

1 LAW, ILLIBERALISM AND THE SINGAPORE CASE

IN OCTOBER 2007, FOUR THOUSAND LAWYERS from more than 120 countries converged upon Singapore for the International Bar Association’s (IBA)¹ annual conference.² The selection of Singapore as a venue had been controversial, with some members³ and Singapore dissidents⁴ protesting that the IBA was lending legitimacy to a regime that had systematically violated the rule of law. The conference aired these and other issues from the air-conditioned comfort of Singapore’s technologically superior conference facilities.⁵

¹ The IBA describes itself as the world’s leading organisation of international legal practitioners, bar associations and law societies with a membership of thirty thousand individual lawyers worldwide; online: “About the IBA”; <http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx>.

² “4,000 Delegates from 120 Countries”, *Straits Times* (16 October 2007).

³ K. C. Vijayan, “Global Law Meeting Will Tackle Heavy Issues”, *Straits Times* (12 October 2007), notes that “some European-based legislators ... initially objected to the choice of Singapore as conference host on rule-of-law grounds.”

⁴ Chee Soon Juan, an opposition politician who is Secretary-General of the Singapore Democratic Party, wrote to the President of the IBA in February 2007 asking him to reconsider Singapore as the venue because of Singapore’s repressive practices towards political opponents; online: “SDP Writes to International Bar Association About Its Conference in Singapore”; <<http://www.singaporedemocrat.org/articleiba.html>>.

⁵ Hailin Qu, Lan Li & Gilder Kei Tat Chu, “The Comparative Analysis of Hong Kong as an International Conference Destination in Southeast Asia” (2000) 21 *Tourism Management* 643.

Singapore's elder statesman, Lee Kuan Yew,⁶ delivered the keynote address at the opening session of the conference.⁷ Lee's address was followed by a question-and-answer session at which Lee was asked to account for Singapore's problematic standing with regard to the rule of law.⁸ Lee's response to this challenge was to pull out a series of tables⁹ citing Singapore's high rankings in rule of law and governance indicators as proof of the existence of the rule of law in Singapore.¹⁰ According to press reports, the listening IBA members responded by bursting into laughter.¹¹

⁶ Lee Kuan Yew was Prime Minister of Singapore from 1959 to 1990. His successor, Goh Chok Tong, was selected by Lee to head a cabinet from 1990 to 2004, in which Lee held the newly created cabinet position of Senior Minister. When Goh was succeeded as Prime Minister by Lee's son, Lee Hsien Loong, in 2004, Goh became Senior Minister. Lee Kuan Yew continued to be a member of cabinet, holding another newly created position, that of Minister Mentor, until May 2011 when both Lee and Goh retired from government following a general election in which the highest number (to date) of opposition members (6 in an 87 seat Parliament) were voted in.

⁷ Vijayan, *supra* note 3; Lee Kuan Yew, "Why Singapore Is What It Is," *Straits Times* (15 October 2007) [*Why Singapore Is What It Is*].

⁸ Rachel Evans, "Singapore Leader Rejects Amnesty," *International Financial Law Review* (18 October 2007), online: <<http://www.iflr.com/Article/1983342/Singapore-leader-rejects-Amnesty.html>>.

⁹ Evans (*ibid.*) mentions that the sources Lee cited included World Bank and Transparency International. Loh Chee Kong, "What Price, This Success? MM Asked Whether Singapore Sacrificed Democracy," *Today* (15 October 2007), describes Lee as "rattling off the favourable rankings of Singapore's legal framework by International Institute for Management Development, Political and Economic Risk Consultancy and the Economist Intelligence Unit." In addition to these, the state typically refers to the rankings produced by the World Competitiveness Yearbook, the World Economic Forum Global Competitiveness Report, the World Bank Report on Governance, the Transparency International Corruption Perception Index, and the Business Environment Risk Intelligence (BERI) reports. These were some of the reports Lee referred to in order to support his claim of the quality of Singapore's 'rule of law' in a 2000 lecture, "For Third World Leaders: Hope or Despair?" (delivered at JFK School of Government, Harvard University, 17 October 2000), online: <<http://www.gov.sg/sprinter/search.htm>>. Chapter 8 discusses the state's use of statistics in its construction of legitimacy.

¹⁰ Evans, *supra* note 8.

¹¹ *Ibid.* Lawyers Rights Watch Canada released a very prompt repudiation of Lee's claim that Singapore observed the 'rule of law': Kelley Bryan, "Rule of Law in

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That laughter could mean many things, of course – from admiration for the preparedness of a man who was Prime Minister for thirty-one years, to incredulity at the discursive minimisation of the ‘rule of law’ from a qualitative ideal to schemas that rank and quantify. This laughter, and the range of meanings held within it, point to a Singapore paradox: A regime that has systematically undercut ‘rule of law’ freedoms has managed to be acclaimed as a ‘rule of law’ state.

The Singapore state’s strategic management of ‘law’ forms the primary focus of this study. In particular, I examine the ways in which legislative text and public discourse have been used to reconstitute the meanings of ‘law’. My concern is to excavate the often-submerged policing and politics of ‘law’ in Singapore. This excavation leads to an exploration of a broader question: How has the Singapore state constructed legitimacy for itself despite methodically eroding rights through legislation even as it claims to be a Westminster-model democracy?¹²

This book builds on that strand of socio-legal studies that “examines law as a discourse that shapes consciousness by creating the categories through which the social world is made meaningful.... [L]aw is part of social life, not an entity that stands above, beyond, or outside of it.”¹³ My methodological approach is detailed in Chapter 2. Briefly, I examine legislative and state discourse through the lens of language as social practice, uncovering how notions of the ‘rule of law’ and state legitimacy have been constructed in Singapore, arguing that though the state claims the

Singapore: Independence of the Judiciary and the Legal Profession in Singapore” (22 October 2007), online: Lawyers’ Rights Watch Canada <<http://www.lrwc.org/pub1.php>>.

¹² The state’s description of itself as Westminster is, as Rodan has noted, insistent: Garry Rodan, “Westminster in Singapore: Now You See It, Now You Don’t”, in Haig Patapan, John Wanna & Patrick Weller, eds., *Westminster Legacies: Democracy and Responsible Government in Asia and the Pacific* (Sydney: UNSW Press, 2005) 109 at 110 [*Westminster in Singapore*].

¹³ Mark Kessler, “Lawyers and Social Change in the Postmodern World” (1995) 29:4 *Law & Soc’y Rev.* 769 at 772. Kessler’s article presents discursive studies of ‘law’ as an alternative to traditional law and society studies requiring “scientific, empirical research” (at 771).

liberalism of the ‘rule of law’, its instrumentalist legalism is more properly labelled ‘rule by law’.¹⁴

I use the binaries ‘rule of law’ / ‘rule by law’ as shorthands for these two modes of ‘law’. Briefly, ‘rule of law’ signifies ‘law’ which, in content¹⁵ and in institutional arrangements,¹⁶ prevents “arbitrary power and excludes wide discretionary authority”.¹⁷ In contrast, ‘rule by law’ signifies ‘law’ which, in content and institutional execution, is susceptible to power such that the rights content of ‘law’, and restraints on and scrutiny of state power, are undermined. I expand upon my use of these terms and address some of the contestations around ‘rule of law’ later in this chapter. I should also explain that, in keeping with sociological conventions, I mark with single quotation marks the terms I problematise as social constructs¹⁸ – terms such as ‘law’, ‘nation’ and ‘race’, along with other, related concepts.

WHY SINGAPORE MATTERS

Singapore’s troubling success lies in the way markets, ‘politics’ and ‘law’ have been managed such that the state is pervasive, constitutional processes have been substantively erased,¹⁹ yet national and international

¹⁴ Li-ann Thio, “Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore” (2002) 20 *UCLA Pac. Basin L.J.* 1 at 75 [*Lex Rex or Rex Lex?*]; Kanishka Jayasuriya, “The Exception Becomes the Norm: Law and Regimes of Exception in East Asia” (2001) 2:1 *Asian Pac. L. & Pol’y J.* 108 at 118 [*The Exception Becomes the Norm*].

¹⁵ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) 114.

¹⁶ David Clark, “The Many Meanings of the Rule of Law”, in Kanishka Jayasuriya, ed., *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (London: Routledge, 1999) 28 at 30.

¹⁷ Ibid.

¹⁸ Social categories and constructs are some of the “deeper classification schemes that organise experience, perception and interpretation, structure communication and are reflected upon, articulated, brought to awareness and made into objects of conflict by discourse”: Piet Strydom, *Discourse and Knowledge: The Making of Enlightenment Sociology* (Liverpool: Liverpool University Press, 2000) at 10.

¹⁹ Rodan, *Westminster in Singapore*, *supra* note 12 at 110.

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legitimacy²⁰ for the state has been sustained. In 2007, when the Australian National University conferred an honorary doctorate on Lee Kuan Yew, one protestor's placard read, "What next? Masters for Mugabe?"²¹ This provocation prompts difficult questions: Does it matter if a regime that secures and sustains general prosperity has also decimated political opponents and prevented institutional autonomy in the media, the courts and civil society? Does the delivery of employment, infrastructure and social order make for some sort of realpolitik balance sheet in which the political violence visited upon a few is set off against general contentment? To even begin to address this conundrum – a normative quagmire – requires a nuanced appreciation of a legal system poised to become a model for other jurisdictions, including, most notably, China.²² In addition to states²³

²⁰ I use the term 'legitimacy' in a broad sense to connote the kind of embedded, everyday acceptability – national and international – that Singapore enjoys, such that events like the IBA are well attended and well organised, subordinating the critique of Singapore's 'rule by law'.

²¹ Emma Macdonald, "ANU Protesters to Corner Lee," *Canberra Times* (28 March 2007).

²² Gordon Silverstein, "Singapore: The Exception That Proves Rules Matter," in Tom Ginsburg & Tamir Moustafa, eds., *Rule by Law* (Cambridge: Cambridge University Press, 2008) 73 at 98 [*The Exception That Proves Rules Matter*]; Lee Kuan Yew, *From Third World to First: The Singapore Story, 1965–2000* (Singapore: Times Editions, 2000), 718 [*From Third World to First*]. Hilton L. Root & Karen May, "Judicial Systems and Economic Development," in Tom Ginsburg & Tamir Moustafa, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (New York: Cambridge University Press, 2008) 304. Rodan notes how Vietnam and China have set out to emulate Singapore's regulatory model for Internet control: Garry Rodan, "The Internet and Political Control in Singapore" (1998) 113:1 *Political Science Quarterly* 63 at 87–88. The contemporary scholarship on the 'rule of law' is increasingly alert to the exportability of 'rule by law' and the manner in which 'Western' formulations of 'rule of law' attributes contribute to this emerging trend: Gordon Silverstein, "Globalisation and the Rule of Law: A Machine That Runs of Itself?" (2003) 1:3 *International Journal of Constitutional Law* 427. See also the Ministry of Law's website: "Visit by Delegation from China's State Intellectual Property Office" (26 November 2008) and "Visit by Deputy Commissioner of the State Intellectual Property Office, People's Republic of China" (24 November 2010), <http://app2.mlaw.gov.sg/News/tabid/204/ctgy/Visit/currentpage/2/Default.aspx#mlato>.

²³ Some other states that appear to be studying Singapore's management of 'law' are Qatar, United Arab Emirates, and Cambodia; <http://app2.mlaw.gov.sg/News/tabid/204/ctgy/Visit/currentpage/2/Default.aspx#mlatop>.

such as China²⁴ and Vietnam,²⁵ institutions such as the World Bank have been lauding Singapore's legal system.²⁶ In short, despite being a tiny island of just 720 square kilometres²⁷ with a population of about 5.08 million,²⁸ Singapore matters because it has powerful admirers who are seeking to adopt and replicate the Singapore model of 'law'.

The appeal of Singapore's legal system to China and Vietnam is particularly significant given that Singapore has a certain fluency in the 'rule of law' derived from having been a British colony. As a former British colony, Singapore stepped into independence equipped with institutions and structures for the 'common law' and Westminster government.²⁹ Singapore is thus positioned to instruct states without the same legal history, or the same sophistication in media management,³⁰ on how to structure a version of the 'rule of law' that negotiates international acceptability alongside high levels of state control of social actors with

²⁴ See references at *supra* note 22.

²⁵ "Vietnam to Bolster Singapore Ties, Particularly on Law," *Thai News Service* (21 August 2007); Ministry of Law press releases archived online: Ministry of Law <<http://app2.mlaw.gov.sg>>: "Singapore and Vietnam Sign Agreement on Legal and Judicial Cooperation" (12 March 2008); "Vietnam Ministry of Justice Delegation Visits MinLaw" (30 June 2008); "Vietnam Ministry of Justice Delegation Visits MinLaw (16 June 2009); "Visit by Dr. Dinh Trung Tung, Vice Minister from the Ministry of Justice, Vietnam (8 July 2009); "Visit by the Vietnam Lawyers' Association" (23 September 2009).

²⁶ Waleed Haider Malik, *Judiciary-Led Reforms in Singapore: Frameworks, Strategies, and Lessons* (Washington, DC: World Bank, 2007).

²⁷ Rodolphe De Koninck, Julie Drolet & Marc Girard, *Singapore: An Atlas of Perpetual Territorial Transformation* (Singapore: NUS Press, 2008) 86. Singapore has added about 140 square kilometres to its territory through land reclamation.

²⁸ This figure is for 2010. Singapore Department of Statistics Press Release: <http://www.singstat.gov.sg/news/press31082010pdf>.

²⁹ Rodan, *Westminster in Singapore*, *supra* note 12.

³⁰ Jonathan Woodier argues that the Singapore state offers a model for authoritarian regimes on how to skilfully manage a media image that projects the state as more liberal than it is and sustains regime longevity: Jonathan Woodier, "Securing Singapore/Managing Perceptions: From Shooting the Messenger to Dodging the Question" (2006) 23 *Copenhagen Journal of Asian Studies* 57. The ironic and rather damning facets of this argument appear to have been misunderstood in at least one mainstream media representation of it: Jeremy Au Yong, "Singapore Govt Wins Kudos for Smart PR," *Straits Times* (24 July 2008).

(actual or potential) political presence. In other words, Singapore is poised to export a version of ‘rule by law’ that serves state power while managing perceptions of legitimacy. In unpacking legislation and public discourse in Singapore, this study presents an argument that is about both why and how. Why is ‘law’ so central to Singapore’s presentation of itself and how has it managed to construct what may seem an oxymoron: authoritarian legitimacy?

AUTHORITARIAN LEGITIMACY

It is important to note that if today’s Singapore is regarded by some as authoritarian,³¹ authoritarianism was not how the Singapore story began. The monopoly of politics,³² the institutionalisation of the ruling party³³ – these are outcomes of the past fifty years of government by one party, the People’s Action Party. And the nature of authoritarianism in Singapore is not straightforward either. While the state describes itself as a Westminster-model democracy,³⁴ scholars have assessed Singapore differently. The range of descriptions applied include authoritarian,³⁵ semi-authoritarian,³⁶ soft authoritarian,³⁷ Asian democracy,³⁸

³¹ Garry Rodan, *Transparency and Authoritarian Rule in Southeast Asia: Singapore and Malaysia* (London: Routledge Curzon, 2004) [*Authoritarian Rule*]; Daniel A. Bell, “A Communitarian Critique of Authoritarianism: The Case of Singapore” (1997) 25:1 *Political Theory* 6.

³² Rodan, *Authoritarian Rule*, *supra* note 31 at 1.

³³ Rodan, *Westminster in Singapore*, *supra* note 12.

³⁴ See, for example, Chief Justice Chan Sek Keong, Keynote Address to New York State Bar Association Seasonal Meeting (27 October 2009), online: Supreme Court of Singapore <www.supcourt.gov.sg> at paragraphs 17 and 18. See also Rodan, *Westminster in Singapore*, *supra* note 12. Rodan notes the state’s “insistence” that it is Westminster-style government at 110.

³⁵ Rodan, *Authoritarian Rule*, *supra* note 31; Bell, *supra* note 31.

³⁶ Shanthi Kalathil & Taylor C. Boas, *Open Networks; Closed Regimes: The Impact of the Internet on Authoritarian Rule* (Washington, DC: Carnegie Endowment for International Peace, 2003).

³⁷ Cherian George, *Contentious Journalism and the Internet: Towards Democratic Discourse in Malaysia and Singapore* (Singapore: Singapore University Press, 2006) at 27.

³⁸ *Ibid.*

semi-democracy,³⁹ illiberal democracy,⁴⁰ communitarian democracy,⁴¹ dictatorship,⁴² pseudo-democracy,⁴³ limited democracy,⁴⁴ mandatory democracy,⁴⁵ despotic state,⁴⁶ “decent, non-democratic state,”⁴⁷ and hegemonic electoral authoritarian.⁴⁸ This plethora of descriptors embracing the poles of despotism and democracy, alongside multiple qualifiers, signals the complexity of Singapore as a regime type. For purposes of this study, I treat Singapore as authoritarian because it is “characterised by a concentration of power and the obstruction of serious political competition with, or scrutiny of, that power.”⁴⁹ The case studies of this project illustrate the ways in which Singapore authoritarianism expresses itself through ‘law’, with legislation removing constraints upon state power and reinforcing the hegemony of the “virtual one-party state.”⁵⁰

Given that Singapore is an authoritarian polity, it becomes important to highlight that authoritarianism and the ‘rule of law’ are not mutually incompatible. Indeed, “the rule of law ideal initially developed in non-liberal societies.”⁵¹ In these non-liberal polities, rights and liberties existed,

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Beng-Huat Chua, *Communitarian Ideology and Democracy in Singapore* (London: Routledge, 1995); Li-ann Thio, “Rule of Law Within a Non-Liberal ‘Communitarian’ Democracy: The Singapore Experience”, in Randall Peerenboom, ed., *Asian Discourses of Rule of Law* (London: Routledge, 2004) 183 [*Rule of Law*].

⁴² George, *supra* note 38.

⁴³ Eugene K. B. Tan, “‘WE’ v. ‘I’: Communitarian Legalism in Singapore” (2002) 4 *Australian Journal of Asian Law* 1.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Larry Diamond, “Thinking About Hybrid Regimes” (2002) 13:2 *Journal of Democracy* 21.

⁴⁹ Rodan, *Authoritarian Rule*, *supra* note 31 at 1.

⁵⁰ Rodan, *Westminster in Singapore*, *supra* note 12.

⁵¹ Tamanaha, *supra* note 15 at 5.

but as grants that “depended on the consent of sovereign power.”⁵² In the non-liberal societies which gave birth to the ‘rule of law’, if rights were somehow contingent, restraints on state power were not.⁵³ Even in the authoritarianism of the pre-liberal state, the ‘rule of law’ was understood as government limited by law.⁵⁴ After the American and French revolutions, the place of rights in ‘law’ shifted so that

rights are recognized as existing prior to the power of the sovereign ... lead[ing] to the establishment of a new form of political rule, one which contains at its core the necessity of maintaining and protecting the “natural rights” of individuals.⁵⁵

If individual rights are at the heart of liberal conceptions of the ‘rule of law’,⁵⁶ this exaltation of individual freedoms builds upon the pre-liberal “widespread and unquestioned belief in the rule of law, in the inviolability of certain fundamental legal restraints on government ... attitudes *about* law provide the limits.”⁵⁷ The data scrutinised by this study – legislation and state discourse on ‘law’ – capture the essence of an authoritarian state’s attitudes about ‘law’ and show that the Singapore state neither adheres to the pre-liberal constraints on government, nor regards individual rights as inviolable. Just as the state has appropriated and emasculated Westminster institutions and ideologies as “an adjunct to, rather than as a constraint against” state authoritarianism,⁵⁸ this study demonstrates the manner in which Singapore has selectively performed emasculated facets of the ‘rule of law’, facets which lack that core capacity to limit state power.

⁵² Martin Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Oxford: Hart 2000) at 202.

⁵³ Ibid. at 29.

⁵⁴ Tamanaha, *supra* note 15 at 58.

⁵⁵ Loughlin, *supra* note 52 at 198.

⁵⁶ Tamanaha, *supra* note 15 at 32.

⁵⁷ Ibid. at 58.

⁵⁸ Rodan, *Westminster in Singapore*, *supra* note 12 at 109. See also Andrew Harding, “The ‘Westminster Model’ Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States” (2004) 4 *Oxford Commonwealth Law Journal* 143.

As a study of ‘law’ in an authoritarian state, this project extends the body of scholarship on how the ‘rule of law’ is dismantled.⁵⁹ In contrast to the extensive scholarly and institutional attention given to building the ‘rule of law’, there is very little literature on how its dismantling occurs.⁶⁰ The small body of literature on how the ‘rule of law’ has been dismantled touches on one or another fragment of this process: how courts in authoritarian regimes perform a range of governance, social control and regime legitimisation functions;⁶¹ how failures by the bar to mobilise for the protection of judicial autonomy leave the judiciary vulnerable to attack;⁶² how strategies of governance mask the dismantling of judicial independence;⁶³ how a legal system driven by the political economy creates courts ideologically aligned to the state⁶⁴; how the formal and procedural regularities of ‘law’ can constitute a minimum and legitimising ‘thin rule

⁵⁹ Extending Rodan’s arguments (*Westminster in Singapore*, *supra* note 12), it is arguable that liberal ‘rule of law’ ideas and institutions have perhaps held a brief place in the history of Singapore. The lively political pluralism of the post–World War II period has been noted by a range of other scholars as well. See, for example, Tim Harper, “Lim Chin Siong and the ‘Singapore Story,’ ” in Tan Jing Quee & Jomo K.S., eds., *Comet in Our Sky: Lim Chin Siong in History* (Kuala Lumpur: Insan, 2001) 3; Hong Lysa & Huang Jianli, *The Scripting of a National History: Singapore and Its Pasts* (Singapore: NUS Press, 2008); and Michael D. Barr & Carl A. Trocki, eds., *Paths Not Taken: Political Pluralism in Post-War Singapore* (Singapore: NUS Press, 2008).

⁶⁰ Peerenboom makes a parallel point, noting that the voluminous literature on ‘rule of law’ in ‘Western’ contexts is in “striking contrast to the ... relatively little work ... clarifying alternative conceptions of rule of law in other parts of the world, including Asia”: Randall Peerenboom, “Varieties of Rule of Law: An Introduction and Provisional Conclusion”, in Randall Peerenboom, ed., *Asian Discourses of Rule of Law* (London: Routledge, 2004) 1 at 5.

⁶¹ Tom Ginsburg & Tamir Moustafa, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (New York: Cambridge University Press, 2008).

⁶² Terence C. Halliday & Lucien Karpik, “Politics Matter: A New Framework for the Comparative and Historical Study of Legal Professions”, in Terence C. Halliday & Lucien Karpik, eds., *Lawyers and the Rise of Western Political Liberalism* (Oxford: Clarendon Press, 1997) 15.

⁶³ Ross Worthington, *Governance in Singapore* (London: Routledge Curzon, 2003).

⁶⁴ Kanishka Jayasuriya, ed., *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (London: Routledge, 1999) [*Law, Capitalism and Power*]; Silverstein, *The Exception That Proves Rules Matter*, *supra* 22 at 98.