RULE BY LAW

The Politics of Courts in Authoritarian Regimes

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courts. Each judicial district now has a division for administrative cases, and government offices have established offices for monitoring compliance with the new legal framework (Mahboubi 2005: 2).

Why did China formalize administrative procedures and facilitate review by courts? Unlike countries in Eastern Europe, China did not experience a change in political structure during the 1980s, as the Communist Party remained the sole legitimate political party. However, the available modalities of controlling agents changed. In particular, with the ascent of Deng Xiaoping, China ended a period where ideology was the primary mechanism for internal control of agents. Indeed, many of the decision makers in the early Deng era had themselves been victims of ideological zealousness in the Cultural Revolution, and quite self-consciously sought to provide a sounder institutional basis for governance. China's ideological drift is well documented, and continues to be reflected in euphemisms, such as the "Three Represents," that help provide an increasingly thin "socialist" ideological cover for a market economy with a large state sector.

The decline of ideology paralleled an increased reliance on decentralization and deregulation, which reduced the possibility of direct hierarchical control and increased the discretion of lower officials (Shirk 1993; Wang 1998:253–58; but see Tsui and Wang 2004). Local networks of entrepreneurs and party officials collaborated to enhance local economies. In doing so, however, they undermined the party hierarchy that might have otherwise served as an effective means of controlling bureaucratic agents.

Regulatory complexity is also a background factor. As China's market economy developed, the traditional mechanisms of command and control over the economy were less available. A market economy requires a regulatory approach, which in turn depends on complex flows of information between government and the governed. The limited ability of any party structure, even one as elaborate as the Chinese Communist Party, to internalize all the expertise required seems to necessitate enhanced delegation.

We have observed, therefore, a shift toward external forms of monitoring (as well as intensification of the internal forms of party control described earlier.) Multiple monitoring strategies are necessary in an environment wherein agency costs are rampant. The regime relies on a mix of second- and third-party monitoring, reflecting not only the long-term time horizon of the Communist Party but also its increasing need for monitoring mechanisms. Formalizing appeals can be seen as a device to empower citizens to monitor misbehavior by the Communist Party's agents in the government. Some third-party monitoring is acceptable because courts are not yet independent of Communist Party influence in administrative matters. Consistent with the theory, it

is generally understood that administrative law in China is used to constrain low officials but not high officials (Jiang 1998). Predictably for a one-party state, there has not been any move to formalize public participation in the rulemaking process.

Scholarly analysis of the Administrative Litigation Law (ALL) ranges from quite optimistic to more pessimistic about its real impact (Lubman 1999; Mahboubi 2005). In my view, there is at least some evidence that the availability of these mechanisms has resulted in particular agencies modifying their behavior. Creative lawyers who are bent on using the administrative litigation regime to constrain the state have been able to do so. In part this is because of the open nature of the legal process, and the availability of procedural mechanisms to any member of the public with standing. In addition, the possibility of shifting the burden of proof under the Administrative Litigation Law means that activists can impose costs on the state.

Furthermore, a sophisticated understanding of the role of law in social change would acknowledge that the impact of the law is not to be found merely in success rates. O'Brien and Li (2006), in their recent account of "rightful resistance" in China, emphasize how administrative litigation is one among many channels used by citizens to raise awareness of abusive policies.[4] Even if unsuccessful in court, administrative litigation can raise attention in the media and help generate internal pressures in the government for policy change. Beyond its impact on policies, the use of administrative litigation as a form of "rightful resistance" has led many "to reconsider their relationship to authority, while posing new questions, encouraging innovative tactics, and spurring thoughts about political change" (O'Brien and Li, 2006: 103).

In one example, a group of law professors from Sichuan used the administrative litigation process to bring attention to an issue of great concern to them, gender discrimination in employment (He 2006). There is no general law prohibiting gender discrimination in China, and private advertisements in the labor market frequently make references to gender, age, physical appearance, and height. The law professors sought to change the norms regarding discrimination in China. Unable to sue private employers, they sued a state agency for gender discrimination, based on a provision of the Chinese Constitution.

As any lawyer in China knows, the Chinese Constitution is not judicially enforceable. There was thus little chance for the lawsuit to succeed, and it

[4] Rightful resistance is defined as "a form of popular contention that operates near the boundary of authorized channels, employs the rhetoric and commitments of the powerful to curb the exercise of power, hinges on locating and exploiting divisions within the state, and relies on mobilizing support from the wider public."

failed on the merits. However, the lawsuit was successful in changing internal policy at the Central Bank of China, the agency that was sued. The law professors had combined the lawsuit with an extensive strategy of media awareness and public education. This is one of many examples in which sophisticated social activists use the courts to try to influence norms, independent of the particular details of the case at hand. Other examples of impact litigation have included the attempt by lawyers to have the National People's Congress (NPC) repeal the system of "custody and repatriation," following the death of a young man in police administrative detention (Hand 2006). Though not filed under the ALL, the suit challenged administrative regulations as exceeding limits on power specified in the Chinese Constitution. While the NPC did not provide the legal relief desired (in part for fear of setting a precedent for constitutional litigation), the system was reformed in response to the challenge.

The Chinese Communist Party did not adopt the Administrative Litigation Law to undermine its own power. Instead, it did so to extend its power and legitimacy. The party gains control over potentially wayward bureaucrats but also gives up some control over the direction of social and economic change in the society. It seems to have found the bargain a successful one. This is all the more remarkable given that the Chinese Communist Party has a long-term horizon and is quite disciplined. But the unique problems of scale and complexity of governance in post-Mao China, and the distrust of ideological solutions, have rendered administrative law quite attractive and perhaps necessary. At the same time, the hierarchy solution continues to be utilized, as China seeks to reform the system of civil service recruitment and control[5] and promote internal review of decisions within the bureaucracy.[6]

What if administrative procedures regime become costly relative to other mechanisms of control? Administrative procedures regimes do have a built-in mechanism for disuse – namely tighter control over courts. Should courts become too activist in challenging core interests of the regime, politicians can shift to greater reliance on hierarchical mechanisms by simply rationing the supply of administrative relief available through courts. This process is easier for regimes that are not democratic, but it can also occur in countries such as the United States (McNollgast 1999). Politicians can change the structure of review or influence judicial selection to ensure more favorable outcomes. In such circumstances the extent of formal proceduralization may not capture

[5] A new law took effect in January 2006. *China Embarks on Civil Service Reforms*, China Daily, accessed Sept. 23, 2003 from http://www.chinadaily.com.cn/en/doc/2003-09/23/content_266501.htm.

[6] The 1999 Administrative Review Law details procedures for this form of review (Ohnesorge 2007).

actual incentives to litigate, which depend on the practical ability of courts to provide effective relief.

It is probable, of course, that principal-agent problems are more severe in a democracy than in a dictatorship because civil servants in democracies have certain rights preventing arbitrary dismissal. Democracies also tend to proscribe the use of violence in punishing malfeasance, so the relative costs of using coercion are higher. In other words, the relative price of a coercive substitute for administrative law may be lower under dictatorship than under democracy, so administrative law is likely to become more attractive with democratization. However, there is a corollary defect in terms of information generation. The usual problems of obtaining high-quality information on which to base governmental decisions are more severe when government agents themselves are afraid of the consequences of revealing information. Authoritarian systems of a more totalitarian bent may find that governing by terror means governing in the complete absence of information (as recent accounts of the Khmer Rouge regime seem to illustrate, for example.) More mild authoritarians need to provide incentives to produce good information for policy decisions, and an administrative litigation regime can complement other such incentives.

CONCLUSION

The approach taken in this chapter and volume more generally is consistent with treating courts as simply one alternative mechanism for governance (Rubin 2002; Shapiro 1964: 6). Courts have particular institutional features that affect the relative desirability of using them for the core governance task of monitoring officials and reducing agency costs. I conclude with a few remarks concerning these institutional qualities.

First, courts are *reactive*. Whereas auditors, designated monitors, and internal affairs boards can take an active role in seeking out instances of malfeasance, courts rely in their very institutional design on a quasi-adversarial process that is initiated from outside the government. Doing so enhances the courts' ability to draw in information that would otherwise be unavailable to the governance system broadly conceived – no official would voluntarily report his or her own exercises of slack.

Reactiveness requires a procedural structure to encourage "good" lawsuits that advance the goal of the regime and to discourage "bad" ones. The nature of law requires that this procedural structure be stated in *general* terms, and this is a second institutional quality that deserves mention. Generality means that regime opponents, or even constructive critics, have access to pursue

strategies through the courts. We should thus anticipate the creative use of the litigation scheme by some who have different policy goals from those of the regime (O'Brien and Li 2006).

The dynamics of how this plays out vary. Sometimes, the administrative litigation scheme can become an effective arena of political contestation. However, the regime may also seek to tighten control over the courts to inhibit them from becoming a major locus of social and political change. Authoritarian governments, even more than democracies, have many tools for "Guarding the Guardians" (Shapiro 1988).

Regardless of the result of these dynamics of interaction among multiple agents, administrative litigation and procedural rules will tend to constrain the government, even if regime opponents are not successful in their particular lawsuits. Bureaucracies will become more "rationalized" in response to the threat of exposure of errors; they will seek to enhance their obedience to legality and their internal procedures.

In conclusion, it is clear that the decision by an authoritarian regime to utilize administrative law can be a rational one and need hardly be at odds with other regime goals. Indeed, by enhancing legality, the authoritarian regime can more effectively implement policy goals through state agents. However, the choice has significant consequences, namely the judicialization of governance, with all the issues that raises.

3

Singapore: The Exception That Proves Rules Matter

Gordon Silverstein

"The foundations for our financial center were the rule of law, an independent judiciary, and a stable, competent, and honest government that pursued sound macroeconomic policies."

–Lee Kuan Yew (2000: 73)

Unlike many authoritarian systems, the Republic of Singapore holds regular elections; Western media circulates widely; the Internet has deep penetration; and even Lee Kuan Yew – Singapore's paramount leader, who served as prime minister for more than 30 years – insists that adherence to the rule of law and a scrupulous, efficient, consistent judicial system are and have been essential to Singapore's spectacular growth and development. An island without adequate fresh water to serve its population, Singapore has risen to be a robust international commercial center that consistently outranks rivals ranging from Hong Kong and Japan to its own former colonial master, Great Britain, and, even in some years, the United States itself on measures of international competitiveness, economic vitality,[1] and its efficient, effective, and

[1] In 2000, 2002, and 2004, Singapore led the world in GDP growth, with the United Kingdom coming in third and the United States fourth (the United States rose to second in 2004); Singapore also led the world in 2003, 2004, 2005, and 2006 with an unemployment rate ranging from 4% (in 2003) to 2.9% (in 2006). Singapore's infant mortality rate also was the lowest in the world in 2000, 2001, and 2002, whereas the United Kingdom finished fifth and the United States sixth. On measures of competitiveness, Singapore has been ranked as one of the world's two most competitive economies by the World Economic Forum (WEF) in Davos, Switzerland, in each of the WEF's rankings from 1996 through 2000. In 2005, the Swiss Institute for Management Development ranked Singapore third in the world for competitiveness, behind the United States and Hong Kong. though the WEF in Davos had Singapore down a bit, falling to sixth in the world, while the United States climbed to number two. Nevertheless, Singapore continued to rank far ahead of Japan (at 12) the United Kingdom

reliable judicial system.[2] And yet, unlike so many other authoritarian systems, Singapore has avoided the pitfalls of judicialization that arise in so many other states considered in this volume. Singapore seems to offer glimmering, shimmering proof that a government can construct a rule-of-law system sufficient to satisfy the demands of a global economy and maintain domestic support in regular elections for more than forty years without being forced to tolerate the tradeoff of uncontrolled, independent judicial power, or significant political opposition.

Unraveling four apparent puzzles about Singapore will help us understand why, despite the fact that Singapore is in some ways an anomalous exception – a city-state-nation of just 4.5 million inhabitants, with a land mass of just 692 square kilometers – it is an exception that proves that, when it comes to the rule of law and judicialization, rules matter. Singapore forces us to recognize the error so many Western politicians, pundits, and academics make in conflating liberal democracy – and its maximization of individual liberty – with the rule of law. The rule of law may be a necessary precondition for liberal democracy, but liberal democracy is not necessarily the product of the rule of law.

The four puzzles, briefly stated are these:

1) With an explicit due process clause in the Singapore Constitution, clear court precedent, and your own judges ordering the government to stand down in a sensitive national security case, can you terminate the application and exercise of judicial review, without undermining your claims to adhere to the rule of law? Without paying a price in terms of international investor confidence? You can if you follow the rules.

2) Can you collapse the wall between the legislature (and executive) on one side and the judiciary on the other, and build a judicial system with very little if any insulation from the executive and legislative branch without undermining

(at 13), Germany (at 15), France (at 30), and China (at 49). See the tables in the Appendix, as well as World Bank (2006).

[2] The Davos-based World Economic Forum rankings, for example, include a measure of "the soundness of legal and social institutions that lay the foundation for supporting a modern, competitive market economy, *including the Rule of Law and protection of property rights*" (WEF 1997 Annual Report). Singapore's legal system actually ranked first in the Institute for Management Development 1997 list, a measure of the degree to which a country's legal system was detrimental to that country's economic competitiveness. By contrast the United States ranked 31st in that category in the same year. The same survey saw Singapore ranked six notches above the United States in response to a survey question asking if respondents had full "confidence in the fair administration of justice in the society." And Singapore's leading newspaper was proud to disclose that a 1998 survey of 400 American senior executives working in Singapore (conducted by the Political and Economic Risk Consultancy of Hong Kong) revealed that Americans themselves believed that "Singapore's judiciary and police force [are] better than those in the United States" and that the Singapore justice system "is better than that in their own country" (*Straits Times*, Sept 14, 1998).

your claims to adhere to the rule of law? Without paying a price in terms of international investor confidence? You can if you follow the rules.

3) Can you use your highly regarded, widely respected judicial system and civil law to shape international perceptions about your country through civil suits for defamation and libel combined with strict controls not on what foreign media write or say, but rather on their access to your market – all without undermining your claims to adhere to the rule of law? Without paying a price in terms of international investor confidence? You can if you follow the rules.

4) Can you use your highly regarded, widely respected judicial system and civil law, combined with strict campaign rules and parliamentary qualifications, to stifle dissent and undermine the growth and entrenchment of domestic political opposition parties and political opposition leaders without undermining your claims to adhere to the rule of law? Without paying a price in terms of international investor confidence? You can if you follow the rules.

UNPACKING THE RULE OF LAW

These puzzles force us to grapple with often unspoken assumptions about the rule of law. Singapore's leaders understand the critical importance of maintaining a judicial system that is efficient, effective, consistent, and reliable, one where laws are general, where they are known and generally available, where they are not retroactive but clear and consistent, and where laws are plausible, embodying requirements that can be accomplished and have some lasting power, and where officials have to abide by the rules they pass. These are, in fact, the eight criteria legal scholar Lon Fuller articulated in 1964 as the baseline requirements of the rule of law (Fuller 1964).

Fuller's conditions certainly had no specific national or cultural boundaries, but as Judith Shklar argues, "One may guess that he had not thought very deeply about any polity other than the United States" (Shklar 1987: 13). Fuller argued that these eight conditions knit together to form an "inner morality" to the law. And while he made no claim that these conditions, having been met, would inevitably lead to an Anglo-American system of limited government and guarantees for individual rights, there was an unspoken assumption that once in place, these conditions would knit together and that the inner morality of the law would take on something of a life of its own. But there is no clear reason why these conditions would necessarily or even likely lead to that result. These conditions, combined with a particular set of normative commitments and social conditions, might well do so. But these conditions, the criteria of the rule of law as most lawyers have come to understand it, could as easily be satisfied in an authoritarian as in a liberal democratic state.

"In its many academic manifestations," Allan Hutchinson and Patrick Monahan write, the rule of law "has been connected, to greater and lesser extents, to an individualistic theory of political justice and jurisprudence. Ostensibly, there have been two versions of the rule of law, but they both represent a commitment to liberalism; it is simply that one tends to be more explicit and marked than the other" (Hutchinson and Monahan 1987: 100). Joseph Raz supports this realistic view, noting that "[a] non-democratic legal system, based on the denial of human rights, of extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies" (Raz 1979: 211). "In itself," Judith Shklar writes, "Fuller's inwardly moral law not only may, but has been, perfectly compatible with governments of the most repressive and irrational sort. The very formal rationality of a civil law system can legitimize a persecutive war-state among those officials who are charged with maintaining the private law and its clients" (Shklar 1987: 13).

This is not to say that the rule of law, even in this stripped-down, or "thin" formulation, is not important.[3] It very well may facilitate a move to a thicker, more rights-laden rule of law with a more robust separation of powers. But Singapore provides a brisk reminder that one *can* have a thin rule of law, build a stable and prosperous nation on a robust economy, and never veer too close to a full-blown Lockean-liberal system with firm limits on government governed by a strict separation of powers *a la* Montesquieu.

SINGAPORE AND THE RULE OF LAW

On August 9, 1965, the people of the island of Singapore were asked to remove themselves from the Federation of Malaysia. This request came from the

[3] The meaning of "thick" and "thin" in discussions of the rule of law is, unfortunately, highly confused. In its first incarnation, these terms were used as they are used here – a thin rule of law is one in which the basic principles Fuller articulated are present but, unlike Fuller (and more like Hart 1961), these rules are both the beginning and the end of the matter. A "thick" conception suggests far more is wrapped in with these basic assumptions – Fuller's inner morality of law, for example, or normative assumptions such as those advocated by writers such as Ronald Dworkin. Peerenboom (2004b: 2) nicely summarizes this distinction. Alan Hutchinson and Patrick Monahan (1987: 100–102) discuss this distinction as well. Conversely, and more recently, Tushnet (1999) and Graber (2001) refer to a "thick" and "thin" constitution – where the thin constitution suggests the powerful strands of fundamental commitments tracing back to the Declaration that animate and undergird the Constitution, whereas the "thick" constitution refers to the complex and specific rules and requirements of the document (how a bill becomes a law; how old one has to be to run for president).

Malaysian government, fearful that Singapore's dominant ethnic Chinese population along with the city-state's economic advantages as an international trading port would allow the tiny island to be the tail that wags the dog. With virtually no natural resources – just 1.4 percent of Singapore's 692 square kilometers of land is arable,[4] and to this day Singapore has to import much of its drinking water – Singapore had to build an outward-looking economy and engage in globalization long before the word was invented. "We inherited the island without its hinterland, a heart without a body," said Singapore's preeminent leader, Lee Kuan Yew (Lee 2000: 1). Singapore, in fact, had but two vital resources – one of the world's greatest natural seaports and a strategic location bestride some of the world's most important shipping lanes. From those humble beginnings, the Republic of Singapore rose "from third world to first,"[5] becoming a leading manufacturing, transportation, shipping, and financial services center in the global economy of the early twenty-first century. "In 1965," Lee Kuan Yew noted in one interview, "Singapore ranked economically with Chile, Argentina and Mexico," but by 1997, the city-state's per capita GNP placed it among the top eight nations in the world (Zakaria 1994).

Lee Kuan Yew is not alone in believing that the rule of law plays an essential role in Singapore's ability to attract foreign capital and to maintain the confidence of foreign investors who are essential to Singapore's prosperity and economic growth. As Singapore's then-Chief Justice, Yong Pung How noted,

> Singapore is a nation which is based wholly on the Rule of Law. It is clear and practical laws and the effective observance and enforcement of these laws which provide the foundation for our economic and social development. It is the certainty which an environment based on the Rule of Law guarantees which gives our people, as well as many [multinational corporations] and other foreign investors, the confidence to invest in our physical, industrial as well as social infrastructure (Thio 2002: 29).

Indeed, international corporations and investors seem to have confirmed this over and over again (see the Appendix). But Singapore's rule of law is not quite the individualistic, liberty-maximizing democracy most in the West conjure when they hear that term.

4 See https://www.cia.gov/cia/publications.

5 This is the subtitle of Lee Kuan Yew's book, *From Third World to First: The Singapore Story, 1965–2000*. (Lee 2000).

Puzzle 1 . . . De-Linking Globalization and Judicialization

Singapore has a long-established, written constitution. It has regular and transparent elections, in which opposition candidates often run and even, on occasion, win a couple of seats in Parliament. (Since 1968, when Lee's People's Action Party [PAP]) swept every seat in Parliament, opposition candidates have held between one and four seats in Parliament.[6]) And, as did many of the countries analyzed in this volume, Singapore experienced a burst of judicial power, despite huge cultural, social, educational, institutional, and political pressures. But unlike so many others, Singapore was able to stop this cold, and all without violating the basic requirements of the rule of law – all well within the rules, written in the constitution and enforced in the courts. And all without jeopardizing Singapore's reliability and dependability among international investors and corporate decision makers.

Singapore has a well-paid, well-educated judiciary to interpret and enforce its constitution, a constitution that explicitly incorporates British common law.[7] In fact, until 1989 the Judicial Committee of Her Britannic Majesty's Privy Council served as Singapore's final court of appeal. And Singapore's Constitution explicitly guarantees fundamental individual rights, including due process: "No person shall be deprived of his life or personal liberty save in accordance with law" (Singapore Constitution, Part IV, Article 9).[8] But, when the Singapore judiciary *did* move to expand individual rights under that due process clause, ruling against the government on an internal security case and in favor of a broad reading of fundamental individual rights,[9] the government – strictly and precisely following the provisions of Singapore's Constitution to

[6] The greatest threat to the dominance of the People's Action Party (PAP) came in a general election in 1991 when four opposition candidates were elected, and the PAP's share of the vote tumbled to 61%. But they recovered two of those seats in the 1997 election, and – rebounded in the shadow of terrorism threats in 2001 to a more robust 75.3%.

[7] High Court Judges are paid about US$630,000 a year, and receive a luxury government car along with access to far-below market-rate luxury accommodations in a government house. The Chief Justice receives about US$1 million a year along with a government-provided residence, chauffeur-driven car, and other perks. As Francis Seow notes, Singapore's Chief Justice "receives more than the combined stipends of the Lord Chancellor of England, the Chief Justices of the United States, Canada and Australia" (Seow 1997b).

[8] Part IV, Article 11 bans *ex post facto* laws; and Part IV, Article 12 guarantees that "all persons are equal before the law and entitled to the equal protection of the law." Other articles provide for freedom of speech, assembly and association (subject to legal restrictions Parliament "considers necessary or expedient in the interest of the security of Singapore," and those that "provide against contempt of court, defamation or incitement to any offense" (Singapore Constitution, Part IV, Art 14) and the freedom to "profess and practice" one's religion among others.

[9] *Chng Suan Tze* 1998; developing doctrine outlined in *Lee Mau Seng* 1971 and *Ong Ah Chuan* 1980–81.

the letter – was able to terminate judicial review, and eliminate the Privy Council as a court of final review, and all without any cost to the economic system or Singapore's standing in the international investment community.[10]

Four dissidents were arrested and detained without trial in December 1988, for what the government said was their role in a Marxist plot to undermine the government. Chng Suan Tze asked the Singapore Court of Appeal to order their release, arguing that the government had not followed the rules set out in the Internal Security Act (ISA) – a law left over from the British colonial era. And, shockingly, the court agreed. "All power has legal limits and the Rule of Law demands that the courts should be able to examine the exercise of discretionary power," the court ruled, concluding that "the notion of a subjective or unfettered [government] discretion is contrary to the Rule of Law" (*Chng Suan Tze* 1988).

But the court then went beyond the case itself, building its argument on a foundation that combined its own case law with long-standing interpretations of British common law as well as precedent set by the Judicial Committee of the Privy Council in London (which then continued to serve as the final court of review for Singapore). The Singapore court held that judicial review could and should be triggered when the government exercised illegal, irrational, or procedurally improper power, insisting that government action that is arbitrary or irrational must be considered *ultra vires* – an act beyond law and therefore, by definition, an act in violation of Singapore's written constitution (*Chng Suan Tze* 1988). This sort of substantive due process argument is quite familiar to any student of American constitutional law, of course. Once unleashed in the United States, substantive due process became the foundation on which a wide array of fundamental rights were built, ranging from property and economic rights in the era before the New Deal to rights of personal autonomy in the Warren Court era and beyond.

Here the Singapore court turned to precedent laid down by the Privy Council in *Ong Ah Chuan v. Public Prosecutor*, a drug case from 1980, in which the Privy Council ruled that the presumption of innocence "is a fundamental human right protected by the [Singapore] Constitution and cannot be limited or diminished by any Act of Parliament" other than a full-scale constitutional amendment. "Although nowhere expressly referred to in the Constitution," the Privy Council held that the presumption of innocence is "imported into" Singapore's Constitution through that document's due process and equal protection clauses (*Ong Ah Chuan* 1980). "References to 'law' in such contexts as 'in accordance with law,' 'equality before the law,' 'protection of the law'

[10] This section is more fully developed in Silverstein (2003).

and the like," the judges wrote, "refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution."

Much like *Marbury v. Madison*, however, the judges wrapped their assertion of strong judicial review in a tolerable package – *Ong Ah Chuan* asserted the power of judicial review and the foundation for substantive due process, but did so in a case that actually found in favor of the government. *Ong Ah Chuan* asserted judicial power, but found that the government had not, in fact, violated the fundamental rights that the court had discovered in the constitution. But, like *Marbury*, the assertion of judicial review would now seemingly be available should a future court choose to build upon this foundation. And indeed, that is precisely what the court tried. Ruling against the assertion of broad discretion under the Internal Security Act in *Chng Suan Tze*, the Singapore Court of Appeal held that "giving the executive arbitrary powers of detention" would be "unconstitutional and void" under the precedent set by *Ong Ah Chuan*. "In our view," the Singapore Justices concluded,

> The notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. If therefore the executive in exercising its discretion under an Act of Parliament has exceeded the four corners within which Parliament has decided it can exercise its discretion, such an exercise of discretion would be *ultra vires* the Act and a court of law must be able to hold it to be so (*Chng Suan Tze* 1988).

The judges in Singapore seemed ready to follow a familiar pattern of judicial empowerment. But in this case, the ruling was no longer wrapped in a pleasing package; instead it directly challenged the government in a most sensitive area – national security. The court ordered the prisoners released. And the government complied, driving the prisoners through the gates of the Whitley Road jail, and down the street where the prisoners got out of the car. But another car pulled up immediately, the prisoners were arrested again, and returned to prison. But unlike the last time, the government now followed the statutory procedure with precision, securing the formal authority that was required (Seow 1994).

This was not, however, the end of the story. Far from the start of a storied growth of judicial power, the national security case spurred the government into action. Not against the judges, nor against dissidents. It spurred the government to move in Parliament a bill to amend the constitution. No longer would the constitution leave room for judges to assert their authority to exercise

this sort of judicial review. Further, the government amended the constitution to roll back the law to the doctrine that was in place before the court's recent ruling.[11] In addition, the constitution was also amended to foreclose appeals under the Internal Security Act, which ended the use of the Privy Council in security cases.[12]

Constitutional amendment is, of course, a perfectly viable option for most constitutional democracies displeased with court rulings. In the United States, the Sixteenth Amendment, providing for a progressive income tax, was passed explicitly to reverse the Supreme Court's ruling in *Pollock v. Farmers Loan & Trust Co.*, whereas the Thirteenth and Fourteenth Amendments reversed the Court's decision in the infamous *Dred Scott v. Sandford*. Constitutional amendment is a very difficult process for Americans unhappy with Court rulings. In Singapore it is not. Constitutional amendment in Singapore requires only the support of a super-majority in Parliament (two-thirds of the Parliament). And since, in 1989, the People's Action Party held 80 of the 81 seats, the amendment was quite easily passed. The basic premise is the same in the United States and Singapore, and the European Union, for that matter – court rulings are ultimately subject to constitutional amendment (or, in the European case, treaty revision). But American judges have a great deal of space and time in which to work before their rulings are likely to trigger the sort of political will needed to counter them with amendment. European judges may have the greatest constitutional space of all, since an amendment there requires unanimous consent of the sovereign Members of the European Union and ratification of a new treaty. Singapore's judges, by contrast, have very little constitutional space in which to work.

Little wonder then that the Singapore government has become somewhat enamored of the option of constitutional amendment as a means of responding to any hint of an aggressive judiciary. A Nominated Member of Parliament[13] once suggested that though the government is able to amend the constitution, and though such amendments certainly can make government more efficient, it is not a wise policy. If the court has acted within its powers, Simon S.C. Tay suggested, "this House should recognize this is the constitutional

[11] Restoring the far more deferential standard the court had articulated in a 1971 case called *Lee Mau Seng v. Minister for Home Affairs*.

[12] Later in the year, additional constitutional amendments were adopted that narrowly circumscribed appeals to the Privy Council. The few paths that remained to Privy Council appeal were eliminated in 1993 when Singapore established its own Court of Appeal (Lee 1999: 51–52).

[13] Singapore has a number of Nominated Members of Parliament. They have highly limited voting rights, and are named by the dominant political party to represent alternative views in a body where there is virtually no elected opposition (see below).

scheme of things and give serious pause before overriding that decision by amendment of new laws and limiting judicial review."[14] Tay's has not been, however, the dominant view.

The Singapore experience suggests serious flaws with the assumptions of Western policymakers that the rule of law somehow will trigger the development of an independent court willing and able to build the economic rights and rulings essential to globalization into individual, domestic liberties, and face the governing regime with the stark choice of all (economic opportunity driven by international investment combined with the slow, but steady expansion of individual liberties) or nothing (strict limits on individual liberties at the cost of the benefits of globalization). Singapore untied the knot – by following the rules. By maintaining Fuller's eight formal criteria for the rule of law, Singapore made clear to investors that what they valued was safe and protected, and that their investments were secure. The swift constitutional revisions including the termination of appeals to the Privy Council sparked no capital flight. No corporations denounced Singapore for jeopardizing the rule of law, or undermining the foundation for investment, intellectual property rights, or the obligation of contracts. In one 1997 survey, Singapore's legal system was ranked first in the world in a measure of the degree to which a country's legal system was seen as least detrimental to its economic competitiveness.[15] And Singapore also outpaced the United States in the same survey on the question of whether people had "confidence in the fair administration of justice in the society." A year later, Singapore's *Straits Times* reported a survey in which American executives in Singapore indicated that they felt that "Singapore's judiciary and police force [are] better than those in the United States" and that the Singapore justice system "is better than that in their own country" (Tan 1998).[16]

Of course, these surveys are focused on competitiveness, on the impact of various factors on a country's economic standing. One survey, from the World Economic Forum in Davos, focuses on contract enforcement, and the ability of private firms to "file lawsuits at independent and impartial courts" if there is "a breach of trust on the part of the government." But these are precisely the aspects of the rule of law that are vital to attracting and holding international financial investment.

[14] Simon S.C. Tay, Nominated Member of Parliament, *Parliamentary Debates of Singapore: Official Report*, January 14, 1998, column 93.

[15] World Economic Forum's 1997 Annual Report (emphasis added).

[16] The newspaper was reporting on a survey conducted by the Political and Economic Risk Consultancy of Hong Kong.

Lee Kuan Yew told Parliament in 1995 that when the government is taken to court by a private individual, "the court must adjudicate upon the issues strictly on their merits and in accordance with the law. To have it otherwise is to lose . . . our standing and . . . our status as an investment and financial centre. The interpretation of documents, of contracts in accordance with the law is crucial. Our reputation for the rule of law has been and is a valuable economic asset, part of our capital, although an intangible one" (*Singapore Parliamentary Debates*, Nov. 2, 1995: col. 236). The rule of law is among other things the law of rules, and Singapore follows the rules.

Was there an economic price to be paid for this wrench in the globalization machine? Not at all. No corporations fled the country. Singapore's competitiveness rankings held strong and capital continued to flow in. Singapore therefore presents countries like China with the possibility of an alternative model: while economic reform and prosperity demand the rule of law, the rule of law does not necessarily mean that judicialization – and the expansion of individual rights – necessarily will follow. It is possible to de-link economic and political/social reform (Silverstein 2003).

Puzzle 2 . . . De-Linking Separation of Powers and the Rule of Law

The court that ruled against the government in *Chng Suan Tze* certainly should not have been surprised that the government would not meekly accede to a judicial order, particularly in a sensitive area such as national security. In fact, Singapore's legal judicial community had been sent a very clear message about what might happen to judges whose rulings were not finding favor with the government just months before the ISA ruling. Senior District Judge Michael Khoo acquitted one of the only opposition Members of Parliament (J.B. Jeyaretnam) on two charges involving the alleged misappropriation of contributions to his political party – the Workers' Party – and convicted him on a third, lesser charge, imposing a fine that fell below the statutorily significant threshold of S$2000. The amount of the fine "was crucial because, under Singapore law, a member of Parliament who has been convicted of a criminal offense and fined more than S$2000 is automatically disqualified from parliament" and barred from running for office for five years (thus guaranteeing that he could not run in the next parliamentary election, since elections are required to be held no more than five years apart (Lydgate 2003: 119).

Under Singapore law, prosecutors are allowed to appeal district court rulings. And while the appeal was pending, coincidentally (as the government would insist) or as direct retaliation for failing to impose a sufficiently high penalty on Jeyaretnam (as opponents concluded), Senior District Court Judge

Michael Khoo was transferred to a far less prestigious post as a prosecutor in the Attorney General's Office. "Judges in Khoo's position were usually promoted to the High court, or at least to more senior posts. But Khoo was made a prosecutor and [was] replaced by a man two [civil service] grades below him" (Lydgate 2003: 122). The sudden transfer certainly looked suspicious, and the government was quick to appoint a review panel that concluded that the transfer was perfectly proper, noting that transfers between the Attorney General's office and the Bench (and back again) were far from unusual at the lower levels of the judiciary. Lower court judges do not have tenure, and do tend to move between the courts and public service. In fact, lower court judges are "part of the executive branch of government," and "district court judges are routinely shuffled between the executive and judicial branches" (Thio 2002a: 22). Serving as a district court judge or magistrate "is simply one of a number of postings for officers within the Singapore Legal Service" (Worthington 2001: 496).

Khoo's case was an extreme reminder that the hard lines between the judicial and legislative branches that are the norm in Britain and the United States are not at all the norm in Singapore, and yet, Singapore maintains a formal constitutional guarantee of an independent judiciary. The Singapore Constitution, for example, clearly provides for a separate and independent judiciary, with Supreme Court judges guaranteed that their office cannot be abolished; they are guaranteed tenure in office until the age of sixty-five. But judges can be hired on a contract basis after age sixty-five. Chief Justice Yong Pung How, who retired in April, 2006, reached that personal milestone in 1991, and remained Chief Justice under sequential three-year contracts for fifteen more years. The new Chief Justice, Chan Sek Keong, was sixty-nine when he took over as Chief Justice in 2006 and will likely continue to work under three-year contracts.

And while Singapore's Supreme Court judges are protected by tenure in office once appointed, the Singapore Constitution also provides for the appointment of temporary judges to Singapore's top courts:

> In order to facilitate the disposal of business in the Supreme Court, the President, if he, acting in his discretion, concurs with the advice of the Prime Minister, may appoint a person qualified for appointment as a Judge of the Supreme Court to be a Judicial Commissioner of the Supreme Court in accordance with Article 95 for such period or periods as the President thinks fit; and a Judicial Commissioner so appointed may, in respect of such class or classes of cases as the Chief Justice may specify, exercise the powers and perform the functions of a Judge of the High Court. Anything done by a Judicial Commissioner when acting in accordance with the terms of his

> appointment shall have the same validity and effect as if done by a Judge of that Court and, in respect thereof, he shall have the same powers and enjoy the same immunities as if he had been a Judge of that Court. (Singapore Constitution, Part VIII, Article 94).

The same powers and immunities, except for tenure in office, since the appointment's term is determined by the president. But despite the reversal in the ISA cases discussed above, and Judge Khoo's demotion, the Singapore courts have maintained a reputation for independence, even ruling (albeit rarely) in favor of individuals and against the government – an acquittal in an Official Secrets Act case in one example and, in another, a case of wrongful dismissal.[17] Li-Ann Thio notes that while in the realm of commercial law "efficiency, certainty and procedural fairness" are valued and observed, the high value placed on social order and "state stability" leads to "less attention given to civil liberties" with the rule of law strengthening state institutions and "marginalizing rights protections" (Thio 2004: 200–201, 209).

To understand why Singapore's judicial system so consistently ranks so highly, one needs to have a fuller picture of the courts. While Chief Justice Yong Pung How left legal practice to move into a business career long before his appointment to the Supreme Court, he did make "an exemplary contribution to the judiciary, not by way of legal expertise or by developing [the courts] as a constitutional bulwark against executive excess, but as chief executive officer of the courts through modernization and impressive gains in efficiency in support of a range of policies for developing Singapore's services sector" (Worthington 2001: 499) – areas that may be of far more central concern to the executives who are surveyed for rankings such as those by the *World Competitiveness Yearbook* (produced by the Institute for Management Development – IMD) or the World Competitiveness Report (from the World Economic Forum (WEF) – Davos) in which Singapore's judicial system consistently ranks among the top five in the world. In 1993, the *Straits Times* proudly announced that Singapore had moved from ninth to first place in the World Competitiveness Report, and in 1997, it noted that these reports focus on assessments of "several areas related to the quality of law," including the WEF's evaluation of "payment of bribes, tax evasion, reliability of contracts with a government; ability to rely on police for physical security and the extent to which business costs are raised by organized crime"

[17] *Christopher Bridges v. Public Prosecutor*, 1 *Singapore Law Report* 406, (High Court, 1997) and *Stansfield Business International v. Minister for Manpower* 3 *Singapore Law Report* 742 (High Court, 1999).

(Tan 1997). In 1998 when Singapore was again ranked number one in the world for its legal system, the newspaper reported that "94 per cent of the respondents had full confidence in the administration of justice in Singapore" (Lim 1998).

Singapore has been able to develop an effective and efficient legal system that wins high praise from global business even as it is attacked by those concerned with the maximization of individual liberty. But Singapore clearly provides an object lesson that an authoritarian regime can gain the global benefits of a reputation for the strict enforcement of the rule of law without risking undue judicialization by following the rules explicitly. And while some measure of judicial independence is required, it would appear that the strict separation of powers is not. Singapore reminds us that the tendency in the West to conflate thick and thin versions of the rule of law, and to layer notions of separation of powers, limited government, democratic participation, and liberal norms onto the foundational requirements of the rule of law, or even the more limited rule by law of the *Rechtsstaat* is far from a foregone conclusion.[18]

Puzzle 3 . . . Law, Courts, and the Shape of International Opinion

A classic complaint about authoritarian governments and the courts is that they will avoid or ignore the courts when faced with direct threats to their regime, or even with perceived slights. Dissidents are rushed to jail without trial, reporters arrested and deported, newspapers closed down, and publications banned. But Singapore has another set of lessons for entrenched liberal democracies and soft-authoritarian republics alike – courts (and the rule of law) are effective tools not only to build and secure a stable economy but also as the method and means to shape international perceptions and formally, transparently, and within the rules, unsettle and unseat domestic political opposition. Singapore accomplished these objectives through a combination of strict statutes on the printing, publishing, and distribution of newspapers and magazines – tested and enforced by the courts – and a very strict application and interpretation (again, by the courts) of libel and defamation in civil suits.

[18] Randall Peerenboom (2004b: 47, ft nt 1) notes, "As with rule of law, *Rechtsstaat* has been interpreted in various ways. While some interpret it in more instrumental terms similar to rule of law, others would argue that the concept entails at minimum the principle of legality and a commitment on the part of the state to promote liberty and protect property rights, and thus some limits on the state. In any case, the concept *Rechtsstaat* has evolved over time in Europe to incorporate democracy and fundamental rights. Accordingly, it is often now used synonymously with (liberal democratic) rule of law."

Singapore's statutory tools to deal with the press began with a 1920 British law – the Printing Presses Ordinance – that required a license for anyone owning a printing press. This was supplemented in 1939, again by the British, with the additional requirement of a permit not just to own a press, but for printing and publishing a newspaper. Jumping ahead to the early 1970s, there was a flurry of activity in the Singapore journalistic community with the arrival of a new, independent, English-language paper, the *Singapore Herald*, funded by foreign investors. In his memoirs, Lee Kuan Yew makes clear his acute understanding of the power of the press: "A newspaper influences the politics of a country," Lee writes, and "I did not want a foreigner not rooted in Singapore to decide our political agenda." A year later, Lee ordered the cancellation of the *Herald's* printing license just hours before flying to Helsinki where he would explain his views of press freedom at a meeting of the International Press Institute (Lee 2000: 189–190). Saying that he "did not accept that newspaper owners had the right to print whatever they liked," Lee noted that unlike Singapore's government ministers, newspaper owners "and their journalists were not elected." He closed his speech by noting that "freedom of the press, freedom of the news media, must be subordinated to the overriding needs of Singapore, and to the primary purpose of an elected government" (Lee 2000: 190).

But on his return he didn't close any other newspapers, or have anyone arrested. Instead, he promulgated laws, openly, following the constitutional process carefully, to amend the Newspaper and Printing Presses Act (Chapter 206), which had replaced the earlier British laws. The new rules not only banned foreign ownership of local newspapers, they banned anyone from owning more than 3 percent of a newspaper company's shares, and created a two-tiered stock plan, with "managerial shares" assigned by the government to four local banks. These shares would have a voting power of 200-to-1 compared with ordinary shares in the hope that the bankers would be more likely to "remain politically neutral and protect stability and growth because of their business interests" (Lee 2000: 190).

This was not the last reform of the newspapers law. The early 1980s saw a significant growth in regional and global media, which discovered in Singapore a highly educated, mostly English-speaking audience with increasingly attractive economic demographics, not to mention an international trade and financial services hub. Newspapers such as the *International Herald Tribune* and the *Asian Wall Street Journal*, as well as magazines like the *Far Eastern Economic Review* (wholly owned by Dow Jones & Co) and *AsiaWeek* (wholly owned by Time-Life Inc.), were rapidly becoming genuine alternative news sources for Singaporeans who found the upbeat and relatively vapid coverage of the government-approved *Straits Times* less than satisfying.

The government could not, of course, so easily control these outlets. They could be banned – but that would be a blunt weapon that could backfire on Singapore, undermining its pitch to global multinationals and investors as a stable, open, and increasingly modern, First-World democracy. Instead, the government passed a new law that would allow the government to restrict circulation of any "newspaper published outside Singapore" that was "engaging in the domestic politics of Singapore." Not only that, but the law provided that the reproduction and distribution of "gazetted" newspapers (offending publications would be listed in the country's official *Gazette*) would be allowed, on a nonprofit basis, with all advertising stripped out. In effect this meant that offending publications *would* be allowed to be sold and read in Singapore, but only a very few copies. This meager circulation (which would be sufficient to provide copies to public libraries and government offices) would be further undercut by the printing of nonprofit versions of the publications that, the law clearly stated, "shall not constitute an infringement of copyright" (Newspaper and Printing Presses Act, Chapter 206, 25 (5)).

These provisions were used extensively from the late 1980s to great effect. The first "gazetted" publication – *Time* magazine – saw its circulation slashed from 18,000 to 9,000 and then to 2,000 after *Time's* editors refused to publish an unedited response from Prime Minister Lee to an article titled "Silencing the Dissenters" concerning Lee's political nemesis, J.B. Jeyaretnam (see below and Lydgate 2003). But the resistance crumbled. "Within a fortnight, *Time* magazine capitulated, and printed the reply in full, adding, by way of an exculpatory editorial footnote, that it did 'not agree with all the corrections cited . . . but prints this letter in the spirit of full discussion of issues'" (Seow 1998).

The next incident came in the midst of the *Time* struggle when the *Asian Wall Street Journal* (*AWSJ*) – edited and published in Hong Kong – ran an article on December 12, 1986, questioning the government's motives and objectives in setting up a new secondary securities market.[19] Stephen Duthie, the *AWSJ*'s Singapore-based correspondent, quoted government critics suggesting that the government wanted to use the market to "unload state-controlled and government-backed companies." When a Singapore official wrote a thunderous denunciation, the *Journal* refused to print it, arguing that it constituted a personal attack and alleged errors the editors were "confident don't exist" (Seow 1998). This action led to the gazetting of the *AWSJ*, with circulation cut from 5,100 copies a day to just 400. The *Journal* challenged the law in Singapore's court – and lost.

[19] SESDAQ (Stock Exchange of Singapore Dealing and Automated Quotation Market System).