RULE BY LAW

The Politics of Courts in Authoritarian Regimes

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

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

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

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

The *Journal* argued that this law violated Singapore's constitutional guarantee of free speech. But Article 14 of the Singapore Constitution provides for freedom of speech for Singapore citizens, and not for foreign newspapers. The court was not impressed with the arguments for an indirect application of this provision (Singapore citizens as consumers of speech rather than providers). Appellants, the court ruled, "are trying to argue indirectly a point which they cannot argue directly, as article 14(1) does not guarantee freedom of speech and expression to them; they have no *locus standi* on this point" (*Dow Jones v. Attorney General* 1989).

Using the law to limit circulation allowed Lee to score significant points. The *AWSJ* offered "to distribute its journal free of charge to all paying subscribers" if Singapore lifted its circulation controls, telling the government that it was willing to "forego its sales revenue in the spirit of helping Singapore businessmen who had complained of lack of access to the journal," an offer Lee was willing to take up, provided the public-service-minded publisher was willing to leave out any advertisements. The government even "offered to defray one-half of the additional costs of removing the advertisements" but the *AWSJ* refused, leading Lee to note that the publisher was "not interested in the business community getting information," and arguing that this proved they simply wanted the "freedom to make money selling advertisements" (Lee 2000: 192–193).

By not banning the publications altogether, Singapore was able to exercise financial pressure on the magazines and newspapers while avoiding charges of direct censorship – the limited copies were, after all, readily and immediately available in all public libraries. This was the statutory route. The other route ran through the courts as well – but this time, through civil litigation.

Singapore's treatment of defamation is built on a British foundation, where the burden of proof lies more heavily with the accused than it does with the person alleging the defamation. One important variation in Singapore, however, is in how the law treats accusations of defamation against public figures in general, and political leaders in particular. In the Anglo-American tradition, public figures are presumed to have surrendered some measure of protection, and this is particularly true of elected political figures. But Singapore takes a very different view. The concept of proving actual malice in a case involving a public figure, Chief Justice Yong Pung How noted, is foreign to Singapore's legal tradition:

> Our law is not premised on the proposition that the limits of acceptable criticism of persons holding public office or politicians in respect of their official duties or conduct are wider than those of ordinary persons. Persons holding

> public office or politicians are equally entitled to have their reputations protected as those of any other persons. Criticisms in relation to their official conduct must respect the bounds set by the law of defamation. The publication of false and defamatory allegations, even in the absence of actual malice on the part of the publisher, should not be allowed to pass with impunity (*Jeyaretnam v. Lee Kuan Yew* 1992).

In a 1998 case, the court observed that "there is an equal public interest in allowing those officials to execute their duties unfettered by false aspersions" (*Goh Chok Tong v. JB Jeyaretnam*). The court here emphasized the critical value of the "intangible qualities of good character, integrity and honesty," ruling that "the plaintiff's high standing could be a factor in raising the quantum of damages awarded" (Thio 2002a: 72).

This strict liability standard, combined with sometimes stunning damage awards running to S$2 million (US$1.45 million), has played out on two fronts – the government's effective campaign to bring the foreign media to heel (Puzzle 3) and its even more effective campaign to limit and constrain political opposition in Singapore (Puzzle 4).

Singapore's leaders argue that it is vital to maintaining their image and reputation. Not only is it essential to maintain domestic peace and confidence but also to assure world investors of the stability and reliability of the state, its leaders, and institutions. Thus, any attack on their integrity, on their reputation, any aspersions cast on their rectitude, and suggestions of corruption or abuse of power are an attack on the government as well as on the individuals who lead that government. The traditional response to unflattering foreign press coverage from authoritarian states is to arrest and imprison the offenders or, at the least, to expel them and ban their publications. But Singapore is different. Banning a publication typically only adds to its luster, and provides grist for attacks on the government for blocking information and impeding free speech. In Singapore, the government has been willing to tolerate critical foreign press coverage, but responds instantly and with enormous litigation efforts. Lee argues that it does so because the "voters have come to expect any allegation of impropriety or dishonesty to be challenged in the courts" and that they must be litigated because allegations of corruption or dishonesty are potentially crippling "in a region where corruption, cronyism, and nepotism are still a plague" (Lee 2000: 130–131).

The Newspapers Act has been amended a number of times, and the government has used statutory authority, actions for contempt of court, and civil suits for defamation as powerful tools to bring the foreign media to heel. Suits have produced sizable damages and abject, published apologies from some of

the Western media's most august institutions, including Dow Jones & Company, which apologized for articles in its *Asian Wall Street Journal* in 1985 and again in 1986 and 1989; it also apologized and withdrew articles in 1987 in the *Far Eastern Economic Review* (a Dow-Jones-owned publication). Dow Jones was not alone. In 1994, the *International Herald Tribune* – owned jointly by the *New York Times* and *Washington Post* – also apologized for published articles. Suits also produced withdrawals, apologies, and significant damages from the *Economist* magazine in 1993, 2004, and 2005; from Time Incorporated's *AsiaWeek* magazine in 1987 and 1995; from Time magazine itself, for an article in 1986; and from Bloomberg LP in 2002.

The 2002 Bloomberg case suggests that Lee well understood the advantages of using a transparent legal process and the effective combination of statutory rules and an aggressive use of classic British defamation law. The Bloomberg settlement demonstrated an effective learning curve. Unlike many of the other media outlets, Bloomberg never waited for the case to make it to court – but expunged the offending article concerning the appointment of Lee's daughter-in-law (the wife of Lee's son, Lee Hsien Loong, then Deputy Prime Minister, now Prime Minister of Singapore) to head up one of the most important government-linked corporations, the behemoth Temasek investments company.[20] "We admit and acknowledge that these allegations are false and completely without foundation." Bloomberg said, and we "unreservedly apologize . . . for the distress and embarrassment caused" and offered to pay an undisclosed amount of compensation for damages to head off a libel suit (Arnold 2002; Safire 2002).

Libel suits and statutory controls (gazetteing and ownership rules) are two of the three prongs by which law and the courts have played an important role in Singapore's relationship with the press. The other more directly involves the courts, and turns on contempt of court proceedings that have swiftly followed articles suggesting that Singapore's courts might lack independence or autonomy from the ruling party.

Singapore insists that its sensitivity is justified since it is a nation with no natural resources, surrounded by less stable regimes, and sitting on its own potential powder keg of religious and racial tension (Singapore has significant minority populations of Muslims, Tamil Hindus, and Sikhs, as well as a large population of ethnic Malays, Indians, and expatriates from Britain and

[20] Temasek, established in the 1970s, manages the Singapore government's substantial corporate investments, with holdings that include about 20% of Singapore's total market capitalization, including controlling interests in Singapore Airlines and Singapore Telecommunications (Arnold 2002).

the United States, among others). As Singapore's Ambassador to the United States, S.R. Nathan, insisted in an op-ed essay in the *Washington Post* in 1995, "an honest, independent judiciary is a pillar of our political system." Singapore, he wrote, is "a wide-open society. Four thousand five hundred foreign publications, including 150 newspapers, circulate there. BBC World Service and CNN are available 'round the clock. Anyone can log on to the Internet and cruise the information superhighway. This is why Singapore is a key communications and financial center in the Asia-Pacific" (Nathan 1995).

Nathan's op-ed article was titled "Singapore: The System Works." And indeed, it does. These rules, and rulings, these court actions, may well have had the effect of getting the international media to think twice about publishing articles critical of the Singapore government and its judiciary. And though it is hard to prove a negative, the Bloomberg story is not the only anecdotal evidence that this has been at least a somewhat successful strategy. William Safire, who had long been a ferocious and public critic of Lee, Singapore's government, and its judiciary, wrote a scathing column on July 10, 1995, titled "Honoring Repression." The column ran in its usual spot on the op-ed page of the New York Times. But it did not run in its usual place in the *International Herald Tribune (IHT)*, the then-joint publication of the *Times* and the *Washington Post*. The *IHT*, with a worldwide circulation at the time of about 190,000, had by then "stopped printing articles critical of Singapore" (Wallace 1995). Singapore may be small, but its laws and rules and rulings have a wide impact. An exiled critic, former Solicitor General of Singapore Francis Seow notes that "there are no two ways about it, the news media have been intimidated through their pocketbook" and are "now more wary about the sensitivities of the Singapore Government" (Wallace 1995).

The use of properly promulgated, publicly known statutes, libel and defamation law derived from British law, and strict contempt of court proceedings have proven effective in shaping Singapore's international image. The rule of law has proven an effective tool in shaping Singapore's international press coverage. There are powerful incentives to avoid covering politics, which only amplifies the stories that do get published about Singapore's economic success and dependability, its safety and stability, all of which undoubtedly serve to bolster Singapore's standing in the world's global-business community.

Puzzle 4 . . . Law, Courts, and Domestic Political Opposition

The courts and civil process have proven to play an even more dramatic role in the standoff between the People's Action Party and the very few opposition politicians who have come close to cracking the PAP's domination of elected

office in Singapore. Where once Singapore made wide use of strict detention provisions in its Internal Security Act (another British leftover), that statute has lapsed in importance. "[S]uing an opponent for libel, or pursuing him for tax evasion, gets far less ink than throwing him in prison, and it is every bit as effective. In Singapore, only those who are willing to risk financial ruin dare to challenge the government openly. There are only so many Joshua Jeyaretnams" (Gee 1997).

Joshua Benjamin Jeyaretnam was not Singapore's first opposition leader, nor its last. But he has been something of a poster child for the evolving ways in which Singapore, hewing to formal rules, statutes, and civil process in open court, has developed both significant barriers to the development of opposition leadership and, at the same time, employed the carrots of innovative campaign finance law, minority representation, and the creation of appointed Members of Parliament (with limited voting power) to bring opposition voices into government – and, yet, perhaps undercut the ability of opposition parties to develop the capacity to run credible campaigns against the governing party. These innovations combined with strict rules, and stringent defamation laws, all overseen by the well-regarded Singapore judiciary, demonstrate the power and effectiveness of courts not as the price of globalization, as has been the case for a number of authoritarian governments in this study, but quite to the contrary, as an integral part of the development, and entrenchment of the ruling party. And though Jeyaretnam was not the only opposition leader to face these limits and constraints, he experienced all of them.

Though the PAP controlled every seat in Parliament from 1968 to 1981 – and since 1981 has never lost more than three seats in a Parliament that varied in size from fifty-eight Members in 1968 to eighty-four Members today – it has battled hard to win those seats and defeat the efforts of various opposition parties to gain a toehold. The Workers' Party probably has the longest history of opposition in Singapore, having once been led by David Marshall, the only non-PAP member to serve as Singapore's chief executive. Born in Singapore in 1908 to an Orthodox Jewish family of Iraqi descent, Marshall was imprisoned by the Japanese during World War II, and in 1955 led a left-wing Labor coalition, ultimately forming a minority government in which he served as Chief Minister prior to independence. After failing to negotiate complete self-rule for Singapore in talks with Great Britain, Marshall resigned, later founding the Workers' Party – which eventually was taken over by Jeyaretnam in 1972 (Sim 1995).[21]

[21] Marshall was widely acknowledged to be a master defense attorney, who lost but one murder trial in 100 cases that went before a jury. Marshall's legendary success with juries was, in

The long run of PAP dominance unquestionably reflects the party's (and Lee's) broad popularity in the nation. But as the years passed, the younger generation no longer could recall the deprivations (or security threats) of the war years that propelled the PAP to power, and convinced the population to return the party to power election after election. Lee himself worried that younger party members were becoming soft and complacent without an opposition to test them and push them. And yet, when Jeyaretnam finally won a seat in Parliament in 1981, Lee and the PAP quickly lost patience with his attacks, questions, and demands. But the government did not order him jailed, or 'disappeared.' Instead, they pursued him in the courts – both criminal and civil. On the criminal side, the government applied a very strict and narrow reading of campaign laws. On the civil side, over the years, Jeyaretnam was brought to court repeatedly (and lost regularly), with damage awards that eventually drove him into bankruptcy. These court cases were about more than just finding fault and collecting damages, however. They were very much designed to push Jeyaretnam out of Parliament itself. And this was possible because of a combination of statutes, constitutional provisions, and parliamentary rules.

In Singapore, any criminal fine of S$2000 or more means immediate expulsion from Parliament, along with a five-year ban on running for office again. On the civil side, Singapore disqualifies from parliamentary office (and bans from running for five years) anyone who has been legally declared bankrupt. And while it seems perfectly reasonable to exclude from public office those convicted of serious criminal offenses and those whose personal finances might make them unreliable, distracted, or more easily subject to bribes, these rules have also served to push out of office four of the very few opposition candidates to have made inroads in parliamentary elections – Jeyaretnam (convicted and fined more than S$2000, later sued repeatedly for defamation, and eventually bankrupted), Wong Hong Toy (convicted on campaign irregularities, fined more than S$2000), Tang Liang Hong (sued for defamation, fled Singapore before being declared bankrupt), and Chee Soon Juan (sued for defamation and convicted of public speaking without a permit).

Jeyaretnam won his first seat in Parliament in a 1981 by-election. In the next general election, in December 1984, not only was Jeyaretnam reelected, but

fact, cited by Lee Kuan Yew as one reason why the country eventually eliminated jury trials altogether in 1970 – having eliminated juries in all but capital cases in 1960. Lee noted in his memoirs that in 1969, "during a parliamentary select committee meeting, David Marshall, then our most successful criminal lawyer, claimed he had 99 acquittals out of the 100 cases he defended for murder. When I asked if he believed the 99 acquitted had been wrongly charged, Marshall replied his duty was to defend them, not judge them." After the bill passed, Lee added, and juries were eliminated, "there were fewer miscarriages of justice arising from the vagaries of jury sentiments" (Lee 2000: 213).

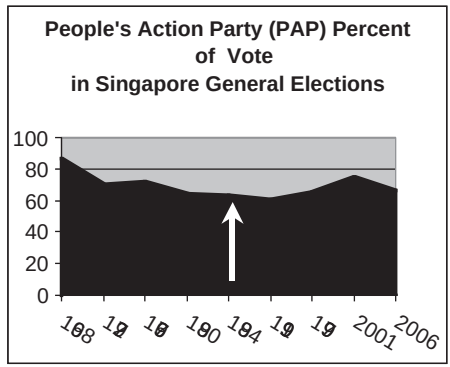

FIGURE 3.1a.

the PAP suffered its most dramatic drop in support since 1963, winning just 64.8 percent of the popular vote. This certainly would seem unlikely to cause any ruling party discomfort – after all, 64.8 percent is a dramatic victory in any democratic system (see Figure 3.1a).

But if we look at the election through the eyes of the PAP, it becomes clear that there was reason for real concern. Given that the PAP rarely faced opposition in more than a minority of the available seats, we, like the PAP, might see the same figures from a different perspective (see Figure 3.1b).

Rather than a pleasing 65 percent approval, one might see a dramatic drop in support. Little wonder, then, that the ruling party and its dominant figure – who was expected to retire after the next election – might be determined to undercut any gains by the opposition. But instead of canceling elections, or tossing opponents in jail, Singapore relied on strict election laws, strictly enforced, combined with strict interpretation and application of even stricter defamation laws.

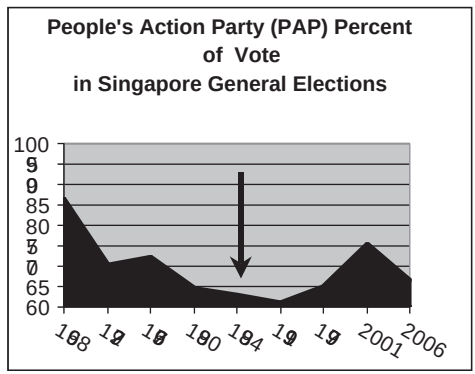

FIGURE 3.1b.

Could the judges have turned to Singapore's due process clause and other rights provisions in the Singapore Constitution to try to ameliorate the reach and impact of these laws? It's plausible, but there is no reason to expect they would have. Given the structure of the courts, and the small size of the island nation, the sorts of influences and forces one might see lending the courts sufficient autonomy and independence to develop in defiance of the central authority were not and are not present in Singapore.

Singapore has also developed, promulgated, debated, approved, and enforced a number of other laws and rules that make it difficult for the opposition – and therefore the courts, again, to play a role in this process. Not by skewing or ignoring the law, but by enforcing it. Among others, Singapore has created two alternative ways to bring opposition voices into Parliament and, at the same time, reducing any demand for a genuine opposition. Singapore launched two programs to bring controlled opposition into the government – the Nominated Member of Parliament (NMP) and the Non-Constituency Member of Parliament (NCMP) plans. The NMP plan was seen as a way to tap "the expertise of persons unwilling to enter politics." Often these are people drawn from the academy and other professions, and while they probably do enhance parliamentary discussions, it is critical to know that these Members are not allowed to vote on revenue and spending bills, nor on constitutional amendments. One Singaporean scholar argues that this is an odd throwback to the "paternalistic colonial practice of appointing nominated legislative assembly members, drawn from among the better natives" (Thio 2002a: 46). The NMP plan also provides an avenue of participation short of joining an opposition party, and running for office independently. Similarly, the NCMP plan is designed to bring the opposition in from the cold, and provides for the appointment to a seat in Parliament for up to three opposition candidates – those who, though they did not win a seat outright, came closest to doing so. One can see this plan as a innovative way to provide for some genuine representation of opposition views – or one can see it as a "cosmetic lure to distract voters from voting in genuine opposition MPs through the placatory effect of a guaranteed token presence of opposition NCMPs who do not have full voting rights" (Thio 2002b: 46). But once again, the rules, the laws, are being followed. And these laws are known and widely publicized, they are not retroactive, they are clear and consistent, plausible, and lasting, and are to be abided by both rulers and ruled alike.

These institutional innovations are supplemented by a set of strict campaign laws that powerfully favor incumbency – though, as the PAP would surely remind us, what ruling party in what democracy in the world has not done everything it could along similar lines? In Singapore, elections are regularly

held on a five-year cycle, though as with all Westminster systems left behind by the British, the majority party can call early elections at any point. In Singapore, campaigning is strictly limited, often to a period of ten to seventeen days before the general election is held. Singapore also has strict campaign finance laws, requiring the full disclosure of the identity of any contributor making political donations over S$5000. This is the sort of law many in the United States and Britain have demanded for years – but for a shaky opposition facing a government not shy about suggesting that there are consequences for supporting the opposition, being willing to finance opposition politicians without anonymity is a very difficult sell.[22] But these rules are known, widely publicized, they are not retroactive, they are clear and consistent, plausible, and lasting, and apply to the PAP as well as the opposition – though obviously the burden is not identical.

On top of strict campaign rules and finance limits, Singapore's controlled version of free speech is a daunting barrier to political campaigns. The Singapore Constitution protects free expression, but oddly "begins by focusing on *restrictions* of freedom of expression," making clear that free expression is not an absolute value (Gomez 2005). Article 14 of the Singapore Constitution states that Parliament "may by law impose on the rights" to freedom of speech and expression "such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offense" (Singapore Constitution, Article 14). And though Singapore's limits on speech are tight, these laws are known and widely publicized, they are not retroactive, they are clear and consistent, plausible, and lasting. and are to be abided by both rulers and ruled alike.

SINGAPORE: A MODEL OR AN EXCEPTION?

As is the case with our assumptions about the rule of law, many of our assumptions about the meaning, requirements, preconditions, and challenges of democracy and a republican form of government are "integrally related to the rise of *liberal* democracy in the West." As Randall Peerenboom notes

[22] In the general election campaign in 1997, Prime Minister Goh Chok Tong grabbed the third rail of Singapore politics – public housing – when he made it explicitly clear that precincts where support for the government was strong would get a priority for housing upgrades: "When the PAP wins, it still has to decide on priority. The MPs will know which precincts support them and their programme more. . . . The stronger the support, the further ahead you are in the front" (Chua 1997; see Rodan 2005, 2006).

(2004b: 4) for many *the* rule of law "means some form of a liberal democratic version of rule of law." The same might be said of the republican form of government. After securing all but two of his Parliament's eighty-three seats in the 1997 recent general election, Singapore's Prime Minister Goh Chok Tong proudly declared that voters had "rejected Western-style liberal democracy and freedoms" and rejected "putting individual rights over that of society" (Suh and Oorjitham 1997).

Obviously, we must be cautious about looking at Singapore as a test case for authoritarian governments, the role of courts, and the rule of law. At the same time, Singapore does have important lessons for emerging democracies, particularly those that are interested in emulating Singapore's emphasis on economic development and full integration with the global business world, and yet reluctant to fully embrace the culture and political development that many in the West like to assume are inextricably linked to these.

China has (as have others no doubt) studied the ways in which Singapore has come to understand that the basic requirements of the rule of law can be embedded in a "non-liberal thick conception" (Peerenboom 2004b: 5), just as it can be embedded in a liberal, thick conception as in the United States and Europe. And, perhaps more importantly in an age of globalization, Singapore teaches that global finance and capital care less about the cultural and institutional system in which the thin rule of law functions – provided the law meets the essential criteria of the thin rule of law.

Many of Singapore's lessons will be hard to apply in large, poor, and underdeveloped authoritarian regimes. Nevertheless, there is much to study here, particularly for those who admire Singapore's security, prosperity, and relative social stability, and particularly its ability to create and maintain an electoral system that, as Singapore's leaders are fond of saying in one form or another allows their country to "take the best of the west and leave the rest" (Goh 1991).[23] Can the Singapore miracle be sustained? Can it be replicated? And if so – at what cost?

[23] Singapore's Minister for Information and the Arts – George Yeo – noted in a 1991 speech that while "Orientalism" selectively absorbed the best of Eastern science, art, and ideas, Singaporeans were now living in an era of "Occidentalism" as Asians need to take the best of the West without losing their essential Asian character; Kishore Mahbubani, the top civil servant in Singapore's Foreign Ministry and later Singapore's UN ambassador, in 1995 insisted that while Asia is absorbing the best of the West, the West clings blindly to outmoded ideas. Americans, he said, "worship the notion of freedom as religiously as Hindus worship their sacred cows. Both must be kept absolutely unfettered, even when they cause great social discomfort" (*Economist* 1995).

APPENDIX: SINGAPORE BY THE NUMBERS

Current account balance in billions (US$)	2003	Rank	2004	Rank	2005	Rank	2006	Rank
Japan	136.238	1	172.07	1	163.891	1	140.175	1
Singapore	**22.319**	**2**	**26.3**	**2**	**33.584**	**2**	**34.494**	**2**
France	7.937	3	− 8.396	3	−27.628	4	−40.647	4
Italy	−19.406	4	−15.137	4	−26.645	3	−18.524	3
United Kingdom	−26.065	5	−43.17	5	−58.053	5	−61.298	5
United States	−519.678	6	−668.082	6	−804.951	6	−864.189	6

Source: International Monetary Fund, World Economic Outlook Database, April 2006.

GNP per capita in US$	1998	Rank
Japan	32,350	1
Singapore	**30,170**	2
United States	29,240	3
France	24,210	4
United Kingdom	21,410	5
Italy	20,090	6

Infant mortality per 1,000 live births	2000	Rank	2001	Rank	2002	Rank
Singapore	**2.9**	**1**	**2.2**	**1**	**2.5**	1
Japan	3.2	2	3.1	2	3.1	2
France	4.4	3	4.5	3	4.4	3
Italy	4.6	4	4.7	4	4.5	4
United Kingdom	5.6	5	5.5	5	5.2	5
United States	6.9	6	6.8	6	7	6

Source: http://www.worldbank.org.

GDP growth annual %	2000	Rank	2001	Rank	2002	Rank	2003	Rank	2004	Rank
Singapore	**9.41**	**1**	**−2.1**	**6**	**3**	**1**	**2.46**	**2**	**8.41**	**1**
France	4.07	2	2.05	2	1.22	4	0.8	5	2.32	5
United Kingdom	3.86	3	2.3	1	1.77	3	2.19	3	3.14	3
United States	3.69	4	0.76	4	1.88	2	3.06	1	4.2	2
Italy	3.03	5	1.76	3	0.38	5	0.25	6	1.22	6
Japan	2.39	6	0.2	5	−0.3	6	1.31	4	2.7	4

Source: World Bank; http://devdata.worldbank.org.

Gross capital formation (% of GDP)	2000	Rank	2001	Rank	2002	Rank	2003	Rank	2004	Rank
Singapore	**32.85**	**1**	**26.31**	**1**	**22.80**	**3**	**14.84**	**6**	**18.3**	**3**
Japan	26.27	2	25.76	2	23.97	1	23.89	1		
United States	20.49	3	18.85	5	18.05	5	18.04	4		
France	20.47	4	20.07	3	18.97	4	18.93	3	19.75	2
Italy	20.20	5	19.71	4	19.97	3	19.46	2	19.81	1
United Kingdom	17.51	6	17.31	6	16.68	6	16.53	5	16.96	4

Source: World Bank http://devdata.worldbank.org.

Unemployment rate (%)	2003	Rank	2004	Rank	2005	Rank	2006	Rank
Singapore	**4**	**1**	**3.4**	**1**	**3**	**1**	**2.9**	**1**
United Kingdom	5	2	4.8	3	4.8	3	4.9	3
Japan	5.3	3	4.7	2	4.4	2	4.1	2
United States	6	4	5.5	4	5.1	4	4.9	4
Italy	8.2	5	8.3	5	8.1	5	7.8	5
France	9.5	6	9.5	6	9.6	6	9.6	6

Source: International Monetary Fund, World Economic Outlook Database, April 2006.

Life expectancy at birth (years)	2000	Rank	2001	Rank	2002	Rank	2003	Rank	2004	Rank
Japan	81.08	1	81.42	1	81.56	1	81.68	1	81.8	1
Italy	79.52	2	79.68	2	79.78	2	79.83	2	79.98	3
France	78.91	3	79.11	3	79.31	3	79.26	3	80.16	2
Singapore	**78.05**	**4**	**78.35**	**4**	**78.67**	**4**	**78.99**	**4**	**79.30**	**4**
United Kingdom	77.53	5			77.59	5	78.40	5	78.52	5
United States	77.03	6	77.03	6	77.24	6	77.14	6	77.43	6

Source: World Bank http://devdata.worldbank.org.

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Agents of Anti-Politics: Courts in Pinochet's Chile

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INTRODUCTION

On September 11, 1973, General Augusto Pinochet helped lead the overthrow of one of Latin America's most democratic regimes. As part of the coup, Chile's military leaders bombed the presidential palace, shut down the Congress, banned political parties, and purged the state bureaucracy. They left the courts, however, completely untouched. Pledging their commitment to judicial independence, the generals kept intact the long-standing system of judicial appointment, evaluation, discipline, and promotion, which placed primary control in the hands of the Supreme Court, and refrained from dictating or otherwise manipulating judicial decisions. The 1925 constitution, which provided a host of liberal and democratic guarantees, remained formally in effect, though the junta gradually (and sometimes retroactively or secretly) supplanted many of these with their own decree-laws, and later, their own constitution. Throughout, the military government insisted it was acting in the name of the rule of law, though its approach violated the most basic principles of that concept.

Despite the formal independence they enjoyed, however, and the resources that the country's legal texts and traditions provided them, Chilean courts never sought to challenge the undemocratic, illiberal, and antilegal policies of the military government. Indeed, they cooperated fully with the authoritarian regime, granting it a mantle of legitimacy not only during the seventeen years of dictatorship, but well beyond the transition back to formal democracy in 1990 (see Hilbink 2007: ch. 5). Ignoring the constitutional text that they had sworn to uphold and dismissing the legal arguments advanced by national and international human rights advocates, the courts overwhelmingly supported the military government's arrogation, concentration, and abuse of power. They unquestioningly accepted the explanations offered by the government

regarding the fate of the disappeared, and readily implemented vague, retroactive, and even secret decrees that violated the country's legal codes. Moreover, the Supreme Court voluntarily abdicated both its review power over decisions of military tribunals and its constitutional review power.[1] Even after the government declared an end to the official state of war and leaders of other legal institutions began pushing (along with other social forces) for more liberal interpretation of the country's new constitution, the judiciary remained at the service of the regime. Judges continued to justify the expansive police powers of the military government, to abdicate constitutional control of legislation, and to offer little protection to the many victims of repression.

In this chapter, I seek to explain why Chilean courts never sought to use their formal autonomy to challenge or cabin the regime in any way. As Osiel (1995: 486) notes,

> A distinguishing feature of authoritarian regimes, when contrasted with totalitarian ones, is that it is often possible for judges to engage in genuine dialogue with executive rulers through critical examination of the regime's most repressive policies. . . . (C)ourts in authoritarian regimes are not the blunt and perfectly pliable instruments of executive power. . . . Judges are allowed to express their criticism publicly, from the bench (and) their views are accorded serious consideration because their participation is regarded as indispensable to the regime's effective operation and to its continued acceptance among an influential sector of the public.[2]

In the bureaucratic-authoritarian regimes of Brazil and Argentina, judges took advantage, where they could, of this unique status to assert limits on the use of power and demand respect for basic rights (Helmke 2002; Osiel 1995; Nadorff 1982). Why is it, then, that in Chile, whose history of democratic practice and respect for legality was much longer and more continuous than those of Brazil and Argentina, and whose human rights movement was one of the strongest on the continent, judges proved to be such faithful agents of the military regime?

The argument I offer here is that the institutional structure and ideology of the Chilean judiciary, grounded in the ideal of judicial apoliticism, furnished judges with understandings and incentives that discouraged assertive behavior in defense of rights and rule-of-law principles. While rival propositions capture some aspects of the story, only the institutional explanation can account for behavior that cut across individual, attitudinal, and objective

[1] For the official critique of the conduct of the judiciary under the military regime, see Ministerio Secretaría General (1991: vol. 1 ch. 4).

[2] On this, see also Toharia (1975) and Tate (1993).

class lines; went far beyond a simple "plain fact" application of Chilean law; and remained quite consistent before, during, and after the authoritarian interlude.[3] The *institutional structure* of the judiciary, in which the Supreme Court controlled discipline and promotion, gave incentives for judges to follow closely the examples set by their superiors. Given that most judges depended on the security of their posts and the promise of promotion to guarantee their livelihood and perhaps improve their social status, they had every reason to play along with those who controlled their careers, and even to absorb or adopt their perspectives. This structure served to reproduce a very conservative understanding of the judicial role, or what I label the *institutional ideology*. The core of this ideology was a belief that adjudication was and should remain strictly apolitical. Judges who desired to increase their chances of promotion or simply to maintain their professional integrity (the two were not unrelated) had to take care to demonstrate their commitment to "apoliticism." At best, then, the institutional setting encouraged judges to avoid taking any stands at all against the government, to be quietist and deferential. At worst, it permitted and amplified the defense of conservative values and interests, which were deemed timeless, natural, and hence not "political."

THE JUDICIAL ROLE IN THE PINOCHET REGIME: CONTEXT AND CONTENT

Before proceeding with a discussion of the judicial role under the Pinochet regime, it is important to establish just how law-focused the Chilean military government was. While the junta clearly didn't desire any limits on what it could do with its power, the generals did take great pains to give their policies a patina of legal formality. Having seized power in the name of the rule of law, which they claimed had been trampled by the government they overthrew,[4] they were eager to cultivate an image of respect for and commitment to law and courts. They thus opted to leave existing judicial personnel in place and sought, from the earliest weeks of their rule, to codify their policies into positive law. Much like their counterparts in Brazil, they seemed to "desire to have a

[3] For a much more detailed version of this argument, analyzing judicial behavior under both democratic and authoritarian regimes in Chile, see Hilbink (2007).

[4] In its first official statement justifying the coup, Edict No. 5 (*Bando No. 5*), the governing junta declared that the Allende government had "placed itself outside the law on multiple occasions, resorting to arbitrary, dubious, ill-intentioned, and even flagrantly erroneous [legal] interpretations," and had "repeatedly failed to observe the mutual respect which one power of the state owes to another." For more on the period preceding the coup, see Hilbink (2007, ch. 3).

legal rationale for their assertion of arbitrary authority" (Skidmore 1988, cited in Osiel 1995: 530). But if in Brazil, this approach reflected a concern for how the military regime would appear internationally (Osiel 1995: 530), in the Chilean case, the audience was more domestic. As one prominent Chilean social scientist argued in 1974, "One of the most characteristic political realities of Chile is the importance of legality as a superior standard [*instancia*] to which all behaviors and the resolution of conflicts between people and institutions are referred. . . . Legality is the foundation of the government's legitimacy" (Arriagada 1974: 122).[5]

Given the centrality of legal forms to political legitimacy in Chile in general, and the fact that the military seized power in the name of the rule of law in particular, judges were actually quite well placed to put the generals in a "rule of law dilemma" (Dyzenhaus 1998). One might thus have expected them to act more like their counterparts in Brazil and force the junta to do their own dirty work (Osiel 1995: 533) or, as in Argentina, to seize on opportunities before and after the transition to democracy to assert themselves in the defense of rights and rule-of-law principles (Brysk 1994a; Helmke 2005). Instead, Chilean courts "tied their own hands and submitted themselves to the sad 'rule of law show'" (Velasco 1986: 159).

To offer a sense of just how servile the courts were to the authoritarian regime, the following sections summarize judicial performance in four areas central to the rule of law and rights protection: habeas corpus or, as it is known in Chile, *amparo*; Supreme Court review of military court decisions; constitutional review of laws (*inaplicabilidad por inconstitucionalidad*); and the constitutional review mechanism introduced by the military government in 1976 with the explicit goal of protecting liberal rights, the *recurso de protección*.

Habeas Corpus (Amparo)

Perhaps the most notorious category of judicial decisions under Pinochet is that of habeas corpus or, as it is known in Chile, *amparo*. As Barros (2002: 141) notes, "Personal liberty was sacrosanct in the many texts that form Chile's constitutional and legal tradition – under no circumstance could an individual be deprived of his or her freedom without legal justification." Upon coming to power, the junta did nothing formally to alter such norms. Yet, according to

[5] Similarly, Cea (1978: 6) notes that at the conclusion of the 1960s, "the Chilean population, by and large, had been educated in respect for the principle of legality, which it had internalized as its own. In accordance with said principle, the rulers as well as the ruled could act only to the extent that an explicit legal precept, technically generated, had previously ordered, permitted, or prohibited that action."

a 1985 report of the Inter-American Commission of Human Rights, Chilean courts accepted only 10 of the 5,400 *recursos de amparo* filed by human rights lawyers between 1973 and 1983 (Constable and Valenzuela 1991: 122). In the remaining seven years of the military regime, only 20 more such *recursos* prospered, leaving the total at 30 out of almost 9,000 (Rigby 2001: 92, fn 34). This means that the courts only challenged the legality of the military regime's detentions in *two or three tenths of a percent* of cases.[6]

Not only were the decisions themselves negative, but the courts took extraordinarily long to process *amparo* petitions, in many cases a month or more, despite the fact that they were legally obligated to rule on them within twenty-four hours. In some cases, the Supreme Court added formalistic impediments to filing such writs, although the law designed the writ to be totally informal and easy to file. In most cases the courts didn't challenge the legality of detention orders issued under the state of exception, nor did judges use their powers to check that detainees were being treated lawfully, either by visiting detention centers or demanding that individual detainees be brought before the court. Complaints of torture thus went ignored or uninvestigated, and confessions offered under torture were accepted. Moreover, if no decree ordering an individual's arrest could be proven to have been issued, judges ruled that the person must not have been detained, and denied *amparo* on the grounds that the writ had been filed on insufficient evidence or with the intention of causing concern or alarm (Amnesty International 1986).

Review of Military Court Decisions

The willingness of the Supreme Court to abandon established legal principles and procedures and, thereby, extend carte blanche to the military's "war on terror," was also evident in its abdication of review power over the decisions of military tribunals. Its first major decision in this regard was issued soon after the coup, in a petition brought against the life sentence that a Valparaíso war tribunal had issued for an alleged leftist spy. The Supreme Court not only refused the appeal, but renounced altogether its power to review the decisions of wartime military courts. The decision argued that because Decree-Laws 3 and 5 had declared the country to be in a state of war, the Military Code of Justice was in effect and war tribunals were in operation. It was the general in charge of the territory in question who had the exclusive power to approve, revoke, or modify the decisions of the wartime tribunals and discipline its members. The Court claimed that, "for obvious reasons," it could not exercise

[6] See Hilbink (2007) for an independent, but smaller, data set, with similar characteristics.

jurisdictional power over the military line of command, and thus could not intervene to alter the decision.[7]

Although both article 86 of the 1925 Constitution and article 53 and article 98, no. 5 of the Judicial Code stipulated that the Supreme Court had supervisory power over all of the nation's tribunals, including military tribunals, and despite the fact that the Court had used the power in previous wars (Tavolari 1995: 79), the Court stuck firmly to its position, reiterating it in the months and years that followed. The result was that several thousand Chileans were subjected to trial by tribunals whose judges "often had no legal training and who were mid-level officials, filled with hatred and with the desire to demonstrate their 'toughness' in order to earn merit in the eyes of the junta" (Velasco 1986: 156).[8] Between 1973 and 1976, approximately 200 individuals were sentenced to death and executed, and thousands of others received harsh, disproportionate prison sentences (Luque 1984: 26–29; see also Ministerio Secretaría General de Gobierno de Chile 1991: vol. I, ch. 3; Pereira 2005). Long after the state of war was formally declared to have ended, the concepts of "potential states of war" and of the "internal enemy" persisted in the doctrine of national security, which was incorporated into the 1980 Constitution. Claiming what was among the broadest jurisdiction in the world, Chile's military justice system tried approximately four civilians for every one member of the military, without basic due process (Verdugo 1990; see also López Dawson 1995; Pereira 2005). Moreover, the military courts shielded members of the armed forces and their civilian collaborators from prosecution. As Barros notes, "Montesquieu's description of justice in despotic regimes – 'the prince himself can judge' – applies to the war tribunals, since justice was being dispensed by officers hierarchically subordinate to the commanders in chief, who were creating the law" (2002: 138). The Supreme Court's abdication of its jurisdiction over cases in the military justice system, and its willingness to hand cases over to the armed forces on demand, thus permitted, under a patina of formal legality, a practice that was fundamentally at odds with even the most basic definition of the rule of law.

Constitutional Review (Inaplicabilidad por Inconstitucionalidad)

As noted above, upon coming to power, the junta left the 1925 Constitution in place, leaving it theoretically possible for citizens to challenge in court the

[7] See *Fallos del Mes* No. 180 (1973): 222–225.

[8] Pereira reports that the average acquittal rate in Chile's military courts was only 12.42% (2005: 267).

constitutionality of military government policies. In some areas of the law, the Supreme Court did stand by the 1925 Constitution, at least early on. While the junta had established, in Decree-Law (DL) 128, that it had both legislative and constituent powers, the government did not always make clear when it was exercising which of these powers. In several rent and labor law cases, the Supreme Court thus asserted both its continued acceptance of the 1925 Constitution as a controlling document, and its own power to declare part or all of a decree-law unconstitutional (Precht Pizarro 1987).[9]

The Court never came close to using this power in more politically sensitive cases, however. In my sample of published decisions from the 1973–1980 period, the justices rejected the petition for *inconstitucionalidad* in twenty-nine of thirty-two instances, and the three accepted were not particularly sensitive cases. Despite the fact that human rights lawyers constantly appealed to the Constitution in their defense of regime victims, the justices never embraced these ready examples of more liberal reasoning. Indeed, in December of 1974, when the junta issued Decree-Law 788, stating that all previous decree-laws in contradiction with the Constitution should be considered modifications thereof, the Court quickly accepted the proposition.[10] In subsequent *recursos de inaplicabilidad* and in other cases in which arguments were presented regarding the unconstitutionality of early decree laws, the Court stated simply that any decree-law issued between September 11, 1973, and the day that DL 788 was issued could not conflict with the 1925 Constitution, since "it must be necessarily accepted that [these laws] have had and have the quality of tacit and partial modifications" to the Constitution.[11] That DL 788 itself made a mockery of the Constitution, judicial review, and the rule of law seemed either to elude or simply not to bother the justices.

Later, after the regime's new constitution went into effect (1981), the Supreme Court offered interpretations that placed almost no limit on the power of the government to restrict or eliminate individual rights. In my sample of the sixteen published *inaplicabilidad* decisions from this period, the Court found constitutional violations in only two cases, both involving a law, passed by the junta, that sought to resolve, in favor of the state, disputes dating

[9] See for example the decision of July 24, 1974, in the case of *Federico Dunker Biggs*, *Fallos del Mes* No. 188: 118–121.

[10] DL 788 was issued while a *recurso de inaplicabilidad* filed by former Senator Renán Fuentealba was pending before the Supreme Court. Fuentealba's lawyers were arguing that his expulsion, based on DL 81, was unconstitutional.

[11] *Luis Corvalán Lepe* (*amparo*), *Fallos del Mes* No. 203: 202–205.