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Legal Hybridity: Rule of Law under Authoritarianism

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Legal Hybridity: Rule of Law under Authoritarianism

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Abstract

My thesis develops the concept of 'legal hybridity' to explain the paradoxical existence of rule of law within an authoritarian polity. Legal hybridity is a situation in which law, while instrumentally used by a regime to strengthen its authoritarian power, imposes constraints on the regime's unlimited authoritarian power. Legal hybridity is where rule of law meets rule by law practices. The element of judicial empowerment by authoritarian regimes differentiates legal hybridity from mere authoritarian rule by law. The fusion of rule of law and rule by law under legal hybridity can be observed in the symbiosis of Weberian legal rationality dialectic and the dynamic of judicial hybridization, the simultaneous empowerment and containment of judicial independence. The evidence of legal hybridity is examined in the context of Singapore in which its authoritarian leadership instrumentally provides a rational legal framework for economic development without leading to political liberalization.

Introduction

The existence of rule of law or judicial empowerment within an authoritarian polity is a unique phenomenon. Authoritarianism is a political system that focuses on constraining institutions and groups from political participation and ensuring subservience to the regime. Rule of law refers to the influence and authority of law within the society, with all power and authority coming from an ultimate source of law rather than from an arbitrary ruler. Both the notion of rule of law and judicial empowerment do not fit with our conventional understanding of authoritarianism. Authoritarian regimes primarily monopolize power in the hands of the ruling elite. Promoting rule of law, and thus empowering judicial independence, involves compromise with the traditional authoritarian principle of unconstrained power, undermining the authoritarian control of absolute power and so leading to tension between the executive and the judiciary. Thus, given the conventional incompatibility between rule of law and authoritarianism, and apparent risks associated with judicial empowerment, we would not normally expect authoritarian regimes to promote rule of law. However, in reality, we are observing evidences of judicial empowerment in many authoritarian states such as Anwar Sadat's Egypt (1970-81) and Singapore under the People's Action Party (PAP) (1959-present). A direct challenge to the conventional incompatibility is the evidence that authoritarian states seeking to strengthen their grip on power may be compelled to construct independent judiciaries.

We can observe three primary motivations – political, bureaucratic, and economic incentives – that compel authoritarian regimes to empower the judicial autonomy despite conventional incompatibility and costly risks associated with judicial activism (See

Chapter 2). Enhancing judicial power in authoritarian states is instrumental for legitimating the state and its policies and justifying the regime's existence. Authoritarian leaders may use administrative laws and legal system as a tool for monitoring their bureaucratic agents. Credible commitments theories contend that regimes empower the judiciary to signal investors, both domestic and foreign, that their authoritarian power is checked and balanced by a credible third party.

My thesis develops the concept of 'legal hybridity' to explain the paradoxical existence of rule of law within an authoritarian polity. Legal hybridity is where rule of law meets rule by law practices. Legal hybridity is a situation in which law, while instrumentally used by a regime to strengthen its authoritarian power, imposes constraints on the regime's unlimited authoritarian power. The evidence of judicial empowerment by authoritarian regimes, which indicates the existence of rule of law within authoritarian polity, differentiates legal hybridity from mere authoritarian rule by law. The fusion of rule of law and rule by law under legal hybridity can be observed in the symbiosis of Weberian legal rationality dialectic and the dynamic of simultaneous judicial empowerment and containment.

The first characteristic of legal hybridity can be observed in the context of the Weberian legal dialectic between formal rationality and substantive irrationality. Legal hybridity can be defined as an amalgam of legal formal rationality and legal substantive irrationality. Formal rationality is achieved when equal and consistent laws that bind authoritarian regimes themselves are formally enacted; substantive irrationality means particular exceptions rather than general laws are instrumentally used to advance the regimes' specific interests. This formally rational approach to rule of law contradicts the

legal decision-making in authoritarian polity in which laws are arbitrarily made or selectively enforced at the will of the authoritarian ruler. In this sense, case-by-case legal decisions are made on the arbitrarily irrational extra-legal basis. This Weberian category of legal substantive irrationality elucidates the dimension of legal decision-making in authoritarian regimes. Legal hybridity projected by formal rationality, where authoritarian regimes promulgating substantively irrational use of law through correct legal procedure, may be considered as a non-liberal "thin" conception of rule of law. In this sense, even if authoritarian leaders are willing to empower judicial independence in the economic sphere, there is no guarantee that such legal rationality can be expected in the areas of political and civil liberties.

The second characteristic of legal hybridity can be observed in the dynamic of judicial hybridization, the simultaneous empowerment and containment of judicial independence. While authoritarian regimes may be compelled to empower courts for political, bureaucratic, and economic reasons (Chapter 2), they also must find ways to contain the consequent judicial activism to secure their political control (Chapter 3). Both judicial empowerment and containment can be observed in three aspects of the judiciary: institution, actor, and issue. The judicial institution is independent to the extent its decision-making is free from domination by the other branches of government. Independent judicial institutions must also allow its judicial actors (or judges) to make impartial decisions. The independent judiciary must also empower judges with an authority to control judicial issues or 'aspects of judicial administration'. The extent of empowerment on judicial terrain can be observed in the scope of judicial review granted by the executive to the judiciary. Judicial empowerment alone cannot be functional

without effective enforcement. The notion of rule of law requires judicial independence as well as compliance since legal rationality cannot be built without laws being enforced fairly and impartially. On the other hand, authoritarian regimes must be strategic to constrain judicial power without formally undermining judicial autonomy, since such a threat would undermine its attempt to project legal legitimacy. Authoritarian rulers may use a diverse set of techniques at their disposal to effectively contain judicial activism while allowing room for legal substantive irrationality, but without infringing formal legal rationality, a key element of legal hybridity. A primary strategy of institutional containment involves designing the judicial institution into a fragmented structure. Another strategy of institutional containment is to make the judiciary vulnerable to external political pressures by structurally designing the judiciary as part of the executive. This exception to the separation of powers doctrine can undermine the judicial autonomy by creating a potential for executive interference in judicial affairs. Judicial actor-based strategies have a direct effect on how judges approach legal challenges to the regime's decisions. The technique aims to ensure that judicial rulings align with the interests of the authoritarian regime. Authoritarian regimes may also seek to constrain the issue context of the judicial activism. The goal is to ensure that the independent judiciary does not have jurisdiction over politically sensitive issues. Regimes can engineer constraints on the type of judicial review permitted.

The evidence of legal hybridity is examined in the context of Singapore in which its authoritarian leadership instrumentally provides a rational legal framework for economic development without leading to political liberalization. Singaporean regime instrumentally provides a rational legal framework for economic liberalization without

compromising its political power. I argue that Singapore's paradoxical success of legal rationalization for economic development without political liberalization lies in the regime's ability to construct legal hybridity. Singapore provides an excellent case that authoritarianism and rule of law are not mutually exclusive. The Singaporean State has instrumentally promoted rule of law to advance its economic interests while dismantling the political rights of its citizens through rule by law processes. Rule of law in Singapore is tailored to economic development, strengthening state institutions rather than protecting individual rights. The independent judicial machinery has been crucial for economic purposes. Openness to global investment and rule of law enforcement have facilitated the emergence of a more competitive financial sector and economic development in Singapore. Despite legal rationality in private commercial law, whereas public law issues are concerned, the judicial "communitarian" approach consolidates state stability and social order in utilitarian terms, with lesser attention given to civil liberties and political rights.

I adopt an institutionalist approach in conducting my qualitative case study of Singapore. Singapore demonstrates the validity of legal hybridity as an instrumental mechanism of a long-lasting authoritarian regime. My close study of Singapore can be considered as a building block to pave the way to further development of legal hybridity theory. I aim to develop a taxonomical framework of legal hybridity – its legal dialectics and judicial dynamics – under which diverse cases of rule of law under authoritarianism can be examined.

My conception of legal hybridity can be considered as an extension of the political hybridity literature. Hybrid regimes combine "democratic rules with

authoritarian governance" (Levitsky and Way 2002, 51). Schedler argues that responding to democratizing pressures by creating and manipulating representative institutions should help authoritarian governments to ease their "existential problems of governance and survival" (2010, 76). Hybrid regime literature mainly concerns the electoral institutions and the role of political opposition, while little attention is given to the judicial aspect. My thesis bridges the authoritarian legal scholarship and political hybridity literature to better explain the phenomenon of rule of law within authoritarianism. Even if hybrid regimes introduce multiparty elections, thereby becoming "electoral authoritarian" regimes, they possess a broad array of manipulative tools for reducing the uncertainty that elections can bring (Schedler 2002). The manipulative use of electoral institutions in hybrid regimes literature can be analogous to the instrumental use of judicial institutions within an authoritarian context. I propose that authoritarian regimes that promote the rule of law can be labeled as hybrid, since judicial exists beyond the conventional boundary of authoritarianism. In this regard, many authoritarian regimes that instrumentally promote rule of law fall under hybrid regime category. For instance, Singaporean regime can be considered as part of hybrid regime category, coined as a 'stable semi-democracy' (Case 2002) or "soft authoritarianism" (Lingle 1996).

The organization of my thesis is as follows: Chapter 1 establishes the concept of legal hybridity in the context of Weberian legal rational dialectics and the judicial dynamic of simultaneous empowerment and containment. The chapter evaluates the evidence of legal hybridity in Singapore by emphasizing its judicial empowerment aspect. Chapter 2 discusses three primary motivations that incentivize authoritarian

regime to empower the judiciary, namely political, bureaucratic, and economic interests. Political and economic incentives constitute prevailing motivations for Singaporean regime in promoting judicial independence. Chapter 3 explores the strategies that authoritarian regimes effectively use to contain the judicial activism. My thesis concludes with a discussion on the implications of Singaporean rule of law and its relevance in the broader context of contemporary authoritarianism.

Chapter 1

The Concept of Legal Hybridity

Theory

This chapter develops the concept of legal hybridity to explain the paradoxical existence of rule of law within authoritarian polity. Legal hybridity can be understood in the context of a Weberian legal dialectic between formal rationality and substantive irrationality, and can be observed in a judicial dynamic of simultaneous empowerment and containment.

Authoritarianism and Rule of Law

Before developing the concept of legal hybridity, I will first discuss why the existence of rule of law or judicial empowerment within an authoritarian polity is a unique phenomenon. 'Authoritarianism' is a political system that focuses on constraining institutions and groups from political participation (Linz 1964, 298) and ensuring subservience to the regime (Casper 1995, 40). Authoritarian polities are usually characterized by repression, intolerance, and "encroachment on the private rights and freedoms of citizens" (Perlmutter 1981, 7-8). Public obedience is an absolute priority for authoritarian governments since they predominantly make orders to ensure stability and social control. Authoritarian understanding of law primarily relies on the premise of "rule following and obedience to authority" (Henderson 1991, 456). Authoritarian governments usually lack credible basis for their legitimacy; they usually use an

"emotional justification" for regime's existence by identifying social problems such as underdevelopment or national security (Linz 1964, 302). The modern authoritarian state simply makes order and stability its "absolute priority" (Henderson 1991, 396).

'Rule of law' refers to the influence and authority of law within society, with all power and authority coming from an ultimate source of law rather than from an arbitrary ruler. It is a system that empowers law to impose "meaningful restraints" on the state by means of "a government of laws, the supremacy of law, and equality of all before the law" (Peerenboom 2002, 2). In this sense, rule of law is achieved only when law is not available as an instrument of control by the state but instead functions as a "contractual benchmark" for every individual in the society (Helmke and Rosenbluth 2009, 348). In other words, rule of law is a system in which laws are made publicly known, clear in meaning and equally apply to every citizen (Carothers 1998, 96). A high degree of judicial independence is indispensable for the maintenance of rule of law (Ferejohn 1999, 366-7). Judicial independence serves as a foundation for rule of law by safeguarding the rights and privileges provided by the Constitution, ensuring that everyone is subject to the publicly communicated general legal rules, and preventing executive and legislative encroachment upon these rights.[1] Thus, judicial independence ensures the elected officials cannot manipulate legal proceedings to their advantage. Judicial independence is also crucial to the doctrine of separation of powers. An independent judicial system must enable courts and its judicial actors to make rulings free from improper intervention from

[1] Hamilton writes: "The complete independence of the courts of justice is particularly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority ... Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing" (1961, 524).

the other branches of the government. The judiciary must be independent of the executive and the legislative so that it can impose checks and balances on the other two branches of government.

Both the notion of rule of law and judicial empowerment do not fit with our conventional understanding of authoritarianism. Authoritarian regimes primarily monopolize power in the hands of the ruling elite. Promoting rule of law, and thus empowering judicial independence, involves compromise with the traditional authoritarian principle of unconstrained power, undermining the authoritarian control of absolute power and so leading to tension between the executive and the judiciary (Solomon 2007, 123). But, even if authoritarian regimes set up autonomous courts, the judiciary rarely succeeds in imposing checks and balances on the executive power. Given the monopoly of political power, an authoritarian regime's comments to judicial independence and rule of law are only contingent on "political convenience" and not truly credible (Helmke and Rosenbluth 2009, 347 and 361). Thus, if independent judiciaries are long lasting in authoritarian context, their endurance only suggests that they are supporting authoritarianism and not building rule of law (Helmke and Rosenbluth 2009, 358).

Promoting rule of law can also impose political risks upon authoritarian regimes. Empowering judicial independence can lead to exposure of regime shortcomings by opposition forces. Autonomous courts have the potential for "dual use" both by the regime and its opponents (Moustafa 2007, 10). Anti-authoritarian democratizing groups attempt to break down authoritarian elites' arbitrary, personalized power by promoting equality before the law (Weber 1978, 813). Democratizing actors may rely on formal

justice resulted from judicial empowerment to reduce "executive arbitrariness" and legally "level authoritarian elites to the rule of law" (Schatz 1998, 219). By creating an alternative center of power, empowered courts can provide opportunities for political mobilizations and the opposition's use of courts for purposes not desired by the regime (Solomon 2007, 136). Judicial empowerment creates a "uniquely independent institution with public access in the midst of an authoritarian state" (Ginsburg and Moustafa 2008, 13) providing a focal point for political resistance and "state-society contention" (Ginsburg and Moustafa 2008, 2). In addition, judicial empowerment also involves the risk of judicial activism in which judges expand their mandate and political influences against the interests of authoritarian regimes. Judicial empowerment is costly if judges play an activist role in cultivating public support for political rights. The combination of judicial independence and incomplete control by the state can give activist judges an opening (Levitsky and Way 2002, 56). For instance, the Constitutional Court of Ukraine stipulated that President Kuchma's referendum to reduce the powers of the legislature was not binding. The Constitutional Court of Slovakia also prevented the ruling regime from denying opposition seats in parliament in 1994. The courts in Serbia legitimized local opposition electoral victories in 1996. Therefore, Moustafa argues that a judicialization of authoritarian politics is likely to result to the extent that courts are utilized (2007, 10). The judicialization of politics is "the process by which courts and judges come to make or increasingly to dominate the marking of public policies that had previously been made by other governmental agencies, especially legislatures and executives" (Tate 1995, 28).

Given the conventional incompatibility between rule of law and authoritarianism, and apparent risks associated with judicial empowerment, we would not normally expect authoritarian regimes to promote rule of law. Yet in reality, we are observing evidences of judicial empowerment in many authoritarian states such as Anwar Sadat's Egypt (1970-81) and Singapore under the PAP (1959-present). A direct challenge to the conventional incompatibility is the evidence that authoritarian states seeking to strengthen their grip on power may be compelled to construct independent judiciaries.[2] As discussed in Chapter 2, authoritarian regimes may empower their judiciary to advance their political, bureaucratic, and economic interests. The following section conceptualizes the existence of judicial empowerment within authoritarian context in terms of legal hybridity.

The Concept of Legal Hybridity

'Legal hybridity' is where rule of law meets rule by law practices. Whereas the core of rule of law is the ability of law and legal system to impose meaningful restraints on the state and individual members of the ruling elite, rule by law refers to an instrumental conception of law in which law is merely a tool to be used as the state sees fit (Peerenboom 2002, 8). Rule by law is a phenomenon in which authoritarian regimes use laws instrumentally to their advantage. In fact, law is used instrumentally in every legal system. However, a distinction can be made between "pernicious instrumentalism" and "acceptable instrumentalism" (Peerenboom 2002, 23, Endnote 23). Peerenboom states that legal systems in which the law is only or predominantly a tool of the state are

[2] In fact, Tamanaha (2004, 5) even argues that rule of law ideal initially developed in non-liberal societies.

best described as ‘rule by law’, whereas legal systems in which the law imposes meaningful limits on state actors merit the label ‘rule of law’. Authoritarian regimes may promote as well as violate rule of law through rule by law practices. Legal hybridity is a situation in which law, while instrumentally used by a regime to strengthen its authoritarian power, imposes constraints on the regime’s unlimited authoritarian power. By empowering judicial independence, authoritarian regimes self-constrain their unlimited authoritarian power. The evidence of judicial empowerment by authoritarian regimes, which indicates the existence of rule of law within authoritarian polity, differentiates legal hybridity from mere authoritarian rule by law. The fusion of rule of law and rule by law under legal hybridity can be observed in the symbiosis of Weberian legal rationality dialectic and the dynamic of simultaneous judicial empowerment and containment.

Legal Rationality

The first characteristic of legal hybridity can be observed in the context of a Weberian legal dialectic between formal rationality and substantive irrationality. ‘Legal hybridity’ can be defined as an amalgam of legal formal rationality and legal substantive irrationality. Formal rationality is achieved when equal and consistent laws that bind authoritarian regimes themselves are formally enacted; substantive irrationality means particular exceptions rather than general laws are instrumentally used to advance the regimes’ specific interests. Weber contends that the tension between formal and substantive approaches to justice is “endemic” because the two are constantly opposed in an “insoluble conflict” (1978, 893). Authoritarian regimes that traditionally prefer

substantively irrational case-by-case justice to secure their power may be compelled to set up independent courts, which are symbolic of formal legal rationality, to fulfill their political, bureaucratic, and economic interests (See Chapter 2). In this case, authoritarian regimes are confronted by the inevitable conflict between an abstract legal formalism and their desire to pursue substantively irrational goals such as suppressing political rights and participation.

An abstract formal approach to justice is found "where the legally relevant characteristics of the facts are disclosed through the logical analysis of meaning and where, accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied" (Weber 1978, 657). According to Weber, an act can be formally rational if its structure is consistent with all its elements pointing in the same direction without counteracting the others. In this sense, the judicial formalism enables the legal system to operate like a technically rational machine. Formal legal rationality involves an increase in the generality of law and its abstract calculability, effectively reducing executive arbitrariness and legally leveling authoritarian rulers' unlimited power (Schatz 1998, 220). Legal formal rationality exists when formally trained jurists carry out laws that apply equally to all citizens in a manner such that only unambiguous general characteristics of the cases are taken into consideration in a strictly procedural way. In this sense, formal legal rationality resembles the 'thin' conception of rule of law which advocates that rule of law is fulfilled by adhering formal procedures and requirements. Thus formal legal rationality requires laws to be general, transparent, predictable, and constitutionally enacted, and that the parties to legal dispute are treated equally.

This formally rational approach to rule of law contradicts the legal decision-making in authoritarian polity in which laws are arbitrarily made or selectively enforced at the will of the authoritarian ruler. In this sense, case-by-case legal decisions are made on the arbitrarily irrational extra-legal basis. A substantively irrational approach occurs when particular exceptions rather than general laws influence legal decision-making just to fulfill the irrational interests of the ruler. In this informal law, how law is applied very much depends on who rules. Weber argues that this highly particularistic legal culture was not facilitative of developing a rational legal system necessary for economic development. This Weberian category of legal substantive irrationality elucidates the dimension of legal decision-making in authoritarian regimes. Authoritarian regimes usually rely on irrational bases of legitimacy such as social and political instability as an excuse for their substantively irrational use of law in their interest. Even if such regimes set up autonomous courts, their commitment to rule of law does not usually encompass ultimate ethical values of justice. Rather, "political expediency predominates" (Schatz 1998, 220). This very adherence to securing political power makes authoritarian decision-making on legal matters substantively irrational because such decision-making is primarily informal and is usually conducted case-by-case (Schatz 1998, 220).

In fact, legal decision-making can be substantively rational if the decision of legal problems is based on the satisfaction of ultimate values or needs derived from sources such as an internal moral framework, religious faith, or political commitments (Schatz 1998, 239) or "some extra-legal absolute values" such as freedom, equality, the good of the people, or the will of the majority (Spencer 1970, 131). In fact, rule of law cannot be

meaningful without a substantive "rights-based"[3] conception of law, which assumes that citizens are subject to judicially enforceable political and moral laws. This substantive approach to justice can be understood as 'thick' conception of rule of law that requires the laws to conform to certain substantive values or standards of justice in addition to the requirements of the formal 'thin' rule. Legal hybridity projected by the formal rationality, where authoritarian regimes promulgating substantively irrational use of law through correct legal procedure, may be considered as non-liberal 'thin' conception of rule of law.

Authoritarian regimes' effort to promote formal rationality before law can be considered as a "rationalization effort" riddled with the dialectical tension between formally rational and substantively irrational approaches to rule of law (Schatz 1998). Judicial empowerment in authoritarian context can be understood as a legal rationalization process by increasing the degree of calculability of law. In this sense, legal hybridity may be understood as incomplete legal rationalization in which judicial autonomy in one area may not always spill over to other spheres of jurisdiction. Legal rationalization to promote formal rationality sponsored by the authoritarian state could be selective and limited to areas in which the state is interested. In other words, the promise of legal rationality is largely contingent on "political convenience" (Helmke and Rosenbluth 2009, 361). Although authoritarian regimes may have an incentive to foster investment by securing property rights, they are not likely to be willing to guarantee the same independent judicial discretion over politically sensitive issues (Helmke and Rosenbluth 2009, 347). In other words, judicial independence in the economic sphere may not spill over into the areas of political and civil liberties. Weber argues that, in the

[3] For the discussion of "right-based" versus "rule-book" conceptions of law, see Ronald Dworkin, *A Matter of Principle 2* (Harvard University Press 1985).

economic sphere, formal rationality increases to the extent that all technically possible calculations within the laws of the market are universally carried out, although such acts may violate ethical substantive rationalities (1978, 85). In this sense, even if authoritarian leaders are willing to empower judicial independence in the economic sphere, there is no guarantee that such legal rationality can be expected in the areas of political and civil liberties. Since the empowerment of rights and legal rationality in the economic arena may not necessarily expand to the political sphere, it is quite possible to "de-link" economic and political reforms (Silverstein 2003).

Judicial Hybridization

The second characteristic of legal hybridity can be observed in the dynamic of judicial hybridization, the simultaneous empowerment and containment of judicial independence. As discussed before, judicial empowerment can be costly and risky for authoritarian regimes. Given the judiciary's potential as a "double-edged sword", a key challenge for authoritarian regimes is to ensure the "regime-supporting roles that courts perform" while minimizing their unfavorable utility (Ginsburg and Moustafa 2008, 14). Such drawbacks of the autonomous judiciary create a core tension between empowerment and containment of courts (Ginsburg and Moustafa 2008, 6). While authoritarian regimes may be compelled to empower courts for political, bureaucratic, and economic reasons (see Chapter 2), they must also find ways to contain the consequent judicial activism. Judicial activism means "control or influence by the judiciary over political or administrative institutions, processes and outcomes" (Galligan 1991, 70). Judicial containment can be understood as constraining the possibilities of

judicial activism arising from judicial empowerment. Chapter 3 identifies three primary strategies of judicial containment: institution, actor, and issue control.

Judicial empowerment can be observed in three aspects of the judiciary: institution, actor, and issue. The independence of the judiciary (i.e. the institution), as opposed to that of individual judges (i.e. the actors), is dependent on the "willingness" of the other branches of government to refrain from using their constitutional powers to infringe on judicial authority (Ferejohn 1999, 382). Rule of law requires the existence of independent and accessible judicial institutions to operate as an independent check upon the legislative and executive branches. The judiciary is independent to the extent its decision-making is free from domination by the "preferences of elected officials" (Rosenberg 1992, 371).[4] Judicial independence is a principle that the judiciary should be separated from legislative and executive power, and shielded from inappropriate pressure from these branches of government. Governments that lack institutional checks and balances cannot provide a reliable basis for either judicial independence or rule of law (Helmke and Rosenbluth 2009, 361). Hamilton (1961) argues that liberty could not be achieved as long as the power of judging is not separated from the legislative and executive powers.

Independent judicial institutions must also allow its judicial actors (i.e. judges) to make impartial decisions. Judges constitute a critical force for interpretation and implementation of a constitution, thus de facto in common law countries creating the body of constitutional law. Hamilton insists that the independence of the judges is requisite to guard the Constitution and the rights of individuals. Hamilton argues that

[4] Huntington assumes that courts have no functional independence from the executive and that justice is "a function of political power" (1991, 228).

security of tenure of judicial officers is important for judicial independence, as appointments that require periodic renewal by the executive or legislature render the judiciary liable to rule in favor of these branches of government.[5] The security of tenure ideally frees judges to decide cases and make rulings according to rule of law and judicial discretion, even if those decisions undermine the executive's interests. Judicial independence is an idea that a judge ought to be free to decide the case without fear or anticipation of (illegitimate) punishments or rewards (Ferejohn 1999, 355). The Article III of the U.S. Constitution specifically provides for life tenure during good behavior, and prohibits Congress from reducing judicial salaries during their terms in office. In addition, appropriate remuneration is important for judicial independence as "a power over a man's subsistence amounts to a power over his will" (Hamilton 1961, 531).

The independent judiciary must also empower judges with an authority to control judicial issues or "aspects of judicial administration" (Russell 2001). The extent of empowerment on judicial terrain can be observed in the scope of judicial review granted by the executive to the judiciary. Judicial review is the doctrine under which legislative and executive actions are subject to review and possible invalidation by the judiciary. The process of judicial review involves the review of executive actions for compliance with administrative law rules, and of executive and legislative acts for unconstitutionality in light of the doctrine of constitutional supremacy.

[5] Hamilton asserts: "That inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either ..." (1961, 529). Hamilton also suggests that temporary tenure would discourage capable individuals from quitting their existing jobs to become judges (1961, 529-30).

Judicial empowerment alone cannot be functional without effective enforcement. Whereas Weber (1978) emphasizes the role of legal rationality as facilitative of legal development for capitalism, Douglass North (1990, 1991) highlights the necessity of legal enforcement. Weber sees rational institutions as technically superior, efficient, and hence supportive of economic growth. Weber argues that a rational system of law played a crucial role in the economic development of the Protestant West by allowing individuals to order their transactions with legal predictability. His assertion has been criticized by the English problem that industrialization initiated in England with its uncodified common law, which according to Weber was less rational than the code system of his native Germany. Here, North argues that countries that protect property rights and establish predictable rules for resolving contract disputes provide a better environment for economic growth than those that do not. North asserts that how effectively agreements are enforced is the key determinant of economic performance. Rule of law developed in England as the government followed clear rules, and provided a predictable and transparent environment in which capitalism flourished. According to North, English law may not have been rational, but it interacted with political and social institutions to reduce the state's capacity for expropriation and thereby enhance security. North's explanation of the rise of capitalism entails a subtle shift from the predictability of substantive norms to the predictability of enforcement (Ginsburg 2000, 833). Thus, besides legal rationality, effective constraint or judicial enforcement is instrumental for rule of law to successfully function.

The notion of rule of law requires judicial independence as well as compliance since legal rationality cannot be built without laws being enforced fairly and impartially

(Peerenboom 2002, 13). Under the doctrine of separation of powers, the judiciary can neither make laws nor enforce them, but rather interprets laws. While the legislature makes laws, it is the responsibility of the executive to enforce laws. The judiciary ultimately depends upon the aid of the executive arm even for the efficacy of its judgments (Hamilton 1961). To ensure judicial compliance, authoritarian regimes must neither ignore the courts' ruling nor poorly implement them. If setting up autonomous courts is symbolic of a commitment to legal rationality, then compliance with the courts' rulings is emblematic of legal enforcement. Helmke and Rosenbluth argue that authoritarian regimes may tolerate some degree of judicial independence as long as they have little to fear from courts (2009, 356). Tate argues that the regimes will simply ignore judges' orders when they do not find them to be in their interests (1993, 319). However, since an independent judiciary is symbolic of a commitment to rule of law, authoritarian regimes have reason to tolerate judicial activism, at least to 'make up for their questionable legitimacy' (Ginsburg and Moustafa 2008, 4). Failing to comply with the judicial decisions would defeat authoritarians' initial purpose of judicial empowerment. In this sense, even rule *by* law regimes are bound by judicial compliance to fulfill their political, bureaucratic, and economic goals as discussed in Chapter 2. For instance, for the legitimizing function of the judiciary to succeed, courts must enjoy some degree of autonomy from the executive and must be able to make rulings against the policies of the authoritarian regime (Ginsburg and Moustafa 2008, 6). Otherwise, legal institutions "will mask nothing, legitimize nothing" (Ginsburg and Moustafa 2008, 6).

Evidence

This section examines the evidence of legal hybridity in Singapore where its authoritarian regime instrumentally provides a rational legal framework for economic liberalization without compromising its political power. I argue that Singapore's paradoxical success of legal rationalization for economic development without political liberalization lies in the regime's ability to construct legal hybridity.

Background

The history of Singapore traces back to 1819 when Sir Stamford Raffles arrived at the island of some 120 fisher-folk. Since then, Singapore developed into a thriving seaport. British control over Singapore as part of the Straits Settlement and a Crown Colony lasted until 1959, when Singapore gained self-governance. Singapore joined the Federation of Malaysia in 1963, and became independent through secession in 1965. After gaining independence, Singapore joined the British Commonwealth and the United Nations. Lee Kuan Yew's People's Action Party (PAP) was founded in 1954 and gained power in 1959. Singapore holds regular and transparent elections and voting is compulsory. In Singapore, members of Parliament are elected every six years, with the leader of the majority party becoming the prime minister. The head of state is the president. Technically, the government can be voted out at any general election by the electorate. However, the PAP succeeded in creating a non-competitive political space and never lost political power to the opposition. The pervasive social and economic roles assumed by the PAP have undermined the basis for independent political opposition to

emerge (Rodan 2006, 1). Singapore remains a one-party-dominant authoritarian state governed by the PAP. Concentration of power in the hands of the ruling elite and obstruction of meaningful political competition makes the Singaporean regime authoritarian (Rodan 2004, 1). Geddes (1999) considers Singapore as a combination of single-party and personalistic authoritarian regime types. 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 a newly-created position called Minister Mentor, until 2011.

The Constitution and Malaysia (Singapore Amendment) Act 1965 (Malaysia)[6] effectively transferred all legislative and executive powers previously possessed by the Federal Government to the new Government of Singapore. The Constitution of Singapore (Amendment) Act 1965 (Singapore)[7] amended the Singapore State Constitution to alter the procedure required for constitutional amendment, and changed various nomenclatures to bring the Constitution in line with the country's independent status. The Republic of Singapore Independence Act 1965 (Singapore)[8] provided that certain provisions of the Malaysian Federal Constitution were to apply to Singapore. In addition, it vested the powers relinquished by Malaysian executive and legislature in the executive and legislative branches of the Singapore Government. At the time of independence in 1965,

[6] No. 53 of 1965 (Malaysia). Texts of laws and legal documents cited in this thesis can be found on Singapore Statutes Online under the Attorney-General's Chambers' Legislation Editing and Authentic Publishing System ("LEAP-SSO") of the Government of Singapore <http://statutes.agc.gov.sg>.
[7] No. 8 of 1965 (Singapore).
[8] Republic of Singapore Independence Act 1965 (No. 9 of 1965, 1985 Rev. Ed.).

the Singapore Parliament did not make any changes to its judicial system.[9] Thus, the High Court in Singapore remained part of the Malaysian court structure. The Supreme Court of Judicature Act[10] came into force in 1970[11] to establish its own Supreme Court, consisting of a Court of Appeal, Court of Criminal Appeal and High Court. The Constitution was amended to establish the Supreme Court of Singapore replacing the Federal Court of Malaysia with respect to Singapore, while retaining the Judicial Committee of the Privy Council in London as Singapore's court of final appeal.[12]

As a former colony, Singapore inherited a political system which includes a single chamber Parliament and a common law legal system which has enshrined the principles of rule of law and an independent bar and judiciary. The 'rule of law' as first articulated by Dicey in print in 1885 was already an established principle of government in 1824 when Singapore became a British possession. Since then, the fundamental structure of Singaporean legal system remained substantially the same. English common law, imported through the 1823 Charter of Justice, remains the basis of the Singapore legal system. Singapore exercises a system of law that incorporates fundamental rules of natural justice, such as equality before the law, which forms the part of the common law of England that was in operation in Singapore at the commencement of the Constitution. Singapore's Constitution explicitly guarantees fundamental individual rights, including

[9] The Republic of Singapore Independence Act, section 11 (entitled "Temporary provision as to jurisdiction and procedure of Singapore Courts"), stated: "Until other provision is made by the Legislature, the jurisdiction, original or appellate, and the practice and procedure of the High Court and the subordinate courts of Singapore shall be the same as that exercised and followed immediately before Singapore Day, and appeals from the High Court shall continue to lie to the Federal Court of Malaysia and to the Privy Council."

[10] No. 24 of 1969, now the Supreme Court of Judicature Act (Cap. 322, 1999 Rev. Ed.).

[11] Supreme Court of Judicature (Commencement) Notification 1970 (S 15/1970).

[12] By the Constitution (Amendment) Act 1969 (No. 19 of 1969)

due process. Singapore Constitution, Part IV, Article 9 states "No person shall be deprived of his life or personal liberty save in accordance with law." Part IV, Article 12 guarantees that "all persons are equal before the law and entitled to the equal protection of the law." As Commonwealth member, Singapore considers its legal system as part of the British common law system, where the decisions of higher courts constitute binding precedent upon courts of equal or lower status within their jurisdiction, as opposed to the civil law legal system in the continental Europe. At the time of Independence in 1965, there was a fairly heavy reliance on English legal structures and institutions. Singapore has since retained the British model of law to regulate commercial transactions although it modified the field of public law, including criminal law, constitutional law and administrative law. Judges in Singapore continue to refer to English case law where the issues pertain to a traditional common-law area of law, or involve the interpretation of Singaporean statutes based on English enactments or English statutes applicable in Singapore.

Legal Hybridity in Singapore

Singapore demonstrates an excellent case that authoritarianism and rule of law are not mutually exclusive (Rajah 2012, 8). Legal hybridity in Singapore is best illustrated in Jayasuriya's characterization of the Singapore legal system as "dual state legality" in that it matches the 'law' of the liberal 'West' in the commercial arena while repressing civil and political rights (2001, 108). The Singaporean State has instrumentally promoted rule of law to advance its economic interests while dismantling the political rights of its citizens through rule by law processes. The process of becoming "Singaporeanized" is

characterized as a state of becoming "politically inert and economically dynamic" (Davis 1999).[13] The role of law as a tool to create a stable business environment and to engender socio-economic transformation through authoritarian control is apparent in Singapore (Lingle 1996). Lingle argues that executive control over the judiciary and legislature in a "soft authoritarian" state means that law follows the regime's whims, despite the meticulous application of justice to commerce cases. He characterizes the resulting system as one of "rule by and for rulers" in place of rule of law. Rule of law as understood by Singapore's leaders is not the version based upon the liberal democratic model and should be more accurately characterized as rule of "rules" or simply rule by law (Thio 2002, 75). The Singaporean regime considered rule of law as an idea embedded in the local politico-cultural context, merely to fulfill political and social needs of the state. Lee once argues that "If the government had failed to establish the basics for political stability and social cohesion, the Rule of Law would have become an empty slogan in a broken-backed Singapore. But we have succeeded, and the Rule of Law today in Singapore is no cliché".[14]

Rule of Law in Private Commercial Law

Rule of law in Singapore is tailored to economic development, strengthening state institutions rather than protecting individual rights (Thio 2002, 75). Concerning private commercial law, the efficiency of the judicial framework, the legal certainty, and procedural fairness contribute to Singapore's exceptional economic growth (Thio 2002,

[13] Davis (1999) uses this term to describe the trend towards the "Singaporeanization" of Hong Kong.
[14] Prime Minister Lee Kuan Yew, Speech at the Opening of the Singapore Law Academy (Aug 31, 1990), in 2 S Ac LJ 155, 156 (1990).

75). Lee describes Singapore's legal system as "similar to" London and New York in terms of "laws relating to financial services", while defending repressive and rights-violating legislation, such as the Internal Security Act as "special legislation to meet our needs".[15] Lee says:

> "I knew the rule of law would give Singapore an advantage in the centre of South-east Asia …Singapore inherited a sound legal system from the British. Clear laws, easy access to justice and an efficient legal system provide the basis for citizens to compete equally in the market and grow the economy".[16]

Singapore's adherence to rule of law and its efficient, effective, consistent, and reliable judicial system have been fundamental to Singapore's rise as an international commercial center. Lee states that Singapore's reputation for rule of law has been a "valuable economic asset" and part of its capital.[17] He also asserts that the foundations for Singapore's financial center have been the rule of law, an independent judiciary, and a stable, competent, and honest government that pursued sound macroeconomic policies (Lee 2000, 73). Former Chief Justice Yong Pung How also claims that Singapore's "clear and practical laws and the effective observance and enforcement" of these laws provided the foundation for economic development (Thio 2002, 29). Lee even argues that rule of law (as a tool for maintaining social control), rather than democracy, is more important for sustaining a free market as foreign investments will not be forthcoming without it, pointing to China's successes under a tight socialist order.[18] Lee also advocates

[15] Lee Kuan Yew "Why Singapore Is What It Is." *The Straits Times* (15 October 2007).
[16] *Ibid.*
[17] Lee Kuan Yew, Singapore Parliamentary Debates, Nov. 2, 1995: col. 236
[18] Rule of Law above Democracy, Says Senior Minister Lee, *Straits Times* (Sing.), Oct. 29, 1999, at 3.

Singaporean style rule of law by highlighting Philippine's over-enthusiastic democracy and economic failures.[19]

The independent judicial machinery has been crucial for economic purposes since the earlier periods of the PAP rule. The economic incentives partly explain why Lee Kuan Yew did not abolish the British common law system when he came to power. By the time Singapore seceded the Federation of Malaysia in 1965, it virtually had no natural resources. Lee said, "We inherited the island without its hinterland, a heart without a body" (2000, 1). To this day, just 1 percent of Singapore's land is arable, and Singapore has to import much of its drinking water. Singapore had to build an outward-looking economy and attract foreign investment to engage in the global economy. Singapore has two vital resources: its strategic location of trading seaports and human capital. After coming to power in 1959, the PAP established a predictable, seamless platform for foreign investors and markets. Singapore transformed itself into an economically prosperous, highly efficient market based on capitalist policies.

Data shows how rule of law and empowered judiciary in Singapore contributed to exceptional economic success of the city-state. The city-state's GDP per capita skyrocketed from about US$500 in 1965 to US$51,709 in 2012, compared to 2012 per capita GDP of the United States (US$51,749), Japan (US$ 46,720), Germany (US$41,863), and United Kingdom (US$39,093).[20] The CIA World Factbook estimates that 2013 GDP per capita on a purchasing power parity basis in Singapore was US$62,400 compared to US$52,800 of the United States. According to the World Bank,

[19] Democracy: Asia's Major Export from the West, *Guardian Weekly*, July 25, 1993.
[20] World Development Indicators (WDI) 2013 of the World Bank <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>.

Singapore ranked 3rd in the world with annual GDP growth rate of 14.8 in 2010, compared to 4.7 percent of Japan, 2.5 United States, and 1.7 United Kingdom. Singapore's stock of foreign direct investment exceeded S$660 billion at the end of 2011.[21] In 2000, 2002, and 2004, Singapore led the world in GDP growth, with the United Kingdom coming in third and the United States fourth (the United States rose to second in 2004); Singapore also led the world in 2003, 2004, 2005, and 2006 with an unemployment rate ranging from 4 percent in 2003 to 2.9 percent in 2006.

Openness to global investment and rule of law enforcement have facilitated the emergence of a more competitive financial sector and economic development in Singapore. Singapore has been ranked as one of the world's two most competitive economies by the World Economic Forum (WEF) in Davos, Switzerland, in each of the WEF's rankings from 1996 through 2000.[22] In 2013, Singapore's public and private institutions are rated as the best in the world for the fifth year in a row. The WEF Global Competitiveness Index focuses on contract enforcement and the ability of private firms to file lawsuits at independent courts if there is a breach of trust on the part of the government. According to WEF 1997 Annual Report, the rankings also include a measure of "the soundness of legal and social institutions that lay the foundation for support of a modern, competitive market economy, including the rule of law and protection of property rights".[23] International competitiveness, economic vitality, contract enforcement, and private property protections are certainly the aspects of rule of law that

[21] "Foreign Equity Investment in Singapore 2011" at 1, online: Department of Statistics Singapore <http://www.singstat.gov.sg/publications/publications_and_papers/investment/fei2011.pdf>.
[22] WEF Global Competitiveness Reports can be found on WEF website <http://www.weforum.org/issues/global-competitiveness>.
[23] Schwab, K. and J. Sachs. *The Global Competitiveness Report: 1997*. Geneva, Switzerland: World Economic Forum, 1997, at 84.

are vital to attracting and holding international financial investment. Singapore usually scores high on rule of law and control of corruption indicators on the World Bank's Worldwide Governance Indicators.[24] The World Bank's rule of law indicator primarily focuses on the predictability of rules with respect to economic interactions, and the extent to which contractual and property rights are protected. Singapore's legal system ranked 1st in the Institute for Management Development 1997 list, a measure of the degree to which a country's legal system was detrimental to its economic competitiveness[25]. By contrast the United States ranked 31st in that category in the same year. The same survey saw Singapore ranked above the United States in response to a survey question asking if respondents had full "confidence in the fair administration of justice in the society".

Rule by Law in Public Law

The PAP regime has been criticized as intolerant of political dissent and repressive in constraining civil-political rights such as free speech and press and associational rights (Thio 2002, 25). Thio observes a "discernible dichotomized approach" (2002, 67) toward legal decision-making in Singapore in that the English model for private commercial law continues to be applied to promote certainty and stability, whereas public law issues are concerned, the culture-based judicial "communitarian" approach consolidates state stability and individual freedoms (2002, 29 and 75). Singapore executives insist that community interests should be privileged over

[24] <http://data.worldbank.org/data-catalog/worldwide-governance-indicators> and <http://databank.worldbank.org/data/views/variableselection/selectvariables.aspx?source=worldwide-governance-indicators>.
[25] *IMD World Competitiveness Yearbook*. Lausanne, Switzerland: IMD, 1997. <http://www.imd.org/wcc/news-wcy-ranking/>.

individual interests, consonant with the "shared value" of "society above self" (Thio 2002, 66). In 1990, Lee Kuan Yew proclaimed that:

> In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with the customs and values of Singapore… The basic difference in our approach springs from our traditional Asian value system which places the interests of the community over and above that of the individual.[26]

The Supreme Court Chief Justice echoed Lee's statement in 1995 that:

> Our heritage has emphasized the importance of an individual's duty and the primacy of the interests of the community. On the other hand, less conservative beliefs have promoted the rights of individuals as being of greater importance.[27]

The quotes hint the PAP regime's rejection of Western or liberal values in its judicial approach toward rule of law. In this sense, the Singaporean judiciary is left to "articulate a public law jurisprudence inspired by local values to advance communitarian interests", rather than expanding civil liberties or political rights (Thio 2002, 67). Thus we can argue that Singapore's rule of law is not quite the individualistic, liberty-maximizing one observed in the Western democracies (Silverstein 2008, 77).

Data also supports Singapore's illiberal practices concerning legal decision-making in the political sphere. Despite Singapore's high rankings on rule of law indicators concerning commercial laws, the country's voice and accountability indices are low on the World Bank's Worldwide Governance Indicators. In 2006, Singapore was

[26] Prime Minister Lee Kuan Yew, Speech at the Opening of the Singapore Law Academy (Aug. 31, 1990), in 2 S Ac LJ 155, 156 (1990) at 156.
[27] Singapore's Chief Justice Defends Tough Laws, Punishment in Legal System, *Straits Times* (Sing.), Nov. 5, 1995, at 1.

ranked in the lowest 25th to 50th percentile in the world[28]. The indicators measure various aspects of the political process, civil liberties and political rights. They also reflect the extent to which citizens are able to participate in the selection of the governing body. Key measures also include the independence of the media, which is instrumental in checking the executives' actions and holding them accountable for their actions.

Legal Rationality

As discussed above, legal decision-making in Singapore is formally rational in private commercial cases, yet substantively irrational in public law cases where the political interest of the state is at stake. In this case, the laws and the rulings further strengthen regime's political control rather than expand political rights of the individuals. This dialectical tension between formally rational and substantively irrational approaches to rule of law defines the first characteristic of Singapore's legal hybridity. The politically illiberal use of laws illustrates the PAP regime's substantively irrational approach to rule of law since the instrumental use of public laws only further strengthens the regime's monopoly of political power, rather than maximizes individual political rights and liberty. On the other hand, the regime maintains an "efficient, effective, consistent, and reliable" judicial system in which laws are general, clear and consistent without being retroactive (Silverstein 2008, 75). In addition, the laws have lasting power and effectively bind the executive as well. The PAP regime's legality is secured by the careful observance of procedure (Rajah 2012, 112). The regime's careful adherence to formal rules effectively projects an impression of a government that respects rule of law. The Singaporean regime

[28] <http://databank.worldbank.org/data/views/variableselection/selectvariables.aspx?source=worldwide-governance-indicators>.

carefully observes formal legal rationality by strictly following the rules and complying with the court's decisions, even when the rulings are not in its favor. The regime can effectively suppress the judicial activism "without violating the basic requirements of the rule of law – all well within the rules, written in the constitution and enforced in the courts" (Silverstein 2008, 78). In this sense, Singapore equates rule of law with 'law endorsed in accordance with correct procedure.' We can thus argue that Singapore's conception of rule of law is a "thin" one, "where assiduous adherence to the letter of the law and procedures are the order of the day and law is viewed as an instrument for social engineering" (Thio 2002, 75).

The PAP regime has proven its ability to curtail the spillover of legal rationality in the economic sphere to judicial rulings in the political arena. The city-state's authoritarian longevity stands in contrast to other comparable developmental states in East Asia, such as Japan, South Korea, and Taiwan, whose "democratic trajectories have conformed to the modernization theory of political development" (Rahim 2013, 697). According to modernization theory, the country is more likely to be democratized (politically liberalized) as its economy is more developed (Geddes 1999). The Singaporean case highlights that rationalization in the legal system and successful economic development may not always lead to political liberalization or the collapse of authoritarian rule. Singapore's judicial institutions succeed in ensuring formal measures of judicial independence, yet fail to constrain the government politically, despite having a good deal of autonomy in economic and administrative matters. The PAP's rule of law claims are largely restricted to matters pertaining to foreign investment, trade, and the

economy, supporting Singapore's reputation as a regional economic hub and commercial center.

Nevertheless, the regime's politically illiberal use of laws did not undermine its economic success or the business confidence of the international investment community. The regime's instrumental use of laws to advance its political interests did not jeopardize its reliability and dependability among international investors and corporate decision makers (Silverstein 2008, 78). No corporations denounced Singapore for infringing rule of law, or undermining the foundation for investment, intellectual property rights, or the obligation of contracts. As a result, Singapore became an economically successful, politically illiberal state, with long-lasting authoritarian regime that claims rule of law legitimacy. Singapore fits with Jayasuriya's (2001) theorization of the authoritarian dual state, in which economic liberalism operates in parallel to political illiberalism while the executive instrumentally dismantles the autonomy of the judiciary in political sphere.

Judicial Hybridization

Judicial empowerment in Singapore is what makes the case stand out from other authoritarian regimes that merely use laws in their favor, or simply rule by law regimes. The judicial dynamic of simultaneous empowerment and containment defines the second characteristic of legal hybridity in Singapore. While political and economic motivations incentivize the regime to empower the independent judiciary (Chapter 2), the regime's desire to hold on to authoritarian power leads to strategic containment of judicial activism (Chapter 3). This section discusses the presence of judicial empowerment in Singapore.

Singaporean regime's judicial empowerment is investigated in three judicial aspects: judicial institution, actor, and issue. The acceptance of the judiciary as an independent institution in Singapore can be observed in the constitutional recognition of the vested judicial power of the judiciary (Chan 2010a, 235). Singapore's Constitution is based on the separation of powers, which requires the legislature, the executive, and the judiciary to act within their own sphere of constitutional power. In *Cheong Seok Leng v Public Prosecutor*, S. K. Chan, J. asserted that the Singapore constitution was "based on the doctrine of separation of powers" (as modified to accommodate the Westminster model of parliamentary government)[29]. The judiciary is established by Part VIII of the Constitution of the Republic of Singapore. Article 93 vests judicial power in the judiciary and confirms the power of judicial review.[30] The Supreme Court is one of the two tiers of the court system in Singapore, the other tier being the Subordinate Courts. The Supreme Court was organized into two divisions: the upper division consisted of the Court of Appeal and the Court of Criminal Appeal, which respectively deals with civil and criminal matters; the lower division being the High Court of Singapore.[31] The Supreme Court bench consists of the Chief Justice, the Judges of Appeal, and Judges and Judicial Commissioners of the High Court. The Chief Justice and other Supreme Court judges are appointed by the President acting on the advice of Cabinet. The Chief Justice may appoint one or more of the Judges of Appeal as vice-presidents of the Court of Appeal. Since after being reorganized in 1970,[32] the Subordinate Courts of Singapore have consisted of the District Courts, the Magistrates' Courts, the Juvenile Courts and the

[29] [1988] 2 M.L.J. 481, 487. Complete records of Singapore Supreme Court Cases can be found on Lawnet, a division of Singapore Academy of Law < http://www.lawnet.com.sg>.
[30] Supreme Court of Judicature Act §18 (Cap 322).
[31] Supreme Court of Judicature Act 1969 (No. 24 of 1969), now Cap. 322, 1999 Rev. Ed.
[32] By the Subordinate Courts Act 1970 (No. 19 of 1970), now Cap. 321, 1999 Rev. Ed..

Coroners' Courts. Up until 1994, the Privy Council was the final court of appeal for civil and criminal cases. After 1994, the Court of Appeal, Singapore's highest court, became the final court of appeal.

The Singaporean Constitution also safeguards the independence of judicial actors (i.e. judges) through high salaries and statutory immunity from civil suit. The Constitution requires the Parliament to provide for the appropriate remuneration of the judges of the Supreme Court by enacting the Judges' Remuneration Act and issuing the Judges' Remuneration (Annual Pensionable Salary) Order. Indeed, Singapore judges are highly paid. The annual pensionable salaries paid to judges are: Chef Justice (S$347,400), Judges of Appeal (S$253,200) and Supreme Court Judges S$234,600).[33] The high salaries aim to prevent judicial corruption since judges who are poorly paid are more likely to accept bribes from interested parties (Chan 2010a, 234). The Constitution also insulates the Supreme Court judges from political pressure by guaranteeing against adverse changing of judicial remuneration during the tenure of the judges.[34] In addition, under common law tradition, a superior court judge enjoys absolute immunity from personal civil liability in respect of any judicial act which he does in his capacity as a judge. The immunity extends to acts done outside the judge's jurisdiction, so long as he has acted reasonably and believed in good faith that the act was within his powers. Immunity from suits for acts or omissions in the discharge of judicial duties can promote the independence of judges in their decision-making. The Subordinate Courts Act provides that a judicial officer of the courts may not be sued for any act in the discharge

[33] Judges Remuneration Act (c. 147, § 291) (Sing.); Judges Remuneration (Annual Pensionable Salary) Order, Sept. 1, 1994. As of March 3, 2014, 1 US$ is equivalent to 1.27 S$ (SGD or Singaporean dollar).
[34] Sing. Const. Art. 98(8)

of judicial duty if at the time the judge has good reason to believe to have jurisdiction to do or order the act complained of.[35] Like judicial officers of the Subordinate Courts, the Registrar, Deputy Registrar, Assistant Registrars and other persons acting judicially in the Supreme Court are given statutory immunity from civil suit.[36] In fact, Singaporean judges can only be removed for misbehavior or incapacity during their tenure. Removal of a Supreme Court judge may be initiated only upon the recommendation of a tribunal of his or her peers.[37] Singaporean executives often argue that such a system can better secure judicial independence than a system of removal by politicians that allows exploitation by politicians to influence judges' decision-making.

The Singaporean judiciary is also empowered with certain level of autonomy over judicial terrain or issues. The Singaporean courts exercise judicial review of executive actions and legislation for compliance with the Constitution, empowering statutes and administrative laws. Article 4 of the Constitution states: "This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void." Article 162 states the preexisting laws prior to 1965 Constitution continue to apply after the Constitution's commencement, but with possible adaptations, qualifications and exceptions as necessary to bring them into conformity with the Constitution.[38] Although neither of these Articles expressly confers power of constitutional judicial review by the courts, the Judiciary has claimed for itself the exclusive power to adjudicate on the constitutionality of laws and executive acts,

[35] SCA, s. 68(1).
[36] SCJA, s. 79(1).
[37] Sing. Const. Art. 98(3).
[38] Sing. Const. Art. 2(1) (definition of *existing law*) and 162.

along the lines of *Marbury v. Madison* (1803). The High Court held in the 1994 case *Chan Hiang Leng Colin v. Public Prosecutor*[39] that:

> The court has the power and duty to ensure that the provisions of the Constitution are observed. The court also has a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution, or which contravenes any prohibition which the Constitution provides.

In the exercise of its original jurisdiction – i.e. its power to hear cases for the first time – the High Court carries out two types of judicial review: judicial review of legislation, and judicial review of administrative acts. Yet, the High Court has exercised this power to adjudge executive actions and Acts of Parliament unconstitutional rather sparingly. In fact, this power never resulted in an invalidated act.[40] Nevertheless, of the 79 total judicial review cases between 1957 and 2010 (and which concerned a large variety of grievances), 22 applicants (or 27.8%) succeeded in obtaining the relief they sought (Chan 2010b, 474). This is a relatively good percentage of success, highlighting the existence of judicial independence.

The evidence of an empowered judiciary in Singapore can be observed in the landmark case of *Chng Suan Tze v. Minister for Home Affairs* (1988)[41]. This is an excellent case to differentiate legal hybridity from plain authoritarian rule by law in

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[39] *Chan Hiang Leng Colin v. Public Prosecutor* [1994] ICHRL 26, [1994] SGHC 207, [1994] 3 S.L.R.(R.) 209 at 231, para. 50, cited in *Taw Cheng Kong v. Public Prosecutor* [1998] 1 S.L.R. 78 at 88-89, para. 14. See also Thio, Li Ann. "Rule of law within a non-liberal 'communitarian' democracy: the Singapore experience." *Asian Discourses of Rule of Law: Theories and Implementation of rule of law in twelve Asian countries, France and the US*. 2003. 183-224, at 188.

[40] The only instance where the High Court struck down a statutory provision was in *Taw Cheng Kong v. Public Prosecutor* (1998). Yet, the decision was later overturned by the Court of Appeal.

[41] *Chng Suan Tze v. Minister of Home Affairs* [1988] SGCA 16, [1988] 2 S.L.R.(R.) 525, Court of Appeal (Singapore). <http://lwb.lawnet.com.sg/legal/lgl/rss/landmark/[1988]_SGCA_16.html>

Singapore. Four dissidents were arrested and detained without trial under the Internal Security Act (ISA)[42] in December 1988 for their alleged role in a Marxist plot to undermine the government. The ISA, a law inherited from the British colonial era, provides for detention without trial for people regarded by the executive as a risk to national security. Detention orders may be renewed every two years. Yet the state has authorized a twenty-three year detention without trial of alleged communist insurgent Chia Thye Poh (Thio 2002, 54). The Act is a "blatant negation of the Rule of Law"[43] since it mandates punishment through deprivation of liberty without proper judicial determination (Thio 2002, 55). In addition, it is hard to differentiate between using the ISA "for genuine security and for self-interested political purposes" (Thio 2002, 58). The Act is shielded from unconstitutionality by Article 149 of the Constitution. However, as an exception to due process, the Act can undermine the thick conception of rule of law as it relies heavily on substantive judgment of the executive in defining the security threat. Section 8(1) of the Act states that "[i]f the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein, it is necessary to do so", the Minister for Home Affairs shall order that the person be detained without trial for up to two years. Section 10 of the Act empowers the Minister to direct that a detention order be suspended "as the Minister sees

[42] The Internal Security Act (ISA) (Cap. 143, 1985 Rev. Ed.)
[43] Jeyaretnam, 71 Sing. Parl. Rep., Nov. 24, 1999, col. 576.

fit", as well as to revoke such a direction. In a way, the ISA grants the government with "virtually unlimited powers"[44] to detain suspects without proper judicial process.

After being detained under the ISA, Chng Suan Tze asked the Singapore Court of Appeal to review the constitutionality of their detention under the ISA. Surprisingly, the Singapore judiciary moved to expand individual rights under the due process clause and ruled against the government on an internal security case and in favor of a broad reading of fundamental individual rights. The Court of Appeal affirms the judiciary as an institutional check on executive power by holding that "the notion of a subjective or unfettered discretion is contrary to the rule of law" because "all power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power".[45] The Court asserted that judicial review should be exercised whenever the government exercised illegal, irrational, or procedurally improper power. The Court held that any government action that is arbitrary or irrational must be considered *ultra vires* or an act beyond law, which, by definition, violates Singapore's written constitution (Silverstein 2008, 79). The Court held that the objective test should apply to the review of the exercise of discretion under sections 8 and 10 of the ISA. Ruling against the assertion of broad discretion under the ISA in *Chng Suan Tze*, the Singapore Court of Appeal held that "giving the executive arbitrary powers of detention" would be "unconstitutional and void" under the precedent laid down by the Britain's Privy Council in *Ong Ah Chuan v. Public Prosecutor* (1980), in which the Privy Council ruled that the presumption of innocence "is a fundamental human right protected by the

[44] "Singapore: Stop Hiding Behind Old Excuses" Human Rights Watch (24 January 2012) Online: Human Rights Watch <http://www.hrw.org/news/2012/01/23/singapore-stop-hiding-behind-old-excuses>
[45] *Chng Suan Tze*, p. 553, para. 86.

[Singapore] Constitution and cannot be limited or diminished by any Act of Parliament" other than a full-scale constitutional amendment. In *Ong Ah Chuan* (1980), the Privy Council held that the presumption of innocence is "imported into" Singapore's Constitution through that document's due process and equal protection clauses although it was not explicitly referred to in the Constitution. Like *Marbury v. Madison*, *Ong Ah Chuan* asserted the power of judicial review and the foundation for substantive due process. Referring to *Ong Ah* Chuan, the Court of Appeal ordered the release of the detainees in *Chng Suan Tze*. This is a landmark judicial activism against the very authoritarian government in the most politically sensitive security case. Surprisingly the regime fully complied with the Court's decision and released the prisoners without undermining the judicial autonomy. After the court's order of the release of prisoners, the regime had two options of either to fully comply or ignore the ruling. Ignoring the court's unfavorable ruling would undermine the PAP's rule of law legitimacy and the judicial independence in Singapore, defeating the regime's initial purpose of judicial empowerment. By complying with the Court's ruling, the regime confirmed its commitment to enforcement of rule of law, even at the expense of its unconstrained authoritarian power. Nevertheless, in the end, the prisoners were rearrested later after amending the constitutional provisions concerning the ISA. Still the regime fixed the laws by carefully following the legal procedures without infringing the formal legal rationality (See Chapter 3 for the regime's judicial containment strategy in *Chng Suan Tze*).

The case of *Chng Suan Tze* highlights an evidence of legal hybridity in Singapore. The activist ruling would not have occurred without the judiciary being empowered.

While the government eventually exercised rule by law to fulfill its political goals (i.e. re-arresting political activists) through constitutional amendments, the regime was bound by rule of law when it initially decided to comply with the court's decision to release the prisoners. The regime's compliance with the court's decision that is against its interests sounds paradoxical in a conventional authoritarian context. This compliance only makes sense in the context of legal hybridity. The regime's compliance with the court's unfavorable ruling indicates its careful observance to the formal rule of law and commitment to judicial enforcement. Moreover, while the regime's compliance signifies the observance of formal legal rationality, the regime's fixing of constitutional provisions to advance its political purposes shows the substantively irrational use of law (See Chapter 3). *Chng Suan Tze* also highlights the dialectic between formal and substantive approaches to justice. In addition, the initial compliance shows the regime's desire to empower the judicial autonomy while the post-compliance law fixing proves the regime's determination to contain judicial activism. Thus, *Chng Suan Tze* also reveals the conflicting dynamic between judicial empowerment and containment.

In brief, the Singaporean regime's strict formal observance of law, careful compliance with the judicial decisions, and the evidence of successful appeals of judicial review (even in a politically sensitive case) signify the regime's intent to empower the judiciary. This judicial empowerment partly sets the context of legal hybridity in Singapore as developed in this chapter. The next chapter discusses what motivates authoritarian regimes to promote rule of law despite conventional incompatibilities and apparent risks.

Chapter 2

Motivations for Judicial Empowerment

Theory

This chapter analyzes the motivations that compel authoritarian regimes to empower the judicial autonomy despite conventional incompatibility and costly risks associated with judicial activism. I identify three primary motivations for judicial empowerment: political, bureaucratic, and economic incentives.

Political Motivations

Enhancing judicial power in authoritarian states is instrumental for legitimating the state and its policies (Moustafa 2007) and justifying the regime's existence (Solomon 2007, 136). Authoritarian leaders may start with other sources of legitimacy, such as charisma or the claim to represent morality, revolution, or order, but in time find support from law and courts increasingly useful (Solomon 2007, 128-9). Authoritarian rulers usually attempt to make up for their questionable legitimacy by employing judicial institutions that seem to impose constraints on their arbitrary rule (Ginsburg and Moustafa 2008, 5). In Egypt, Anwar Sadat manipulated the rule of law rhetoric to overcome a tremendous "legitimacy deficit" left by the failures of Nasserism (Ginsburg and Moustafa 2008, 6; Moustafa 2007). The gain in legitimacy through judicial enhancement played a crucial role in Sadat's decision to empower the Supreme Constitutional Court (Solomon 2007, 133). Additionally, legitimacy is crucial not only to

justify the use of power but also to maintain power (Ginsburg and Moustafa 2008, 5). In Pakistan, judges have repeatedly legitimized the right of military leaders to rule after coups (Ginsburg and Moustafa 2008, 5). The Turkish military also turned to the judiciary to legitimate its interventions in the civilian politics (Shambayati 2008, 290).

Authoritarian regimes can also sideline political participation and activism within established legal frameworks. Such legal mechanisms can sometimes enable authoritarian regimes to sideline political opponents and maintain power. By strictly following laws instrumentally designed to advance the regime's political control, the regimes can curtail political rights. Anthony Pereira (2008, 23-57) examines three contemporaneous military dictatorships in Latin America – Argentina, Brazil, and Chile – which varied widely in their willingness to use the regular judiciary to sideline political opponents. With courts showing deference to the regime, political cases were routed through the regular judiciary to repress the political opponents. Moreover, Spanish political trials remind Francoist courts executing opponents up to the last days of the regime in 1975 (Pereira 2008, 44). We can also observe the widespread use of military courts to prosecute dissidents and opponents in Egypt, Nigeria, Pakistan, and Peru (Pereira 2008, 47). Sadat's regime in Egypt depended on upon the parallel legal track of State Security Courts as a tool to sideline political opponents (Moustafa 2008, 152).

Bureaucratic Motivations

Authoritarian leaders may use administrative laws and legal system as a tool for monitoring their bureaucratic agents (Ginsburg 2008, 58-72). Authoritarian regimes can use legal mechanisms to better institutionalize their rule and to strengthen discipline within their states' expanding administrative hierarchies (Ginsburg and Moustafa 2008, 7). As elaborated by Ginsburg, all rulers face the problem of controlling their inferiors, who have superior information but little incentive to share it (2008, 58). These problems may be particularly severe in authoritarian states. Autonomous courts can provide a useful mechanism by which rulers gain information on the behavior of their bureaucratic subordinates. Judicial institutions can promote discipline within the state's administrative hierarchy because they generate an independent stream of information on bureaucratic misdeeds (Shapiro 1981, 49). Administrative courts can make the state's administrative apparatus work more smoothly since information about defiance and noncompliance by subordinates can be uncovered. A legal system that discloses the disobedience of state officials helps attain an improved loyalty of administrative personnel and greater conformity from state officials. Ginsburg (2008) describes how the Chinese Communist Party turned to administrative law as ideology waned and conventional tools of hierarchical control became less effective. Widner (2001) observes the same dynamic in several East African countries both before and after the region's democratic transitions, illustrating the utility of administrative courts for enhancing bureaucratic compliance in both democratic and authoritarian regimes. Widner says:

> "Opportunities to develop judicial independence arose as leaders grew concerned about corruption within the ranks of the ruling parties or with arbitrariness and excess on the

> part of lower officials whose actions they could not supervise directly. The ability of private parties or prosecutors to bring complaints against wayward civil servants and party members in independent courts helped reduce the need for senior politicians to monitor and cajole" (2001, 363).

Similarly, Magaloni (2008) describes how Mexican regime encouraged citizens to use the judicial mechanism of *amparo* to challenge arbitrary applications by individual bureaucrats during its seven-decade long single party rule. Moustafa traces how the administrative court system was vastly expanded by the Egyptian regime beginning in the 1970s in order to restore discipline to a rapidly expanding and" increasingly unwieldy bureaucracy" (2008, 132-155).

Economic Motivations

Weber (1978) argues that legal rational institutions are technically superior, efficient, and hence supportive of economic growth. Since rational law played an important role in the early development of capitalism, modern-day policymakers concerned with sustaining the conditions of economic growth should promote rule of law (Trubek 1972; Ginsburg 2000, 831). Credible commitments theories contend that regimes empower the judiciary to signal investors, both domestic and foreign, that their authoritarian power is checked and balanced by a credible third party (North and Weingast 1989).[46] The judiciary that is independent of executive interference offers

[46] Nevertheless, some may argue that credible commitments may not explain all cases of judicial empowerment. Some authoritarian regimes do not rely on productive income and tax revenue to fill state coffers. These regimes use high levels of "unearned" income from sources like natural resource wealth to generate state wealth. Since the state controls this sector of the economy they do not need to create

transparent and nominally neutral forums to limit the regime's authoritarian power (Ginsburg and Moustafa 2008, 9). Aiming to attract foreign investment, authoritarian regimes can develop incentives to set up relatively autonomous courts to assure investors of legal protections especially property rights (Shapiro 2008, 330). Advocates of rule of law and neoclassical economists alike have argued that sustainable economic development requires rule of law and in particular clear and enforceable property rights (Pristor and Wellons 1999; North 1981, 1990). Clear property rights and rule of law reduce "transactional friction" and expedite economic activity (Root and May 2008, 308). With effective enforcement of property rights and contracts, courts can serve as an institutional intermediary between business interests and authoritarian leadership, providing a stable legal environment for economic transactions (Root and May 2008, 308). For instance, Anwar Sadat's regime in Egypt created an institutionally autonomous Supreme Constitutional Court (SCC) with powers of judicial review in 1979, with an intention to develop legal support for controversial government economic policies and to convince foreign business firms that the country was a safe ground for investment (Moustafa 2007, 5, 77-78). Sadat's regime ensured its survival through attracting foreign direct investment after years of economic stagnation and escalating pressures from international lenders throughout the 1970s during the previous Nassar's regime.

Reform of legal institutions is seen as one pillar of a tripartite package of reforms that includes democracy and economic liberalization. The United Nations Development

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institutions, like independent courts, capable of checking state power to create credible commitments to investors (Wright 2008). In these cases credible commitments theory suggests these states should have low levels of judicial empowerment. However this is not the case. Some regimes, like the Middle East oil monarchies, have high levels of judicial empowerment despite a decreased need to create credible commitments for economic investment.

Program, when designing a package of assistance to promote market-oriented reforms in Vietnam, stated that the two most essential elements were a complete definition of property rights and a complete system of contract law (Jayasuriya 1999, 121). The World Trade Organization requires member states to provide judicial institutions in trade-related arenas because bilateral investment treaties can guarantee proper dispute resolution. Multilateral institutions such as the World Bank and Inter-American Development Bank expend vast resources to promote judicial reform in developing countries (Ginsburg and Moustafa 2008, 9).

Evidence

This section investigates the political, bureaucratic, and economic motivations of Singaporean regime to empower the judiciary.

Political Motivations

Just as Lee Kuan Yew's PAP did not abandon the electoral process, the regime continued the constitutional process and legal tradition from British colony when it came to power in 1959. The PAP could have abolished the British legal infrastructure when it came to power. Clearly, Lee did not have intention to set up a liberal democratic state. Samuel Huntington (1991) blames the leadership as the missing ingredient to explain the absence of democracy in Singapore. So favorable were the preconditions, according to Huntington (1991, 108), that 'a political leader far less skilled than Lee Kuan Yew could have produced democracy in Singapore'. The PAP succeeded in creating a non-competitive political space by building a "soft authoritarian" state, in Lingle's (1996) words. The fact that the PAP continued to use the British legal system highlights the usefulness of the independent judiciary for the regime. The regime's initial political motivation for judicial empowerment may not have been to legitimize its political rule as in the case of Egypt and Turkey where the military regimes turned to the courts to legitimize their coups. Lee's PAP came to power through a politically legitimate election in 1959, and it continued winning the elections by a politically transparent process. The key incentive to not abolish the British legacy could have been that discarding the existing judicial structure would have been politically costly for the regime. Although the

continued use of British system may not have further legitimized the PAP's rule, abolishing the judicial legacy could have undermined its political legitimacy.

In addition, the Singaporean regime has apparently used courts to suppress the opposition participation and curtail freedom of speech in news media. From the mid-1980s, the legal system became pivotal to the political persecution of the PAP's most formidable opponents and to the intimidation of the international and independent media (Rodan 2006, 13). This has been accompanied by the increasing use of administrative law and associated legislation to indirectly narrow the grounds and avenues for political contest, and to empower bureaucrats to greatly complicate lawful political competition. Despite having a written constitution with a bill of rights, the government has successfully altered and framed ordinary laws to curtail civil and political rights and liberties, including freedom of expression and association.

The PAP instrumentally issues legislation and constitutional amendments to sideline political opponents, while fully respecting formal judicial independence (See Silverstein 2008). The defamation and bankruptcy suits brought against opposition member J.B. Jeyaretnam allowed the regime to effectively sideline the political opposition (Silverstein 2008). Jeyaretnam was first elected as a Member of Parliament for the Workers Party in 1981, thereby becoming the first opposition candidate to be elected to parliament since independence. Jeyaretnam was an articulate critic of the PAP policies and programs. Jeyaretnam was twice disqualified from serving as a Member of Parliament through the use of court proceedings after his re-elections in 1984 and 1997. Following his re-election in 1984, Jeyaretnam was charged with financial impropriety related to the collection of Workers Party funds. After an initial acquittal and a series of

appeals, Jeyaretnam was found guilty and sentenced to a fine of S$5,000. The sentence – a fine of over S$2,000 – resulted in the automatic disqualification of Jeyaretnam as a Member of Parliament.[47] Jeyaretnam was again sued for defamation relating to a 1995 article published in the Workers' Party Newspaper. Damages and costs of S$510,000 were awarded jointly against all the defendants. Two of the plaintiffs subsequently commenced bankruptcy proceedings against Jeyaretnam alone and he was pronounced bankrupt the day after he failed to pay one of the agreed-upon payments. The Court of Appeal confirmed the bankruptcy order despite Jeyaretnam's offer to pay the remaining damages and he was automatically removed from Parliament in 2001. In 2004, when Jeyaretnam became eligible for discharge from bankruptcy, the Assistant Registrar, High Court and finally the Court of Appeal refused his application for discharge. In so doing, the courts considered as the overriding factor the rights of the creditors to demand full payment and did not give due consideration to the bankrupt's right to rehabilitation. The Court also undercut the public interest in having Jeyaretnam discharged from bankruptcy so that he could return to his former role as a consistently elected member of the opposition. In 2007 he was discharged from bankruptcy and regained his qualifications. However, as a result of the defamation actions and bankruptcy, Jeyaretnam was prevented from standing in the 2001 and 2006 general elections.

Legal amendments to the Newspaper and Printing Presses Act in 1986 allowed the regime to effectively dismantle the independent press and discourage the freedom of speech using the formal legal procedures. The amendments gave the Minister for

[47] Under the Constitution, Art. 45(1)(e), a person is disqualified from being an MP if he or she "has been convicted of an offence by a court of law in Singapore or Malaysia and sentenced to imprisonment for a term of not less than one year or to a fine of not less than $2,000 and has not received a free pardon".

Communications and Information the capacity to restrict the circulation of foreign publications deemed, by the Minister, to be engaging in domestic politics. The regime does not shut down any foreign media or restrict the display of politically sensitive matters inside the country. Banning the foreign media would be a blunt weapon that could backfire on Singapore, undermining its claim to rule of law. Without banning foreign publications, the PAP is able to exercise financial pressure on the magazines and Newspapers while avoiding charges of direct censorship. The PAP effectively censors politically sensitive matters through strict statutes on the printing, publishing, and distribution of Newspapers and magazines, followed by a strict application and interpretation of libel and defamation in civil suits. The regime passes laws that would allow it to restrict circulation of any "Newspaper published outside Singapore" that was "engaging in the domestic politics of Singapore" (Silverstein 2008, 88). The laws also provide that the reproduction and distribution of "gazetted" Newspapers (offending publications can be listed in the country's official Gazette) would be allowed, on a nonprofit basis, with all advertising stripped out. This effectively means that offending publications would be allowed to be sold and read in Singapore, but only a very few copies. The first "gazetted" publication – Time magazine – saw its circulation slashed from 18,000 to 9,000 and then to 2,000 after Time's editors refused to publish an unedited response from Lee to an article titled "Silencing the Dissenters" concerning Lee's political opponent Jeyaretnam. Dow Jones Publishing also reduced the circulation of the Asian Wall Street Journal from 5,000 to 400 copies a day.[48]

[48] *Dow Jones Publishing Co (Asia) Inc. v AG* [1989] 1 SLR(R) 637

Bureaucratic Motivations

Given Singapore's small country size of 716 square kilometers with only 5.4 million populations, the judiciary's role to regulate the bureaucratic mechanism and discipline the administrative agents may not be as significant as in geographically large and populous countries like China. The corruption control function of courts may not be as obvious in Singapore as well. Unlike in some African countries where corruption is a critical problem, Singapore has bureaucratic a good reputation in accountability and clean governance. Singapore typically scores high on the rule of law and control of corruption indicators on the World Bank's worldwide governance indicators.[49] To avoid the corruption, cronyism and nepotism, the PAP practices meritocracy as a cornerstone of government policy and to deal robustly with imputations of corruption (Thio 2002, 26). Corruption is also prevented through high ministerial salaries; since 1994 ministerial pay has been pegged to top private salaries (Thio 2002, 26). The regime also carefully ensures transparency in its governmental affairs. When it was alleged that Senior Minister Lee and his son Deputy Prime Minister Lee Hsien Loong had profited from special discounts in relation to some luxury properties, Lee called for parliamentary debates to air the issue (Thio 2002, 26).

Economic Motivations

The independent judicial machinery has been crucial for Singapore's economic success since the earlier periods of the PAP rule. The economic incentives partly explain

[49] World Bank, Governance Matters 2007, Worldwide Governance Indicators, 1996-2006.

why Lee Kuan Yew did not abolish the British common law system when he came to power. Singapore's adherence to rule of law and its an efficient, effective, consistent, and reliable judicial system have been fundamental to Singapore's rise as an international commercial center. Concerning private commercial law, the efficiency of the judicial framework, the legal certainty, and procedural fairness contribute to Singapore's exceptional economic growth. Openness to global investment and rule of law enforcement have facilitated the emergence of a more competitive financial sector and economic development in Singapore. Please refer to Chapter 1 Section "Legal Hybridity in Singapore" (*Rule of Law in Private Commercial Law*) for detailed discussion of the role of legal rationality in Singapore's economic success.

In short, political and economic incentives constitute the prevailing motivations for Singaporean regime in promoting judicial independence. Not only do courts attract foreign cash flows, but they also allow autocrats' selective use of property rights for political purposes to weaken the financial capacity of the opposition. The legal institution that enables Singapore to conduct clean business practices also allows the regime to intimidate its opposition (Root and May 2008, 308). The regime imposes credible threats to the political opponents and the news media through legal prosecutions. Now the question is how authoritarian regimes can achieve their goals of judicial empowerment without compromising their authoritarian power. The next chapter explores strategies of judicial containment often used by authoritarian regimes to instrumentally use the laws in their favor while observing the formal legal rationality.

Chapter 3

Strategies of Judicial Containment

Theory

While certain authoritarian regimes may be compelled to construct autonomous courts to advance their political, bureaucratic, or economic interests, they also must find ways to contain the consequent judicial activism to secure their political control. In doing so, they must be strategic to constrain judicial power without formally undermining judicial autonomy, since such a threat to the judiciary would undermine its attempt to project legal legitimacy (Ginsburg and Moustafa 2008, 17). Authoritarian rulers may use a diverse set of techniques at their disposal to effectively contain judicial activism without infringing formal legal rationality, a key element of legal hybridity. I classify the judicial containment strategies into institutional, actor, and issue-based approaches.

Institutional Containment

A common strategy of institutional containment involves engineering fragmented judicial systems instead of unified judiciaries by the activation of special courts external to the regular judiciary. Then the regime can shift the politically sensitive judicial cases from the regular judiciary to the higher-level extraordinary judiciary such as military courts. In the ideal type of a unified judiciary, the regular court hierarchy has jurisdiction over every legal dispute in the land. In fragmented systems, one or more exceptional courts run alongside the regular court system. In these auxiliary courts, the executive

retains tight controls through "non-tenured political appointments, heavily circumscribed due process rights, and retention of the ability to order retrials if it wishes" (Ginsburg and Moustafa 2008, 17). Politically sensitive cases are channeled into these auxiliary institutions when necessary, enabling rulers to sideline political threats as needed. The extraordinary courts usually employ "procedures and standards of proof far less demanding and rule-bound than regular judicial procedures" and are usually staffed by individuals tied to the authoritarian elites that wielded legislative and executive power (Barros 2008, 158). In this scenario, tolerating judicial independence is not costly for authoritarian rulers. The regular judiciary is unwilling to rule on the constitutionality of parallel state security courts – the regime's core legal mechanisms for maintaining political control – for fear of losing a hopeless struggle with the regime (Ginsburg and Moustafa 2008, 18). The availability of subservient auxiliary courts allows authoritarian rulers to extend substantial degrees of autonomy to the regular judiciary (Ginsburg and Moustafa 2008, 17). The regular judiciary may be left with a degree of independence as long as politically sensitive cases were shifted to special (often military) courts (Toharia 1975; Linz 1975). Channeling politically sensitive cases into security courts allows some degree of independence for the rest of the court system (Pereira 2008, 24). There is likely to be a direct relationship between the degree of independence and the degree of fragmentation of judicial institutions in authoritarian context (Ginsburg and Moustafa 2008, 18). Ginsburg and Moustafa assert:

> "The more independence a court enjoys, the greater the likely degree of judicial fragmentation in the judicial system as a whole. The more compliant the regular courts are, the more that authoritarian rulers allow political cases to remain in their jurisdiction.

> The more the regular courts attempt to challenge regime interests, on the other hand, the more the jurisdiction of the auxiliary courts is expanded" (2008, 18).

In Anwar Sadat's Egypt, the regime's ability to transfer select cases to exceptional courts facilitated the emergence of judicial power in the regular judiciary. The Supreme Constitutional Court was able to push a liberal agenda and maintain its institutional autonomy from the executive largely because the regime was confident that it ultimately retained full control over its political opponents (Ginsburg and Moustafa 2008, 18). Another example is the use of security courts to prosecute political dissidents in three South American military dictatorships – those of Argentina (1976-1983), Brazil (1964-1985), and Chile (1973-1990). In Argentina during General Videla (1976-83), courts retained a greater degree of autonomy, but their scope of action was sharply reduced and state violence took on an extrajudicial dimension such as appointing a new Supreme Court to dismiss writs of habeas corpus. Where security courts at the first level are completely separate from civilian justice, as in Pinochet's Chile (1973-90), the military can more easily act upon its own view of "political justice," without regard for the ideas of civilian judges and lawyers (Pereira 2008, 27). Moreover, in Spain under the Franco regime (1939-75), judges frequently held preferences at odds with the government, but ordinary courts also lacked jurisdiction over the important political questions of the day (Toharia 1975). The regime developed a parallel system of two court organizations. One structure included the regular or ordinary court. They were fairly independent of political interference and self-contained to non-political issues. Judicial activism was deterred in areas of political tension or with political implication that affected the stability of the legitimacy of the Franco regime. The other court system was

organized with a complex set of special bodies ruling over all matters relevant or important to the political stability of the ruling elite and the survival of the regime. These courts were "highly controlled, subservient to the regime, and completely dependent on political aims" (Garoupa and Maldonado 2011, 617-8). However, while such extraordinary auxiliary courts are easy to set up under the sponsorship of the regime, they can easily be abolished as well. In the 1975 transition to democracy these auxiliary courts were quickly abolished whereas little change was effected on the ordinary courts (Toharia 2003, 377).

Another strategy of institutional containment is to make the judiciary susceptible to extraneous political pressures by structurally designing the judiciary as part of the executive branch. This exception to separation of power principle can undermine the judicial autonomy by creating a potential for the executive interference in the judicial affairs. This can be accomplished by appointing judicial positions from the executive and routinely shuffling judges between the two branches. In Singapore, the active discouragement of a professional judiciary within the subordinate courts ensures that the lower judiciary adopts the 'characteristics of the civil service including implicit support for the political executive and its power arrangement' (Worthington 2002, 497). See the evidence section for further discussion of this institutional containment strategy in Singapore.

Actor Containment

Judicial actor-based strategies have a direct effect on how judges will approach legal decision-making. They aim to ensure that the judicial rulings align the interests of the authoritarian regime. An authoritarian regime may have to find ways to put pressure on judges to ensure their deference to the regime's interests, especially when its core interests will be at stake should legal subjects seek to challenge the regime in court. Such a strategy may involve weakening judicial protections from removal, controlling judicial appointments, and determining judicial salaries by reference to judges' deference to the regime's interests. Authoritarian regimes may compel the rational self-restraint of judicial actors. The anticipated threat of executive reprisal and the simple futility of court rulings on the most sensitive political issues are usually sufficient to produce judicial compliance with the regime's core interests. Ironically, the more deference that a court pays to executive power, the more institutional autonomy an authoritarian regime is likely to extend to it (Ginsburg and Moustafa 2008, 16). Some court leaders may push all judges to avoid confrontations with the interests of the executive in order to protect the institutional autonomy of the courts (Solomon 2007, 136). In 1997 a Chilean Supreme Court justice admitted that if the court had challenged the Pinochet (1973-90) government's prerogatives, it could have been dissolved, as was the Congress from 1973 to 1980 (Pereira 2008, 27). In Chile, Supreme Court justices enjoyed a substantial amount of institutional autonomy and power but shared the same ultraconservative views as Pinochet (Hilbink 2007). Hilbink (2007) argues that the process of training, selection, and promotion within the judiciary essentially guaranteed that justices serving on the Supreme Court held conservative views and would discipline lower-court judges who did

not. As a result, Chilean judicial system enjoyed a substantial amount of institutional autonomy.

Techniques to compel judicial self-restraint may include both positive sanctions (co-option) and negative sanctions (intimidation). Mechanisms of co-option include promotion and giving economic incentives through bribery or high salary. A strategy is to promote disloyal judges, particularly in the highest courts, to high profile jobs and other lucrative positions with less political influence outside of the judiciary (Garoupa and Maldonado 2011, 605). Apparently Argentinian President Menem (1989-1999) was an enthusiast of this strategy during his term in office (Garoupa and Maldonado 2011, 605). This approach may effectively promote a buy-out for the incumbent judiciary. However, this strategy inevitably requires the incumbent judiciary's collaboration since the acceptance of such promotions results from a passive or active submission of ideological defeat.

On the other hand, strategies to subordinate the judiciary through intimidation include impeachment, dismissal, blackmailing, extortion, and even physical violence. In Zimbabwe, after the Supreme Court ruled that occupations of white-owned farmland – part of the Mugabe government's land-redistribution policy – were illegal, independent justices received a wave of violent threats from pro-government war veterans. Four justices, including Chief Justice Anthony Gubbay, opted for early retirement in 2001 and were replaced by justices with closer ties to the government (Levitsky and Way 2002, 56). In Peru, scores of judges, including several Supreme Court justices, were intertwined in the web of patronage, corruption, and blackmail constructed by Fujimori's intelligence chief, Vladimiro Montesinos (Levitsky and Way 2002, 56). In Brazil (1964-85), the

military regime abolished judges' traditional rights to tenure and irremovability, putting all judges and prosecutors on notice that they could be punished if they made decisions against the regime's interests. This actor punishment proves to be a common strategy of authoritarian regimes. In Peru, the pro-Fujimori congress dismissed three members of the Constitutional Tribunal in 1997 after the judges attempted to block Fujimori's constitutionally contested bid for a third presidential term (Levitsky and Way 2002, 57). Although authoritarian regimes may punish judges who rule against them, such acts against formally independent judiciaries may generate important costs in terms of domestic and international legitimacy. The move generated sharp criticism both domestically and abroad, however, and the case remained a thorn in the regime's side for the rest of the decade (Levitsky and Way 2002, 57).

Another approach to contain judicial actors is to institute court packing. Authoritarian leaders have a capacity to unilaterally select judges who share their views. The purpose is to have a loyal majority in the courts and reduce the influence of the disloyal incumbent judiciary. Court packing plans have been observed in transitional regimes (e.g., Argentina in the late 1980s) as well as military authoritarian regimes (e.g., Brazil in 1964). A severe form of court packing is to dismiss the entire incumbent judiciary and replace it with royal judges, as observed in some Latin American countries such as Argentina, Peru, and Bolivia. The entire replacement of the Supreme Court or of the constitutional court could effectively secure a loyal judiciary. The judiciary of the lower courts may also be purged to secure a completely faithful court system. Nevertheless, the disadvantage of court packing is that obvious political goals can

adversely affect the judicial independence (Garoupa and Maldonado 2011, 606). Court packing or purging can impose serious political costs in terms of international reputation.

Issue Containment

Authoritarian regimes may also seek to contain the issue context or the judicial terrain of legal decision-making to prevent judicial activism. The goal is to ensure that the independent judiciary does not have jurisdiction over the politically sensitive issues. Issue control is a strategy to manipulate the legal landscape through framing the laws in order to use the procedural and substantive elements of legal rationality in the favor of the state. The issue control involves the state's framing laws to limit the domain of politically sensitive issue through legislative lawmaking. Through political control over the legislature, certain authoritarian regimes can effectively amend or pass legislation to advance their interest without undermining the judicial autonomy of the courts. The regimes may limit procedural rights by constricting access to justice or amending a bill of rights to limit its scope of judicial action.

To contain the issue scope of legal decision-making, authoritarian regimes can engineer constraints on the type of judicial review permitted (Ginsburg and Moustafa 2008, 19). The restriction of judicial review illustrates the limited strength of abstract formal justice and the greater strength of substantively irrational justice in Weberian terms (Schatz 1998, 225). Most regimes also limit the types of legal challenges that can be made against the state. The widespread exclusion of judicial review for either administrative decisions or the decisions of the political executive is a crucial technique

that diminishes the potential use of the courts to scrutinize or restrain the exercise of power by the political executive (Rodan 2006, 14). In Mexico under the PRI, citizens could only raise *amparo* cases, limiting the judicial terrain of the Mexican Supreme Court (Magaloni 2008). Although article 12 of the Chinese Administrative Litigation Law empowers citizens to challenge decisions involving personal and property rights, it does not mention political rights, such as the freedom of association, assembly, speech, and publication. These select issue areas highlight the central government's intention to restrain local bureaucrats while impeding the potential of political challenges through courts. Tate and Haynie (1993) show how authoritarian elites ensured the severe reduction of the Philippine Supreme Court's powers of constitutional judicial review of law. The Supreme Court lacked powers of judicial review in reviewing human rights cases, ruling on issues of the separation of powers, ruling on the degree of legitimate executive use of emergency police powers, reviewing executive censorship of the media, reviewing the legality and legitimacy of elections, and reviewing the executive's ability to suspend habeas corpus provisions (Schatz 1998, 219). In Franco's Spain, although judges frequently held rulings against the state, the ordinary courts lacked jurisdiction over the important political questions (Toharia 1975).

Evidence

This section examines how Lee Kuan Yew's PAP successfully controls judicial activism using institutional, actor and issue containment strategies. As a result of effective judicial containment, Singapore developed into an authoritarian state with an independent judiciary that is unlikely to become too activist and the executive pays due respect to rule of law.

Institutional Containment

Unlike Spain under Franco or Egypt under Sadat, Singapore's judicial system is unified and not fragmented. The regime did not set up parallel or extraordinary courts to handle politically sensitive issue separately. Singapore's Constitution does not provide for a constitutional court to resolve constitutional conflicts, but instead vests the judicial power of Singapore in the regular courts. The Supreme Court consists of the Court of Appeal and the High Court. The Court of Appeal exercises appellate criminal and civil jurisdiction, while the High Court exercises both original and appellate criminal and civil jurisdiction.[50] The Court of Appeal is Singapore's final court of appeal after the right of appeal to the Judicial Committee of the Privy Council in London was abolished in April 1994.

The assertion of a lack of judicial independence has been made against the lower judiciary in Singapore, which deals with over 95 percent of all judicial matters. The institutional setup of the lower judiciary makes Singapore's Subordinate Courts

[50] "Supreme Court of Judicature Act". Attorney-General of Singapore.

vulnerable to external political pressures as Subordinate Court judges are can be considered part of the executive branch of government (Thio 2002, 21). This is an exception to the separation of powers principle. Moreover, district court judges are routinely shuffled between the executive and judicial branches. This raises concerns that these judges might further support the executive's "corporatist ideology"[51], undermining their discharge of judicial functions as an independent check on the executive (Thio 2002, 21-22 and Tremewan 1994, 193). The District Judges and Magistrates of the Subordinate Courts are appointed to their positions by the Legal Service Commission (LSC). Their career advancement depends on the LSC, of which the Attorney General is a member, since they can be transferred out of the judiciary to the Attorney General's Chambers or to other government department as a legal officer. Thus, the active discouragement of a professional judiciary within the subordinate courts ensures that the lower judiciary adopts the 'characteristics of the civil service including implicit support for the political executive and its power arrangement' (Worthington 2002, 497). This institutional arrangement inevitably creates a potential for the executive interference in judicial affairs.

The transfer of Senior District Judge Michael Khoo is a good illustration of the executive influence over the lower judiciary. Senior District Judge Michael Khoo was suddenly transferred to Attorney General's chambers in 1981 following his acquittal of Joshua Benjamin Jeyaretnam, an opposition member of parliament and the prime minister's political opponent. Jeyaretnam was charged with three charges of having fraudulently transferred checks to prevent the distribution of money to the creditors of the

[51] This relates to a close and consultative relationship between the executive and judiciary (See Jayasuriya 1999).

Workers' Party of Singapore, and one charge of making a false declaration.[52] In January 1981, Khoo acquitted Jeyaretnam of all charges, except a single charge of fraud involving a check for S$400. Jeyaretnam was sentenced to a S$1,000 fine, which was well below the amount of S$2,000 that would have caused him to lose his seat in Parliament.[53] Upon the Public Prosecutor's appeal to the High Court, Chief Justice Wee Chong Jin ordered retrials on the two charges of check fraud that Jeyaretnam had been acquitted of.[54] Jeyaretnam was convicted of the charges by a different senior district judge and sentenced to three months' imprisonment which later reduced to a fine of S$5,000. In August 1981, before the retrials, Khoo was transferred to the Attorney General's Chambers to take up appointment as a deputy public prosecutor. This way, Khoo became a "mere digit" within the Attorney General's chambers from being a respected head of the subordinate judiciary (Seow 1997, 2-3). Although Lee Kuan Yew later explained that the transfer was routine and the timing was coincidental[55], critiques argue that Khoo's transfer had been motivated by political considerations related to his handling of the case. In this sense, Khoo's transfer can be considered as evidence for the executive punishment of the judicial actors if their rulings do not satisfy the regime's interests. This relates to judicial actor containment discussed in the following section.

[52] Respectively offences under the Penal Code (Cap. 224, 1985 Rev. Ed.), ss. 421 and 199 (now the Penal Code (Cap. 224, 2008 Rev. Ed.)).
[53] See *Jeyaretnam Joshua Benjamin v. Law Society of Singapore* [1988] 2 S.L.R.(R.) [*Singapore Law Reports (Reissue)*] 470 at 476–478, paras. 10–20, Privy Council (on appeal from Singapore).
[54] *Public Prosecutor v. Wong Hong Toy and another* [1985–1986] S.L.R.(R.) 126.
[55] Lee Kuan Yew (Prime Minister), "Legal Service Postings (Statement by the Prime Minister)", *Singapore Parliamentary Debates, Official Report* (21 March 1986), vol. 47, cols. 891–892; Lee Kuan Yew, "Report of Commission of Inquiry into Allegations of Executive Interference in the Subordinate Courts (Paper Cmd. 12 of 1986)", *Singapore Parliamentary Debates, Official Report* (29 July 1986), vol. 48, cols. 167–177.

Actor Containment

Since the lower judiciary judges are appointed from the legal service, they can be technically considered as part of the executive. There is also a potential for untenured lower court judges to be transferred between judicial and government service. Since the career advancement of such judges depends on the LSC, this strategic appointment of judicial actors compels judges' self-restraint in legal decision-making. The case of District Judge Khoo's transfer supposedly illustrates an example of executive punishment on activist judges and further ensures self-restraint of fellow judicial actors.

Other techniques of judicial actor containment in Singapore are observed in judges' limited tenure security and the executive's strategic judicial appointments. Such actor control strategies aim to prevent judicial activism by compelling the judges' self-restraint in making judicial decisions. The District Judges and Magistrates of the Subordinate Courts, who are appointed to their positions by the LSC on a term basis, do not enjoy the security of tenure. Supreme Court judges in Singapore have security of tenure only up to the age of 65 years, after which they cease to hold office.[56] However, Article 98 of the Constitution permits such judges to be re-appointed on a term basis at the will of the president. For many years, retiring high court judges have had their appointments extended on contract for short periods at a time and, in some cases, from month to month. Extensions of judicial terms are not automatic, raising the prospect that judges on contract could be beholden to the executive. This is particularly since contract judges, whose contracts are renewable at the government's discretion, are paid their fully salary rather than their pension and thus have a financial incentive to develop political

[56] Sing. Const. Art. 98(1).

ties with the executive. A person who has ceased to hold the office of a judge may be appointed as Chief Justice or may sit as a judge of the High Court or a Judge of Appeal for a designated period as directed by the President if he concurs with the Prime Minister's advice on the matter.[57] In addition, to facilitate the disposal of business in the Supreme Court, judicial commissioners may be appointed for limited periods,[58] including the hearing of a single case only, although they have the same powers and enjoy the same immunities as Supreme Court judges. Thus, judges on contract, renewable at the will of the executive, infringes the doctrine of judicial independence and undermines the doctrine of judicial impartiality.

The constitutional arrangements in Singapore enable the executive to strategically appoint judges who believe in the same fundamental policies. The institutional structure the Singaporean judiciary enables the executive, exercising power through the Attorney General, the Legal Services Commission, the legislature, the presidency or the Chief Justice, can control appointments to and dismissals from the courts (Worthington 2002, 498). His study of appointments to the Supreme Court since 1987 documents the frequent use of temporary appointments, the appointment of career civil servants with close ties to the government, and even the judicial appointment of the PAP cadre members and other close affiliates of the PAP (Worthington 2002, 498-500). The Chief Justice, Judges of Appeal, Judicial Commissioners and High Court Judges are appointed by the President from candidates, recommended by the Prime Minister, acting on the advice of his Cabinet.[59] In 1990, Lee Kuan Yew appointed Yong Pung How, his banker-friend or a

[57] Sing. Const. Art. 94(3).
[58] Sing. Const. Art. 94(4) and (5).
[59] Sing. Const. Art. 95(1).

loyal crony who had not practiced law for 20 years, as Chief Justice. Yong Pung How became the 2nd Chief Justice of Singapore serving from 1990 to 2006.

Issue Containment

The case of *Chng Suan Tze v. Minister for Home Affairs* (1988) discussed in Chapter 1 highlights how initially successful judicial activism was effectively contained by the executive control of judicial issues or context of judicial activism. When Chng Suan Tze appealed to the Court of Appeal, the judiciary had an uncompromised jurisdiction over judicial review in politically sensitive cases including the constitutionality of detention under the ISA. Moreover, citizens had access to the Judicial Committee of the Privy Council in London as the final Court of Appeal. The Court of Appeal initially declared that the government's detention of suspects under the ISA was unconstitutional and ordered the release of prisoners. By strictly following the statutory procedure with precision and securing the formal legal authority, the regime fixes the laws and constitutional amendments so that future judicial review in security cases could be terminated. After the Court of Appeal ruled the unconstitutionality of detentions under the ISA, the effect of the case was reversed through amendments to the Constitution and the ISA in 1989. The court's decision was legislatively overruled a few weeks later by an amendment to the ISA (Cap. 143) in January 1989 which reinstated the subjective test review with respect to the ISA decisions as applied in *Lee Mau Seng v. Minister of Home Affairs* 2 Malay L. J. 137 (1971). The Parliament restricted the judicial review in response to *Chng Suan Tze* by arguing that national security is not a judicial decision and

thus not capable of objective evaluation by the courts.[60] This elucidates Jayasuriya's characterization of Singapore legal system as "legal exceptionalism" that ousts judicial review and concentrates power in the executive on the grounds of national security (2001, 108). In the debates surrounding the 1989 ISA amendments, the Home Minister stressed that local "socio-economic and political conditions" must shape how cases are decided particularly in public law (Thio 2002, 65-66). The constitution was amended to foreclose appeals under the ISA, which ended the use of the London Privy Council in cases involving national security. The ISA amendments were determined to be effective by the High Court and Court of Appeal in *Teo Soh Lung v. Minister for Home Affairs* in 1989 and 1990 respectively. By fixing the issue of judicial activism, the government was able to detain the prisoners, while still observing the formal rule of law. Under amended constitutional provisions, the relevant detainees were re-arrested again in the end. This way, the regime not only fixed the present case of judicial activism through post-compliance issue containment strategy, it effectively eradicated sources of future judicial activism from similar national security cases.

In Singapore, issue control is a convenient strategy due to the PAP's secure political control over a unicameral legislature. In fact, issue containment (for instance, constitutional amendment) is a legitimate strategy even for constitutional democracies displeased with the judicial rulings. The democratic institutions do allow court rulings to be ultimately subject to constitutional amendment. However, unlike in constitutional democracies, the constitutional amendment process in Singapore is almost costless for the government. Constitutional amendments can be passed by a simple majority of

[60] S. Jayakumar (25 January 1989), Second Reading of the Constitution of the Republic of Singapore (Amendment) Bill, col. 527.

parliament until the law was modified in 1979 to require a two-thirds majority. Singapore regime is a very secure regime that has remained a one-party dominant authoritarian state governed by the PAP since 1959. The PAP has won all eleven general elections since. In fact, in nearly fifty years, the PAP has never won less than 95 percent of the parliamentary seats, and in recent years a large number of the PAP candidates have run unopposed. The PAP's parliamentary supremacy means that it can amend the Constitution at will. With commending majority in the Parliament, the PAP is able to pass legislation and exercise executive power unopposed. In 1989 when the regime amended the laws to restrict judicial review in the ISA cases, Lee Kuan Yew's PAP held 80 of the 81 seats.

Conclusion

The existence of rule of law or judicial empowerment within an authoritarian polity is a unique phenomenon. My thesis has established the concept of 'legal hybridity' to explain the paradoxical existence of rule of law within an authoritarian polity. The evidence of judicial empowerment by authoritarian regimes, which indicates the existence of rule of law within an authoritarian polity, differentiates legal hybridity from mere authoritarian rule by law. The nature of legal hybridity is elucidated in the symbiosis of Weberian legal rationality dialectic and the dynamic of judicial hybridization, the simultaneous empowerment and containment of judicial independence.

Singapore demonstrates an excellent case of legal hybridity. Legal decision-making in Singapore is formally rational especially in private commercial cases, but in public law cases where the political interests of the state is involved, the rulings tend to be substantively irrational, i.e. the laws and the rulings further strengthen regime's political control rather than expand political rights of the individuals. This dialectical tension between formally rational and substantively irrational approaches to rule of law defines Singapore's legal hybridity. The case of Singapore shows that economic and political liberalizations can be separated by the regime's careful manipulation of law. Lee Kuan Yew's PAP can effectively curtail the transition from formal legal rationality in economic rulings to social and political liberalization at no discernible cost to their economic standing in the world community. Surprisingly, the regime's politically illiberal use of laws did not undermine its economic success or the business confidence of the international investment community.

Judicial empowerment in Singapore is what makes the case stand out from other authoritarian regimes that merely use laws in their favor, or simply rule by law regimes. The constitutional or legal recognition of the vested judicial power of the judiciary highlights the judiciary's independence as an institution in Singapore. Part VIII of the Singaporean Constitution safeguards judicial independence by insulating judicial actors (i.e. judges) from political pressure by guaranteeing against adverse changing of judicial remuneration after appointment. The Singaporean judiciary is empowered with certain level of autonomy over judicial issues, such as legal decision-making or judicial review. The evidence of empowered judiciary in Singapore can be observed in the landmark case of *Chng Suan Tze v. Minister for Home Affairs* (1988). The Singaporean regime's strict formal observance of law, careful compliance with the judicial decisions, and the evidence of successful appeals of judicial review (even in politically sensitive cases) signify the regime's intent to empower the judiciary.

As discussed in Chapter 2, political and economic incentives constitute prevailing motivations for Singaporean regime in promoting judicial independence. Not only do courts attract foreign cash flows, but they also allow autocrats' selective use of property rights for political purposes to weaken the financial capacity of the opposition. Just as Lee Kuan Yew's PAP did not abandon the electoral process, the regime continued the constitutional process and legal tradition from British colony when it came to power in 1959. The key incentive to not abolish the British legacy could have been that discarding the existing judicial structure would have been politically costly for the regime. Although the continued use of British system may not have further legitimized the PAP's rule, abolishing the judicial legacy could have undermined its political legitimacy. In addition,

the Singaporean regime has apparently used courts to suppress opposition and curtail freedom of speech in news media. Legal amendments to the Newspaper and Printing Presses Act in 1986 allowed the regime to effectively dismantle the independent press and discourage the freedom of speech using the formal legal procedures.

Chapter 3 examined how Singaporean regime controls judicial activism using institutional, actor and issue containment strategies. The assertion of a lack of judicial independence has been made against the lower judiciary in Singapore. The institutional setup of the lower judiciary makes Singapore's Subordinate Courts susceptible to extraneous political pressures as Subordinate Court judges are can be considered part of the executive branch of government, an exception to the separation of powers principle. Judicial actor containment in Singapore is observed in judges' limited tenure security and the executive's strategic judicial appointments. The case of *Chng Suan Tze v. Minister for Home Affairs* (1988) highlights how initially successful judicial activism was effectively contained by the executive control of issue space of judicial activism. By strictly following the statutory procedure with precision and securing the formal legal authority, the regime fixes the laws and constitutional amendments so that future judicial review in security cases could be terminated. In Singapore, issue control is a convenient strategy due to the PAP's secure political control over a unicameral legislature. With commending majority in the Parliament, the PAP is able to pass legislation and exercise executive power unopposed.

Singapore sets an alternate model for fellow authoritarian regimes that rule of law can be an effective tool not only to build and secure a stable economy but also to depose domestic political opposition, "formally, transparently, and within the rules" (Silverstein

2008, 86). Singapore elucidates that that an authoritarian government can construct a rule-of-law system sufficient to satisfy the demands without being forced to tolerate the tradeoff of independent judicial power (Silverstein 2008, 74). Singaporean model of rule of law may attract authoritarian regimes seeking to emulate Singaporean style economic development while consolidating grip on power through constraining political rights (Rajah 2009, 117). The dominant view of rule of law in Singapore as an instrumental tool of economic growth seems attractive to other authoritarian countries like China, Vietnam, and regimes in the Middle East, and Eastern Europe (Rahim 2013, 697). In fact, China has apparently turned to the courts to convince foreign investors of the security of investment climate (Silverstein 2008, 98; Lee 2000, 718; Root and May 2008, 304).

Nevertheless, the scope of my analysis on legal hybridity is very limited to the Singaporean experience. Questions still remain: Can legal hybridity in Singapore be sustained? Can other authoritarian regimes emulate the Singapore's success? If so, how? Future work should expand the legal hybridity framework of legal rationality dialectic and judicial empowerment-containment dynamic to a wider range of authoritarian regimes instrumentally promoting rule of law. This deeper analysis of comparative case studies would further contribute to the theoretical development of legal hybridity under authoritarianism.

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