Jothie Rajah

I. REBELLING AGAINST LEGAL EDUCATION

Speaking to graduate Law students on the question of method, and the relationship between methodology, authority and rebellion, Melbourne Law School's Sundhya Pahuja made a point that had a particular resonance for me. Method is political, she said; calling method into question is to draw attention to the type of knowledge that we produce. Her point, so succinctly put, captured a tension at the heart of my own struggle to produce knowledge; a tension centring on methodology.

Methodology was not a word I encountered in my undergraduate legal education. At the Law Faculty of the National University of Singapore, I was subject to a predominantly doctrinal pedagogy.[1] The welcome exception was one semester of Marxist Jurisprudence taught by a visiting professor, Yash Ghai. A passionate and inspiring teacher, Yash introduced us to a perspective of law that was very different from the positivist paradigm. After that semester, I

[1] I was a student there from 1982-1986. The National University of Singapore's Law Faculty has since become a very different institution and now offers a wide range of courses, many with critical content and approaches.

no longer saw law as a lofty, neutral entity. Law was now part of grubby social processes; inextricably tied to history, people and power.

In 2006, twenty years after this transformative re-framing of law, and with a second undergraduate degree under my belt, I embarked on a PhD in Law. My doctoral project is on the Singapore state's use of legislation and public discourse to re-configure the meanings of the term 'law'. How, I ask, is it possible for Singapore to be acknowledged the world over as a state that upholds the rule of law even as it systematically undercuts basic legal freedoms? My project explores the manner in which legislation that represses rights has been strategically justified by narratives of national emergency. In addition to tracing the state's discourse on law, I argue that state legality and legitimacy are secured by the careful observance of procedure. Each piece of rights-eroding legislation has been enacted through rigorous state adherence to rule of law procedures. It is this disaggregation between the content and form of 'law' (as a social category) that, I argue, builds on the material prosperity of the polity to secure the Singapore state's national and international legitimacy.

Well before I arrived at a clear understanding of the scope and argument of my project, my supervisor asked me what my methodology was. This entirely reasonable query stumped me. The way in which I had learnt the Law, an invisible methodology existed in rules of *stare decisis* and the principles of statutory interpretation. But these rules failed to explain the rich possibilities and arguments of my doctoral data. Yes, one semester of Marxist Jurisprudence had transformed my understanding of Law as a discipline, but I was reluctant to replace one ideological cocoon (the one I had been socialised in as a Singaporean) with another tied to an explicitly Marxist framework. Adding to my methodological muddle was the awareness that I was drawing on techniques of close reading adopted from Literature, and interrogations of text informed by the study of socio-linguistics. All this added up to far too personal an accounting of my analytical practices to amount to a methodology. In need of authority for my interpretive readings of legislation, I set out in search of a sufficiently scholarly methodology.

This chapter details the methodology that I came to adopt – discourse theory – and my discovery that thinking about law in these contextualised ways has a happy home in the field of

Law and Society. As I worked on my material, I understood more and more the political expediency of Singapore's only Law Faculty excluding (at the time) the growing field of Law and Society from its curriculum. It is as Sundhya pointed out – method shapes knowledge in ways that threaten and implicate power.

In this following section, I summarise my doctoral project through a brief discussion of a statement on 'law' by Singapore's senior statesman, Lee Kuan Yew. From this framework of issues, I then launch a discussion of the methodological and theoretical concerns and choices that have shaped my work.

II. PARADOXES IN SINGAPORE LAW

In October 2007, 4,000 lawyers from more than 120 countries converged upon Singapore for the International Bar Association's (IBA)[2] annual conference.[3] The selection of Singapore as a venue had been controversial, with some members, and Singapore dissidents, protesting that the IBA was lending legitimacy to a regime that had systematically violated the rule of law. The conference aired these and other issues, from the air-conditioned comfort of Singapore's technologically superior conference facilities.

Singapore's elder statesman, Lee Kuan Yew,[4] delivered the keynote address at the opening session of the conference.[5] Lee's keynote was followed by a question-and-answer session at which Lee was asked to account for Singapore's problematic standing with regard to the rule

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[2] The IBA describes itself as the world's leading organisation of international legal practitioners, bar associations and law societies with a membership of 30,000 individual lawyers world-wide: <http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx>.

[3] "4,000 delegates from 120 countries" *The Straits Times* (16 October 2007).

[4] Lee Kuan Yew was prime minister of Singapore from 1959 to 1990. His successor, Goh Chok Tong, was selected by Lee to head a cabinet from 1990 to 2004, in which Lee held the newly-created cabinet position of Senior Minister. When Goh was succeeded as Prime Minister by Lee's son, Lee Hsien Loong in 2004, Goh became Senior Minister. Lee Kuan Yew now continues to be a member of cabinet, holding another newly-created position, that of Minister Mentor.

[5] Lee Kuan Yew, "Why Singapore is what it is" *The Straits Times* (15 October 2007).

of law.[6] Lee's response to this challenge was to pull out a series of tables citing Singapore's high rankings in rule of law and governance indicators as proof of the existence of the rule of law in Singapore.[7] According to press reports, the listening IBA members burst into laughter when he produced this statistical "evidence".[8]

That laughter can mean many things, of course – from admiration for the preparedness of a man who was prime minister for 31 years, to incredulity at the discursive minimisation of the 'rule of law' from a qualitative ideal to quantifying ranks and schemas. It is the range of meanings captured by this laughter – the Singapore state's strategic management of the ambivalence inherent to 'law' – that constitutes the primary focus of my doctoral project.

The ambivalence inherent to 'law' is the space between a Dicean ideal[9] and an instrumentalist legalism. The state's strategies that I focus upon are the use of legislative text and public discourse to re-constitute the meanings of 'law'. In other words, the primary research question informing the project is: how does the Singapore state maintain its legitimacy as a 'rule of law' polity despite its 'rule by law' practices?

Lee Kuan Yew's encounter with the IBA encapsulates the major issues addressed by my study. Through a socio-legal reading of legislation, the project analyses how a small, decolonised nation-state manages perceptions of state legitimacy – nationally and internationally – through talking about, and performing 'law' in certain ways. Public pronouncements on 'law', authoritatively delivered by state actors, have played a key role in re-configuring 'law' from a Dicean 'rule of law' to an instrumental 'rule by law'. I use the binaries 'rule of law'/ 'rule by law' throughout this paper as short-hands for these two modes of 'law'. Section VII below

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[6] Rachel Evans, "Singapore leader rejects Amnesty" *International Financial Law Review* (18 October 2007), online: <http://www.iflr.com/Article/1983342/Singapore-leader-rejects-Amnesty.html>.

[7] Evans, *supra* note 6.

[8] Evans, *supra* note 6.

[9] The Victorian jurist, A.V.Dicey is generally considered to have framed "the seminal modern definition of the 'rule of law'" (Kleinfeld 2006: 38). Dicey's definition required first, that there should be "no punishment without a preexisting law", which laws should be enforced by ordinary courts rather than special tribunals or government officials exercising discretion; second, that everyone is equal before the law, with a particular emphasis on the subordination of public officials to law, and third, that in the common law tradition, rights should be enforceable through courts: (Tamanaha 2004: 63-65).

expands upon my use of these terms. In keeping with sociological conventions, I mark with single inverted commas the terms I problematise as social constructs; terms such as 'law', 'nation' and 'race', along with other, related concepts.

The use of legislation (in tandem with public discourse) to alter the nature of state-citizen engagement is a second major state strategy addressed by the project. I trace the role of legislation in re-configuring the 'rule of law' egalitarianism of state-citizen relations into a 'rule by law' hierarchy in which silenced citizens are subordinated to an increasingly hegemonic state. Each of the Acts studied involves the state's use of legislation to constrain an institution with the capacity to challenge the state's command of the public domain.

A third major contention of my project is the instrumental effect, on 'law', of the state's pervasive narrative of national vulnerability. 'Law' is rarely discursively presented without a simultaneous invocation of 'nation', pertaining to the problem of vulnerable Singapore's "survival". Unsurprisingly, Lee's address to the IBA rehearsed this narrative strategy. Indeed, he opened his talk by characterising Singapore as a disadvantaged terrain with traumatic origins:

> [W]e were suddenly thrown out of the Federation of Malaysia…We faced a bleak future. We had no natural resources. A small island-nation in the middle of newly independent and nationalistic countries of Indonesia and Malaysia. To survive, we had to create a Singapore different from our neighbours – clean, more efficient, more secure, with quality infrastructure and good living conditions. (Lee 2007)

In addition to exploring the tropes of the discourse of national vulnerability, the empirical body of my project illustrates the range of state-serving uses to which 'law' has been put in order to secure the "survival" of the 'nation'.

The discourse of national vulnerability is typically presented as a legitimising rationale for two further features of the Singapore legal system: first, legal exceptionalism (ousting judicial

review and concentrating power in the executive on the grounds of national security); and second, dual state legality (Jayasuriya 2001:108). The dual state, in Jayasuriya's terms, is exemplified by Singapore's legal system in that it matches the 'law' of the liberal 'West' in the commercial arena while repressing civil and political individual rights. (These features are elaborated upon below at section VIII).

Lee's address to the IBA is consistent with this duality, and the state's use of legal exceptionalism as a justifying rationale. He described Singapore's legal system as "similar to" London and New York in terms of "laws relating to financial services", while characterising repressive, rights-violating legislation, such as the *Internal Security Act*[10] and the *Maintenance of Religious Harmony Act*,[11] as "special legislation to meet our needs" (Lee 2007). A major finding of my project is thus the manner in which the state employs a narrative it has constructed – the narrative of national vulnerability – so as to engender legitimacy for the Singapore state's bifurcated 'law'.

A fourth finding of the project consistent with Lee's keynote to the IBA is the pedagogical stance adopted by state actors when they instruct citizens, and the rest of the world, on state formulations of 'law'. The thesis examines the governmentality (in Foucaultian terms) of 'law' achieved through the state's instructional stance and demonstrates that, through employing legislation as a tactic of governmentality, the state enhances its control and management of citizens (Foucault 1991). Governmentality, as a concept, is defined and discussed below at section VI.

A final analytical strand threading through the project is the centrality of Lee Kuan Yew to 'law' in Singapore. At the IBA, Lee presented his credentials to speak on 'law' in a manner that asserted first, personal legitimacy arising from his legal professional qualifications; second, the legitimacy of Singapore 'law' arising from an English common law heritage; and third, a comity of values and practices with the First World:

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[10] *Internal Security Act* (Cap. 143, 1985 Rev.Ed.Sing.).
[11] *Maintenance of Religious Harmony Act* (Cap. 167A, 2001 Rev.Ed.Sing.) [*Religious Harmony Act*].

> I studied law in the Cambridge Law School and am a barrister of Middle Temple, an English inn of Court. I practised law for a decade before I took office in 1959 as prime minister of self-governing Singapore. Therefore I knew the rule of law would give Singapore an advantage in the centre of South-east Asia …Singapore inherited a sound legal system from the British. Clear laws, easy access to justice and an efficient legal system provide the basis for citizens to compete equally in the market and grow the economy. …Our laws relating to financial services are similar to those of leading financial centres such as London and New York. (Lee 2007)

It is striking that Lee describes the "sound legal system" in terms that meld 'rule of law' and 'rule by law' values. Clarity and accessibility are 'rule of law' values consistent with the Dicean ideal, as indeed, is efficiency; but the direction in which Lee takes this cluster of attributes is overwhelmingly instrumentalist – market competition and economic growth in the service of material prosperity.

More recently, Singapore's legal strategies have become a transferable commodity. Its legal system has been studied by China (Silverstein 2008: 98; Lee 2000:718) and Vietnam.[12] Singapore, through its access to the common law, and to 'Western' modes of building legitimacy, is positioned to instruct states without the same legal history, or the same sophistication in media-management (Woodier 2006:57) on how to structure a version of the 'rule of law' that negotiates international acceptability alongside high levels of state control of social actors with (actual or potential) political presence. Singapore's mode of legitimising 'rule by law' may seem like an aberrant situation-specific legality without transferability but the emerging practices of China, (Root and May 2006:304) for example, suggests otherwise. Singapore 'law' might well become the paradigm of the future for a range of regimes seeking to deliver material prosperity while consolidating the state's hold on power through constraining individual rights and controlling discourse on 'law'.

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[12] "Vietnam to Bolster Singapore Ties, Particularly on Law", *Thai News Service* (21 Aug 2007).

In summary, my project uncovers the manner in which the Singapore state uses legislation and state discourse to construct and sustain its claim to 'rule of law' legitimacy despite its 'rule by law' practices. The major findings that emerge from investigating this question are: first, the mutually constitutive relationship between legal text and the discourses of 'law' in constructing legal meaning; second, the subordination of citizens through legislation and state discourse designed to silence non-state actors; third, the instrumental applications of a narrative of national vulnerability in generating a dual state legal system; fourth, 'law' as governmentality; and fifth, the lasting impact of Singapore's first, and long-time lawyer-prime minister, Lee Kuan Yew, in formulating the bifurcations of 'law' in Singapore.

III. CONTEXTUALISING LEGISLATION

My methodological approach seeks to examine legislative and state discourse through the lens of language as social practise, analysing the way in which knowledge about the 'rule of law' and state legitimacy has been constructed through enactments and through discourse on 'law'.

As text, legislation has an oddly clean, a-historical appearance. Judgments, that other primary source of 'law' in a common law system, reveal argument and challenges to interpretation in a way that legislation does not. Legislation sits on the statute books stripped of history and of the challenges that might have informed the language that has come to be 'law'. By approaching legislation as textual moments in a narrative of state power, my project counters the a-historical appearance of legislation and draws attention to forgotten contestations that have marked the making of 'law': contestations rendered absent and invisible in legislation's final text.

Reading legislation in tandem with contextual discourse allows me to trace the history of the state's construction of a discursive definition of 'law'. This study reveals a pattern: facilitated by state dominance of the public domain, the state's meanings become entrenched in three related steps; first, state meanings are institutionalised through legislation; secondly, they are

normalised through reiteration in the public domain, and finally, when the state's inherently ideological definitions are adopted by the courts, they become even more legitimised, and are given the appearance of 'neutral' and self-evident 'truths'.

By situating the enactments in their particular historical contexts, I am able to consider the role played by narratives that contest state accounts, generated by non-state actors, at the time of law-making. The project demonstrates that counter-narratives have been either criminalised or radicalised as threats to national security. If a substantive version of the 'rule of law' depends, in part, on the presence and possibility of contestation in the public domain, then the state's re-framing of counter-narratives as de-stabilising and anti-national untruths is one indicator of legal instrumentality through discursive dominance.

In studying text in context and attending to discourse, the use of language relating to 'law' is a central concern of my project. The project is informed by critical theory on discourse and power. I rely broadly on the approach known as Critical Discourse Analysis introduced by Fairclough's *Language and Power* (1989) and primarily developed in his *Discourse and Social Change* (1992); *Media Discourse* (1995); and in Chouliaraki and Fairclough, (1999) *Discourse in Late Modernity: Rethinking Critical Discourse Analysis.* Critical discourse analysis offers methods and tools for analysing power relations and ideology encoded by language.

IV. DISCOURSE THEORY: TEXT, CONTEXT AND POWER

The term 'discourse', and the idea of discursive constructions of knowledge, have become commonplace in scholarly writing, although 'discourse' has largely been used in a taken-for-granted manner. In order to be clear on what I mean by 'discourse' and 'discourse theory', I first outline the parameters of discourse theory as I have applied it.

In discourse theory, language choices and power relations in society are seen as co-determined such that an analysis of communication in a particular social institution ties together the macro analysis of society with the micro analysis of particular texts. Thus, a close reading of a

legislative text, its conditions and contexts, validly enables a reading of 'law' and power relations in the Singapore state.

With discourse theory shaping my analysis, I do not focus just on the text of legislation: to do so would be to disengage legislation from the processes informing the textual product. Instead, I look to the conditions of production and interpretation of each of the legislative enactments and consider the ways in which the use of language relating to 'law' has been, and is, socially determined. I read the legislation and the contexts in which each Act came into being as a narrative of issues and resolutions; and as instances of the ways in which people construct and reconstruct social knowledge and power, via legal discourse, in the collective space of society.

V. LAW, LANGUAGE AND POWER

My assumption is that this collective space, society, is marked by a "dynamic formation of relationships and practises constituted in large measure by struggles for power" (Candlin 1989: vi). In other words, power in society is not equally distributed, nor is its distribution fixed. In terms of power relations, 'law' occupies a particular niche in the complex discursive networks of society. If, in modern societies, it is through discourse (rather than coercion) that the steering of social processes takes place (Strydom 2000: 9), then 'law', as the "uniquely authorised discourse for the state" (Post 1991: vii), has a particular capacity to be the means by which social processes are steered. While all discourse is a vehicle for the reiteration, contestation and negotiation of social categories and socially constructed knowledge (Strydom 2000: 1), legal discourse is especially expressive of elite formulations of social knowledge, elite efforts to manage contestations and negotiations. Given that 'law' is a discursive field especially contiguous with power, dismantling the positivist isolation of 'law' becomes especially important when reading legal texts as expressions of state management of legitimacy through 'law'.

Legal scholarship has recently come to approach 'law' as not just interacting with society, but as being in a relationship with society "mediated by or even constituted by language itself"

(Nelken 1996: 108). It is this focus on language that leads me to label the approach I take as 'discourse theory'. The recent cross-disciplinary focus on narrative, persuasion and rhetoric (Nelken 1996: 109) has meant that there is no single, neatly-contained theoretical model of discourse theory. Indeed, the plurality of approaches and applications is consistent with the postmodernist reflexivity that informs scholarly attention to the unfolding processes of communication, for which language is a vehicle. Postmodernist awareness dismantles the barriers that formerly held between disciplinary fields, adding to the richness with which language is understood as constituting, constructing and re-constructing society.

Literature in the field expresses the struggle inherent to approaching 'law' as discourse. Fundamental questions have arisen, even as to whether "conditions for a field of study of or for 'law as communication'" (Nelken 1996: 3) exist. Reviews of existing work on 'law' and discourse note that it is interdisciplinary fields, (such as law and language, law and literature, and the semiotics of law) that set out to examine law as communication (Nelken 1996: 5-13). In adopting an interdisciplinary approach, I perceive the fluidity inherent to a 'law' and discourse approach as a rich resource. This fluidity is a "problem" only if theory is expected to provide "a circumscribed explanation of its object that is universally valid in all circumstances" (Golder and Fitzpatrick 2009:3). If, on the other hand, 'law' and discourse is approached as offering 'a situated 'analytics' of power in diverse social practices" (Golder and Fitzpatrick 2009:4), then the absence of fixity might be perceived as a strength.

To approach 'law' as discourse involves some measure of engagement with the theories and concepts that inform these interdisciplinary fields, notably, the work of modern and postmodern social theorists who have focused on communication and discourse, such as Habermas, Luhmann and Foucault (Nelken 1996: 4; Fairclough 1989: 12-15). Arguably, it is the work of the social theorists Foucault and Habermas that has been most influential in launching the contemporary scholarly attention currently afforded to discourse. The Habermasian emphasis on the role of public discourse in securing democratic legitimacy (Habermas 1995), and his ideal of a "social system that guarantees basic civil rights and enables meaningful participation by all those affected by a decision" (Froomkin 2003:752) makes a close application of his conception of discourse problematic in the context of Singapore's

carefully managed public domain (George 2007) and minimally participatory democracy (Chua 1995). In addition, the colonial history of Singapore, and the impact of the particular events on state responses to 'law' and the public domain, (such as the Indian Mutiny/Rebellion on state responses to 'religion',[13] or the Malayan Emergency on state responses to 'law') speak of a different trajectory from that assumed in Habermas' work (Habermas 2006). There is also the risk that "under conditions of Western hegemony, Habermas's "impartial" procedures and "universally binding" communicative rationality … may mask both Western hegemony and non-Western cultural extinction" (Kapoor 2002:470) ;[14] a risk that perhaps accounts for the impoverishment of scholarship applying Habermasian democratic theory to the political contexts of the developing world.[15] I must however note that Habermas's "crucial insight…that a public sphere is constituted as a particular way of using language in public" (Chouliaraki and Fairclough 1999:5) informs this analysis of legal text and the attendant focus on state discourse.

In contrast to Habermasian theory, Foucault's conception of discourse seems particularly apt to understanding Singapore because of its focus on historical specificity and on how power informs discourse (Strydom:50). I should, however, explicate the manner in which Foucault's ideas inform this project. In their important new work, *Foucault's Law*, Golder and Fitzpatrick identify two approaches to Foucault in legal scholarship. The first they call an "exegetical or interpretive" approach which seeks to "locate the position of law within Foucault's …work …[and] synthesise Foucault's disparate statements on law or to explicitly (re)construct his overall position on law as a precondition to using his work" (Golder and Fitzpatrick 2009:5). The second approach, which Golder and Fitzpatrick call applied or appropriative,

> seeks to employ Foucaultian concepts and methodologies in the critical study
> of law …unencumbered by the exegetical debates around whether and to
> what extent, Foucault theorised law. … In doing so, they have developed a

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[13] *1858 Proclamation of Queen Victoria*, Straits Government Gazette Number 47, 19 November 1858, 245.

[14] There is a large literature softening and broadening the application of Habermasian theory on law, discourse and democracy, which space constraints prevent me from engaging with here. Some recent samples are: Apel 2007; Johnson 2006; , McCormick 2007; Prychitko and Storr 2007; and Von Schomberg and Baynes 2002.

[15] A recent example of the application of Habermas to the third world is Gillespie 2006, See also Kapoor 2002).

piecemeal Foucaultian jurisprudence which addresses a wide range of legal topics…Such an approach is entirely consistent with Foucault's oft-repeated methodological pronouncements on how he wished his work to be used – that is, as a 'toolkit' for activists, scholars and writers. (Golder and Fitzpatrick 2009:5)

I locate my scholarship within the second approach: applied or appropriative use of Foucaultian concepts and methodologies. In the same spirit of valuing and adopting the conceptual "toolkit" generated by prior scholarship, I use the term "hegemony" in a broad, everyday sense (to mean dominance) without engaging in the debates surrounding the strictly Gramscian sense of the term, just as I employ the concept of the public domain without engaging in the Foucault-Habermas debate. Instead, my focus is on Foucaultian approaches because the Foucaultian alertness to forms of knowledge and power that might be subjugated, disguised or hidden by dominant discourses is a particularly enabling approach in the context of the high level of state hegemony in Singapore. In keeping with a Foucaultian understanding of discourse, I also employ broadly his concepts of genealogy; conditions of possibility; disciplinary power; bio-power; and governmentality. Given my project's focus on the state's re-framing of the 'rule of law', governmentality – the "calculating preoccupation with activities directed at shaping, channelling and guiding the conduct of others" (Hunt and Wickham 1994:26) – is a concept that seems especially useful.

VI. GOVERMENTALITY

Governmentality represents a complex and diffuse, post-monarchical form of power by which people govern themselves and others. Foucault's concept of governmentality explores a range of ways in which power expresses itself in a dynamic that he described as triangular (Foucault 1991: 219-220):

> [W]e have a triangle: sovereignty, discipline, and governmental management, which has population as its main target and apparatuses of security as its essential mechanism.

Governmentality includes a range of ways in which states target populations and acknowledges "the multiplicity of forces acting on a given individual in any activity" (Dent 2009:135). The governmentality power complex is constituted by "institutions, procedures, analyses, and reflections …calculations and tactics" (Foucault 1991:208) and results in the construction of "specific governmental apparatuses alongside the development of complexes of knowledge", all of which are geared towards the state's control and management of populations (Foucault 1991:208). An important feature of governmentality relating to a study of 'law' and discourse is that governmentality embraces:

> both the (self-)governance of individuals (through internalised controls and the individual's discursive constitution – the conduct of conduct) and multiple government rationalities that are engaged in order to govern the population (Dent 2009:136).

One expression of governmentality is the state appropriation of the "political technology of pastoral power" embedded in "the pastoral promise of material salvation within the frame of the modern administrative state" (Golder and Fitzpatrick 2009:30-31). An application of Foucault's concept of governmentality is therefore especially apt for a study of legislation and discourse in Singapore because the Singapore state assumes an overtly pedagogical stance towards a population it discursively infantalises. The state's discourse, legitimating its legislative incursions into individual rights, repeatedly illustrates this stance. Augmenting the ascendancy the state accords itself is the state's consistent rehearsal of the discourse of national vulnerability, alongside the promise of continuing prosperity, as legitimising tropes when enacting 'law'. In other words, the state presents itself as shepherd, as the only social actor equipped to lead the vulnerable 'nation' to the protected pastures of wealth and social order.

With reference to Singapore however, an important qualification to add is that:

in most governmentalist analyses, there is no entity, called the "state", that consciously acts upon the population. Such a process would require that the state understands themselves as separate from the population (in the way that Machiavelli did – Foucault 1991). In governmentalist states, there are individuals who act according to their internalized norms to put in place, and perpetuate, strategies, tactics and practices that are aimed at the better "security" (in the wide sense of the word – Hunt and Wickham 1994: 54) of everyone in the population – including themselves. In a sense, we all are part of the state and act to perpetuate the strategies and tactics of our security.

As governmentality is historically specific, it has come about as a result of the conditions of possibility that existed in the (Western European) populations that gave rise to it. It arose out of the traditions and practices that existed before it (but was not "caused" by them). Those traditions and practices relate, in part, to the administrativist mode of governance – the mode that has received little attention in the literature. The repetition, and modification, of practices of governance in the West (since, for example, the passing of the 1689 Bill of Rights) means that few strands of the administrativist mode would remain.

The history of Singapore is such that it is likely that other traditions and practices support the motivations, practices and strategies of those who govern the city-state. At the very least, governmentality in Singapore will be different from that in England because those traditions etc are, in part, different. It may be possible to argue that these differences allow a "state" to exist within Singaporean governmentality – a state that is, to a degree, separate and can, therefore, act upon the population – this, however, may be seen as sufficiently different to other understandings of governmentality that it should not be termed governmentality.

> Particular practices of governance (akin to strands of the Western administrativist mode) within the actions of the Lee Kuan Yew and others may be sufficient, however, to consider the state as an actor itself; an actor that has appropriated some governmentalist practices (such as encouraging the self-regulating (economic) practices of *homo oeconomicus* – Foucault 2008: 226) but has retained that degree of separation necessary to act upon the population in certain limited but specific areas. (Dent 2009(b))

Bearing in mind both Dent's caution, and the continuing presence of the technologies, ideologies and practices of the colonial administrative state in contemporary Singapore (Jayasuriya 1999), and in keeping with my "appropriative" (Golder and Fitzpatrick 2009:5) approach to Foucaultian tools, I retain the term "governmentality" in my analysis.

Existing accounts of state legitimacy tend to focus on the centrality of material prosperity as a legitimising pillar. My discursive analysis of 'law' adds an important dimension to existing scholarship by attending to the manner in which an illiberal democracy turns to the same strategies of governance as liberal democracies. In other words, it is partly the governmentality of 'law' that constructs legitimacy for the state's 'rule by law'.

VII. GENEALOGIES FOR 'RULE OF LAW' AND 'RULE BY LAW'

1. 'Rule of Law'

Historical contextualising is called for in unpacking the meanings attaching to a highly contested term that is fore-grounded in this project: the 'rule of law'. The vast scholarship on the 'rule of law', while of immense value, has not been the concern of my thesis. Rather, working from the principle of language as social practice, my concern is with the meanings imported by the category 'rule of law' into the Singapore public domain.

Contextualising the 'rule of law' as a concept and an expression that entered Singapore's legal and public discourse through the transition from British colonialism to independent statehood, there can be no doubt that this term has been used to include the Enlightenment values and ideals inherent to understanding the 'rule of law as "a venerable part of Western political philosophy" (Carothers 2006:4). Indeed, the public, declaratory and symbolic legal texts of Singapore, such as the *Proclamation of Singapore*, bring the 'nation' into being as a 'rule of law' entity:[16]

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

As the voice of the 'nation', Lee marked Singapore's genesis through proclaiming 'democracy', 'independence', 'liberty', 'justice' and 'equality' as founding principles. The proclamation of these values was entirely consistent with constructing the emerging 'nation' along the lines of a 'Western' model. In legal text, these values have been expressed as the Fundamental Liberties promise of the *Constitution*.[17] If the Fundamental Liberties encapsulate and exalt the 'rule of law', then 'rule by law' is represented by the many qualifications and constraints that have (from 1965) incrementally rendered these liberties almost meaningless (Tan 2005:14).

But to return to the founding moments of the 'nation', if the Singapore state's account of history constitutes the 'nation' as already-always 'Western' (Ang and Stratton 1995), there can be little doubt that the language, concepts, and vision of 'law' are a similarly foundational claim to a 'Western' mode of state legitimacy. Despite the post-communist formulation of an 'Asian Values' argument against 'Western' liberalism in 'law' the Dicean ideals are, I would argue, entirely relevant to the complex of meanings carried by 'rule of law' in Singapore.

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[16] *Independence of Singapore Agreement 1965* (1985 Rev.Ed.).

[17] *Constitution of the Republic of Singapore* (1999 Rev.Ed.Sing.) [*Constitution*] Part IV.

Thus, the 'rule of law' as a content-rich ideal, signifying the protection of individual rights and liberties, informs Singapore's very existence as a nation-state and is incontrovertibly a part of Singapore discourse. Indeed, as the humanist text and values of the 1965 *Proclamation* and the *Constitution* reveal, Singapore 'law' has sought parity and comity with 'Western' 'law' from the inception of the 'nation'. And as Lee Kuan Yew's 2007 engagement with the IBA demonstrates, the state continues to claim membership of an international league of legitimacy. The state's retention and reiteration of 'rule of law' in its discourse conveys the continuing importance of 'rule of law' features in the state's management of its legitimacy.

2. 'Rule by Law'

I use the term 'rule by law' as the Other, so to speak of 'rule of law'. 'Rule by law', conveying the impoverishment of power-serving instrumentalism, is not an expression used by the Singapore state. It is, however, an expression used by scholars tracking modes of state legality characterised by efficiency, (Carothers 2006:5) and the subordination of 'law' to political power. In Singapore, if the 'rule of law' occupies public and declaratory spaces, then 'rule by law' is contained within the detail of legal text and practice; detail through which the Singapore state effects a re-scripting of the 'rule of law' content of the promise of 'nation'. It is the strategic re-scripting of the 'rule of law' into 'rule by law', while sustaining state legitimacy, that this thesis tracks and reveals.

It is befitting of the complexity carried by the many meanings of 'law', that if 'rule of law' attaches to Singapore's colonial history, so too does 'rule by law'. The colonial legal system governed through modernist, bureaucratic technologies that were, in essence, power-serving 'rule by law' (Furnivall 1956; Hooker 1988). Colonial legal instruments typify the governmentality of state control through licensing, co-option, and from 1915, surveillance (Ban 2002). Lee's assertion to the IBA that Singapore had inherited and built upon an "English' legal system is a mis-description. The legal system the British governed their colonies by was tailored for colonial purposes (Furnivall 1956; Hooker 1988). The legal system Singapore "inherited" from the colonial master arrived in Singapore via India (Hooker 1988).

There is thus, for Singapore, an important disjunction relating to 'law' in relation to 'nation'. Through colonisation, features of the modern nation-state, such as sovereignty, were transplanted but the more enduring structures of modern statehood entrenched by the colonial project derive from the "powerful illiberal ideological traditions" (Jayasuriya 2001: 114) drawn from the absolutist state:

> [T]he colonial state …facilitated the development of notions of executive power rooted in ideas of 'state prerogatives' that were formed within the womb of the absolutist state. The colonial state was pre-eminently an 'executive state' defined by the 'reason of state' juristic tradition. …The development of the post-colonial state in East Asia also has been greatly influenced by those aspects [a high degree of hegemony and autonomy] of the colonial state. For example, in Singapore the state has tended to justify the use of executive power in a manner reminiscent of the colonial state. …the post-colonial state could continue to be characterised as an executive state. (Jayasuriya 1999:178)

For Singapore, the executive state characteristics of colonial rule have been augmented by two further historical events: the legal exceptionalism of the Malayan Emergency;[18] and the Cold War context in which Singapore became a 'nation'. For now, in tracing the trajectories of 'rule of law' and 'rule by law' in Singapore, it is sufficient to note that 'rule by law' has been continuous from the colonial state to the nation state.

The one defining event that might have ruptured 'rule by law' and generated a groundswell of awareness for 'rule of law' individual rights – an anti-colonial battle for independence – did not occur in Singapore. The closest thing to a liberation movement was represented by the left-wing socialists and the communists in post-World War Two Singapore (Hong and Huang 2008; Harper 2001). But because of the Cold War anxieties of the time, the British allied with

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

the pro-'West' People's Action Party to repress the left-wing, smoothing the way for ideological continuity between the colonial state and the nation-state (Hong and Huang 2008; Harper 2001).

Thus it is that 'rule by law' has had a long and powerful presence in Singapore. The liberal humanism of the *Constitution* and the *Proclamation* sits like a thin, extremely fragile veneer upon deeply-rooted structures that counter and de-value the proclaimed democracy, liberty, justice and equality. 'Rule by law' has a far deeper legal tradition in Singapore than 'rule of law'; a tradition which possibly accounts for the sustained expression of 'rule by law' in the 'nation'. The post-communist account of the 'rule of law' as a technocratic assemblage of institutional attributes seamlessly extends Singapore's 'rule by law' into a new era of relevance and legitimacy without resolving the founding disjuncture between 'rule of' and 'rule by' law; a disjuncture arising from the critical difference between the colonial project and the national project: 'colony' did not promise democracy, independence, liberty, justice and equality. It is the project of 'nation' that has made these promises.

In summary, a particular complex of factors – colonial legality, the Cold War crucible of the nation-state's birth, the PAP-British alliance, and the post-communist valorisation of a technocratic 'rule of law' – have created the conditions of possibility for 'rule by law' in Singapore. Significantly however, because the nation-state has brought itself into being through claiming the 'rule of law', the Singapore state renders itself perpetually vulnerable to a 'rule of law' critique. It is this vulnerability that has led the state to turn repeatedly to legislation and public discourse to manage the ambivalent and paradoxical space between 'rule of law' and 'rule by law'.

VIII. 'RULE BY LAW' AND THE DUAL STATE

In his compelling analysis of 'rule by law' in Singapore, Jayasuriya adopts Fraenkel's concept of the Nazi dual state, combining "the rational calculation demanded by the operation of the capitalist economy within the authoritarian shell of the state" to argue that Singapore

exemplifies a contemporary dual state in which "economic liberalism is enjoined to political illiberalism" (Jayasuriya 2001:119-120). Jayasuriya presents Singapore's dual state legality as building upon the normalisation of legal exceptionalism. Legal exceptionalism, (understood as the authoritarian primacy of executive power through a suspension of individual rights and standard legal processes), entered the Singapore legal system through colonial ordinances designed for the Malayan Emergency. Jayasuriya argues that, building on the colonial model of state authoritarianism, the post-colonial Singapore state has frequently deployed executive power "in the name of public order and national unity" in a manner that constructs a culture of political and ideological homogeneity in Singapore, dismantling the autonomy of the judiciary in political matters (Jayasuriya 2001:109).[19] His characterisation of Singapore as a legal regime in which "the "rule of law" applies to the economy but not to the political arena" frames the argument of my project. The coexistence of 'rule of law' and 'rule by law' in a manner that represses individual rights and entrenches state power, while generating commercial success, goes towards the construction of state legitimacy through the vehicle of 'rule by law' in a dual state.

IX. CONCLUSION: AUTHORITY + REBELLION = ACTION

Finding my way to sociolegal approaches and discourse theory has required rebelling against my positivist, doctrinal legal education. For purposes of producing a doctoral dissertation however, rejecting the politically anaesthetising effects of growing up in a 'soft' authoritarian state has required more than the impetus to rebel. I have needed the authority of scholarly methodology to shape, express and locate the knowledge I have sought to produce. Rebellion, I have discovered, needs authority to effect action. And, just method has indeed proven to have been extraordinarily political.

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[19] With reference to Dicey's parameters for the 'rule of law', this results in a failure of the principle of the equality of the law if courts interpret 'law' so as to secure state hegemony. See also these studies of the Singapore judiciary: Worthington 2001; Sheehy 2004.

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