurisdiction which previously belonged to the Court has been conferred upon other bodies and individuals who, however distinguished, are not obviously independent of the Executive.[63]

The High Court of Australia has in the recent case of *Kable* v *Director of Public Prosecutions (NSW)*[64] given some degree of protection to the court systems of the States.[64a]

IN SEARCH OF ASIAN CONTRIBUTIONS

Justice is sought by every human being, regardless of whether he or she belongs to a western or an eastern society. Central to the attainment of justice is an independent judiciary. Judicial independence is not simply a western concept. In a keynote address to the 10th LAWASIA Conference, Tun Salleh Abas, who ironically was subsequently removed from office by the Mahathir administration, said:

> In Islamic law, this concept of judicial independence was considered as a vital necessity. About 1400 years ago, it was Omar the second Khalif who

[60] *Clyne* v *East* (1967) 68 SR (NSW) 385; *Building Construction Employees and Builders' Labourers' Federation of NSW* v *Minister for Industrial Relations* (1986) 7 NSWLR 372; *City of Collingwood* v *Victoria [No. 2]* [1994]1 VR 652.

[61] Supreme Court of Victoria, *Annual Report* (1988).

[62] Id, 19.

[63] Id, 22. A controversial episode was the abrupt termination of the appointment of the judges of the Victorian Accident Compensation Tribunal in 1993. See 'Judicial independence' (1993) 67 ALJ 243.

[64] (1996) 70 ALJR 814.

[64a] '[T]he decision in *Kable v Director of Public Prosecutions (NSW)* extends the doctrine of incompatibility to State courts so that State parliaments, although they remain entitled to usurp the functions of those courts, cannot assign to those courts any powers whose exercise is incompatible with the judicial power of the Commonwealth vested in those courts by Commonwealth Legislation.'; E Handsley, 'Do Hard Laws Make Bad Cases? The High Court's Decision in *Kable* v *Director of Public Prosecutions (NSW)*' (1997) 25 FLR 171. Elizabeth Handsley regards the High Court's decision as a 'bad' decision.

> introduced this concept by separating the judiciary from the general administration. His insistence upon judges to act correctly is legendary. Once he had a law suit against a Jew and both of them went before a *Qadzi*, i.e. a judge. When the *Qadzi* saw the Khalif, as a mark of respect, the *Qadzi* stood up. This behaviour was considered by Omar to be an aberration of judicial duties because it displayed that he was a superior party to his opponent, the Jew. Omar therefore had the *Qadzi* dismissed at once.[65]

In his doctoral thesis, Professor Samuel Murumba points out:

> The concept of government for and in the interests of the people, a basic contemporary human rights principle, has been an important one in Chinese history. The great Confucian political scholar Mencius (c.372–c.289 BC) put it this way: 'People are of primary importance. The State is of less importance. The Sovereign is of least importance.[66]

Professor Murumba proceeds to highlight a vital difference between western and eastern values:

> But while both Western and Chinese traditions may recognise and cherish the principle of government in the *interest* of the governed, their concepts of *interest* are by no means identical. In the West the concepts of *interest* and *rights* are cast in an individualistic, often hedonistic and materialistic mould. By contrast the Chinese concept of interest takes an organic view of society as its point of departure. In China, neo-Confucian writers would regard the satisfaction or pursuit of *individual* wishes, intentions and goals as self-centred consciousness or selfishness. Their metaphysical premise for this view was that the greatest good of the organic whole should never be subordinated to that of some lesser unit of it. The greatest impact of the whole community should never be subordinated to that of some member or members of that community.[67]

This distinction is not, in my view, a justification for jettisoning core values of a constitutional system: justice in the treatment of individuals and respect for human dignity. Such a view appears to suggest that it is an either/or situation and that there cannot be a reconciliation between individual and community interests. Even in the western democracies, derogations from the fundamental rights of the individual are permitted if they are demonstrably justifiable in the context of a democratic society. Legislatures have been permitted by courts to enact laws which may impair certain fundamental freedoms provided these laws can be established to the satisfaction of the courts as having struck an appropriate balance between the public interest

[65] T S Abas, 'Law and Its Perspective in the Third World'; reproduced in [1987] MLJ l xxxvii. This account of Omar and the *Qadzi* may be used by the critics of the core constitutional value of judicial independence as evidence of a ruler's power to dismiss judges at will. Such an approach will be misleading. The episode occurred over 1400 years ago. The basic value of judicial independence in the United Kingdom was non-existent until the *Act of Settlement*. The framers of the constitutions of the emergent nations embraced this value readily as an important constitutional feature.

[66] S K Murumba, 'The Cultural and Conceptual Basis of Human Rights Norms in International Law' (Unpublished thesis for the degree of Doctor of Philosophy of Monash University, Melbourne, 1986) 99.

[67] Id, 99–100.

and the individual's fundamental liberties, and that the legislative measures constitute the least intrusive means.[68]

Another core constitutional value is that there should be accountability of those who govern to the governed. Asian learning can provide the underpinning of such a value. The ancient sage, Confucius, was engaged in the following discourse:

> "A state needs three things: sufficient food, sufficient military equipment, and the confidence of the people in their government."
> "If you had to eliminate one, which would you give up first?"
> "Military equipment."
> "And next?"
> "Food. Because everyone must die, and life is not worth much unless people have confidence in their government."[69]

Confidence of the people is an earned commodity. People will respect government if there are in place accountability mechanisms. Many developing nations have gone down the slippery slope to ruination mainly because the governmental authorities, unimpeded by the need to account to the people, have been totally sapped by rampant corruption. The need to be accountable to the people cannot be decried as a western value. Common sense will dictate that a government which is only accountable to itself will never retain the confidence of the people. It is a recipe for national disaster. The expression 'Who guards the guards?' is a universal expression.

When Asian leaders resent international concern over their disregard for human rights, they ignore the fact that human right values are accorded recognition in eastern philosophy. Professor Murumba explains in relation to one major philosophy, Hinduism:

> It is the basic idea of 'humanity as part of the absolute, of man as an immortal spirit as part of the cosmos' which in Hinduism becomes the source of human dignity: the dignity in all men and women which is also tied up with the larger concept of rightness (*dharma*). Hinduism speaks not of *rights as such*, but of *freedoms* and *virtues* some of which it shares with Buddhism. In *substance*, however, many of these freedoms and virtues are not very different from some of the modern human rights formulations. The freedoms are: (1) freedom from violence (*Ahimsa*), (2) freedom from

[68] See generally, H P Lee, 'Proportionality in Constitutional Adjudication' in G Lindell (ed.), *Future Directions in Australian Constitutional Law* (1994) 126–149.

[69] B Kelen, *Confucius* (1971), at p 103. See D Gangjian and S Gang, 'Relating Human Rights to Chinese Culture: The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence' in M C Davies (ed.), op cit (fn 2) 35–56. The main thrust of the view expounded by Gangjian and Gang was summarised by Davies as follows:

> 'They argue that classical Confucianism ... contained elements that encouraged actions of citizenship, criticism of government, freedom of speech, resistance to authority, and individualism, to name a few examples. At the same time they acknowledge that Confucianism was elitist and undemocratic. In this sense they accept the view that democracy is alien to Chinese soil, while advocating that when it is practised consistently with traditional values it must embody genuine choice and open elections. The authors urge that because of these value systems, human rights can be established ahead of democracy.'
>
> — M C Davies (ed), op cit (fn 2) 13.

want (*Asteya*), (3) freedom from exploitation (*Aparigraha*), (4) freedom from violation or dishonour (*Avyabhichara*) and (5) freedom from early death and disease (*Armitetra* and *Aregya*). The virtues are: (1) absence of intolerance (*Akrodha*), (2) compassion or fellow feeling (*Bhutadaya, Adreba*), (3) knowledge (*Jnana, Vidya*), (4) freedom of thought and conscience (*Satya, Sumta*) and (5) freedom from fear and frustration or despair (*Pravrtti, Abhaya, Dhrti*).[70]

The notion of the equality of all human beings was superimposed upon all eastern thought by Buddhist thinking. Indeed, Emeritus Professor C.G. Weeramantry (currently Vice-President of the International Court of Justice) points out that Buddhist thinking likewise furnishes some of the earliest recorded thought concerning the conduct of democratic self governing institutions. He invokes the following account by the Marquis of Zetland, a former Viceroy of India:

> It is, indeed, to the Buddhist books that we have to turn for an account of the manner in which the affairs of these early examples of representative self-governing institutions were conducted. And it may come as a surprise to many to learn that in the Assemblies of the Buddhists in India two thousand years and more ago are to be found the rudiments of our own Parliament practice of the present day. The dignity of the Assembly was preserved by the appointment of a special officer — in the embryo of Mr Speaker, in the House of Commons. A second officer was appointed whose duty it was to see that when necessary a quorum was secured — the prototype of the Parliamentary Chief Whip in our system. A member initiating business did so in the form of a motion which was then open to discussion. In some cases this was done only once, in others three times, thus anticipating the practice of Parliament in requiring that a Bill be read a third time before it became Law. If the discussion disclosed a difference of opinion, the matter was decided by the vote of the majority, the voting being by ballot.[71]

The smorgasbord of eastern contributions to the notions of democracy and freedom which I have mentioned amply refute the assumption of Mr Lee Kuan Yew and Dr Mahathir Mohamad that notions of democracy and fundamental guarantees are notions embodying only western values. Such an assumption diminishes the contributions of Asian societies to the underpinning of these notions.

THE RULE OF LAW

In this article, a number of constitutional values have been highlighted by reference to specific contexts, such as the invocation of emergency powers, preventive detention laws, and judicial independence. All these values when considered on a broader plane can be subsumed under one main constitutional value, namely, the rule of law. The Universal Declaration of Human

[70] S K Murumba, op cit (fn 66) 91–92.
[71] C G Weeramantry, *Equality and Freedom: Some Third World Perspectives* (1976) 18, quoting from the Introduction to G T Garratt, *The Legacy of India* (1937).

Rights has itself made it clear that without the rule of law people would be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression. The rule of law, as a core constitutional value should be upheld by every country. Its universality is implicitly acknowledged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region.[72] The east-west dichotomy is simply irrelevant. When Asian governments subscribe to the rule of law, it does not mean that they must transform themselves into clones of western democracies. What it means is that there must be fidelity to the protection of freedom, justice and human dignity.

Fortunately, more thoughtful views are being expressed by other Asian leaders. Mr Anwar Ibrahim, the Deputy Prime Minister of Malaysia, appears to contradict Dr Mahathir Mohamad when he said:

> If we in Asia want to speak credibly of Asian values, we too must be prepared to champion those ideals which are universal and which belong to humanity as a whole. It is altogether shameful, if ingenious, to cite Asian values as an excuse for autocratic practices and denial of basic rights and civil liberties. To say that freedom is western or unAsian is to offend our own traditions as well as our forefathers who gave their lives in the struggle against tyranny and injustices. It is true that Asians lay great emphasis on order and societal stability. But it is certainly wrong to regard society as a kind of false god upon whose altar the individual must constantly be sacrificed. No Asian tradition can be cited to support the proposition that in Asia the individual must melt into the faceless community.[73]

Five days later, speaking at a human rights conference, Mr Anwar Ibrahim proceeded to reiterate his views. He asserted that development could not be used as an apology for authoritarianism. He referred to the standard argument that civil and political liberties are incompatible with the pressing needs of backward or emerging economies, and the claim that democracy follows economic advancement and not vice-versa. Mr Anwar said:

> The fact of the matter is that more nations have been impoverished by authoritarianism than enriched by it. Authoritarian rule more often than not has been used as a masquerade for keptocracies, bureaucratic incompetence, and worst of all, for unbridled nepotism and corruption. By not giving vent to the voices of dissent, wrongs cannot be made right and remedies for failures cannot be made available. Thus the notion that freedom must be sacrificed on the altar of development must be rejected. Indeed, it is our conviction that only through the ability of every individual, however weak or disadvantaged, to freely articulate his fears and grievances can we hope to bring about a just and caring society. Only by guaranteeing the individual's right to participate fully in the society's decision-making processes can we confer legitimacy to political leadership and governance, for governments derive their just power from the consent of the government.[74]

[72] See Art 10(a) which requires the Judiciary 'to ensure that all persons are able to live securely under the Rule of Law.'

[73] A Ibrahim, 'Media and Society in Asia', keynote speech at the Asian Press Forum, Hong Kong, 2 December 1994, 3–4.

[74] A Ibrahim, Luncheon Address at the International Conference on Rethinking Human Rights, The Legend Hotel, Kuala Lumpur, 7 December 1994, 4–5.

The President of the Philippines, Mr Fidel Ramos, has openly rejected the stand of Asian leaders who are critical of the notions of democracy in relation to the economic development of developing countries. Mr Ramos was reported to have said:

> Experience has taught us we cannot safely dismantle our constitutional institutions and guarantees — even for the briefest period — because suspending these mechanisms makes public administration no more efficient but only more arbitrary.[75]

CONCLUSION

As the modernisation of Asian countries gathers pace, the hardened attitudes of entrenched authoritarian regimes will come into conflict with the aspirations of a new generation of Asian people who are better educated and more articulate. Notions of freedom and justice will be viewed as the birth-rights of the citizens, not privileges to be dispensed at the pleasure of those who control the levers of government. The choice will be pivotal for the continued success of national development. Authoritarian regimes can chant the familiar refrains of western/eastern values to keep at bay the overarching core value of the rule of law, or they can earn the respect of their people by setting the foundations, both institutional and non-institutional, for this core value to flourish. Characterisation of notions of democracy and freedom as western values is a meaningless exercise.

[75] 'Ramos rejects criticism of democracy', *The Age*, 15 October 1994, 14.