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 members[3] and Singapore dissidents[4] 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 tables[9] 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

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 content[15] 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 constructs[18] – 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.

legitimacy[20] 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 states[23]

[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 China[24] 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 kilometres[27] 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 Konick, 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 party[33] – 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 legitimation 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 state[64]; how the formal and procedural regularities of 'law' can constitute a minimum and legitimising

[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.

'thin rule of law'[65]; and how socialist states create their own legalities and reinterpret the 'rule of law'.[66]

Although establishing a valuable foundation, none of these works or other scholarship on contemporary authoritarianism offers a comprehensive account of a sustained and successful dismantling of the 'rule of law'. Even scholarship on Singapore authoritarianism,[67] while providing a valuable foundation for this project, has not offered a systematic treatment of the role of legislation and public discourse in dismantling and reconfiguring the 'rule of law'. This project applies discourse theory to

[65] Peerenboom, *supra* note 60; Thio, *Rule of Law*, *supra* note 41 at 183.

[66] John Gillespie & Pip Nicholson, "The Diversity and Dynamism of Legal Change in Socialist China and Vietnam", in John Gillespie & Pip Nicholson, eds., *Asian Socialism and Legal Change* (Canberra: Asia Pacific Press, 2005) 1; Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China* (Cambridge: Cambridge University Press, 2007); Mark Sidel, *Law and Society in Vietnam* (Cambridge: Cambridge University Press, 2008); John Gillespie, "Understanding Legality in Vietnam", in Stephanie Balme & Mark Sidel, eds., *Vietnam's New Order* (New York: Palgrave Macmillan, 2007) 137; Pip Nicholson, "Vietnamese Courts: Contemporary Interactions Between Party-State and Law", in Stephanie Balme & Mark Sidel, eds., *Vietnam's New Order* (New York: Palgrave Macmillan, 2007) 178; Randall Peerenboom, "Competing Conceptions of Rule of Law in China", in Randall Peerenboom, ed., *Asian Discourses of Rule of Law* (London: Routledge, 2004) 113; Pip Nicholson, *Borrowing Court Systems* (Leiden: Martinus Nijhoff, 2007) (Part Four in particular traces links and departures between the Soviet and the Vietnamese court systems); William A. W. Neilson, "Reforming Commercial Laws in Asia: Strategies and Realities for Donor Agencies", in Timothy Lindsey, ed., *Indonesia: Bankruptcy, Law Reform and the Commercial Court* (Sydney: Desert Pea Press, 2000) 15.

[67] Chua, *supra* note 41; Li-ann Thio, "'Pragmatism and Realism Do Not Mean Abdication': A Critical and Empirical Inquiry into Singapore's Engagement with International Human Rights Law" (2004) 8 *Singapore Year Book of International Law* 41 [Pragmatism and Realism]; Thio, *Rule of Law*, *supra* note 41; Christopher Tremewan, *The Political Economy of Social Control* (Hampshire: Macmillan Press, 1994); Garry Rodan, "Singapore 'Exceptionalism'? Authoritarian Rule and State Transformation", in Edward Friedman & Joseph Wong, eds., *Political Transitions in Dominant Party Systems: Learning to Lose* (London: Routledge, 2008) 231; Rodan, *Authoritarian Rule*, *supra* note 31; Rodan, *Westminster in Singapore*, *supra* note 12; Manuel Castells, "The Developmental City-State in an Open World Economy: The Singapore Experience" (Berkeley: University of California, 1988), online: <http://brie.berkeley.edu/publications/working_papers.html>.

legislation in order to repair this gap in the scholarship while excavating the political processes underpinning the formulation and application of enactments. While there is a well-established scholarly literature on Singapore as an authoritarian state (as noted) and although the role of courts in Singapore has also been well studied,[68] the political processes by which legislation has been formulated, justified and applied have received almost no attention.[69]

In studying the operations of 'law' through a focus on legislation and state discourse, this project is explicitly directed at "law imposed by a political superior onto a political inferior".[70] This focus on the source and speech of political power is surely necessary in studying a de facto one-party state. A focus on legislation is important for another reason: As text, legislation has an oddly clean, ahistorical appearance. Judgments, that other primary source of 'law' in a 'common law' system, reveal argument and challenges to interpretation in a way that legislation does not. Legislation sits on the statute books stripped of histories and skirmishes that may have informed and resisted the language that has come to be 'law'. By approaching legislation as textual moments in a narrative of state power, this study counters the ahistorical appearance of legislation and draws attention to forgotten contestations that have marked the making of 'law' – contestations rendered absent and invisible in legislation's final text.

Reading legislation in tandem with contextual discourse allows me to trace the history of the state's construction of a discursive definition of 'law'. This study reveals a pattern: Facilitated by state dominance of the

[68] Worthington, *supra* note 63; Jayasuriya, *Law, Capitalism and Power*, *supra* note 64; Thio, *Rule of Law*, *supra* note 41; Ginsburg & Moustafa, *supra* note 61; Silverstein, *The Exception That Proves Rules Matter*, *supra* note 22.

[69] In addition to drawing on the legal texts of judgments and legislation, I have drawn on other sources which capture state discourse, such as parliamentary debates, Select Committee Hearings and newspaper reports.

[70] Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* (Sydney: Lawbook, 2002) 27.

public domain, the state's meanings become entrenched in three related steps. First, state meanings are institutionalised through legislation; second, they are normalised through reiteration in the public domain; and finally, when the state's inherently ideological definitions are adopted by the courts, they become even more legitimised and are given the appearance of 'neutral' and self-evident 'truths'.

Singapore's complex and contingent discourses on 'law' are so central to the analysis and argument presented that I ground the case studies and the methodological discussion in a genealogy for 'rule of law' and 'rule by law' in Singapore. Before launching into this genealogy for Singapore 'law', however, I will account for the choice of legislation examined by this project.

CASE STUDIES OF 'LAWS' THAT SILENCE

The five enactments which form the empirical heart of this project – the *Vandalism Act*, the *Press Act*, the 1986 amendments to the *Legal Profession Act*, the *Religious Harmony Act*, and the *Public Order Act* – demonstrate that the state has enacted 'law' in response to moments of contestation in the public domain. More importantly, these 'laws' have been instrumental in silencing critique emanating from non-state actors and institutions while sustaining the government's standing as a 'rule of law' regime. In this way, legislation has been central to effecting illiberalism.

Illiberalism, as the Other of liberalism, might be understood in terms of the absences, fractures and subversions of political liberalism. If political liberalism[71] is disaggregated as, first, the existence and protection of

[71] I adopt the "legal concept of political liberalism": Terence C. Halliday, Lucien Karpik & Malcolm Feeley, "Introduction: The Legal Complex in Struggles for Political Liberalism", in Terence C. Halliday, Lucien Karpik & Malcolm Feeley, eds., *Fighting for Political Freedom: Comparative Studies of the Legal Complex for Political Change* (Oxford: Hart, 2007) 1 at 10–11.

the basic legal freedoms of individuals, second, the moderation of state power (most crucially by autonomous courts) and, third, civil society,[72] then these Acts might be understood as augmenting state power by undermining these features of political liberalism. Basic legal freedoms are those freedoms that

> reside in the core rights of citizenship … [and] rest upon the granting of legal personality to a citizen and the protection of all residents within a sovereign legal jurisdiction. These freedoms include the institutionalisation of juridical rights (eg, rights to due process in law, habeas corpus, legal representation and access to justice, freedom from arbitrary arrest, torture and death) … and the protection of foundational political freedoms (eg, speech, faith, travel, association).[73]

The case studies illustrate a range of ways in which the courts have been constrained, civil society dismantled and basic legal freedoms disregarded. Put differently, these Acts have silenced non-state actors that, in conditions of political liberalism, would enable advocates for 'law' (such as the legal professions and civil society) to moderate state power.[74] In brief, the legislation I study illustrates that 'law' has been the state's instrument for silencing critique.

A second reason for selecting these Acts is that they demonstrate how, despite a 'rule of law' procedural correctness in their enactment, crucial legislative terms have taken on (often oppressive) ideological meanings peculiar to Singapore. In other words, legislative language lacks the clarity and autonomy from the state that it should, in 'rule of law' terms, exemplify. This feature of the Acts is particularly ironic given Lee's 2007 assertion to the IBA that Singapore 'law' was characterised

[72] Ibid.
[73] Ibid.
[74] Ibid.

by "clear laws".[75] A third reason determining my selection of legislation relates to the manner in which 'law' is routinely discursively presented alongside an invocation of 'nation'. The legislation I study was enacted in the first fifty years of Singapore's existence as a nation-state. All five Acts construct, reinscribe and consolidate the connectedness of 'law' and 'nation'. These enactments and the discourses in which they are situated illustrate the thematic consistency of the Singapore state's insistence that 'law' must ensure the security, prosperity and social order of the 'nation'.

This project is concerned primarily with covert, rather than overt, modes of illiberalism and does not claim to comprehensively survey the corpus of Singapore 'law' for the range of ways in which 'law' is illiberal. Indeed, two particularly notorious instances of Singapore's legal illiberalism – defamation proceedings against political opponents and the *Internal Security Act* (enabling detention without trial) – are not studied. These illiberal facets of 'law', while beyond the parameters of this study, are related issues.

The *Internal Security Act*[76] (*ISA*) is the nation-state's reformulation of the colonial state's *Emergency Regulations*. The *Emergency Regulations* were originally designed to enable detention without trial during the Malayan Emergency (1948–60), the colonial state's response to the Malayan Communist Party's decision to take up an armed struggle.[77] The *ISA* has, unfortunately, become a fixed feature of the Singapore

[75] Lee, *Why Singapore Is What It Is*, *supra* note 7.

[76] *Internal Security Act* (Cap. 143, 1985 Rev. Ed. Sing.).

[77] Yeo and Lau note that the Emergency Regulations, by prohibiting all public meetings except at election times, and empowering the police screening of union leaders cleared the political arena of left-wing politicians unacceptable to the colonial state: Yeo Kim Wah & Albert Lau, "From Colonialism to Independence, 1945–1965", in Ernest Chew & Edwin Lee eds., *A History of Singapore* (Singapore: Oxford University Press, 1991) 117 at 124. See also C. C. Chin & Karl Hack, eds., *Dialogues with Chin Peng: New Light on the Malayan Communist Party*, 2nd ed. (Singapore: Singapore University Press, 2005).

scene. The crude 'rule of law' violations of the *ISA* have been well noted in scholarly literature,[78] as have the Act's applications against political opponents of the state.[79]

[78] For a sampling, see Li-Ann Thio, "Taking Rights Seriously? Human Rights Law in Singapore", in Randall Peerenboom & Andrew Chen, eds., *Human Rights in Asia* (London: Routledge Curzon, 2006) 158; Michael Hor, "Law and Terror: Singapore Stories and Malaysian Dilemmas", in Michael Hor, Victor Ramraj & Kent Roach, eds., *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005) 273; Michael Hor, "Terrorism and the Criminal Law: Singapore's Solution" (2002) *S.J.L.S.* 30; Damien Chong, "Enhancing National Security Through the Rule of Law: Singapore's Recasting of the Internal Security Act as an Anti-Terrorism Legislation" (2005) 5 *AsiaRights Journal* 1; Simon Tay, "Human Rights, Culture and the Singapore Example" (1996) 41 *McGill L.J.* 743; H. F. Rawlings, "Habeas Corpus and Preventive Detention in Singapore and Malaysia" (1983) 25 *Mal. L. Rev*. 324; Tan Yock Lin, "Some Aspects of Executive Detention in Malaysia and Singapore" (1987) 29 *Mal. L. Rev*. 237; S. Jayakumar, "Emergency Powers in Malaysia, Development of the Law, 1957–1977" (1978) 1 *M.L.J.* ix; Low Hop Bing, "Habeas Corpus in Malaysia and Singapore" (1977) 2 *M.L.J.* iv; Rowena Daw, "Preventive Detention in Singapore: A Comment on the Case of Lee Mau Seng" (1972) 14 *Mal. L. Rev*. 276; R. H. Hickling, "Some Aspects of Fundamental Liberties Under the Constitution of the Federation of Malaya" (1963) 2 *M.L.J.* xiv; R. H. Hickling, "The First Five Years of the Federation of Malaya Constitution" (1962) 4 *Mal. L. Rev*. 183; Francis Seow, *The Media Enthralled: Singapore Revisited* (Boulder: Lynne Rienner, 1998); Jayasuriya, *Law, Capitalism and Power*, *supra* note 64; Silverstein, *The Exception That Proves Rules*, *supra* note 22; Thio, *Pragmatism and Realism supra* note 67; Rodan, *Authoritarian Rule*, *supra* note 31; Tremewan, *supra* note 67. Geoff Wade, "Operation Cold Store: A Key Event in the Creation of Malaysia and in the Origins of Modern Singapore", Paper presented at the 21st Conference of the International Association of Historians of Asia, 21–25 June 2010.

[79] For a sampling see J. B. Jeyaretnam, "The Rule of Law in Singapore", in *The Rule of Law and Human Rights in Malaysia and Singapore: A Report of the Conference Held at the European Parliament* (Limelette, 1989) 37; Fong Hoe Fang, ed., *That We May Dream Again* (Singapore: Ethos, 2009); Tan Jing Quee, Teo Soh Lung & Koh Kay Yew, eds., *Our Thoughts Are Free: Poems and Prose on Imprisonment and Exile* (Singapore: Ethos, 2009); Said Zahari, *The Long Nightmare: My 17 Years as a Political Prisoner* (Kuala Lumpur: Utusan, 2007); Chris Lydgate, *Lee's Law: How Singapore Crushes Dissent* (Melbourne: Scribe, 2003); Asia Watch, *Silencing All Critics: Human Rights Violations in Singapore* (Washington, DC, 1989); Lawyers Rights Watch Canada, "Singapore: Independence of the Judiciary and the Legal Profession in Singapore" (17 October 2007); Chee Soon Juan, *Dare to Change: An Alternative Vision for Singapore* (Singapore: Singapore Democratic Party, 1994); Teo Soh Lung, *Beyond the Blue Gate: Recollections of a Political Prisoner* (Singapore: Ethos, 2010); Poh Soo Kai, Tan Jing Quee & Koh Kay Yew eds., *The Fajar Generation: The University Socialist Club and*

My excluding the *ISA* as a case study has, however, been ironically subverted by the insidious persistence of internal security detentions in the sub-strata of events relating to three of the four Acts studied: the *Press Act*, the *Legal Profession Act* and the *Religious Harmony Act*. Additionally, the core illiberalisms displayed by the five Acts might be read as the *ISA* writ large in three crucial ways. First, like the *ISA*, all five case studies reveal the exclusion or containment of the courts. Second, like the *ISA*, all five case studies involve legislative text that facilitates an interpretive imprecision weighted in favour of the state's accusatory characterisations, transforming dissent into a security threat. And third, as in the case of the *ISA*, the state's accusations need never be scrutinised or substantiated because the state claims to be preventing and pre-empting an emergency.

There is, however, an important distinguishing feature that sets the five enactments I study apart from the *ISA*. The case studies of this project, unlike the *ISA*, are not obvious 'rule by law' instruments encoding the legal exceptionalism through which the state manages extreme threats. The legislative instruments I study *conceal* their 'rule by law' nature. Bearing in mind the alarming attainment of legitimacy for the Singapore state's 'rule by law', the masking of legislation as a tool of repression warrants attention. The instruments I study construct a homogenised public domain, incrementally and almost invisibly. Alongside the crude repression of the *ISA*, it is covert 'rule by law' that appears to have facilitated the legitimacy of the Singapore state.

If the *ISA* is one illiberal facet of Singapore 'law' that has most widely and most consistently earned the state a measure of notoriety, then the use of defamation proceedings against opposition politicians and critics of the state is another. Defamation 'law' in Singapore is, broadly speaking, the 'common law' conception of defamation,[80] although Singapore

the Politics of Postwar Malaya and Singapore (Petaling Jaya: Strategic Information and Research Development Centre, 2010).

[80] Doris Chia & Rueben Mathiavaranam, *Evans on Defamation in Singapore and Malaysia*, 3rd ed. (Singapore: LexisNexis, 2008) 3.

courts have developed a uniquely Singaporean formulation with regard to damages[81] and have limited the applicability of 'common law' defamation in certain ways.[82] In contrast to the standard common law parameters for damages, in which public figures are expected to be able to deal with a degree of public criticism, Singapore courts have adopted the state's reasoning in holding that the reputations of political leaders are especially vulnerable to public opinion[83] and thus warrant a higher accounting of damages than when calculating damages for ordinary people.[84] Jurisprudence on the related offence of scandalising the court has also generated a uniquely Singaporean standard that inhibits

[81] Michael Hor, "The Freedom of Speech and Defamation" (1992) *S.J.L.S.* 542; Li-ann Thio, "Singapore: Regulating Political Speech and the Commitment 'to Build a Democratic Society' " (2003) 1 *International Journal of Constitutional Law* 516 at 523–24 [*Regulating Political Speech*]; Tsun Hung Tey, "Confining the Freedom of the Press in Singapore: A 'Pragmatic' Press for 'Nation-Building'?" (2008) 30:4 *Hum. Rts. Q.* 876 at 902; Tsun Hung Tey, "Singapore's Jurisprudence of Political Defamation and Its Triple-Whammy Impact on Political Speech" (2008) *Public Law.* 452; Cameron Sim, "The Singapore Chill: Political Defamation and the Normalisation of a Statist Rule of Law" (2011) 20:2 *Pac. Rim L. & Pol'y J.* 319; *Lee Kuan Yew v. J. B. Jeyaretnam*, [1979] 1 M.L.J. 281; *Lee Kuan Yew v. Seow Khee Leng*, [1989] 1 M.L.J. 172; *Lee Kuan Yew v. Derek Gwynn Davies & Ors*. [1990] 1 M.L.J. 390; *Lee Kuan Yew & Anor. v. Vinocur & Ors. & Another Action*, [1995] 3 Sing. L.R. 477; *Goh Chok Tong v. Jeyaretnam Joshua Benjamin*, [1998] 1 Sing. L.R. (upheld in *Goh Chok Tong v. Jeyaretnam Joshua Benjamin & Another Action*, [1998] 3 Sing. L.R. 337 (C.A.)); *Goh Chok Tong v. Chee Soon Juan (No. 2)*, [2005] 1 Sing. L.R. 573; *Lee Kuan Yew v. Chee Soon Juan (No. 2)*, [2005] 1 Sing. L.R. 552. See also jurisprudence cited at note 230 below.

[82] In *Attorney-General v. Wain and Others (No.1)* [1991] 1 Sing.L.R. 383, the High Court limited the applicability of English 'common law' on defamation and contempt to the pre-1981 position, citing developments in statute 'law' and the European Court of Human Rights as reasons to exclude post-1981 English decisions. Jurisprudence from a range of other 'common law' and Commonwealth jurisdictions was also excluded for a various reasons that were not especially convincing.

[83] A Deputy Prime Minister who also holds the office of Minister for Home Affairs reiterated the state's position recently when he said that the government "must robustly defend the integrity of our institutions of justice and law enforcement when anyone maliciously attacks and undermines the public confidence and trust which have been earned over the years." S. Ramesh, "Why S'pore Must 'Robustly' Defend Its Courts, Police Force", *Today* (4 August 2010).

[84] Ibid.

free speech.[85] As with the *ISA*, this feature of Singapore 'law' has been well studied.[86]

The legislation I study points to a different strand of state legal practices in two important ways. First, defamation proceedings have (inter alia) been directed at individuals who enter the public domain as explicit political opponents.[87] In contrast, none of the Acts featured as case studies in my project have acknowledged their targets as political opponents.

[85] Thio Li-ann, "Legal Systems in Singapore: Chapter 3 – Government and the State", Legal Systems in ASEAN, online: <http://www.aseanlawassociation.org/legal-sing.html>, 13–14; Tsun Hung Tey, "Singapore's Jurisprudence of Defamation and Scandalising the Judiciary", Paper presented at the Centre for Media and Communications Law Conference, Melbourne Law School, November 2008 (unpublished); Thio Li-ann, "The Virtual and the Real: Article 14, Political Speech and the Calibrated Management of Deliberative Democracy in Singapore" (2008) *Sing. J.L.S.* 25; Cameron Sim, "The Singapore Chill: Political Defamation and the Normalisation of a Statist Rule of Law" (2011) 20:2 *Pac. Rim L. & Pol'y J.* 319.

[86] Chia & Mathiavaranam, *supra* note 80; Hor, *supra* note 81; Thio, *Regulating Political Speech*, *supra* note 81, Tey, *supra* note 82; Michael Hor & Collin Seah, "Selected Issues in the Freedom of Speech and Expression in Singapore" (1991) 12 *Sing. L. Rev.* 296; Michael Hor, "Civil Disobedience and the Licensing of Speech in Singapore" (1999) *Lawasia Journal* 1.

[87] Singapore's leaders have used defamation against political opponents since 1960, when a split within the ruling PAP precipitated Lee Kuan Yew's threat to bring defamation proceedings against a cabinet minister and fellow PAP member, Ong Eng Guan: "Singapore: Its History", in Singapore Year Book 1966, reprinted in Verinder Grover, ed., *Singapore: Government and Politics* (New Delhi: Deep & Deep, 2000) 33 at 63. All of the cases cited at *supra* note 81 involve actions brought by state actors against opposition politicians. See also Gail Davidson & Howard Rubin, Q.C., for Lawyers Rights Watch Canada, "Defamation in Singapore: In the Matter of J. B. Jeyaretnam" (July 2001), online: <http://www.lrwc.org/news/report2.php>; Kelley Bryan & Howard Rubin for Lawyers Rights Watch Canada, "The Misuse of Bankruptcy Law in Singapore: An Analysis of the Matter of Re Joshua Benjamin Jeyaretnam, ex parte Indra Krishnan" (October 2004), online: <http://www.lrwc.org/documents/Misuse%20of%20Bankruptcy%20Law.Bryan& Rubin.22.10.04.pdf>; Howard Rubin for Lawyers Rights Watch Canada, "In the Matter of an Addendum to the Report to Lawyers Rights Watch on the Trial of J. B. Jeyaretnam as a Result of Observations on the Trial of Chee Soon Juan" (March 2003), online: <http://www.lrwc.org/documents/Addendum.Chee.Soon.Juan.trial.Mar.03.pdf>; Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Commission on Human Rights, 52d Sess., UN Doc. E/CN.4/1996/37.

Second, in contrast to the visibility and attention invited by defamation proceedings and internal security detentions, the enactments I study attract relatively little national or international notice. It is surely no accident that three of the five Acts studied deploy muted technologies of control enveloped within administrative and regulatory mechanisms. This enveloping that ensures the state's controlling measures lack the dramatic flourish of court proceedings or detention without trial and thus does not enter the public domain with the same demand for attention. In other words, the legislative technologies through which silencing is effected are themselves almost silent.

FROM BACKWATER TO METROPOLIS: PROSPERITY, 'RACE' AND 'LAW'

The state's account of Singapore history (an account I refer to as the national narrative) might be regarded as the primary context for 'law' with reference to 'nation'.[88] In turn, the national narrative locates various permutations of 'law' – colonial 'law', national 'law', 'English law', customary 'law', Dicey's concept of 'rule of law' – as markers of development. Unsurprisingly, the national narrative does not name 'rule by law'. Together with the strands of 'law' the national narrative does name, 'rule by law' weaves into a discursive fabric constructing and reinforcing the authority of the state. These compound and complex meanings attaching to 'law' in Singapore, indicate that 'law' sits within a context in which discourse, legal and otherwise, is marked by the recurrence of certain categories of social identity, in particular 'race',[89] 'language'[90] and

[88] Discussing the overwhelming dominance of the state's account of Singapore history, Hong and Huang (perhaps in a parody of *From Third World to First*, the title of the second volume of *The Singapore Story*, Lee Kuan Yew's two-volume memoir) write of "the 'from mangrove backwater to metropolis' line [of history], with Raffles and Lee Kuan Yew as the transformers": Hong & Huang, *supra* note 59 at 15.

[89] Geoffrey Benjamin, "The Cultural Logic of Singapore's Multiculturalism", in Riaz Hassan, ed., *Singapore: Society in Transition* (Kuala Lumpur: Oxford University Press, 1976) 115.

[90] Nirmala Srirekam PuruShotam, *Negotiating Language, Constructing Race: Disciplining Difference in Singapore* (Berlin: Mouton de Gruyter, 1998) 30–55.

'religion',[91] all framed by the category 'nation'.[92] In Singapore's national narrative, history, prosperity, 'race' and 'law'[93] entwine to produce the state's claims that, first, Singapore is a 'rule of law' state in the 'English' tradition and, second, that Singapore must, in the interests of 'nation', script departures from that same 'English' 'rule of law'. The state's pervasive narrative of national vulnerability[94] tends to be at the heart of the state's arguments as to why 'law' must be modified. When Lee Kuan Yew addressed the IBA, for example, he opened his address by characterising Singapore as a disadvantaged terrain with traumatic origins:

> [W]e were suddenly thrown out of the Federation of Malaysia.[95] … We faced a bleak future. We had no natural resources. A small island-nation in the middle of newly independent and nationalistic countries of Indonesia and Malaysia. To survive, we had to create a Singapore different from our neighbours – clean, more efficient, more secure, with quality infrastructure and good living conditions.[96]

The trauma of an imposed nationhood layers onto other events in Singapore's past to augment the trope of vulnerability: the Japanese

[91] Tong Chee Kiong, *Rationalising Religion: Religious Conversion, Revivalism and Competition in Singapore Society* (Leiden: Brill, 2007).

[92] In Singapore, as in other former colonies, social categories such as 'race', 'religion', 'law' and 'nation' are vehicles of concepts and belief systems "authored and authorised by colonialism and Western domination" but adopted and renewed by the nation-state: Gyan Prakash, 'Subaltern Studies as Postcolonial Criticism' (1994) 99:5 *American Historical Review* 1475.

[93] For a succinct summary of the arguments on the centrality of 'law' to 'nation', see Peter Fitzpatrick, "Introduction", in Peter Fitzpatrick, ed., *Nationalism, Racism and the Rule of Law* (Aldershot: Dartmouth, 1995) xiii at xv–xvii.

[94] The uses and effects of the state's narrative of national vulnerability inform scholarship in a range of other disciplines. For a sampling see PuruShotam's sociological study, *supra* note 90; a collection of essays produced by scholars in the social sciences and the humanities, Anne Pakir & Tong Chee Kiong, eds., *Imagining Singapore*, 2nd ed. (Singapore: Eastern Universities Press, 2004); a foreign policy study, Michael Leiffer, *Singapore's Foreign Policy: Coping with Vulnerability* (Abingdon: Routledge, 2000); and from the perspective of historians, Hong & Huang, *supra* note 59.

[95] In an arrangement brokered by the departing British colonial state, Singapore was granted independence as a state in the newly formed Federation of Malaysia in 1963. In 1965, Malaysia ejected Singapore from the Federation.

[96] Lee, *Why Singapore Is What It Is*, *supra* note 7.

Occupation (1942–45)[97]; Konfrontasi with Indonesia (1962–66), which took the form of military aggression[98] and sabotage[99] and riots in Singapore and Malaysia, which are typically presented as mob violence precipitated by irresolvable differences centring on 'race' and 'religion'.[100] It is probable that the enduring efficacy of the narrative of national vulnerability rests, in part, on its resonance with the lived experience of Singaporeans of a certain generation. Vulnerability chimes with "the middle sort of knowledge"[101] and social memory.

[97] The Japanese Imperial Army was a violent occupying force. The Occupation is remembered for large-scale massacres, starvation, torture and general terror. The inhumane treatment of Australian, New Zealand and British prisoners of war, many of whom lost their lives while interred at Changi Prison or while building the so-called Death Railway through the Thai/Burmese jungles, is part of the military history that links Singapore to these countries. The Occupation has been widely written about. For a sampling, see Lee Geok Boi, *The Syonan Years: Singapore under Japanese Rule, 1942–1945* (Singapore: Epigram, 2005) and Kevin Blackburn, "Reminiscence and War Trauma: Recalling the Japanese Occupation of Singapore, 1942–1945" (2005) 33:2 *Oral History* 91.

[98] The dominant national narrative in Singapore recounts Konfrontasi (or Confrontation) as Indonesia's objection to the 1963 constitution of the Federation of Malaysia as a "neo-colonialist plot": Yeo Kim Wah & Albert Lau, "From Colonialism to Independence, 1945–1965", in Ernest C. T. Chew & Edwin Lee, eds., *A History of Singapore* (Singapore: Oxford University Press, 1991) 117 at 142–43. The Federation consisted of peninsula Malaysia, the British Borneo territories of Sabah and Sarawak, as well as Singapore. Sukarno is generally cast as the initiator of Konfrontasi. The British were heavily involved in the formation of the Federation of Malaysia. Recent scholarship reveals that the British had been covertly involved militarily in attempts to destabilise Sukarno's regime and may have been motivated to secure the Federation as a way of countering Communism in the region: Tony Stockwell, "Forging Singapore and Malaysia: Colonialism, Decolonization and Nation-Building", in Wang Gungwu, ed., *Nation-Building: Five Southeast Asian Histories* (Singapore: Institute of Southeast Asian Studies, 2005) 191 at 200–209.

[99] Harun Said Osman Hj Mohd Ali, Jackie Sam, Philip Khoo, Cheong Yip Seng, Abdul Fazil, Roderik Pestana, & Gabriel Lee, "Terror Bomb Kills 2 Girls at Bank", *Straits Times* (11 March 1965).

[100] Syed Muhd Khairudin Aljunied, *Colonialism, Violence and Muslims in Southeast Asia* (London: Routledge, 2009); Lai, Ah Eng, *Beyond Rituals and Riots: Ethnic Pluralism and Social Cohesion in Singapore* (Singapore: Eastern Universities Press, 2004); Albert Lau, *A Moment of Anguish: Singapore in Malaysia and the Politics of Disengagement* (Singapore: Times Academic Press, 2000).

[101] Colin Gordon, "Introduction", in James D. Faubion, ed., *Michel Foucault: Power* (London: Penguin, 1994) xviii.

The trope of national vulnerability has been framed by a regional context in which violence and disorder precipitated by power struggles, often linked to the Cold War (such as the Vietnam War, the Korean War, the Cultural Revolution in China, the coup in Indonesia and the long years of violence in Cambodia), 'race' politics (such as the Sri Lankan civil war),[102] periodic violence in India presented as 'religious' clashes[103] and the bewildering lack of civility periodically displayed by Taiwanese parliamentarians when they abandon debate and resort to fisticuffs.[104]

When regarded in this light, the political, social and economic stability of Singapore appears extraordinary. The state-scripted national narrative explains the Singapore success story as a product wrought through the wisdom, foresight and virtuous diligence of its leaders,[105] with emphatic attention to the inescapable vulnerability of the nation-state. In terms of 'law' and 'nation', national vulnerability is typically presented as a legitimising rationale for two further features of the Singapore legal system: first, legal exceptionalism (ousting judicial review and concentrating power in the executive on the grounds of national security); and second, dual state legality.[106] Singapore is a dual state in that it matches the 'law' of the liberal 'West' in the commercial arena while repressing civil and political individual rights.[107] The bifurcation of Singapore's legal system is so distinct that the Canadian courts have recently specified that Singapore courts have parity with Canadian courts in commercial matters,[108] a specification that might be seen as implicit acknowledgement of different standards in other realms of 'law'. In a similar vein, the World Justice

[102] See, for example, Zakir Hussain, "Religious Harmony: 20 Years of Keeping the Peace", *Straits Times* (24 July 2009).

[103] Ibid.

[104] Chin Ko-lin, *Heijin: Organized Crime, Business, and Politics in Taiwan* (Armonk, New York: MESharp 2003).

[105] Hong & Huang, *supra* note 59.

[106] Kanishka Jayasuriya, "Introduction", in Jayasuriya, *Law, Capitalism and Power*, *supra* note 64 [*Introduction*].

[107] Ibid.

[108] *Oakwell Engineering Ltd. v. Enernorth Industries Inc.*, 2005 CanLII 2218 ON Sup. Ct. 7 B.L.R. (4th) 256.

Project has ranked Singapore first among its socio-economic peers for access to civil justice and order and security, while ranking it last in terms of open government and fundamental rights.[109]

Lee's address to the IBA was consistent with employing dual state legality to justify the state's use of legal exceptionalism. He described Singapore's legal system as "similar to" London and New York in terms of "laws relating to financial services", while characterising repressive, rights-violating legislation, such as the *Internal Security Act*[110] and the *Maintenance of Religious Harmony Act*,[111] as "special legislation to meet our needs".[112] The instrumental applications of the state's accounts of Singapore's history featuring the tropes of Singapore exceptionalism and Singapore vulnerability are best understood through the dominant account of how Singapore came to be.

Singapore tells its history in a particular way, and there is a particular significance to the choice of a launching point for this history. According to the national narrative, the island was populated by a few pirates and fisher folk until 'discovered' by the British East India Company's Raffles in 1819.[113] Recounting Singapore's history in this manner is consistent with the colonial account of Singapore as an insignificant space until it

[109] Mark David Agrast, Juan Carlos Botero, & Alejandro Ponce, *WJP Rule of Law Index* (Washington, DC: World Justice Project, 2010) at 78.

[110] *Internal Security Act* (Cap. 143, 1985 Rev. Ed. Sing.).

[111] *Maintenance of Religious Harmony Act* (Cap. 167A, 2001 Rev. Ed. Sing.).

[112] Lee, *Why Singapore Is What It Is*, *supra* note 7.

[113] It is impossible to overstate the overwhelming dominance of the state's account of Singapore history. Not only does it feature in the education system in terms of content taught in History, the National Education project involves presenting the national narrative as content across the curriculum; online: Ministry of Education <http://www.ne.edu.sg/>. See also Hong & Huang, *supra* note 59 at 15–29. The ruling party has been alert to the power of narrating its account of history from as early as 1961: Harper, *supra* note 59 at 4.

In addition to socialising effected through schools, compulsory military service (for all male citizens and permanent residents), as well as the annual National Day celebrations (which typically involve a re-telling of the national narrative), become platforms for the national narrative. See also Trocki & Barr, *supra* note 59 at 1 on efforts to complement "the standard 'Singapore Story' sponsored by the regime", and the references therein.

came into colonial hands.[114] Both the colonial and the national narratives credit Sir Stamford Raffles with having transformed Singapore into a thriving entrepôt, drawing immigrants seeking a better life from China, India and the surrounding Malay archipelago.

The People's Action Party (PAP) government has ruled Singapore since the first moments of independence in 1959 and has based much of its legitimacy on the delivery of prosperity.[115] In the colonial framing of Singapore as an insignificant fishing village until Raffles,[116] all prosperity in Singapore-the-nation is necessarily tied to this genesis of

[114] For example, "Singapore when occupied by Sir Stamford Raffles on the 6th of February 1819 … was covered by dense primeval jungle … with a few fishermen (of piratical habits).… [A]t the end of 1822, … Raffles …[wrote,] 'In little more than three years it has rise[n] from an insignificant fishing village, to a large and prosperous town, containing at least 10,000 inhabitant of all nations, actively engaged in commercial pursuits, which afford to each and all a handsome livelihood and abundant profit'". W. J. Napier, "An Introduction to the Study of the Law Administered in the Colony of the Straits Settlements" (1898), reprinted in (1974) 16:1 *Mal. L. Rev*. 4. Sir Walter Napier was Attorney General of the Straits Settlements from 1907 to 1909. His description of Singapore as a territory echoes the preamble of the document through which the reception of 'English law' is traced, the "Letters Patent Establishing the Court of Judicature at Prince of Wales Island, Singapore and Malacca in the East-Indies" (1826), known as the Second Charter of Justice.

[115] Kevin Y. L. Tan, "Economic Development, Legal Reform and Rights in Singapore and Taiwan", in Joanne R. Bauer & Daniel A. Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999) 264; Linda Low, *The Political Economy of a City-State: Government-Made Singapore* (Singapore: Oxford University Press, 1998). One scholar describes the Singapore government's determinations of the interests of citizens as "nearly completely materialistic" and the government as "now one of the wealthiest in the world, with massive financial assets both at home and abroad". Ian Austin, "Singapore in Transition: Economic Change and Political Consequences", Paper presented at the 17th Biennial Conference of the Asian Studies Association of Australia, July 2008. The legitimising effect of prosperity is not, of course, limited to Singapore as a polity. Loughlin, for example, writing in general on the modern state, notes that "the political administrative system is legitimated by its achievement in bringing about substantial improvements in material conditions. It delivered the goods. Consequently, throughout much of the twentieth century, when living standards for the majority were improving, the nature of the political-administrative system was not called into question". Martin Loughlin, "Law, Ideologies, and the Political-Administrative System" (1989) 16:1 *J. L. & Soc'y* 21 at 22.

[116] On the manner in which the ruling party resolves and presents its post-colonial credentials despite valorising colonisation, see Hong & Huang, *supra* note 59 at 16–18.

Singapore-the-colony. Selecting as history's Day One the moment of Singapore's entry into global capital (as it then was) is ideologically consistent with Singapore's development "from a colonial entrepot economy to one based on trade and foreign investments in manufacturing".[117] If the colonial project was primarily about trade[118] and managing populations so as to generate wealth for the colonial coffers,[119] then the national project shares the colonial state's focus on wealth and social order[120] but remedies the colonial state's neglect of social welfare.[121]

Locating the beginnings of Singapore in 1819 is also significant in terms of 'race'.[122] It is British colonial rule that has led to Singapore's 'racially' plural population and the dominance of 'race' as a social category.[123] Singapore-the-nation has adopted colonial 'race' categories and has extended the meanings and applications of 'race'.[124] The population of Singapore has been predominantly 'Chinese' since 1836 (45.6%).[125] Today, 'Chinese' consist of about 74% of the population, with

[117] Ibid. at 3.

[118] J. S. Furnivall, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India* (Cambridge: Cambridge University Press, 1948).

[119] Ibid.

[120] See generally Part One of Lee, *From Third World to First*, *supra* note 22.

[121] In hailing Singapore's "remarkable achievements in economic growth and social welfare", Doshi and Coclanis echo the many admiring assessments of Singapore's progress since independence: Tilak Doshi & Peter Coclanis, "The Economic Architect: Goh Keng Swee", in Lam Peng Er & Kevin Y. L. Tan, eds., *Lee's Lieutenants: Singapore's Old Guard* (St. Leonards: Allen & Unwin, 1999) 24. The text I have quoted is from note 20 at 208. For a sampling of evaluations of Singapore's economy, see World Bank, *The East Asian Miracle* (New York: Oxford University Press for World Bank, 1993) and W. G. Huff, *The Economic Growth of Singapore: Trade and Development in the Twentieth Century* (Cambridge: Cambridge University Press, 1994). Vasoo and Lee point out that social welfare has been incorporated into, and treated as a factor of, economic development: S. Vasoo & James Lee, "Singapore: Social Development, Housing and the Central Provident Fund" (2001: 10) *International Journal of Social Welfare* 276. See also Beng-Huat Chua, *Political Legitimacy and Housing: Stakeholding in Singapore* (London: Routledge, 1997).

[122] PuruShotam, *supra* note 90.

[123] Ibid.

[124] Ibid.; Benjamin, *supra* note 89.

[125] PuruShotam, *supra* 90, note 3 at 41.

a significant 'Malay' minority (13%) and an 'Indian' population of about 9.2%.[126] To start the Singapore story in 1819 is a way of constructing the island as becoming economically viable only with the arrival of a range of outsiders: first, the foreign British, who then facilitated immigration, resulting in prosperity. 'Race' and 'prosperity' are thus enmeshed and inter-dependent categories.

This narrative focus on prosperity deflects attention from a core instability in Singapore nationhood – the inability of the majority 'Chinese' population to claim legitimacy from being 'of the land'; a mode of legitimacy that resides in the 'raced' bodies of the minority, but crucially indigenous 'Malays'. A national narrative that celebrates colonisation is thus a narrative that validates the presence of the non-indigenous, attributing prosperity to colonialism and 'racial' pluralism and vesting legitimacy in material attainments, thereby augmenting the state's narrative of its virtuous rule.[127]

Celebrating colonisation also cements the place of 'law' in the 'nation'. Typically, the state's description of Singapore 'law' simultaneously elevates the colonial past and the national legal system, as in this example: "The Singapore legal system, which is closely modelled after the English legal system, is a legacy from Singapore's colonial past".[128] The characterisation

[126] Government of Singapore Census of Population 2010 Press Release online: <http://www.singstat.gov.sg/news/news/press31082010.pdf>.

[127] Harper, *supra* note 59.

[128] Sharon Koh, Gillian Koh Tan & Low Wan Jun Tammy, eds., *Speeches and Judgments of Chief Justice Yong Pung How*, vol. 1, 2nd ed. (Singapore: SNP, 2006) 18. Yong was Chief Justice from 1989 to 2006. Other instances of this simultaneous claim to inheriting English 'law' and building a sound legal system might be seen in Lee, *Why Singapore Is What It Is*, *supra* note 7; Chan, *supra* note 34; and the state's self-description in Singapore's Initial Report to the UN Committee for the Convention on the Elimination of All Forms of Discrimination Against Women (1999) 21 [CEDAW Report]a state report to the United Nations. The received status of this account of Singapore's legal history is also reflected in authoritative scholarship, for example, Kevin Tan, Yeo Tiong Min & Lee Kiat Seng, *Constitutional Law in Malaysia and Singapore* (Singapore: Malayan Law Journal, 1991); Li-ann Thio, "Government and the State", in Legal Systems in ASEAN, online: <http://www.aseanlawassociation.org/legal-sing.html>; Li-ann Thio and Kevin Y. L. Tan eds., *Evolution of a Revolution: 40 Years of the Singapore Constitution* (Abingdon: Routledge Cavendish, 2008).

of 'English' or 'British law' as "legacy"[129] or "heritage"[130] builds on the adoption of the colonial account of Singapore history[131] by adopting the colonial presentation of 'law' as "the gift we gave them".[132] Thus, in crucial ways, the national narrative perpetuates colonial constructs.

Just as the nation-state's accounts of history constitute the 'nation' as already-always 'Western',[133] the language, concepts and vision of 'law' are a similarly foundational claim to a 'Western' mode of state legitimacy. Indeed, the public, declaratory and symbolic legal texts of Singapore, such as the *Constitution*[134] and the *Proclamation of Singapore*,[135] bring the 'nation' into being as an entity shaped by explicitly 'Western' notions of legitimacy and political liberalism:[136]

[129] Koh, Tan & Low, *supra* note 128.

[130] Lee, *Why Singapore Is What It Is*, supra note 7.

[131] *Supra* notes 93 and 94.

[132] Peter Fitzpatrick, "Custom as Imperialism", in Jamil M. Abun-Nasr, Ulrich Spellenbert & Ulrike Wanitzek, eds., *Law, Society and National Identity in Africa* (Hamburg: Helmut Buske, 1990) 15.

[133] Ien Ang & John Stratton, "The Singapore Way of Multiculturalism: Western Concepts/ Asian Cultures" (1995) 10 *Sojourn: Journal of Social Issues in Southeast Asia* 1.

[134] *Constitution of the Republic of Singapore* (1999 Rev. Ed. Sing.) [*Constitution*]. The *Constitution* declares itself to be "the supreme law of the Republic of Singapore" (Art. 4), thereby explicitly "opposing political absolutism": Thio, *Lex Rex or Rex Lex*? *supra* note 14 at 1. The Fundamental Liberties section of the *Constitution* (Part IV) imports liberal values by guaranteeing the freedoms of speech, assembly, association, movement, religion and equality before the law. It protects against retrospective criminal laws and repeated trials, prohibits banishment, slavery and forced labour. These constitutional promises, however, are qualified in a range of ways, such that, generally, human rights practice and policy in Singapore are "ultimately informed by overriding state objectives and national development goals prioritising economic growth and social order": Thio, *Pragmatism and Realism*, *supra* note 67 at 43. On the dereliction of the ideal of the supremacy of the *Constitution* in Singapore's nearly one-party Parliament, see Benedict Sheehey, "Singapore, 'Shared Values' and Law: Non East versus West Constitutional Hermeneutic" (2004) 67 *Hong Kong L.J.* 74.

[135] *Independence of Singapore Agreement 1965* (1985 Rev. Ed. Sing.) [*Proclamation*].

[136] An enormous literature, a review of which is beyond the scope of this project, tracks the long history of liberalism embedded within 'rule of law'. A recent and accessible account is Tamanaha, *On the Rule of Law*, supra note 15. A succinct summation of the history of liberalism's inseparable connection with 'common law' and the location of that 'common law' in Singapore is available in Michael Rutter, *The Applicable Law in Singapore and Malaysia* (Singapore: Malayan Law Journal, 1989).

> Now I Lee Kuan Yew Prime Minister of Singapore, do hereby proclaim and declare on behalf of the people and the Government of Singapore that as from today the ninth day of August in the year one thousand nine hundred and sixty-five Singapore shall be forever a sovereign democratic and independent nation, founded upon the principles of liberty and justice and ever seeking the welfare and happiness of her people in a more just and equal society.[137]

As the voice of the 'nation', Lee marked Singapore's genesis through proclaiming 'democracy', 'independence', 'liberty', 'justice' and 'equality' as founding principles. The proclamation of these values, consistent with constructing the emerging 'nation' along the lines of a 'Western' model, shows that the complex links and entanglements between 'law', political liberalism and legitimacy[138] inform the category 'rule of law' in Singapore. The 'nation' is, in a sense, constituted by a liberal account of 'law'.

The enduring power of this strand of Singapore 'law' is signalled, for example, by Lee Kuan Yew's 2007 address to the IBA. Here, too, the description was "Singapore inherited a sound legal system from the British.… The common law heritage and its developed contract law are known to and have helped attract investors".[139] It is noteworthy that, for Lee, the value of 'English law' is exemplified by commercial advantage. Augmenting the presentation of institutional inheritance, Lee highlights his unassailable personal authority arising from education and immersion in 'English law':

> I studied law in the Cambridge Law School and am a barrister of Middle Temple, an English inn of Court. I practised law for a decade

[137] *Proclamation*, *supra* note 135.

[138] As previously set out, while acknowledging the many contestations around these terms, I adopt the parameters for "a legal concept of political liberalism rather than a suffrage-based model of liberalism" identified as basic legal freedoms, a moderate state and civil society: Halliday, Karpik & Feeley, *supra* note 71.

[139] Lee, *Why Singapore Is What It Is*, *supra* note 7. Lee has identified the protection of intellectual property rights and the 'rule of law' as the two crucial ways in which Singapore had a competitive advantage over China: Chew Xiang, "IP Rights, Rule of Law Our Competitive Edge: MM Lee", *Business Times* (20 October 2009).

> before I took office in 1959 as prime minister of self-governing Singapore. Therefore I knew the rule of law would give Singapore an advantage in the centre of South-east Asia.[140]

In claiming 'English law', 'British law' and 'common law' as part of the genealogy of Singapore 'law', it is as if the state signals the pedigree, so to speak, of its modernity. The inter-textuality of language[141] lends richly legitimising associations to this claim of a shared parentage in 'English law', for England is "the acknowledged birthplace of liberalism and the bastion of the rule of law".[142] Thus, just as the national narrative links prosperity to colonial rule and 'racial' pluralism, the pedigreed modernity of 'British law' becomes an important legitimising trope in the Singapore account of 'law'. The apparent contradiction between declaratory texts asserting 'Western' liberal values, and everyday discourse and legislative text recoding these values into a Singapore mode of illiberalism, points, I would argue, to subterranean anxieties relating to 'race' and legitimacy.

Subterranean Anxieties

When the majority of Singapore's population bears a 'race' name – 'Chinese' – that precludes claiming power on the basis of a timeless, ancestral connection to the land,[143] then 'British law' and 'common law' become vital to a post-colonial construction of legitimacy. 'British law', structuring 'nation' in ways that vest rights in humanity and citizenship rather than ancestry, prevents an interrogation of the right to rule for those who

[140] Lee, *Why Singapore Is What It Is*, *supra* note 7.

[141] In the terms employed by Critical Discourse Analysis, "texts always exist in intertextual relations with other texts … [requiring] us to view discourses and texts from a historical perspective": Norman Fairclough, *Language and Power* (London: Longman, 1989) at 155.

[142] Tamanaha, *supra* note 15 at 56.

[143] The title of Regnier's monograph reflects the 'racial' dislocation that underpins state, and popular, conceptions of Singapore's existence: Philippe Regnier, *Singapore: A Chinese City State in a Malay World*, trans. Christopher Hurst (London: Hurst, 1991).

are not, so to speak, 'of the land'.[144] In adopting the legal-administrative apparatus put in place by the British, the 'nation' deflects possible claims to prior legal systems, claims which would necessarily import alternative histories and alternative legitimacies (the place of 'customary law' within the official legal system is discussed later in this section).

Read through the lens of the legitimising project of the national narrative,[145] the state's discourse on 'law' might be understood as a constant endeavour to authorise itself, to the exclusion of all others, to speak on 'law'. When speaking, the state repeatedly prescribes the basis for a uniquely Singapore account of the 'rule of law'. This account typically frames Singapore, and Singapore 'law', as an exception to some generalised 'Western' notion of 'rule of law'. For example:

> Singapore's legal system is largely founded upon the British legal system which has since been modified and adapted to suit the nation's needs and circumstances. It is within this legal framework whereby human rights are protected. Any persons who are of the view that their legal rights have been infringed upon can bring an action in the local courts which will then adjudicate upon the issue according to the applicable law in Singapore.[146]

However, the discursive double-bind for the state is that the 'nation' has been explicitly shaped by 'Western' ideals and values that valorise a 'Western', liberal 'rule of law' (as demonstrated by the text of the *Proclamation*, for example). And yet the same state that has framed

[144] Hong argues that because of the immigrant composition of the population, Singapore's nationalist leaders initially steered clear of references to the past immediately prior to colonial rule, because "[t]he glories of a mythical past did not suit the purposes of a Singapore leadership ruling over an immigrant, plural society. They claimed to be harbingers of a new society rather than the reincarnation of essentialist cultural icons". Lysa Hong, "Making the History of Singapore: S. Rajaratnam and C. V. Devan Nair", in Lam Peng Er & Kevin Y. L. Tan, eds., *Lee's Lieutenants: Singapore's Old Guard* (St. Leonards: Allen & Unwin, 1999) 96 at 98–99.

[145] Hong & Huang, *supra* note 59; Harper, *supra* note 59 at 3–55; Philip Holden, "A Man and an Island: Gender and Nation in Lee Kuan Yew's Singapore Story" (2001) 24:2 *Biography: An Interdisciplinary Quarterly* 410.

[146] CEDAW Report, *supra* note 128.

'nation' as 'Western' (probably so as to avoid the problematic issue of political legitimacy arising from an ancestral connection to land) insistently departs from a 'Western' standard for 'law' with reference to civil and political rights.[147] This double-bind has led to the state's efforts to be the sole author on 'law' and legitimacy, a project requiring endless reiteration and constant refinement.

DISCIPLINING DIFFERENCE THROUGH 'LAW'

The manner in which the categories 'law', 'race' and 'nation' come together in Singapore state discourse is captured by this address delivered by independent Singapore's first Head of State, the Yang Di-Pertuan Negara,[148] presiding over the 1965 opening of the first sitting of the first Parliament of the very new Republic of Singapore:

> Our survival as a people … depends upon … our perseverance in seeking long-term solutions to the problems of finding a new balance of forces in this part of the world, a task made more difficult by the migration of different racial groups into South-East Asia during the period of European domination.… [I]ndependence offers us the greater authority to bring about what we have always thought necessary, a tolerant society, multi-racial, multi-lingual, multi-religious, welded ever closer together by ties of common experience into a satisfying society, satisfying both for the indigenous peoples and for those migrant stock who came during the period of British rule.

[147] Jayasuriya, *The Exception Becomes the Norm*, *supra* note 14, at 118; Jayasuriya, *Introduction*, supra note 107 at 1; Agrast, Botero & Ponce, *supra* note 109.

[148] Singapore has maintained the Westminster practice of a Head of State delivering an address on behalf of government on the occasion of the opening of Parliament. 'Yang Di-Pertuan Negara' is the formal title for the Head of State in the Malay language. Malay is officially, and as provided in Art. 153A(2) of the *Constitution*, the national language of Singapore. In what must have been obeisance to the symbolic power of language, Singapore's head of state went by the title 'Yang Di-Pertuan Negara' from 1959 to 1970. With the death of Singapore's first Head of State, the 'Malay' Yusof bin Isyak, and the appointment of the second Head of State, the 'Eurasian' Benjamin Sheares, the title changed to 'President'.

> Whilst the best guarantee of our future as a distinct and separate people in South-East Asia is the creation of a tolerant multi-racial society, we must however expect obstruction and resistance to this from groups inside … and outside Singapore. They are the Communalists and the Communists.… Needless to say, the more extreme any community is about one race, one language and one religion, the more likely it is to arouse counter chauvinism amongst the other communities to the detriment of all.
>
> … [W]e must never allow ourselves the luxury of forgetting that survival depends upon rallying and strengthening the forces … who are for a secular, rational and multi-racial approach to the problems of economic backwardness and the legacy of unbalanced development in the colonial era.[149]

When this speech was made, in 1965, issues of 'race' and tensions about the place of Singapore in the Federation of Malaysia[150] had precipitated the ejection of Singapore from the Federation.[151] Issues of 'race', identity and the legitimacy to reside in and rule the territory of Singapore therefore launched Singapore's very existence as a nation-state. And 'British law', embedding (in the state's terms) secularism, modernity and rationality, was presented as the vehicle that de-clawed the dangerous beasts of difference: 'race', 'language' and 'religion'.

The importance of a 'Western' mode of legality for Singapore 'law' is reflected in another way: the absence, within the official legal system, of 'customary law'.[152] In using the term 'customary law', I adopt the colonial

[149] Sing., *Parliamentary Debates*, vol. 24, cols. 5–14 (8 December 1965) (Yang Di-Pertuan Negara Encik Yusof Ishak).

[150] Hong & Huang, *supra* note 59 at 88–95.

[151] Rogers M. Smith, ed., *Southeast Asia Documents of Political Development and Change* (Ithaca, N.Y.: Cornell University Press, 1974) at 266–76.

[152] It is not my intention to perpetuate essentialising oppositions of 'Western law' and 'customary law'. Rather, I point to a colonial history of differentiated categories – in particular, 'English law' as against 'customary' or 'personal law'. These terms were used by the British to draw a distinction between the domains in which 'English' law would apply (for example, contract, property and taxation) and the domain of "personal law" (such as marriage and inheritance): M. B. Hooker, *Laws of Southeast Asia* (Singapore: Butterworths, 1986). Article 12(3) of the *Constitution* may appear to enable personal law in the colonial sense, but the case law (discussed later) suggests otherwise.

state's category for 'law' tied to custom and tradition.[153] While there is a limited legal pluralism represented by the operation of the *Administration of Muslim Law Act*[154] and the history of even the colonial ruler accommodating some measure of 'customary law[155] within the hegemony of 'English law',[156] the nation-state has policed 'law' in a manner that minimises, to the point of exclusion, a non-'Western' 'law'.

The official legal system of Singapore-the-nation-state is extremely wary of claims made by citizens that legal consequences should follow from customary practices. In a 2002 decision, *OHC on behalf of TPC v. TTMJ*,[157] the Tribunal for the Maintenance of Parents refused to recognise an adoption conducted by Chinese customary rituals, holding that only adoptions consistent with the bureaucratic requirements of the *Adoption of Children Act*[158] could be recognised as valid. In the 1995 High Court decision of *Sonia Chataram Aswani v. Haresh Jaikishin Buxani*,[159] the court refused to recognise a marriage that was conducted in accordance

[153] Hooker, *supra* note 152; H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2004).

[154] *Administration of Muslim Law Act* (Cap. 3, 1999 Rev. Ed. Sing.) [*AMLA*]. Although state discourse presents *AMLA* as unproblematically 'Muslim', the statute is very much a colonial construct (Hooker, *supra* note 152). *AMLA* constitutes an administrative body, the Majlis Ugama Islam, "to administer matters relating to the Muslim religion and Muslims in Singapore" (s. 3(2)(b)) and limits the operation of 'Muslim law' to the areas of marriage, divorce, inheritance, charitable trusts and the administrative aspects of Islam, such as the certification of halal food, the regulation of Haj services and goods. *AMLA* was passed in 1966, a year after Singapore became an independent republic. *AMLA* reworks the colonial *Muslim and Hindu Endowments Ordinance*, which was enacted by the British in 1905; see "Chronological Table of the Ordinances Enacted From 1st April, 1867 to 30th April, 1955", *The Laws of the Colony of Singapore* (1955 Rev. Ed.), vol. VIII, 206.

[155] Hooker, *supra* note 152.

[156] Hence the description of a "fused administration of justice". Geoffrey Bartholomew, "Introduction", *Tables of the Written Laws of the Republic of Singapore, 1819–1971* (Singapore: Malaya Law Review, University of Singapore, 1972).

[157] [2002] SGTMP 3. The decisions of the Tribunal for the Maintenance of Parents are available at the electronic database produced by the Singapore Academy of Law, LawNet.

[158] Cap. 4, 1985 Rev. Ed. Sing.

[159] [1995] 3 Sing.L.R. 627.

with Hindu rites but not registered as a monogamous marriage within the terms of the *Women's Charter*.[160] In both these decisions, the national legal system's need for bureaucratic homogeneity was asserted over the unpredictable diversity of prior legal traditions.[161]

The fact that these cases are among the very few in which Singapore citizens have attempted to seek recognition for 'customary law' as legally valid reflects perhaps the overwhelming success of the nationalist legal project. Legal traditions that pre-date colonial rule and that might still operate in the everyday realities of people's lives are not traditions the 'nation' is ready to recognise as 'law'. In other words, Singapore-the-nation has appropriated 'law' in such a manner that only textual 'law' consistent with 'common law' categories of cases and legislation is recognised. In closing off the limited accommodation of 'personal law' afforded by the colonial system, there may be less 'customary law' in Singapore-the-nation than there was in Singapore-the-colony. The state's vigilant exclusion of 'customary law' from the Singapore legal system points to a crucial homogenising role played by 'law' in the 'nation'.[162]

That 'law' should be tied to the homogenising project of 'nation' is unsurprising. National legal systems have a long history of "pointing to the exclusivity of state sources of law … instrumentally directed towards the process of creating binding law, which can be uniformly enforced within the defined territory of the state".[163] In tracing this history, Glenn argues that "[s]tate law had to bind because otherwise there would be

[160] Cap. 353, 1997 Rev. Ed. Sing.

[161] On the enduring nature of legal traditions, see Glenn, *supra* note 153.

[162] This homogenising effect was possibly augmented by a 2004 High Court decision on an appeal from a ruling of the Fatwa Committee constituted by the *AMLA*. In this decision, the High Court held that "it was an important principle of Western as well as Muslim jurisprudence that a person could not be a judge in his own case", with the possible consequence that Syariah courts will be subject to supervision by civil courts in issues of natural justice: *Mohammed Ismail bin Ibrahim and Another v. Mohammed Taha bin Ibrahim* [2004] 4 Sing.L.R. 756 at 779.

[163] H. Patrick Glenn, "The Nationalist Heritage", in Pierre Legrand & Roderick Munday, eds., *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) 76 at 83.

no state law, and no state".[164] Even allowing for the centrality of 'law' to marking and consolidating the boundaries of 'nation', the resistance to 'customary law' sits oddly with Singapore's avowed and explicit plural political model of the nation-state.[165] The contradiction inherent to rejecting 'customary law' while presenting the modern, rational 'nation' as a guardian of multi-racial, multi-religious difference[166] is an ongoing (but underlying) tension within Singapore public discourse on 'law'.[167] Chapter 4 on the *Press Act* and Chapter 6 on the *Religious Harmony Act* show how 'race', 'language' and religion' have been appropriated by the state in certain ways, delegitimising any attempt on the part of the citizen to invest these categories with claims for rights.

If 'law' in Singapore has been used to shape legal homogeneity for citizens marked notionally and bureaucratically different in terms of 'language', 'religion' and 'race', then this project shows how 'law' has been used to erase the expression of another kind of difference – ideological/political difference. Through interrogating and contextualising legislation, this project shows how the state has reserved unto itself the authority to manage the discursive ambivalence of 'law'. The inaugurating Proclamation of Independence (quoted earlier) inter-textually[168] invokes "a legal concept of political liberalism"[169] that is inherently and explicitly

[164] Ibid. at 80.

[165] The state has, from the outset, declared itself to be building a 'nation' on the principles of being multi-racial, non-Communist, non-aligned, and democratic socialist: Chan Heng Chee, "Political Developments, 1965–1979", in Ernest Chew & Edwin Lee, eds., *A History of Singapore* (Singapore: Oxford University Press, 1991) 157 at 158.

[166] The promises of the plural political model are perhaps best exemplified by Art. 12 of the *Constitution*. Article 12(1) guarantees that "[a]ll persons are equal before the law and entitled to the equal protection of the law". At the same time, this guarantee is qualified by Art. 12(2), which paves the way for positive discrimination for 'Malays' (Art. 152), and Art. 12(3), which preserves the regulation of "personal law" and restrictions to employment in religious affairs.

[167] Sing., *Parliamentary Debates*, vol. 86 (19 August 2009) (Lee Kuan Yew); Clarissa Oon, "MM Rebuts NMP's Notion of Race Equality", *Straits Times* (20 August 2009).

[168] Fairclough, *supra* note 141.

[169] Halliday, Karpik & Feeley, *supra* note 71.

'Western'. This political liberalism is then moderated by qualifications and constraints the state positions itself, and only itself, as authorised to determine. In the process, as the case studies illustrate, the state delegitimises actors who challenge the state's prescriptions for Singapore 'law'. The vehemence with which the state rejects and silences critique is consistent with the inaugural anxiety of 'nation'. The state's hyper-vigilant policing of the standing to speak on 'law' papers over the fragility of a state that can claim neither the authority of 'race' nor (as I argue later in this chapter) the authority of an unambiguous electoral victory. The leaders of the state cannot claim that third legitimising banner of post-colonialism, that of having led an anti-colonial battle for independence (a point discussed later). As the discussion in Chapter 3 elaborates, this is a state that has come into power through a complicit relationship with the coloniser, relying on coercion, surveillance and a violence legitimated by legal exceptionalism so as to secure power and control.

'RULE OF LAW': THICK, THIN, DUAL AND DICEY

It is consistent with the state's claim that its legal system originates in 'British law' that the category 'rule of law' has rich, legitimising resonances in the Singapore public domain. The Diceyan notion of the 'rule of law' offers a reference point for one of the main ways in which the category 'rule of law' is used in Singapore public discourse. The Victorian jurist A. V. Dicey is generally considered to have framed "the seminal modern definition of the 'rule of law'".[170] Dicey's definition requires, first, that punishment should be only according to existing 'laws', which 'laws' should be enforced by ordinary courts rather than special tribunals or government officials exercising discretion; second, that everyone be regarded as equal before the 'law', with a particular emphasis on the subordination of public officials to 'law'; and third, in the common law

[170] Rachel Kleinfeld, "Competing Definitions of the Rule of Law", in Thomas Carothers, ed., *Promoting the Rule of Law Abroad* (Washington. DC: Carnegie Endowment for International Peace, 2006) 31 at 38.

tradition, that rights should be enforceable through courts.[171] Diceyan notions of 'rule of law' are applicable in Singapore through the 'common law',[172] which, as I have shown, the state celebrates as part of Singapore's "heritage" from 'colony'.[173] Additionally, Singapore state actors describe Singapore as complying with Dicey's formulation of the 'rule of law', as this recent excerpt from a speech delivered by Chief Justice Chan Sek Keong illustrates:

> Singapore has a robust criminal justice system under the rule of law. English law and English justice, the epitome of the rule of law as conceived by A V Dicey, was the foundation for the Singapore legal system.[174]

Not only are Dicey's parameters for the 'rule of law' typically claimed as a foundational Singapore feature by state actors, Dicey is also presented as relevant to Singapore 'law' by the standard texts of legal education.[175] In addition to explicit references, the Diceyan formulation is repeatedly alluded to in Singapore state discourse.[176] Examples of these discursive allusions are presented in the Chapter 3 discussion of the Fay case, in the state's insistence that it punishes according to the 'law',[177] that all are equal before the 'law' in Singapore[178] and that Singapore courts are

[171] Tamanaha, *supra* note 15 at 63–65.

[172] Rutter, *supra* note 136.

[173] Lee, Why Singapore Is What It Is, *supra* note 7.

[174] Chan, *supra* note 34. Zakir Hussain, "Raffles, MM Lee and the Rule of Law: CJ", *Straits Times* (28 October 2009).

[175] Significantly, a leading Singapore constitutional law textbook offers students three definitions of 'rule of law': Dicey's, de Q. Walker's, and Raz's; Tan, Yeo & Lee, *supra* note 129. See also Jaclyn Ling-Chien Neo & Yvonne C. L. Lee, "Constitutional Supremacy: Still a Little Dicey", in Li-ann Thio & Kevin Y. L. Tan, eds., *Evolution of a Revolution: 40 Years of the Singapore Constitution* (Abingdon: Routledge, 2009) 153.

[176] Lee Kuan Yew's IBA address is an example: Lee, *Why Singapore Is What It Is*, *supra* note 7. In his October 2009 address to the New York State Bar Association Seasonal Meeting, Chief Justice Chan Sek Keong claimed that "English law and English justice, the epitome of the rule of law as conceived by A.V. Dicey, was the foundation for the Singapore legal system"; Chan, *supra* note 34.

[177] See Chapter 3.

[178] Ibid.

independent.[179] The state's description of the legal system as protective of human rights[180] and as facilitating the enforcement of rights in courts (as illustrated in the earlier quote from the state's report to CEDAW) also alludes to Diceyan principles.

The Diceyan ideals are perhaps most symbolically captured by the constitutional enshrinement of the supremacy of 'law',[181] the equality of all before the 'law'[182] and the structures of governance designed to maintain the separation of powers and the independence of the courts.[183] In this, 'law' in Singapore conforms to the fundamental and foundational notion of the 'rule of law' as "a government of laws, the supremacy of the law, and the equality of all before the law".[184] And if the 'common law', which the state claims as the applicable 'law' in Singapore, is inextricably "a law of liberty"[185] informed by "the philosophy which places the highest value upon the right of the individual to life, liberty and security",[186] how has Singapore 'law' come to be characterised by illiberalism?

When Lee Kuan Yew gave his 2007 address to the IBA, in reciting laudatory rankings and assessments he was equating the demonstrable success of Singapore 'law' with technocratic efficiency[187] and "institutional attributes",[188] such as the "necessary" laws, a "well-functioning" judiciary and a "good" law enforcement apparatus.[189] If, as Peerenboom argues,[190] such institutional attributes are at the foundation of a functional 'rule of

[179] Ibid.
[180] CEDAW Report, *supra* note 128.
[181] *Constitution*, Art. 4.
[182] Ibid.
[183] Ibid., Parts V, VI and VII.
[184] Peerenboom, "Introduction," *supra* note 60 at 2.
[185] Rutter, *supra* note 136 at 574.
[186] Ibid. at 575.
[187] Kleinfeld, *supra* note 170 at 32, notes the World Bank's focus on "providing computers to courts, printing laws, and establishing magistrates' schools to create its technocratic vision of the rule of law as efficient and predictable justice".
[188] Kleinfeld, *supra* note 170 at 33.
[189] Ibid.
[190] Peerenboom, "Introduction," *supra* note 60 at 2–46.

law', does that mean the Singapore legal system is already and adequately 'rule of law'? This question is best explored through Peerenboom's conception of a 'rule of law' continuum, articulated as 'thin' and 'thick' conceptions of 'rule of law'.

Peerenboom argues that in order for 'rule of law' to be a meaningful category enabling the commensurability of comparative study, 'rule of law' conceptions must be divided into 'thin' and 'thick' accounts of the 'rule of law'.[191] At its most basic, a 'thin rule of law' conceives of 'law' in formal or instrumental terms,[192] whereas a 'thick rule of law' involves embedding the formal operations of 'law' within "a particular institutional, cultural and values complex".[193] A 'thin rule of law' displays the following features, which, Peerenboom argues, represent "core … and basic elements" of 'rule of law' for which there is broad consensus:[194] meaningful restraints on state actors; rules determining which entities may validly make 'law'; public accessibility and general applicability of 'law'; clear, consistent 'laws'; stable and generally prospective 'laws'.[195] Additionally, 'laws' must be enforced and be reasonably acceptable to a majority of the population.[196] Peerenboom presents these features as general markers, not absolutes, stressing that "[w]hile marginal deviations are acceptable, legal systems that fall far short are likely to be dysfunctional".[197] Broad functionality, then, is a key determinant of a realised 'thin rule of law'. The conspicuous efficiency of the Singapore legal system,[198] he argues, means that with reference to Singapore, contestation centres on "competing thick conceptions rather than thin rule of law concerns".[199]

The analysis presented by this project supports Peerenboom's evaluation that 'rule of law' critique in Singapore focuses on the state's

[191] Ibid. at 2.
[192] Ibid.
[193] Ibid. at 5.
[194] Ibid. at 2.
[195] Ibid.
[196] Ibid.
[197] Ibid. at 3.
[198] Thio, *Rule of Law*, *supra* note 41 at 183.
[199] Peerenboom, "Introduction," *supra* note 60 at 18.

"particular non-liberal thick conception".[200] However, my project illustrates two crucial refinements of his evaluation. First, contrary to Peerenboom's assessment,[201] the state's own 'thick' conceptions are not simplistically non-liberal. The state's discourse and the key legal texts of 'nation' present 'Western' liberalism as *generally applicable* to Singapore 'law' (as demonstrated by the *Proclamation* and the *Constitution*). It is vital to note that liberalism, or the claim to liberal democratic statehood, is the Singapore state's opening position on 'law'. Second, facets of 'thick rule of law' generate problematic uncertainties in the realm of 'thin rule of law' in a manner that undermines even Peerenboom's core and basic elements for 'thin rule of law'. For example, the state's ideology of Singapore exceptionalism, and its readiness to instrumentally appropriate legal forms and procedures, point to ways in which the formal, 'thin' functionality of the legal system is tainted by its susceptibility to power. Even Peerenboom identifies meaningful restraints on state actors as a primary constitutive feature of a 'thin rule of law',[202] yet as these case studies show, the Singapore state's incursions into individuals' rights leave citizens without meaningful and substantive redress or methods of restraining the state. Legal instrumentalism cannot be treated as value-neutral.

Thio's position that Singapore adheres to a formal, 'thin rule of law' bolstered by a 'thick' communitarian conception of the 'rule of law'[203] is an argument that supports Peerenboom's model. But the reading of power relations informing legal text and state discourse that I engage in through this project suggests otherwise. The detail of this study demonstrates that, despite Peerenboom's caution that "legitimate differences in values [are] at stake" in 'Asian' discourses on 'rule of law',[204] it is impossible, in the context of Singapore, to divorce state formulations of values from political

[200] Ibid. at 5.

[201] Ibid.

[202] Ibid. at 2.

[203] Thio, *Rule of Law*, *supra* note 41.

[204] Randall Peerenboom, "Preface", in Randall Peerenboom, ed., *Asian Discourses of Rule of Law* (London: Routledge, 2004) at x.

motivations. Even if operating within the parameters of Peerenboom's general markers for a 'thin rule of law', the case studies show how an instrumental 'thin rule of law' selectively obstructs the public accessibility and general applicability of 'law', discards meaningful restraints on state actors and strategically scripts opaque and uncertain 'laws'. Both 'thin' and 'thick' accounts of 'rule of law' and the dynamic interpellations between formal rules ('thin rule of law') and ideological justifications ('thick rule of law') are vividly demonstrated in the data of discourse, legislation and contextual events presented by the case studies.

A related difficulty is Peerenboom's claim that a 'thin rule of law' is "ideologically neutral".[205] Through this project, I argue that Singapore's attention to a high-functioning, "institutional attributes"[206] account of 'law' is inextricably ideological. Singapore's 'thin rule of law' is ideologically invested in at least three ways. First, 'law' is central to Singapore's conception of 'nation'; second, 'British law', 'common law' and 'rule of law' (categories replete with liberal legitimacy) are claimed as foundational features of the Singapore legal system; and third, 'law' pertaining to foreign investment, trade and the economy is on par with 'Western' liberal democracies while 'law' pertaining to civil and political rights is repressive.[207] It is this ideological dichotomy within 'law' that has led Jayasuriya to characterise Singapore as a dual state.[208]

'LAW' AND THE DUAL STATE

In his compelling analysis of Singapore's legal system, Jayasuriya adopts Fraenkel's concept of the Nazi dual state, combining "the rational

[205] Peerenboom, "Introduction," *supra* note 60 at 33.

[206] Kleinfeld, *supra* note 170 at 33.

[207] Jayasuriya, *Introduction*, *supra* note 106.

[208] Peerenboom's critique of Jayasuriya's model of legal statism relates to three points: Jayasuriya's focus on state discourse, the failure to account for the diversity of legal systems within Asia and the failure to apply the model to the full range of Asian jurisdictions: Peerenboom, "Introduction," *supra* note 60 at 48. This critique does not diminish the value and applicability of Jayasuriya's model to Singapore.

calculation demanded by the operation of the capitalist economy within the authoritarian shell of the state"[209] to argue that Singapore exemplifies a contemporary dual state in which "economic liberalism is enjoined to political illiberalism".[210] Jayasuriya presents Singapore's dual state legality as building upon the normalisation of legal exceptionalism. Legal exceptionalism (understood as the authoritarian primacy of executive power through a suspension of individual rights and standard legal processes) entered the Singapore legal system through colonial ordinances designed for the Malayan Emergency.[211] Jayasuriya argues that, building on the colonial model of state authoritarianism, the post-colonial Singapore state has frequently deployed executive power "in the name of public order and national unity"[212] in a manner that constructs a culture of political and ideological homogeneity in Singapore, dismantling the autonomy of the judiciary in political matters.[213]

Jayasuriya's characterisation of Singapore as a legal regime in which "the 'rule of law' applies to the economy but not to the political arena"[214] frames the argument of this study. With regard to the overarching question of the Singapore state's legitimacy despite violations of the 'rule of law', dual state legality accounts for one of the strategies that has sustained

[209] Jayasuriya, *The Exception Becomes the Norm*, *supra* note 14.

[210] Ibid. at 120.

[211] Ibid.

[212] Ibid. at 109.

[213] Ibid. at 128. With reference to Dicey's parameters for 'rule of law', this dismantling of judicial autonomy results in a failure of the principle of the equality before the 'law' when state practices and the courts interpret 'law' so as to secure state hegemony: Thio, *Regulating Political Speech*, *supra* note 81 at 516; Li-ann Thio, "Beyond the 'Four Walls' in an Age of Transnational Judicial Conversations Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore" (2006) 19 *Colum. J. Asian Law* 428; Li-ann Thio, *Pragmatism and Realism, supra* note 67. Li-ann Thio, "The Secular Trumps the Sacred: Constitutional Issues Arising from *Colin Chan v Public Prosecutor*" (1995) 16 *Sing. L. Rev*. 26; Ross Worthington, "Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore" (2001) 28:4 *J. L. & Soc'y* 490; Sheehey, *supra* note 134.

[214] Jayasuriya, *The Exception Becomes the Norm*, *supra* note 14 at 124.

legitimacy for the state. The dual state nature of Singapore 'law' also accounts for the confusion and complexity that mark discourse on 'law', such that a critique of the state's violations of individual liberties might be deflected and thrown into doubt by presenting World Bank rankings of legal efficiency, as Lee did when addressing the IBA.[215]

While the focus of this project is on legislation, the role of the courts in enabling illiberal legislation cannot be ignored. Singapore's courts have not, generally speaking, shown themselves to be advocates for the 'rule of law'.[216] Jayasuriya contextualises the operation of liberal courts as requiring "a liberal state and an autonomous civil society, whereas statist legalism is located within a corporatist state and a managed civil society".[217] The case studies of this project demonstrate the extent to which Singapore courts are located within the shaping context for statist courts – a context which predetermines the impossibility of liberal courts.

In summary, in this discussion of the category 'rule of law', I have argued that important and inaugural legal texts, such as the *Proclamation* and the *Constitution*, have imported into Singapore discourse the liberal values and ideals inherent to understanding the 'rule of law' as "a venerable part of Western political philosophy".[218] Ongoing state descriptions of Singapore's legal system as shaped by 'British law', 'common law', and Diceyan ideals build on these key texts to construct the 'rule of law' as a content-rich ideal, signifying the protection of individual rights and liberties.[219] In short, a liberal account of 'rule of law' informs Singapore's very existence as a nation-state and is incontrovertibly a part of Singapore discourse.

[215] Lee, *Why Singapore Is What It Is*, *supra* note 7.

[216] See, generally, references at *supra* notes 67 and 68, as well as the references on the applications of the *Internal Security Act* and defamation law: notes 78, 79, 80, 81, and 230.

[217] Kanishka Jayasuriya, "Corporatism and Judicial Independence within Statist Legal Institutions in East Asia", in Kanishka Jayasuriya, ed., *Law, Capitalism and Power in Asia* (London: Routledge, 1999) 173 [*Statist Legal Institutions*].

[218] Thomas Carothers, "The Rule-of-Law Revival", in Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006) 4.

[219] Kleinfeld, *supra* note 170 at 36.

Through these textual claims to a 'Western' mode of 'thick rule of law' and through the state's delivery of 'thin rule of law' in the shape of efficient[220] and corruption-free[221] legal operations, the 'nation' has sought parity and comity with 'Western' states. And as Lee Kuan Yew's 2007 engagement with the IBA demonstrates, the state continues to claim membership of an international league of legitimacy. The state's retention and reiteration of 'rule of law' in its discourse[222] conveys the continuing importance of 'rule of law' as a key category in the state's management of its legitimacy.

'LAW', POLITICAL LIBERALISM AND THE MODERATE STATE

If the category 'rule of law' (as deployed in Singapore discourse) is a vehicle for the values and meanings of political liberalism, then part of what is claimed via the state's references to 'British law', the 'common law' and the Westminster-model separation of powers is the desirable dispersal of power characteristic of the moderate state.[223] The moderate state is a state where power is internally, systemically dispersed (for instance, through judicial independence), providing for "ordered or

[220] The World Economic Forum Global Competitiveness Report 2008 ranks Singapore second out of 134 in terms of efficiency of legal framework; online: <http://www.weforum.org>. See also the Chapter 8 discussion of the manner in which the Singapore state uses these assessments and tables.

[221] "The World Bank's governance indicators place Singapore in the top percentile (90% to 100%) with reference to control of corruption, rule of law, government effectiveness and regulatory quality"; "Governance Matters 2009"; online: <http//info.worldbank.org/governance/wgi>.

[222] K. C. Vijayan, "Singapore Gets Top Marks in Global Law Survey", *Straits Times* (7 January 2011) reports on Chief Justice Chan Sek Keong's speech on the occasion of the opening of the legal year in which Chan highlighted the fact that Singapore had been ranked first among its socio-economic peers in terms of access to civil justice in the World Justice Project's Rule of Law Index. Neither the Chief Justice nor the press report acknowledged that the same index had ranked Singapore last in terms of fundamental rights and transparency of government.

[223] Halliday, Karpik & Feeley, *supra* note 71 at 10–12.

constitutionally-structured contestation among elements of the state".[224] Within the legal principles that frame the 'nation', citizens are meant to be protected against abuses of state power through constitutional provisions for the separation of powers. In other words, power in the moderate state[225] is reliably moderated by non-state centres of power.

By focusing on state measures to silence actors who seek the scrutiny and containment of state power, this study extends the Halliday, Karpik and Feeley theorising on the relationship between state power and advocacy for political liberalism.[226] While the analysis of the state's intimidation of lawyers (presented in Chapter 5) is explicitly within the Halliday et al. contemplation of legal professions as advocates for political liberalism,[227] the overarching attention of this project to the state's discursive and legislative delineations of 'law' demonstrates Singapore's institutional subversions of the moderate state. With authoritarian rule of law, legislation has been a key tool effecting the decimation of opposition parties (Chapter 3), the dismantling of independent media (Chapter 4) and the thwarting of an autonomous civil society (Chapters 5–7). In other words, 'law' has been central to consolidating the state, thus simultaneously subverting the dispersal of power characteristic of the moderate state. Despite the declaratory promises of political liberalism in founding legal texts like the *Constitution* and the *Proclamation*, legal and institutional practices have effected a "naked merging of state and party".[228]

Given the absolutist nature of the Singapore state,[229] its insistence that it is institutionally observant of the Westminster separation of powers is significant. The many defamation and contempt of court proceedings

[224] Ibid. at 10.

[225] Jayasuriya's parameters for the liberal state also highlight the presence of an autonomous civil society; *Statist Legal Institutions*, *supra* note 217.

[226] Halliday, Karpik & Feeley, *supra* note 71.

[227] Ibid.

[228] Rodan, *Westminster in Singapore*, *supra* note 12 at 114.

[229] Jayasuriya, *The Exception Becomes the Norm*, *supra* note 14.

initiated by the state to defend itself against allegations of executive interference in the judiciary[230] testify to the importance accorded by the state to being perceived as governing through the separation of powers. And yet the state is known for "the politicization of the legal system and the use of law to undermine political opposition, limit civil society and advance the conservative, statist substantive agenda of the People's Action Party".[231] Augmenting the close association between state and the judiciary is the conflation between the executive and Parliament.[232] An institutional division of powers does not appear to be a reality in the context of Singapore. Instead,

> [a]spects of Westminster-style government such as accountability of ministers to parliament, a non-partisan public bureaucracy and the tolerance of a loyal opposition were all casualties in the … establishment of a virtual one-party state by the ruling People's Action Party.… [A]ppearances of at least some aspects of Westminster remain important to the ideological defence of the political system ….[reflecting]

[230] The state has brought cases in defamation and scandalising the judiciary against parties who have explicitly or implicitly suggested that the courts are not independent of political pressure: *Lee Kuan Yew v. J.B. Jeyaretnam*, [1979] 1 M.L.J. 281; *Lee Kuan Yew v. Seow Khee Leng*, [1986] 1 M.L.J. 11; *Lee Kuan Yew v. Seow Khee Leng* [1989] 1 M.L.J. 172; *Lee Kuan Yew v. Derek Gwynn Davies & Ors*. [1990] 1 M.L.J. 390; *Lee Kuan Yew v. Jeyaretnam J.B. (No. 1)* [1990] Sing. L.R. 688; *Lee Kuan Yew & Anor v. Vinocur & Ors. & Another Action* [1995] 3 Sing. L.R. 477; *Lee Kuan Yew v. Tang Liang Hong (No. 1)*, [1997] 2 Sing.L.R. 97; *Lee Kuan Yew v. Tang Liang Hong (No. 2)*, [1997] 2 Sing.L.R. 833; *Lee Kuan Yew v. Tang Liang Hong (No. 3)*, [1997] 2 Sing.L.R. 841; *Goh Chok Tong v. Jeyaretnam Joshua Benjamin* [1998] 1 Sing.L.R. (upheld in *Goh Chok Tong v. Jeyaretnam Joshua Benjamin & Another Action*, [1998] 3 Sing.L.R. 337 (C.A.)); *Goh Chok Tong v. Chee Soon Juan (No. 2)*, [2005] 1 Sing.L.R. 573; *Lee Kuan Yew v. Chee Soon Juan (No. 2)*, [2005] 1 Sing.L.R. 552; *Lee Hsien Loong v. Singapore Democratic Party & Ors.* [2007] 1 Sing.L.R. 675; *Attorney-General v. Hertzberg Daniel* [2009] 1 Sing.L.R. 1103; *Lee Hsien Loong v. Review Publishing Company* [2009] 1 Sing.L.R. 167; *Review Publishing Company Ltd. and another v. Lee Hsien Loong and another appeal* [2010] 1 Sing.L.R. 52; *Attorney-General v. Shadrake Alan* [2010] SGHC 327 read with *Attorney-General v. Shadrake Alan* [2010] SGHC 339.

[231] Peerenboom, "Introduction," *supra* note 60 at 18.

[232] Chan Heng Chee, "Politics in an Administrative State: Where Has the Politics Gone?" in Seah Chee Meow, ed., *Trends in Singapore* (Singapore: Institute of Southeast Asian Studies, 1975) 51.

> the deliberate practice of trying to harness historically liberal institutions to authoritarian ends.[233]

Rodan points out that in addition to selected performative facets of liberal institutions, the rhetoric of liberalism has been harnessed by the PAP in its rise to power with the Lee Kuan Yew of 1955 attacking detention without trial and restraints on free expression until the eve of the PAP's rise to power.[234] In other words, the PAP has exalted the 'rule of law', but in an instrumental manner. Alongside strategic uses of discourse and institutions, Lee managed an "uneasy but powerful alliance" between the two major factions of the PAP: the middle-class, 'English-educated' PAP leadership, and the working-class, 'Chinese-educated' leftists and nationalists of the labour movement. Lee managed this uneasy alliance until his party came to power in 1959.[235] Once the party was in government, a 1961 split between the two factions led to the founding of the opposition Barisan Sosialis. This split exposed Lee's faction as "but a shell of a party"[236] without strong links to the working class or to organisations and networks on the ground. It was the instrumental power of 'law' that enabled the PAP leadership to recover from this moment of weakness

> through exploiting its executive power systematically to obstruct its opponents, embedding the party within the structures of the State, and building a new electoral base through social and economic reforms. In particular, both the formal political institutions through which political competition was channelled, as well as the broader civil society institutions needed to render that competition meaningful, were to undergo major modifications. Repressive laws to block free expression and curtail independent collective organisations engaged in political activities combined with various initiatives to build up extensive structures of political co-option that saw a naked merging of state and party.[237]

[233] Rodan, *Westminster in Singapore*, *supra* note 12 at 110.
[234] Ibid.
[235] Ibid.
[236] Rodan, *Westminster in Singapore*, *supra* note 12 at 114.
[237] Ibid.

Others have noted that it was an alliance between the right-wing faction of the PAP and the colonial state that facilitated this early turn to repressive executive power –culminating perhaps in Operation Coldstore, the detention without trial of more than a hundred left-wing Socialists, trade unionists and journalists in the crucial lead up to the 1963 general elections.[238] Operation Coldstore decimated the leadership of the opposition Barisan Sosialis[239] and eviscerated the Left.[240] The party was never to regain its strength or its promise.[241]

If a pre-condition of the moderate state is party political contestation, then all the case studies illustrate how the Singapore state has undermined this crucial pre-condition. Civil society is another major moderator of state power, but in Singapore, associations that had been autonomous of the colonial state were dismantled by the new nation-state,[242] resulting in a quiescent and co-opted civil society without the capacity or the will to contest the state in the public domain.[243] The studies of the *Legal Profession Act*, the *Religious Harmony Act* and the *Public Order Act* illustrate how an embryonic civil society leadership attaching to the Law Society, the Catholic Church and an opposition politician has been repressed and removed. Media also has the capacity to moderate state power. With print media, as with civil society, the PAP dismantled media autonomy early in its rule and extended its policing of print media at a crucial juncture in the mid-1980s (Chapter 4).[244]

[238] Hong & Huang, *supra* note 59 at 18; Harper, *supra* note 59, Barr & Trocki *supra* note 59.

[239] Ibid.

[240] Wade, *supra* note 78.

[241] Ibid.

[242] Kay Gillis, *Singapore Civil Society and British Power* (Singapore: Talisman, 2005).

[243] Terence Chong, *Civil Society in Singapore: Reviewing Concepts in the Literature* (Singapore: Institute of Southeast Asian Studies, 2005); Terence Lee, "The Politics of Civil Society in Singapore" (2002) 26:1 *Asian Studies Review* 97; Gary Rodan, "Civil Society and Other Political Possibilities in Southeast Asia" (1997) 27:2 *Journal of Contemporary Asia* 14.

[244] The Singapore formulation of defamation has further attenuated the independence of media.

'RULE *BY* LAW': PRACTICES OF ILLIBERALISM

This project is, in part, an excavation of the Singapore state's development of a measure of legitimacy for its brand of 'rule by law'. I use the term 'rule by law' as the Other, so to speak, of 'rule of law'. 'Rule by law', conveying the impoverishment of power-serving instrumentalism, is not an expression used by the Singapore state. It is, however, an expression used by scholars tracking modes of state legality characterised by the subordination of 'law' to political power.[245] Peerenboom, for example, describes 'rule by law' as operating when "states … rely on law to govern but do not accept that basic requirement that law bind the state and state actors".[246] Thio concludes that in the context of state authoritarianism and one-party dominance, the Singapore state's subordination of liberal democratic values to "statist goals like stability and economic growth … is more accurately characterised as … the rule *by* law".[247] And as Neilson points out with reference to another one-party state, "*rule of law* … might better be described as *rule by law* in a single party state because questions of constitutionality, due process and official illegality are not reviewable by an independent judiciary".[248] In Singapore, if the 'rule of law' occupies resonant public and declaratory spaces (the *Constitution*, the *Proclamation*), then 'rule by law' is contained within the tedious detail of legal text and practice – detail through which the Singapore state effects a rescripting of the 'rule of law' content of the promise of 'nation'. It is the strategic rescripting of the 'rule of law' into 'rule by law', while sustaining state legitimacy, that this study tracks and reveals.

It is befitting of the complexity carried by the many meanings of 'law' that if 'rule of law' attaches to Singapore's colonial history, so too does 'rule by law'. The colonial legal system governed through modernist,

[245] Thio, *Lex Rex or Rex Lex? supra* note 14 at 75; Jayasuriya, *The Exception Becomes the Norm*, *supra* note 14 at 113.

[246] Peerenboom, "Introduction," *supra* note 60 at 2.

[247] Thio, *Rule of Law*, *supra* note 41 at 75.

[248] Neilson, *supra* note 66 at 15.

bureaucratic technologies that were, in essence, power-serving 'rule by law'.[249] Colonial legal instruments typify 'law' as governance: state control through licensing, co-option and, from 1915, surveillance.[250] Lee's assertion to the IBA that Singapore had inherited and built upon an "English' legal system is an interesting mis-description. The legal system by which the British governed their colonies arrived in Singapore via India[251] and had been tailored for colonial purposes.[252]

There is thus, for Singapore, an important disjunction relating to 'law' vis-à-vis 'nation'. Through colonisation and tutelage to independence, features of the modern nation-state, such as sovereignty, were transplanted. However, the more enduring structures of modern statehood entrenched by the colonial project derive from the "powerful illiberal ideological traditions"[253] drawn from the absolutist state:

> [T]he colonial state … facilitated the development of notions of executive power rooted in ideas of 'state prerogatives' that were formed within the womb of the absolutist state. The colonial state was preeminently an 'executive state' defined by the 'reason of state' juristic tradition.… The development of the post-colonial state in East Asia also has been greatly influenced by those aspects [a high degree of hegemony and autonomy] of the colonial state. For example, in Singapore the state has tended to justify the use of executive power in a manner reminiscent of the colonial state.… [T]he post-colonial state could continue to be characterised as an executive state. [254]

For Singapore, the executive state characteristics of colonial rule have been augmented by two further historical events: the legal exceptionalism of

[249] Hooker, *supra* note 152; Furnivall, *supra* note 118.

[250] Ban Kah Choon, *Absent History: The Untold Story of Special Branch Operations in Singapore, 1915–1942* (Singapore: Horizon, 2002).

[251] Hooker, *supra* note 152. McQueen and Pue also note that 'law' in the colonies, because of adaptations, misapplications and different institutional support, inevitably differed from 'law' in the metropolitan centre: Rob McQueen & W. Wesley Pue, eds., *Misplaced Traditions: British Lawyers, Colonial Peoples* (Sydney: Federation Press, 1999) 1.

[252] Furnivall, *supra* note 118; Hooker, *supra* note 152.

[253] Jayasuriya, *The Exception Becomes the Norm*, *supra* note 14 at 114.

[254] Jayasuriya, "Statist Legal Institutions", *supra* note 217 at 178.

the Malayan Emergency[255] and the Cold War context in which Singapore became a 'nation'. The studies of the *Vandalism Act* (Chapter 3), the *Press Act* (Chapter 4) and the *Religious Harmony A*ct (Chapter 6) reveal the legal-discursive continuities between Emergency and Cold War exceptionalism, on the one hand, and contemporary 'law', on the other. In other words, Singapore's 'rule by law' core has been uninterrupted in the passage from 'colony' to 'nation'.

The one defining event that might have ruptured colonial 'rule by law' and generated a groundswell of awareness for 'rule of law' individual rights – an anti-colonial battle for independence – did not occur in Singapore. The closest thing to a liberation movement was represented by the left-wing Socialists and the Communists in post–World War II Singapore.[256] But because of the Cold War anxieties of the time, the British allied with the pro-'West' PAP to repress the left wing, smoothing the way for ideological continuity between the colonial state and the nation-state.[257]

Thus it is that 'rule by law' has had a long and powerful presence in Singapore. The liberal humanism of the *Constitution* and the *Proclamation* sits like a thin, extremely fragile veneer upon deeply rooted structures that counter and devalue the proclaimed democracy, liberty, justice and equality. 'Rule by law' has a far deeper legal tradition in Singapore than 'rule of law' – a tradition which possibly accounts for the sustained expression of 'rule by law' in the 'nation'.[258] The post-Communist account of the 'rule

[255] Singapore's most notoriously illiberal legal instrument, the *Internal Security Act*, is an adoption and extension of the colonial *Emergency Regulations*. The *Emergency Regulations* were enacted to enable detention without trial as a state strategy to repress the anti-colonial activity of the Malayan Communist Party.

[256] Hong & Huang, *supra* note 59; Harper, *supra* note 59; Geoff Wade, "Suppression of the Left in Singapore, 1945–1963: Domestic and Regional Contexts in the Southeast Asian Cold War", Paper presented at the 5th European Association of Southeast Asian Studies (EUROSEAS) Conference, University of Naples 'L'Orientale', Italy, 12–15 September 2007); Kevin Hewison & Garry Rodan, "The Decline of the Left in Southeast Asia" (1994) *Socialist Register* 235; Rodan, *Authoritarian Rule supra* note 31.

[257] Ibid.

[258] Glenn, *Legal Traditions of the World*, *supra* note 153, argues that newer legal institutions and practices are reinterpreted, driven and determined by deeper and longer established traditions.

of law' as a technocratic assemblage of institutional attributes[259] seamlessly extends Singapore's 'rule by law' into a new era of relevance and legitimacy without resolving the founding disjuncture between 'rule of' and 'rule by' law, a disjuncture arising from the critical difference between the colonial project and the national project: 'Colony' did not promise democracy, independence, liberty, justice and equality. It is the project of 'nation' that has made these promises. 'Rule of law' indicators that privilege efficiency and commerce, and contemporary theorising on 'rule of law', such as Peerenboom's 'thin' to 'thick' 'rule of law' continuum, generate additional ways of attending to function first, thus relegating values and ideals to a secondary place in evaluations of 'law'.

Inevitably, my project's scrutiny of 'law' in Singapore raises the issue of whether my study argues from a normative position on the 'rule of law'. In tracing the discursive excursions of the Singapore state in, through and around the category 'law', my goal has been to avoid an unreflective treatment of the 'rule of law'. The close reading of text required by discourse analysis grounds my conclusions in the detail of history, language and social encounters. While I have done my best to resist polarising positions, I ought to declare my own normative inclinations towards a 'rule of law' that protects and upholds political liberalism.

[259] Kleinfeld, *supra* note 170 at 33.