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Rule of law without democratization: Cambodia and Singapore in comparative perspective

Stephen McCarthy and Kheang Un

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'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 each country's political, historical, and social differences, and the obstacles confronting Cambodia's judicial and legal reform. Cambodia, like Singapore, lacks the democratic fullness required to approximate a western liberal democracy and subsequently should more appropriately be labelled a semi-authoritarian, semi-democratic, or illiberal regime. These types of regimes possess a 'thin rule of law' as part of their institutional arrangements and practices. A thin rule of law is a narrow version of the rule of law in a developmental context that may secure property rights and enforce contracts in order to promote economic development—usually driven by foreign investment. It is not just 'rule by law' which is a procedural description of behaviour that can also occur in liberal democracies—connoting the enforcement of the law by the executive, judiciary, or various arms of the state without regard for, or at the expense of justice. As such, the thin rule of law constitutes a structural category in itself that can be used to identify semi-authoritarian or illiberal regimes. While staging elections may be manageable for authoritarian regimes, promoting the rule of law means addressing the structure and distribution of power and as such is less desirable for elites in these countries.

The Cambodian People's Party (CPP) of Prime Minister Hun Sen has in recent years systematically employed defamation and other legal tactics as a means to weaken opposition parties and suppress outspoken critics. There has been a steady rise in arrests, detention, and lawsuits entered into against opposition party leaders, NGOs leaders, and journalists. Lawsuits filed by opposition party members against ruling elites, on the other hand, have little chance of success in the courts and the party lodging complaints risks counter-suits. In late 2010, a new Criminal Code came into effect in Cambodia, retaining the criminalization of defamation and disinformation, and providing detailed coverage along with penalties. The definitions of defamation and insult are very broad, allowing for wide ranging interpretations by those enforcing the laws. The scope of defamation is extended to criminalise comments made not only against individuals but also against institutions of the state and public officials. This tactic of using defamation as a political weapon has gained regional popularity in recent years, most noticeably in Myanmar following the passing of a new Telecommunications Law by the Thein Sein government in 2013. The Act was never repealed by the National League for Democracy government who took office in 2016, and by June 2017 many persons were known to have been charged for online defamation under the law. Under the current law, the treatment of defamation as a criminal offence in Myanmar mirrors the criminalization of defamation in Cambodia.

Societal pressure has been generated against the ruling government in Cambodia through significant electoral gains made by opposition parties at the national and local levels. It has been witnessed through spontaneous protests over alleged electoral fraud, and it has ignited a sense of urgency for the CPP to initiate reforms. However, while the CPP has carried out some reforms at the national level, these reforms are unlikely to spill-over into the judicial arena, as demanded by the political opposition and civil society, given the ruling party's insistence on following other Asian models like Singapore. 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.

1. Introduction

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 more liberal forms of democracy. Unlike some countries in Asia, there is less evidence of meaningful constitutional contestation taking place—bargains and struggles among elites, opposition forces and civil society—over state institutions, the broader political order, and the 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 single-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 way to seek insight into the trajectory of political development and the obstacles to Western ideals for legal reform.

This paper traces the recent convergence of the rule of law in Singapore and Cambodia in the face of each country's political, historical, and social differences, and the obstacles confronting Cambodia's judicial and legal reform program. Over the past decade Cambodia has seen a series of legal reforms and an increase in the use of legal proceedings including defamation and disinformation lawsuits against opposition politicians and members of civil society. We argue that this is a product of a strategic calculation by the Cambodian ruling elites to utilise a more subtle and legitimate strategy of social control. The legal reforms already introduced, those now coming into effect, and the role of the judiciary in relation to each may be better understood through insight into the rule of law in Cambodia and by placing it in the context of other exemplars in the region—in particular Singapore. However, differences will remain as the judiciary's role in society and public policy is intertwined with and impacted by each country's understanding of the rule of law that has evolved through a series of historical, political, institutional, cultural, and economic factors. Therefore, this paper undertakes a comparative analysis of the two countries' legal traditions and political-historical trajectories in order to discern the development of the role of the courts and their power in judicial review.

This approach is consistent with recent calls for more comparative research on the rule of law in order to better understand the nature of democracy and authoritarianism in Asia.[1] While electoral gains by opposition movements in Singapore (2011) and Cambodia (2013 and 2017) illustrates that the meaning of democracy and the rule of law is contested locally, we argue that understanding the rule of law as it is understood by the countries' elites themselves offers more insight into the true nature of the regimes in question than comparing and classifying polities as examples of "competitive authoritarianism" or "electoral authoritarianism" on the basis of their democratic deficiencies.[2]

The paper also examines the increasing use of defamation law as a political weapon in Cambodia. In recent years the Cambodian People's Party (CPP) of Hun Sen has systematically employed defamation and other legal tactics as a means to weaken opposition parties and suppress outspoken critics. This is evidenced by the steady rise in arrests, detention, and lawsuits entered into against opposition party leaders, NGOs leaders, and journalists since 2005. On the other hand, lawsuits filed by opposition party members against ruling elites have little chance of success in the courts and the party lodging complaints risks counter-suits. Definitions of defamation and insult are very broad, allowing for wide ranging interpretations by those enforcing the laws. Defamation is covered by the new Criminal Code, and these provisions and other procedural changes allow for a more efficient processing of criminal charges for defamatory acts committed. The use of defamation law in this way is being replicated across the region, including in Southeast Asia's newest 'disciplined' or 'guided' democracy, Myanmar. In addition, we analyse whether Singapore's lessons can be applied in large, poor, and underdeveloped authoritarian regimes; and whether the Singapore model can be sustained or replicated in the case of Cambodia.[3]

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.[4] Laws must be promulgated in advance and then fairly and consistently applied by relevant state institutions, including the judiciary, across equivalent cases.[5] Without an independent judiciary there will be an absence of checks and balances and no guarantee that state institutions, 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.[6] An independent judiciary can mediate conflicts among political actors and political institutions and societal organizations in a legitimate fashion, a process that can minimise political violence and confrontation that could jeopardise political order, civil and political rights, and hence democratic and economic advancement.[7]

Judicial independence can be compromised by institutional weakness, such as limited resources, low salaries, lack of trained personnel and low intra-institutional cooperation. Low salaries make judges and court officials susceptible to compromise and corruption; the latter defined as court officials' engagement in "procedural, substantive and/or administrative behavioural patterns for private benefits".[8] A lack of intra-institutional cooperation is a weakness found in many newly emerging democracies like Cambodia. Since no single agency can enforce horizontal accountability, the judiciary cannot perform its role effectively unless it receives support from other government institutions—particularly the police who investigate crimes and execute court orders and rulings—but also the support of the army.[9] Judicial independence can also be compromised by patron-clientelism. When power, resources, and loyalty flow through patron-client networks, any meaningful reform would affect the interests of these networks and is thus self-defeating. Consequently, elites, through their patronage networks, tend to resist any effort to reform and strengthen political institutions—including the judiciary—aimed at making them more efficient, effective, and independent.

It is important to note that this democratic or 'true' rule of law is of an ideal type—the proximity of a country's rule of law including its judicial system to this type indicates the level of its independence, and hence its effectiveness in the protection of civil and political rights, and in reviewing and vetoing legislative and executive decisions deemed to be undemocratic. Yet it fails to adequately explain the rule of law and judicial conditions that are intertwined with the wider social, political and economic realities found in many countries in Southeast Asia. In single-party dominant regimes, elites could deny that economic growth requires democratization; therefore the rule of law, these elites argue, should be narrow, proceduralist, and divorced from democracy promotion. Indeed, the minimum requirement for this thin or narrow version of the rule of law in a developmental context could be that it secures property rights and enforces contracts in order to promote economic development—usually driven by foreign investment. This scenario is popular with advocates of the "Beijing Consensus" as an alternative to the "Washington Consensus" that has been promoted in various forms by Western governments and international financial institutions since before the end of the Cold War. To be sure, the Beijing Consensus argument has gained further resonance in East Asia and elsewhere following the Global Financial Crisis.[10] While Singapore was an early exemplar of this approach, we argue that in Southeast Asia Cambodia's Hun Sen has followed Singapore's lead and become a new member of the Beijing Consensus club by pursuing an ordered society wherein human rights are subordinated to political stability and economic growth.[11]

Moreover, like Singapore, Cambodia lacks the democratic fullness required to approximate a western liberal democracy and subsequently should more appropriately be labelled a semi-authoritarian, semi-democratic, or illiberal regime. These types of regimes possess a 'thin rule of law' as part of their institutional structure; and not just 'rule by law' which is a procedural description of behaviour than can also occur in liberal democracies—connoting the enforcement of the law by the executive, judiciary, or various arms of the state without regard for, or at the expense of justice. As such, the thin rule of law constitutes a structural category in itself that can be used to identify semi-authoritarian 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 kind of rule of law found in each country is therefore a far more important indicator of the quality of democracy and differences in the rule of law are more reflective of the particular regime type. This can be illustrated by examining the evolution of the thin rule of law in Singapore and Cambodia despite their undergoing starkly different political, historical and legal trajectories.

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) and in 1878 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 dared 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.[13] 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 correct 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).[14] 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 MM 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 must be exercised subject to and in accordance with the rule of law".[16] Describing Lee Kuan Yew as a political and legal realist, Chan outlined Lee's vision of the rule of law by citing a speech delivered by then Prime Minister Lee to the University of Singapore Law Society in 1962:

> There is a gulf between the principles of the rule of law, distilled to its quintessence in the background of peaceful 19th century England, and its actual practice in contemporary Britain. The gulf is even wider between the principle and its practical application in the hard realities of the social and economic conditions of Malaya. You will have to bridge the gulf between the ideal principle and its practice in our given sociological and economic milieu. For if the forms are not adapted and principles not adjusted to meet our own circumstances but blindly applied, it may be to our undoing…
>
> The rule of law talks of habeas corpus, freedom, the right of association and expression, of assembly, of peaceful demonstration, concepts which first stemmed from the French Revolution and were later refined in Victorian England. But nowhere in the world today are these rights allowed to practise without limitations, for blindly applied, these ideals can work towards the undoing of organised society. For the acid test of any legal system is not the greatness nor the grandeur of its ideal concepts, but whether in fact it is able to produce order and justice in the relationships between man and man and between man and the State…

> Justice and fair play according to predetermined rules of law can be achieved within our situation if there is integrity of purpose and an intelligent search for forms which will work and which will meet the needs of our society. Reality is relatively more fixed than form. So if we allow form to become fixed because reality cannot be so easily varied, then calamity must... befall us.[17]

The particular 'form' of the rule of law that was adopted for Singapore on the basis of this search criteria, and which pervades the laws that reflect Lee Kuan Yew's precepts and values, was the thin version rather than the thick version. According to Chan, "the thick describes the rule of law in liberal democracies and the thin describes the rule of law in all other democracies." When Singapore is criticised for paying lip service to the rule of law, Chan believes, critics are referring to their own version of the rule of law and not Singapore's.[18] Singapore is a non-liberal democracy where a thin version of the "rule of law simply means the supremacy of the law, without reference to whether the law is just or unjust." Since the law also applies to the state, one of the judiciary's roles is to determine whether the limits of the law have been breached by the state—either by reviewing legislation or executive acts to determine whether they are unconstitutional. According to Chan, so long as this power of judicial review exists in Singapore, judicial independence and the rule of law exists.[19] But this does not necessarily require that the courts be concerned with whether the laws passed by Parliament are fair, just and reasonable. Detention orders made under the provisions of the *Internal Security Act* (ISA), for example, are subject to judicial review whereby the courts can determine if a detention order was made in accordance with the law.[20]

The thin or narrow version of the rule of law was justified by Lee and subsequently by the judiciary as being the most fitting form for Singapore given its own political, social, economic, and cultural values. While jurisprudence theorists might tag this form as an example of legal positivism, critics often infer a wider concept of the rule of law when they cite undemocratic or illiberal laws and outcomes.[21] It is not the purpose of this paper to enter into the debate on the justice or fairness of these laws and outcomes but rather to focus on the meaning of the rule of law as understood by the laws' founders and subsequent adjudicators. Within the context of thin rule of law, legislatures in Singapore have continued to amend the Constitution and to pass laws which could otherwise be considered undemocratic or a restraint on civil liberties in the West. These include amendments to remove trial by jury in criminal cases and a whole range of legislation containing provisions which operate in conjunction with the ISA such as the *Public Entertainment and Meetings Act*, the *Societies Act*, the *Undesirable Publications Act*, the *Films Act*, and the *Newspaper and Printing Presses Act*.

Furthermore, the trend since the mid-1970s has been to revise the civil and criminal law so as to remove judicial sentencing discretion from most legislation and to limit scope for judicial review. The executive thus shares the judicial function—the courts decide on the broad merits of a case and the executive does the sentencing via legislation. Much legislation contains mandated sentencing provisions for offences, including the Criminal Code and the Acts cited above.[22] According to Chan, "efficiency and strict enforcement of the criminal law" are the strong points of the Crime Control Model in Singapore, along with practicality and pragmatism.[23] If the judiciary in Singapore interprets law in such a way that counters the intention of the legislature, the legislature has the means to correct such a decision through further legislative or constitutional amendments. While some have described examples of this occurring in Singapore as legislative override of excessive judicial activism (with the effect of restricting judicial review), Singaporean authorities would believe that this practice lies within their realms of constitutional power given the rule of law as understood in their own context.

Two important examples help illustrate this phenomenon. In 1988, the Singapore Court of Appeal held that persons detained under the ISA were entitled to judicial review of the constitutionality, legality and reasonableness of their detention (*Chng Suan Tze & Ors v Minister of Home Affairs & Ors,* 1988). In a separate case, the Judicial Committee of the Privy Council overturned a decision of a Singapore district court to expel J.B. Jeyaretnam (of the opposition's Workers Party) from the Singapore Bar Association after having "suffered a grievous injustice" being "fined, imprisoned and publicly disgraced by offences of which [he was] not guilty" and "in addition [he has] been deprived of his seat in Parliament and disqualified for a year from practicing his profession" (*Jeyaretnam v Law Society of Singapore,* 1989). The legislature subsequently moved to correct these anomalies with retrospective amendments to the Constitution and the ISA,[24] thus nullifying the effect of the Court of Appeal's decision on judicial review and severely limiting appeals to the Privy Council—such appeals were later abolished altogether. Kirby notes that after these amendments, a government lawyer criticised the "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 non-PAP affiliated appointments are made to the bench.[27] However, the political executive also needs a Supreme Court which is seen as, and is capable of, maintaining the confidence of the international business community and this provides the Court with some power vis-à-vis the executive, particularly on commercial matters. It is also true that not all judges wish to be involved in political trials, nor can their support for the executive be guaranteed.

4. Cambodian Rule of Law

A modern civil law based legal system was introduced under French colonial rule in the late 19th century; this came to a halt in 1975, when Cambodia fell under the radical regime of Democratic Kampuchea (DK) which terminated the entire system. Almost all Cambodians with legal backgrounds were killed, while other resources such as law schools, books, court buildings and legal texts were either destroyed or converted to other uses.[28] Arrests and sentencings were arbitrarily ordered by DK cadres who acted in the name of *Angkar* (the organization), resulting in grave systematic violations of human rights, summary executions, and a death toll of over 1.7 million people.[29] Thus, when the People's Republic of Kampuchea (PRK) came into existence under Vietnamese occupation in 1979, there was no legal system in place. The PRK would slowly re-establish a formal court system by offering short-term training courses for would be judges and prosecutors.[30] However, because the regime considered the legal system an integral part of the ruling party's apparatus, the training emphasised Marxist-Leninist doctrines over legal subjects. Prosecutors and judges were usually former school teachers and literate Cambodians with "good biography"—meaning they had no political connection to the previous regime.

As in other communist states, the PRK judicial system was subservient to the party and the government.[31] The ruling party's distrust in the courts opened the space for frequent interference into the judicial process by government officials at both the central and provincial levels.[32] Soon after the departure of Vietnamese troops in 1989, the government—having anticipated a future pluralist electoral contest, and wishing to distance itself from its communist past—adopted a new name for the country, the State of Cambodia (SOC). It in turn promulgated a new constitution emphasizing fundamental freedoms and the rule of law. However, under the SOC government the previous relationship between the judicial and executive branches persisted and the courts remained subordinate to the party.

Given Cambodia's violent history, a concern to prevent "a return to the policies and practices of the past" was central to the negotiations leading to the 1991 Paris Peace Agreement. This agreement ensured that the protection of fundamental human rights contained in the Universal Declaration of Human Rights and other relevant international instruments, including the United Nations Basic Principles on the Independence of the Judiciary, were to be enshrined in the constitution of the new government to be formed after the UN-sponsored elections. These basic principles include "due process and equality before the law, protection from arbitrary deprivation of property or deprivation of private property without just compensation, and freedom from racial, ethnic, religious or sexual discrimination".[33]

After the 1993 democratic elections, Cambodia adopted a liberal constitution that included a system of checks and balances enforced by an independent judiciary and the protection of fundamental human rights contained in the Paris Peace Agreement. Article 128 of the Constitution specifies that the judicial body "shall be an independent power and shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens." Article 130 stipulates that "Judicial power shall not be granted to either the legislative or the executive branch." To safeguard the Constitution and to protect citizens' fundamental rights, complex judicial institutions were established to review laws, to impartially adjudicate laws, and to enforce constitutional provisions for equal protection under the law and for the defence of civil and social rights. The regular courts would consist of three tiers—the courts of first instance, an Appeals Court, and the Supreme Court.[34] Situated atop this system was the Supreme Council of Magistracy (SCM) whose constitutional role is to assist the King to ensure the independence of the judiciary, to recommend judges and prosecutors for royal appointment, dismissal and discipline. Moreover, the Constitutional Council was also created to ensure the constitutionality of laws, rules, and regulations through review and veto power.

Over time these judicial institutions, however, failed to function appropriately and many of the laws and regulations have not been systematically implemented. Part of the reason for this is that civil law countries are less likely to permit judicial review over the constitutionality of laws.[35] Further, the character of judicial review also corresponds to the nature of a country's political past, and its judicial and executive relations. Cambodia's civil law legal system is today a mixture of French-influenced codes from the United Nations Transitional

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 move Cambodia's legal system towards the Singaporean 'thin' rule of law model.[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 2017[39]—which is a welcome rise however the figure remains miniscule for a population of over 16 million.[40] Overall, limited legal experience and inadequate knowledge of the law and legal procedures, as well as the presence of corruption and political dependency, negatively 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 non-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-institutional cooperation. The judicial police are an auxiliary arm of the court assisting on judicial issues including investigations and the execution of court warrants and rulings. By law, prosecutors have the responsibility to supervise the judicial police in the latter's working relationship with the court. However, the court and the judicial police are in constant confrontation with one another, a precedent that dates back to the socialist regime of the 1980s[41] Consequently, there have been numerous instances and allegations in which the judicial police refused to execute court warrants or rulings, often with the support of the executive branch.[42]

In addition, compared to Singapore where court officials are relatively well paid and higher court justices are remunerated at rates comparable to senior legal positions in the private sector, Cambodian judges seem to be poor cousins. The median monthly gross wage for lawyers in Singapore was S$8400 in 2011—excluding bonuses or increments for seniority.[43] It is not uncommon for Lawyers in Singapore to earn over S$250,000 annually; legal partners would earn considerably more. Indeed, in 2012 the Public Services Division of the Prime Minister's Office underwent a review of the salaries of Administrative Service officers, the Judiciary, and Statutory Appointment Holders to ensure that their salaries remained competitive relative to their market benchmarks. Court officials in Cambodia, on the other hand, including judges and prosecutors, commonly attribute the prevalence of corruption in the judiciary to low salaries. Before 2002, the average monthly salary for judges, prosecutors, and other court officials was around US$24—an amount that was never anywhere near sufficient to support individual court officials, let alone their families. As part of judicial reform, the salaries of judges and prosecutors were substantially increased, starting from US$250 per month to over US$600 depending on seniority.[44] However, this salary increase did not diminish corruption within the judiciary and the corresponding public perception of the judiciary continues to be negative.[45]

The prevalence of high levels of corruption is contingent on three factors: uncertainty over job security among judges and prosecutors, the absence of institutional restraint, and the patronage political system. Similar to situations in other developing countries, if judges, prosecutors and clerks have to buy their positions and maintain kickbacks to retain them, they also have to recoup their investment.[46] Furthermore, judges and prosecutors are required to contribute to the ruling party's patronage-based development projects such as constructing schools, rural roads, and other gifts during the elections. The politicised nature of Cambodian governance makes it impossible for a neutral judicial system to emerge. Indeed, one prosecutor stated that "the characteristics of politics determine the peculiarity of the court system" in Cambodia.[47] Because judges and prosecutors owe their careers to their parties or their patrons, in making any decision they have to consider "who offered them the seat."[48] Consequently, in Cambodia "it is unavoidable that court officials serve the interests of political parties and that the judicial system serves politics."[49]

Cultural sentiments that characterise the patrimonial system also shape judges' perceptions of corruption, and their responses to executive interference. Experience from other countries indicates that when corrupt practices are considered to be the norm, as is the case in patrimonialist settings, even clean judges bear the pressure of political, cultural, and societal conditions. Pressure comes not only from politicians and political institutions, but also from members of groups with whom they are associated.[50] The absence of institutional constraints, coupled with a wider socio-political environment dominated by patronage and corruption, blurs judges' perceptions of what constitutes legality and illegality; morality and immorality. Strong empirical evidence reveals that while judges do not reject the allegation of court corruption; they defended their actions forcefully, arguing that some acts of receiving money from litigants do not constitute corruption. Rather, these monetary transactions can rightfully be called "fees," and accepting such a fee is not wrong—if not legally, at least morally. In addition, when faced with intervention by high-ranking government officials, judges and prosecutors generally acquiesce. Such acquiescence results not only from fear but also from "affection." Affection is the product of reciprocal relationships whereby people return favours for what others did for them; such relationships are a standard practice that is difficult to avoid in the patronage based society of Cambodia. It is this sense of a desire to maintain a personal relationship and the need to maintain backing from higher authorities in the long run that stands in contrast to how "corruption" is often perceived in the West—as a purely financial transaction.

The most recent interaction of Cambodian courts with Western legal codes and norms followed the establishment in 2001 of the Extraordinary Chambers in the Courts of Cambodia (ECCC) to try the former Khmer Rouge leaders. This has been a prolonged process which was expected to produce a more transparent, independent, and efficient judicial system. It has often expressed that as court personnel received training and interacted with foreign judges and lawyers, the Cambodian judiciary would become more impartial, professional, and gain a greater respect for the rule of law as understood in Western legal norms—Western legal codes and norms were theoretically grafted onto existing institutions. However, while it is true that judges, prosecutors and clerks enjoyed some degree of independence at the tribunal, this should not be interpreted as increasing judicial independence in Cambodia. This is a narrow and unique case, the politics of which had been ironed out in advance during protracted negotiations between the Cambodian government and the United Nations. Judges, prosecutors and others do have some freedom to manoeuvre, though it is within already established parameters and this freedom from political or institutional influence is unlikely to continue in the national courts. Because of the Cambodian courts' embeddedness in the existing political system, the impact of the tribunal on the overall Cambodian judiciary is minimal and is not likely to bring any substantial change in the way the local courts operate.[51]

5. Defamation as a Political Weapon

The Constitution of Cambodia provides for the rights and obligations of Khmer citizens, including the freedom of expression, press, publication and assembly.[52] Unlike the Singaporean Constitution, these rights are not expressly limited by a provision covering defamation since the drafters of the Cambodian Constitution did not believe that the right of reputation should override the right to freedom of speech where the two may conflict. Nevertheless, as Cambodia operates on civil rather than common law, defamation and libel have been treated solely as criminal offences (rather than civil or criminal as in Singapore) since 1992 when Cambodia was under the United Nations Transitional Authority in Cambodia.

Not unlike Singapore, in recent years the Cambodian People's Party (CPP) of Hun Sen has systematically employed defamation and other legal tactics as a means to weaken opposition parties and suppress outspoken critics. This is evidenced by the steady rise in arrests, detention, and lawsuits entered into against opposition party leaders, NGOs leaders, and journalists since 2005. Members of the Sam Rainsy Party (SRP), which was one of the only major opposition parties in Cambodia for example, suffered severely from successive legal battles with the incumbent government.[53] In 2005, four SRP members, Cheam Channy, Chea Poch, Khom Piseth, and Rainsy himself were charged with defamation and establishing a 'shadow army.' Rainsy was sentenced in absentia to 18 months in prison and 56 million riel in fines. All charges were dropped following Rainsy's letter of apology to the prime minister and a royal pardon from King Norodom Sihamoni. In 2010, Rainsy, who was then in self-exile, was again convicted on two separate counts: destruction of public property after his removal of Cambodia-Vietnam border markers in an October 2009 protest of alleged Vietnamese encroachment on Cambodian soil; and disinformation and falsification of public documents for publishing evidence of alleged Vietnamese encroachment on Cambodian territory in video press conferences and posted on the SRP's website. He was sentenced to two years imprisonment by the Svay Rieng Provincial court for the first charge and to 10 years imprisonment with over US$15,000 in fines and damages by the Phnom Penh Municipal Court. Rainsy was pardoned in 2013 in order that he could take part in the general election.

Similar to Singapore, lawsuits filed by opposition party members against ruling elites have little chance of success in the courts and the party lodging complaints risks counter-suits. For example, SRP member Mu Sochua's legal battle began when she filed a defamation suit against the prime minister for his alleged 'derogatory comments about a female parliamentarian' in Kampot Province in April 2009. She was counter-sued by the prime minister for defamation and was ordered by the court to pay 16.5 million riels in compensation to the Prime Minister Hun Sen.[54] The government has come under international pressure to decriminalise defamation in recent years. While Prime Minister Hun Sen stated that he supported decriminalization in 2006, a new Penal Code—passed not long after that statement was made—contains detailed provisions on defamation which suggest the opposite.[55] A new Criminal Code, which came into effect in December 2010, retained the criminalization of defamation and disinformation, and went much further than Singapore by providing detailed provisions along with penalties. Defamation and insult are covered in several sections of the Criminal Code, most notably Articles 305-313, 445-447, and 511.[56] Article 305 defines defamation as "any allegation of slanderous charge that undermines the *honour* [sic] or the *reputation* of a person or an *institution*", while Article 511 defines insult as "the use of words, gestures, writings, sketches or objects which undermine the *dignity* of a person."

The definitions of defamation and insult are very broad, allowing for wide ranging interpretations by those enforcing the laws. Importantly, these provisions and other procedural changes allow for a more efficient processing of criminal charges for defamatory acts committed, and the scope of defamation is extended to criminalise comments made not only against individuals but also against institutions of the state and public officials. The state, in other words, institutes defamation charges against individuals while the courts enjoy very wide latitude in determining whether the offending act undermines a person's, or an institution's, honour, reputation or dignity. By including public institutions in this way, the legislators have also removed the need for judges to justify any variance in the standards applied to public officials as has occurred under common law in Singapore. Therefore, although the Constitution of Cambodia does not include any limitations on free speech as in Singapore, the Cambodian legislators have more than made up for this through the provisions of the new Criminal Code.

The tactic of using defamation as a political weapon has also gained regional popularity in recent years, most noticeably in Myanmar following the passing in 2013, under the military-backed Thein Sein government, of the new Telecommunications Law. By May 2017, human rights organizations had increased their appeals to amend the vague language of the 2013 Telecommunications Law and the criminalization of defamation provisions contained in Section 66(d) which was criticised for its suppression of freedom of expression. In May 2017, Human Rights Watch (HRW) reported that at least 54 cases had been filed under the law, and 8 persons had been sentenced to imprisonment since the National League for Democracy took office in 2016. By late June 2017, HRW noted that at least 71 persons were known to have been charged for online defamation under the law. A joint statement of 61 human rights organizations called for a repeal of S. 66(d); and over 100 journalists protested against the law in Yangon in June 2017, demanding that the government abolish it and drop all related law suits.[57] Under the current law, the treatment of defamation as a criminal offence in Myanmar mirrors the criminalization of defamation in Cambodia.

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 socio-political 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.[58]

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 an 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.[59] 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 has occurred in Cambodia. By contrast, common law systems can evolve through continual litigation and re-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 realised 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 its continuing rule in the name of peace, stability and economic growth. Since that time, societal pressure—generated through significant electoral gains made by the opposition party and witnessed through spontaneous protests over alleged electoral fraud—has ignited a sense of urgency for the CPP to initiate reforms. The CPP has carried out some reforms at the national level, most noticeably cabinet reshuffles (the replacement of some aging ministers with more dynamic and better educated ones); the appearance of an oversight role for the National Assembly and the restructuring of the National Electoral Commission; and improvements made in revenue collection. However, whether these reforms will spill-over into the judicial arena—as demanded by the opposition party and civil society—remains unlikely given the ruling party's insistence on following other Asian models like Singapore. Since the 2013 elections, allegedly under pressure from the government, the courts have continued to imprison opposition activists including parliamentarians for leading "insurrection" and causing "social disorder." [61] For their struggles and bargains to spill over into areas concerning the rule of law and the judiciary would require far broader societal pressure, or a willingness among the political elites to subordinate their power to a more liberal rule of law. Meanwhile, there has been a 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 in Singapore evolved from the English common law and was modified (and justified) to suit the political, social and cultural values of the people. Likewise, Singapore's own version of democracy emerged from within, evolving and being modified by legislators with the same justification. This form of democracy is clearly not meant to be a liberal one and the rule of law reflects this while the highest justices openly state that any wider interpretations of the rule of law are not meant for Singapore. Cambodia, on the other hand, had a liberal form of democracy imposed upon the country by the drafters of its Constitution following the framework of Western democratic principles.[62] In practice, however, these principles have been twisted to meet the interests of the Cambodian political elites. When the dust of democratic imposition settled, Cambodian leaders looked towards Singapore as a model of the rule of law.

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