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without deinstitutionalization. Dubois, R. (1989). *Race of Law*.

in *Journal of Law and Society*, 16(1), 1-15.

in *Journal of Law and Society*, 16(1), 1-15.

in *Journal of Law and Society*, 16(1), 1-15.

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Research Paper

Rule of Law without Democratization: Cambodia and Singapore in
Comparative Perspective

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Executive Summary

The rule of law in Singapore has been criticised by liberal democrats for its illiberal nature yet it remains an attractive model for some newly developing countries, including Cambodia, that aspire to achieve economic development without liberal democracy. This paper traces the recent convergence of the rule of law in Singapore and Cambodia in the face of

1. Introduction

The rule of law in Singapore has been criticized by liberal democrats for its illiberal nature yet it remains an attractive model for some newly developing countries, including Cambodia, that aspire to achieve economic development without more liberal forms of democracy. Unlike some countries in Asia, there is less evidence of meaningful constitutional contestation taking place between bargains and struggles among elites, opposition forces and civil society over state institutions, the broader political order, and granting and enforcement of rights in Cambodia and Singapore. To be sure, civil and political struggles over representation, human rights issues, and fair compensation have been rife in recent years. However in these party-dominated regimes there is a lack of contestation in areas encompassing the rule of law, courts and justice. This is not to say that the rule of law and justice mechanisms are absent from these regimes. Rather, to understand the rule of law as it is understood by the elites is a

2. Rule of Law without Democratization

Democratization theorists have long argued the importance of the rule of law for liberal democracies. Indeed one of the distinguishing features of liberal democracy over competitive or electoral authoritarianism is the existence of a democratic or "true rule of law" that grants all citizens political and legal equality, and makes the state and its agents subject to the law. Laws must be promulgated in advance and then fairly and consistently applied by relevant state institutions, including the judiciary, across equivalent states. Without an independent judiciary there will be an absence of checks and balances and no guarantee that the state, or the rich and powerful, or both in combination will act within legal and institutional boundaries. Ideally, an independent judiciary holds everyone equal before the law, protects political and civil rights, and holds elected officials and their associates accountable for illegal actions. An independent judiciary can mediate conflicts among political actors and political institutions and societal organizations in a legitimate fashion, a process that can minimize political violence and confrontation that could jeopardize political order, civil and political rights, and hence

be used to identify semiauthoritarian or illiberal regimes. While staging elections may be manageable for authoritarian regimes, changing the rule of law means addressing the structure and distribution of power and as such is less desirable for elites in these countries. The rule of law is not an offshoot of authoritarianism (Carr, 2004).

3. Singaporean Rule of Law

Singapore inherited English common law from Great Britain when it acquired sovereignty of the island in 1824. The courts set up by the British under the Second Charter of Justice in 1826 would later interpret this Charter to have imported the whole body of English law into its Straits Settlements (including Singapore).¹² A Civil Law Ordinance would also import the application of English commercial law (Civil Law Ordinance [Ord No 4, 1878] s.6). Under the Japanese occupation of Singapore in World War II, although civil courts would continue to function, criminal law was replaced by military law and the idea, influenced by the Chinese legalist school of some 2,500 years before, that law was to be the basis of government, that everyone must obey the law, and that penalties should be so harsh that no one dares to break the law.¹²

When the British and French returned to claim back their colonies after the war, their former legal orders were reinstated and Singapore became a separate Crown Colony and eventually a separate State with its own Constitution before briefly merging with Malaya in the Federation of Malaysia in 1963. Singapore's Constitution evolved throughout this period through acts of the National Assembly, not only to reflect its independence in 1965 after leaving the Federation, but also thereafter through a series of constitutional amendments. Upon independence, for example, Singapore found itself in a position of having its judicial system, which had been created under its State Constitution, still tied to the Federation of Malaysia. In order to solve this problem, an amending act was passed to constitute the Singapore judiciary as well as to constitute the Judicial Committee of the Privy Council in London to act as Singapore's final court of appeal. Changes in the amendment process in 1965 had transformed the Singapore Constitution into a very flexible one. This was necessary for the passing of wide-ranging legislation to effect the economic and political development of the country by the only party that has ruled Singapore since independence, the People's Action Party (PAP). The Constitution of Singapore, therefore, while departing from the original Westminster model, continued to form the basic framework for social, economic and political advancement as well as provide a springboard for government action.¹⁵

These sentiments were echoed by Singapore's then Chief Justice Chan in 2009 in an address to the New York State Bar Association where he commented that although the English legal system was inherited from the British, it was also modified: "The fundamental principles are the same, but our public law is quite different since this body of law must reflect the political, social and cultural values of the people." Moreover, Chan believed that "If you study the Singapore statute book today, you will find Lee's [Lee Kuan Yew's] precepts and values reflected in all the laws. But pervading all of the laws is the rule of law: the idea that political authority

“foreign” judges of the Privy Council, dismissing their arguments about the rule of law as being based on a “vague and indefinable concept”²⁵.

Hirschl believes that “political power holders often possess some control over the personal composition of national high courts” and that “consequently, the demographic characteristics, cultural propensities, and ideological tilts of supreme court judges in most countries are likely to match the rest of the political elite in these countries.”²⁶ Worthington notes that this is also the case in Singapore, just as it is in the United Kingdom and other Westminster systems, and few NAP affiliated appointments are made to the bench.²⁷ However,

Authority (UNTAC) period from 1992 to 1993, along with royal decrees and acts of the legislature. The introduction of the new Criminal Code in Cambodia with detailed provisions for defamation and insult, along with other judicial reforms currently underway, signifies an effort on the part of the executive to improve Cambodia's legal system towards the Singaporean 'thin' rule of law.³⁶ In addition, further legislation has been drafted (the *Law on Associations and Non-Governmental Organizations* and the *Law on Trade Unions*) that affects the constitutional rights to freedom of association for non-government organizations and trade unions, including a requirement for the compulsory registration of all NGOs and vague provisions that could provide for the selective denial of registration applications and prosecution.³⁷

As in Singapore, Cambodian leaders believe that the concept of rule of law should reflect the country's cultural values and level of development.³⁸ However, unlike Singapore, Cambodia's legal development has been closely intertwined with decades of social, political and economic turmoil, and international leverage following the 1993 United Nations sponsored elections. The belief in contextual particularity is reflected in over two decades of struggle between the Cambodian government and the international community over the issue of judicial reform. While significant amounts of financial assistance since 1993 have pressured the Cambodian government to initiate some judicial and legal reforms, the judiciary continues to display a lack of professionalism. Institutional weaknesses include a severe shortage of resources including trained personnel. Since 2002, as part of the judicial reform process, government training programs increased the number of judges to 201 and practicing lawyers to 1011 by 2017³⁹—which is a welcome rise however the figure remains miniscule for a population of over 16 million. Overall, limited legal experience and inadequate knowledge of the law and legal procedures, as well as the presence of corruption and political dependence, primarily affect the quality of legal representation.

Overwhelming caseloads produce delays and distortions, limiting access for the poor, and inevitably corruption. Although there have been some improvements in the physical infrastructure in recent years, this has also come at a high social cost. The Cambodian government, capitalizing on the recent rise in metropolitan real estate values, entered into not transparent land swapping arrangements wherein old court buildings were traded for newly constructed buildings in areas of lower real estate value. There is also a very low degree of intra-

6. Conclusion

This paper has shown that constitutional contestation has been relatively muted in Singapore and Cambodia two single party dominant illiberal regimes in Southeast Asia. Particularly with regards to the rule of law and the courts. While it is true that in Singapore close relations with political elites has led to active support for the state's communitarian values (political stability, interracial harmony and economic development), it should not be inferred that the courts have largely failed to consistently uphold the rule of law and that justice mechanisms are absent. The latter observation would only be true if indeed the country's founders, and its political and legal elites, intended to create a Western liberal democratic version of the rule of law—an assumption which this chapter has found to be false. Therefore, comparing regimes to some ideal type of liberal democracy fails to adequately explain how the rule of law is intertwined with the social, political and economic realities of many countries in Southeast Asia. Achieving a more nuanced understanding of Asian constitutional developments and the rule of law requires that one does not view current outcomes as lagging versions of Western models but rather as distinct outcomes reflecting unique sociopolitical circumstances and political cultures. That the particular kind of rule of law must be culturally acceptable in each country has also been argued by some Western scholars as well as by Singapore's legal elite.

The similarities to Cambodia outlined above also reveals a strategy that is politically useful to leaders elsewhere in the region. Having presided over sustained economic growth and maintained a dominant party system over the past decade, Cambodian political elites have aspired to develop the country along Singaporean lines including following the Singaporean version of the rule of law. However Cambodia also faces major impediments as it undergoes this transition: high levels of corruption, low levels of expertise, and undeveloped legal system sets it apart from Singapore. At the same time, Singapore has been able to maintain an efficient and credible legal system in protecting property rights and adjudicating commercial cases while Cambodia has not. Indeed, Haggard notes that common and civil law traditions vary in their deference to the state, the respect they show toward private property, and the enforcement of private claims. Civil law systems like Cambodia's are less hospitable to private economic activity, and the French legal tradition has particularly deleterious effects. Moreover, civil law countries normally tie the hands of judges and are less flexible and adaptable to changing circumstances as this usually requires the costly revising of statutes as occurred in Cambodia. By contrast, common law systems can evolve through continual litigation—litigation, which improves the efficiency of the law. In Singapore, however, although the "Efficiency Model" is often heralded by the highest justices,⁶⁰ its evolution has been realized through continual litigation on commercial matters. On politically sensitive cases, evolution occurs through constitutional amendments and, more than anything else, a narrow interpretation of the rule of law.

The relative lack of constitutional contestation in the rule of law and the courts in these countries does not mean that contestation is absent elsewhere. The political opposition, civil society groups, and the blogosphere in Singapore, and Cambodia especially, struggle to be heard and in some cases reach bargains with the ruling elites. As the 2013 national elections showed, the Cambodian people are no longer satisfied by the CPP's justification for .15 0 Td (9 (an)0c)-1.1 (at (ur)3.7 (t)1.7)7.7 (iv)ug(t)1.7 (o)JTJpu.15 0 Td (9(g)-1.9 (ai0.9 (s no)2 (t-

noticeable rise in the use of defamation as a political weapon in Cambodia, as well as Myanmar, and the criminalization of defamation (and the threat of imprisonment) has become a useful tactic for silencing critical voices.

It is remarkable that despite each country's divergent political histories, legal systems, and development strategies since independence, they appear to be merging in terms of the form of rule of law practiced in both. As we have seen, the rule of law

Notes and References

- 1 Fukuyama, Francis, 2011, 'Transitions to the rule of law', *Journal of Democracy* vol. 21, no. 1, pp. 33-44; Fukuyama, Francis 2012, 'China and East Asia democracy: The patterns of history', *Journal of Democracy* vol. 23, no. 1, pp. 14- 26.
- 2 Levitsky Steven and Way Lucan 2010, *Competitive Authoritarianism: Hybrid Regimes After the Cold War*, Cambridge University Press, New York; Schedler, Andreas 2006, *Democratization: The Dynamics of Unfree Competition*, Lynne Rienner, Boulder
- 3 Silverstein Gordon 2007, 'Singapore: The exception that proves rules matter', In Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, Cambridge pp. 73- 102.
- 4 Diamond Larry, 1999, *Developing Democracy: Towards Consolidation*, Johns Hopkins University Press, Baltimore pp. 11.
- 5 O'Donnell Guillermo, 2004, 'Why the rules of law matters', *Journal of Democracy* vol. 15, no. 2, pp. 32- 46.
- 6 Huber Everlyne et al 1999, "The paradoxes of contemporary democracy: Formal, participatory, and social dimensions." In Lisa Anderson (ed.), *Transitions to Democracy*, Columbia University Press, New York pp. 168-92.
- 7 Gunther Richard, Puhle Hans-Dieter and Diamantouras Nikiforos 1995, 'Introduction' In Richard Gunther et al. (eds.), *The Politics of Democratic Consolidation: Southern Europe in Comparative Perspective*, Johns Hopkins University Press, Baltimore pp. 1-32.
- 8 Buscaglia Edgardo 2007, 'Judicial corruption and the broader justice system', *Transparency International, Global Corruption Report 2007: Corruption in Judicial Systems*, Cambridge University Press, Cambridge pp. 68.
- 9 Frankel Marvin E. 1993, 'Concerning the role the judiciary may serve in the republic of China', *Journal of Democracy* vol. 14, no. 1, pp. 1-10.

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- 47 Interview with Municipal Court judge. Subsequent research has revealed that remarks though made several years ago remain relevant to present conditions.
 - 48 Interview with Municipal Court clerk.
 - 49 Interview with Municipal Court (has) 0.5 (r) 3.7 (e) 1 (v) 3.9 u Tw 1949 urkunicyia a