CRIMINALISING CRITIQUE OF THE
SINGAPORE JUDICIARY

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Despite its small size, Singapore occupies a position of special significance in the
debate on the relationship between economic development and political, social
and legal institutions. The ruling People's Action Party (PAP) of Singapore
legitimises its authoritarian political regime – and insulates it from substan-
tive scrutiny – via a three-pronged strategy: first, through its tightly controlled
media and communication channels; secondly, by delivering an admirable eco-
nomic performance and, creating and maintaining an awe-inspiring standard
of living; and thirdly – and most importantly – through its legal institutions.
However, there are profound logical flaws and stark absences of consistency
in the judgments that help secure this legal state of affairs. This article confines
its analysis to the criminal offence of scandalising the judiciary, in the context
of critical reporting of the judgments in political defamation cases in Singapore.

Introduction

Freedom of expression in Singapore is a constitutionally-recognised, but
heavily qualified, right under the Singapore Constitution. The Singapore
judiciary has shown ostensible recognition of the constitutional right of
freedom of expression in several of its judgments, albeit with huge res-
ervations as to the remit that should be accorded to it. And because the
judiciary is the final arbiter on constitutional issues in Singapore, it has
at stake its reputation of impartiality. This must be vigorously defended
when adjudicating on politically sensitive cases where political defama-
tion actions are successfully brought by incumbent government leaders
against political dissidents.

This is where the law of contempt of court assumes crucial importance
for the purposes of upholding the integrity of the administration of justice

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dication in Singapore is confined to the process of judicial decision-making and the extent of
explicit or apparent judicial reasoning in the relevant judgments. This article does not make
any reference to, or cast any aspersions on, the personal character of anyone or institution. It
does not make any imputation or insinuation of any motives to any member of the Singapore
judiciary or anyone taking part in the administration of justice in Singapore. Neither does it
impugn the integrity, propriety, impartiality, independence of the Singapore judiciary or the
administration of justice in Singapore.
in Singapore. One could be tempted to speculate on the partiality or otherwise of the Singapore judiciary in moulding the law of contempt of court.

However, this article does not seek to do any of this, nor does it intend to. Instead, it seeks to examine and analyse the jurisprudence and legal decision-making process of the courts in proceedings pertaining to the offence of contempt by scandalising the court.

A brief survey of the underlying political context and history of political defamation in Singapore is, however, necessary to help readers fully appreciate the perceived concerns and attention that the judiciary of this small island-state is increasingly attracting worldwide.

Political Ideology

Singapore's constitutional and legal history is relatively short. Its political landscape has been overwhelmingly stable throughout, with the People's Action Party (PAP) dominating government since 1959. As a Westminster-style government, Singapore has essentially adopted a parliamentary constitutional democracy where the basic notions of separation of powers, limited government and constitutional supremacy are entrenched in its Constitution. Individual fundamental liberties institutionally enshrined in the Constitution bear ostensible testament to a modern constitutionalist attitude towards human rights and their protection in society. To date, however, no legislation has ever been successfully struck down by the courts.

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1. See generally Kevin Y.L. Tan, An Introduction to Singapore's Constitution (Singapore: Talisman Publishing, 2005), pp 16–31. In 1958, the Colony of Singapore was transformed into a self-governing state with the offices of the Head of State and Prime Minister created. The People's Action Party (PAP) won the 1959 election and Mr Lee Kuan Yew became Singapore's first Prime Minister. A new state Constitution was granted to Singapore when Singapore merged with the Federation of Malaya in 1963 to form the Federation of Malaysia. Due to certain irreconcilable political differences, Singapore separated from the Federation and achieved its independence in 1965. The Singapore Constitution today is largely birthed from the recommendations found in the Wee Chong Jin Commission formed in 1965.

2. Today, the PAP holds 82 out of 84 seats in Parliament. Throughout Singapore’s post-independence history, the opposition has not once won more than three seats in Parliament at any one time.


“This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”


5. See Constitution, arts 9–16.


7. The only occasion the court has held that a legislation was unconstitutional can be found in Taw Cheng Kong v Public Prosecutor [1998] 1 SLR 943. It was reversed on appeal to the Court of Appeal: see Public Prosecutor v Taw Cheng Kong [1998] 2 SLR 410.
The political ideology of the ruling party is unique. It is essentially neo-Confucianist, communitarian and pragmatic, formulating what was described as “Asian” democracy. Perhaps due to such uniqueness, it has sparked controversies of varying intensity both domestically and internationally. This is notwithstanding Singapore’s track record of receiving laudatory international reports extolling the virtues of its effective and efficient political governance, as well as its economic prosperity.

For instance, in its July 2008 report the International Bar Association Human Rights Institute mounted a strong criticism of the PAP’s hegemonic stance towards the opposition as well as the legal profession.

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11 It was ranked 5th in the Transparency International Corruption Perceptions Index 2006. In the same index, Malaysia was ranked 44th, Indonesia 130th, Thailand 63rd, and the Philippines 121st. It was also ranked 5th in the Transparency International Corruption Perceptions Index 2005. In the same index, Malaysia was ranked 39th, Indonesia 137th, Thailand 59th, and the Philippines 117th. See Transparency International, available at http://www.transparency.org/news_room/in_focus/2006/cpi_2006_1.

12 For a small nation with an estimated population of 4.5 million, Singapore’s Gross Domestic Product was ranked 44th by the International Monetary Fund in 2006, and 41st by the World Bank in 2005. In United States dollars, its GDP per capita was ranked 25th out of 180 members of the International Monetary Fund, at close to US$30,000. At GDP at purchasing power parity per capita, Singapore was ranked 17th out of 179 members by the International Monetary Fund in 2006.
in Singapore. Singapore has also consistently scored below average for freedom of speech accorded to its people.

Political Dissent and Political Defamation Suits

Political dissent is not freely tolerated. This is in light of politicians’ practice of suing opposition politicians for defamation whenever the occasion justifies such actions, or whereby the Attorney-General moves the courts for orders of committal against publication that are deemed to scandalise the Singapore judiciary. Such practice has been, and continues to be, seen as imposing a “chilling effect” on the right to free speech as enshrined in Art 14 of the Constitution.

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15 The Singapore government has recently liberalised the rules governing Singapore citizens’ right to demonstrate at the Speakers’ Corner with effect from 1 Sept 2008: see “Ban on outdoor demos eased from Monday”, Straits Times, 26 Aug 2008 (Factiva); “Hearty buzz at speakers’ corner”, Straits Times, 2 Nov 2008 (Factiva).


17 Constitution, art 14(1)(a) provides that “every citizen of Singapore has the right to freedom of speech and expression”.
There are consistent criticisms that the frequent use of defamation actions by the Singapore political leadership against both the opposition and newspapers silences political dissent from within and without. Accusations have been made that the trend of political defamation actions violates the fundamental constitutional right to freely hold and peacefully express one’s political opinions and constitutes severe restrictions on the freedom of expression that cannot be justified under international standards.\textsuperscript{18}

For example, Amnesty International said that, “this pattern of defamation suits has been both unnecessary and disproportionate and that, by undermining the requisite balance between the right to protection of reputation and the right to free speech, has amounted to a violation of the fundamental right to freely hold and peacefully express one’s opinions”.\textsuperscript{19} Lawyers Rights Watch Canada also expressed concerns that “[t]he right to express oneself freely in public without fear of reprisal has been severely compromised in Singapore”.\textsuperscript{20}

\textit{Governing Politicians’ Total Record of Winning in Singapore Courts}

The frequency of resorting to defamation actions in Singapore can be traced to the 1970s.\textsuperscript{21} The success rate of such deployment is overwhelming and total. No PAP political leader has ever lost a defamation action against an opposition leader in Singapore courts.\textsuperscript{22} No foreign publisher has ever successfully defended a defamation action brought by a governing Singapore political leader in the Singapore courts.\textsuperscript{23}

The Singapore courts have awarded very heavy damages. In a number of cases, due to failure to pay crippling damages, enforcement proceedings have been taken out, resulting in highly-publicised successful bankruptcy proceedings against prominent opposition leaders.

\textsuperscript{18} Amnesty International, “Singapore: J B Jeyaretnam — the use of defamation suits for political purposes” (n 10 above).

\textsuperscript{19} Amnesty International, “Singapore: Defamation suits threaten Chee Soon Juan and erode freedom of expression” (n 10 above).

\textsuperscript{20} “Singapore’s High Court Denied Trial to Opposition Leader in Defamation Case”, The Canadian Press, 4 Apr 2003 (Factiva).


\textsuperscript{23} See, eg, “Singapore authorities use libel law to silence critics” (ibid.).
For instance, it was reported that J.B. Jeyaretnam paid more than S$1 million to satisfy defamation awards against him. On 23 July 2001, after Jeyaretnam’s bankruptcy appeals were dismissed by the Court of Appeal, he was disqualified from his seat as a non-constituency member of Parliament, as well as from his law practice. Jeyaretnam’s application for an early discharge from bankruptcy, which was opposed by his creditors and the Official Assignee, was rejected. It was not until 2007 that he was successfully discharged as a bankrupt.

This, in turn, attracted criticism that it constituted an abuse of the bankruptcy law for political purposes. On 23 Mar 2002, the Governing Council of the Inter-Parliamentary Union adopted a resolution expressing deep regret that Jeyaretnam had been removed from Parliament, and stated that “the sequence and timing of the defamation and bankruptcy proceedings brought against Mr Jeyaretnam suggest a clear intention to target him for the purpose of making him a bankrupt and thereby removing him from Parliament.”

On the other hand, the few defamation actions commenced by opposition members ended in dismissals of their claims.

All this fuels the allegation that the law of defamation, and its frequent employment, produces a chilling effect. It engenders a general sense of intimidation and a climate of self-censorship in Singapore.

The political leadership’s response to this is equally robust, at times branding such criticisms as political interference. For example, the then Minister for Foreign Affairs, Professor S. Jayakumar, argued that defamation actions were an “established part of Singapore’s political culture that seeks to maintain a high standard of truth and honesty in politics”, and essentially constituted a vindication before the electorate.

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25 See Constitution, art 45(1)(b).
28 “JP looking to set up new political party”, Straits Times, 21 May 2007 (Factiva).
31 This does not take into account possible case(s) that might have been settled out of court.
32 See Jeyaretnam J B v Goh Chok Tong [1984–1985] SLR 516 (the defendant was then the Minister for Defence). This dismissal was affirmed on appeal: see Jeyaretnam J B v Goh Chok Tong [1986] SLR 106 and Jeyaretnam Joshua Benjamin [1989] 2 SLR(R) 130. See also Workers’ Party v Teo Boon Too [1972–1974] SLR 621 (where the defendant was a PAP member).
The “Sanctity” of the “Integrity of Institution” in Singapore

The above must be viewed in the context of what is constantly purveyed in the domestic media, which is subject to a tightly calibrated regime of control.

The first foundational myth is that “public institutions are autonomous, efficient and administered by a meritocracy”, whereby “the integrity of any institution is directly linked to the character of its officials and vice versa”. Thus, the “integrity” of any institution must not be subject to any manner of “damaging critique”.

The second myth “posits that unless all politics is channelled through clearly defined and regulated formal political institutions then Singapore’s social and political stability will be at risk”. Rodan argues that “[c]learly the PAP’s determination to insulate its foundational myths remains resolute and attempts to challenge these continue to attract a harsh response from Singapore’s authorities”.

This is apparently achieved by the PAP by developing and promulgating legislation and rules that intimidate the opposition – but, and this is a critical point, not without drawing legitimacy from their endorsement and enforcement by the Singapore judiciary.

Scandalising the Singapore Judiciary as Political Reinforcement

There has been significant litigation in Singapore on speech alleging executive bias on the part of Singapore judiciary over the last three decades. Such allegations are said to scandalise the Singapore judiciary – an archaic phrase which embodies “[a]ny act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority”.

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36 Ibid.
38 Gordon Silverstein, “Singapore: the exception that proves rules matter” in Tom Ginsburg and Tamir Moustafa (eds), Rule by Law: the Politics of Courts in Authoritarian Regimes (Cambridge: Cambridge University Press, 2008), p 96: “Singapore has also developed, promulgated, debated, approved, and enforced a number of other laws and rules that make it difficult for the opposition—and therefore the courts, again, to play a role in this process. Not by skewing or ignoring the law, but by enforcing it.”
The Singapore Courts have dealt firmly with these contemptors in the contempt of court committals taken out; shaping a jurisprudence that places determinative weight on the public interest of maintaining the good public perception of its “integrity and impartiality”\textsuperscript{41} – at the expense of the freedom of political speech and critical reporting.

\textit{The Official Rationale}

The jurisdiction to punish for contempt is “not a new-fangled jurisdiction; it is a jurisdiction as old as the common law itself, of which it forms part”.\textsuperscript{42} In fact, Singapore has accorded this jurisdiction statutory and constitutional recognition. Article 14(2)(a) of the Singapore Constitution sanctions contempt of court as a restriction to the freedom of speech and expression protected by Art 14(1)(a).\textsuperscript{43} The Parliament has given effect to this by providing that both the Subordinate Court\textsuperscript{44}

\textsuperscript{41} Attorney General v Chee Soon Juan [2006] 2 SLR 656, para 25.

\textsuperscript{42} See n 40 above.

\textsuperscript{43} See Attorney General v Wain and Others (No 1) [1991] SLR 383 and Attorney General v Lingle and Others [1995] 1 SLR 696. Art 14 of the Constitution states:

\textit{Freedom of speech, assembly and association
14. —(1) Subject to clauses (2) and (3) —
(a) every citizen of Singapore has the right to freedom of speech and expression;}

\text{...}

\textit{(2) Parliament may by law impose —
(a) on the rights conferred by clause (1) (a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence [This is an important provision for this article – could it be highlighted in the body and not only in the footnote];}

\text{...}

\textsuperscript{44} Consisting of the District Courts, Magistrates’ Courts, Juvenile Courts, Coroners’ Courts and Small Claims Tribunals: see Subordinate Courts Act (Cap 321, 2007 Rev Ed Sing), s 3(1). Section 8 of the same statute states:

\textit{“Contempt
8. —(1) The subordinate courts shall have power to punish for contempt of court where the contempt is committed —
(a) in the face of the court; or
(b) in connection with any proceedings in the subordinate courts.
(2) Where contempt of court is committed in the circumstances mentioned in subsection (1), the court may impose imprisonment for a term not exceeding 6 months or a fine not exceeding $2,000 or both.
(3) The court may discharge the offender or remit the punishment if the court thinks it just to do so.
(4) In any case where the contempt is punishable as an offence under section 175, 178, 179, 180 or 228 of the Penal Code (Cap. 224), the court may, in lieu of punishing the offender for contempt, refer the matter to the Attorney-General with a view to instituting criminal proceedings against the offender.”

See also Criminal Procedure Code (Cap 68, 1985 Rev Ed Sing), s 320 which provides for the procedure as to offences committed in a court other than a High Court.
and the Supreme Court\textsuperscript{45} have the jurisdiction to punish acts of contempt.\textsuperscript{46}

It is said that the rationale behind the law of contempt is “not to vindicate the dignity of the court or the person of the judge, but to prevent undue interference with the administration of justice”,\textsuperscript{47} as well as to preserve public confidence in the integrity and competence of the judiciary so as to facilitate effective and efficient administration of justice.\textsuperscript{48}

It is therefore not uncanny practice for the same judge in whose presence a court has been allegedly criticised contemptuously to hear a contempt proceeding flowing from the same incident that brought the contempt hearing into existence.\textsuperscript{49}

In view of the importance of the public interest in protecting the administration of justice, “the law of contempt has been considered, not just in Singapore, but in other jurisdictions as well, to be a justifiable restriction on the right to freedom of speech”.\textsuperscript{50} An action for contempt of court may be commenced by the Attorney-General\textsuperscript{51} or commenced

\textsuperscript{45} Consisting of the High Court and the Court of Appeal of Singapore: see Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed Sing), s 7(1) which states:

“Contempt
7. —(1) The High Court and the Court of Appeal shall have power to punish for contempt of court.

(2) Contemptuous disposal by a person, otherwise than in accordance with law or by leave of the court, of any property attached in his hands or under his control by a notice of court, shall be deemed to be contempt.

(3) Contemptuous disposal by a corporation to any order punishable by attachment may be punished by attachment of the directors or other officers of the corporation who are responsible for, or are knowingly a party to, such willful disobedience.”

\textsuperscript{46} See, eg, Lee Hsien Loong v Singapore Democratic Party and Others [2009] 1 SLR 642, para 223. The defendants were charged and convicted with disobedience of court orders such that administration of justice was interfered with (paras 204–205) and scandalising the court (paras 206–219). See also Annexes A and B of the judgment for details of the charges.


\textsuperscript{48} See also the Law Minister’s interview in “Integrity of judiciary must be protected”, Straits Times, 5 June 2008 (Factiva).

\textsuperscript{49} See Lee Hsien Loong v Singapore Democratic Party (n 46 above), para 155 onwards. At para 159, Belinda Ang J said: “I was of the view that it was not only proper but also imperative for the court, on its own motion, to cite [an alleged contemnor] for contempt”. Later at para 178, Ang J also reiterated V.K. Rajah J’s judgment in You Xin v Public Prosecutor and another appeal [2007] 4 SLR 17 that “as each case of contempt was different, the judge before whom the alleged act of contempt should be exercised only when it was in a much better position than any other judge to assess what was required to be done to safeguard the court’s authority, and his decision to exercise the summary power to punish for contempt of court of his own motion was unfettered, save that the power should not be invoked lightly”. See also para 202 where Ang J cited her own reasons in justifying her refusal to refer the committal proceedings to another judge.

\textsuperscript{50} Hertzberg Daniel (n 47 above), para 21.

against an alleged offender by the court making an order of committal on its own motion.\textsuperscript{52} 

While specific examples of contempt are multitudinous, contemptuous acts are generally classified into two broad categories, namely: (i) contempt by interference, and (ii) contempt by disobedience.\textsuperscript{53} The former is thought to be sufficiently wide to encompass both contempt in the face of the court and contempt by way of scandalising the court.\textsuperscript{54}

The following section focuses on the Singapore judiciary’s reaction towards selected instances of critique alleged to have committed the offence of scandalising the court.

\textit{Dealing Firmly with Contemnors – Punishing the “Unknowing” Reporter and Publisher}

A string of case authorities demonstrates that a reporter or publisher of an offending article will be guilty of contempt of court even when he, she or it had no knowledge – much less the intention – of committing an act which has the effect of scandalising the court.

In Attorney-General \textit{v} Pang Cheng Lian and Others,\textsuperscript{55} two persons and a company were charged for contempt of court for the publication of an article entitled “Singapore – Selective Justice” in a 1974 issue of Newsweek. It was alleged to have the effect of scandalising the court of Singapore.\textsuperscript{56} The article referred to two defamation suits\textsuperscript{57} which had been consolidated earlier on and instituted in the High Court by the Workers’ Party (an opposition party) against a candidate of the PAP, Tay Boon Too, and the Attorney-General in his representative capacity representing the Department of Broadcasting, Ministry of Culture. The disputed article alleged, \textit{inter alia}, that:

“the Singapore High Court by its decision in the Workers’ Party defamation actions did little to dispel the notion long charged by critics that the courts


\textsuperscript{53} You Xin \textit{v} Public Prosecutor and another appeal (ibid.), para 16. See also “What qualifies as contempt of court”, Straits Times, 15 June 2008 (Factiva).

\textsuperscript{54} You Xin \textit{v} Public Prosecutor and another appeal (ibid.), para 16.

\textsuperscript{55} See n 40 above.

\textsuperscript{56} Ibid. p 667.

\textsuperscript{57} These suits arose out of a speech by Tay Boon Too at an election rally during the 1972 general elections which was broadcasted by the Department of Broadcasting. See Workers’ Party \textit{v} Tay Boon Too [1972–1974] SLR 621.
of this country are little more than extensions of the one-party system ... [and] 'chose to turn a blind eye to all precedents'.

Finally, the article ends with a shocking allegation namely, that 'in the courts in Singapore it makes a vital difference whether it is the government or the opposition that is in the dock'.

The presiding judge, Wee Chong Jin CJ, had little difficulty in holding the article as "a deliberate and unwarranted attack upon the impartiality of the learned judge hearing the Workers' Party defamation actions". Wee CJ remarked that the article constitutes a:

"grossly offensive allegation [which] imputes to the judiciary of this country a complete lack of impartiality in every [sic] in which the parties before the court are the government and a party in opposition to the party in power and that the courts of this country have been, and will always be biased and partial in favour of the government. In my opinion this allegation attacking the whole of the judiciary of this country is the worst form of 'scandalising' of the court meriting the infliction of a severe penalty." (emphasis added)

All the respondents were found liable because they could "fairly be said to bear some real responsibility for the publication".

This meant that freelance journalists and reporters can be held liable for contempt of court even where they merely provided inaccurate background information to news publishers, and even though they did not become the authors of the offending article. However, it remains unclear what kind of inaccurate information is sufficient to render a reporter liable.

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60 Ibid. p 666, quoting from Lord Golddard CJ in R v Griffith [1957] 2 QB 102, 205.
61 The first respondent, Pang Cheng Lian, was employed as a part-time reporter or stringer by the proprietors of the Newsweek magazine. He was found to be liable even though he was not the author of the article and merely volunteered matter which was inaccurate and irrelevant. The learned Chief Justice subsequently emphasised the "necessity for part-time reporters of foreign publications imported here which have no responsible editor or manager in this country to send accurate and, so far as possible, complete material to their foreign employers for use or publication." See ibid.
62 See F.A. Trindade and H.P. Lee, "Freelance Journalists and Contempt of Court" (1975) 17 Malayt L Rev 233, 236. The learned authors of the article further criticised the criterion laid down by the Chief Justice as "scanty and/or inaccurate".
The saga continued in Attorney General v Wong Hong Toy. The respondent published a letter titled “Appeal from the Workers’ Party” which was alleged to be calculated to bring F.A. Chua J and/or the judiciary into contempt, or to lower his or its authority.

The letter appealed to the public for donations to the Workers’ Party, referring to two defamation actions in Workers’ Party v Tay Boon Too whereby the actions were dismissed with costs awarded against the Workers’ Party. The Court of Appeal dismissed the appeal by the Workers’ Party. The letter stated, *inter alia*:

“Mr Tay’s statement was broadcast over the radio in all the four languages. This was completely untrue and Mr Tay Boon Too did not seek to prove in the court that his statement was true. The court, however, dismissed the Workers’ Party’s actions against Mr Tay and the government and ordered the party to pay their costs. The party appealed to the Court of Appeal but the appeal was also dismissed and the party was ordered to pay the costs of the appeal. It is for the payment of these costs that the Official Receiver has been appointed.

... The [Workers’] party will not be able to carry on with its work of providing an alternative government for our people if these costs are not paid. We therefore appeal to all Singaporeans who believe that there should be more than one political party in Parliament to help us in our struggle to bring this about.

... We remain confident that our friends and supporters all over Singapore will help us now in our struggle for them to establish Parliamentary democracy in this country of ours.”

The court found that:

“[t]he sting is in the use of the word ‘however’, made worse by the words ‘but ... also’ ... I give the word ‘however’ its natural and ordinary meaning. In the context it is used it means ‘in spite of’ or ‘nevertheless’. The words ‘but ... also’ in the sentence, ‘The Party appealed to the Court of Appeal...”

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64 F.A. Chua J was the presiding judge in the defamation suit of Workers’ Party v Tay Boon Too [1972–1974] SLR 621.
67 See n 63 above, p 400.
but the appeal was also dismissed….’ means ‘in addition to’ or ‘likewise’. Taken together, [the letter] state[s] that Mr Tay’s statement did not seek to prove in the High Court that his statement was true, that in spite of it the High Court dismissed the case, and that, in addition to it the Court of Appeal dismissed it. The imputations are clear. The learned Attorney-General has dealt with them fully. I adopt them here. Accordingly, I hold that in the letter of appeal are matters calculated to bring the judiciary in Singapore into contempt.”

The court went further:

“If the true facts were told the appeal to the public for donations to the party will be a flop. Undoubtedly therefore the letter of appeal was made and published at the expense of lowering the authority of the courts.

…

In my view it is bad enough that the letter of appeal imputes that the Workers’ Party had been unfairly treated by the courts. What is objectionable in the highest degree here is that the respondent has drawn the courts into the political arena and used them to further the party’s political ends. It is this conduct of the respondent that is to be deplored and condemned.”

These are very harsh words to be used by the courts against the contemnors, noting that some of these contemnors were largely “innocent” in the sense that they had no knowledge or intention of scandalising the court.

**The Illiberal Inherent Tendency Test**

This strict approach is consistently adopted and seemingly tightened by the Singapore judiciary, as seen from the subsequent cases of *Attorney General v Wain and Others (No 1)* and *Attorney General v Lingle and Others.*

In *Wain (No 1),* five respondents were convicted for publishing an article in the Asian Wall Street Journal relating to the case

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69 Ibid. p 407.  
of Lee Kuan Yew v Derek Davies and Others. The presiding judge, Sinnathuray J, in following Pang Cheng Lian, laid down the principles of the law of contempt which made it relatively easy to convict the accused of contempt:

"it is settled law that any publication which alleges bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function which has terminated is a contempt of court.

Next, it is not a requirement in our law ... that in contempt proceedings it must be proved that the publication constitutes a real risk of prejudicing the administration of justice. In my judgment, it is sufficient to prove that the words complained of have the inherent tendency to interfere with the administration of justice." (emphasis added)

Sinnathuray J readily concluded that the law of contempt, at least as it pertains to scandalising the judiciary, is settled law.

However, this was done without much discussion as to the previous authorities in Singapore. Instead of stating the existing law, Sinnathuray J seemed to have changed the law into one which was stricter than the original formulation in Pang Cheng Lian.

Upon closer examination, Wee CJ in Pang Cheng Lian did not lay down any general formulation relating to the law of contempt. Sinnathuray J had unfortunately given no clue as to which authority he was relying on for this proposition. Despite this, the formulation has been retained and applied in several cases such as Attorney-General v Chee Soon Juan, Attorney-General v Hertzberg Daniel and Others and Attorney-General v Tan Liang Joo John.

As a result, the Singapore courts have not only insisted on the label "inherent tendency test", but also made sure that the substance of the test follows what its name literally suggests. This effectively forecloses the argument that a "real risk" test (which is currently preferred by

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73 [1990] SLR 1063. This case is a defamation suit taken out by the then Prime Minister Lee Kuan Yew against Far Eastern Economic Review in which the court ruled in favour of the former, awarding aggravated damages against the latter.
75 Sinnathuray J opined that Pang Cheng Lian had effectively settled the law of contempt relating to scandalising the judiciary in Singapore. See Wain (No 1) (n 70 above), p 397.
78 [2009] 2 SLR 1132.
many common law countries) could be read into the label preferred by the courts.

The present test for liability is thus whether a statement has an inherent tendency to interfere – not a real risk of interfering – with the administration of justice, the question of real risk merely affects the measure of punishment.

Officially, the reasons for retaining the inherent tendency test are twofold. Firstly, there is a perceived need to impose prior restraint on potentially deleterious contemptuous conduct as well as to avoid the perceived impossible task of calling for detailed proof of “what in many instances will be unprovable, namely, that public confidence in the administration of justice really was impaired by the [contemptuous conduct]”. Secondly, there is a strong perception that Singapore is unique in its “local conditions”, so that foreign decisions adopting the more liberal “real risk” test are unhelpful for the purposes of local jurisprudence. Indeed, the High Court in Wain (No 1) declined to follow contrary foreign case authorities on this basis. Subsequent local decisions have also followed the approach adopted in Wain (No 1) without much rigorous reasoning.

A few observations are pertinent. First, the courts evinced acute Nationalism by seizing upon textual differences in legislative and constitutional materials between Singapore and foreign jurisdictions. The High Court refused to consider the Canadian authorities raised by counsel on the grounds that such decisions “are not useful authorities in Singapore for they are decisions based on the Canadian Charter of Rights and Freedoms which has no parallel in Singapore.” This dismissive stance is rarely seen in other areas of law in Singapore, which fairly extensively cite foreign authorities. The Singapore courts have unfortunately not furnished any reason for this jarring inconsistency in consideration of foreign authorities.

Secondly, the courts seemed to seize upon recent legislative developments in foreign jurisdictions as a distinguishing factor to deny application

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79 See, eg, R v Kopito 39 CCC 1.
81 Wain (No 1) (n 70 above), p 397E–F; Attorney-General v Chee Soon Juan (n 51 above), para 31; Hertzberg Daniel (n 47 above), paras 27, 31; Attorney-General v Tan Liang Joo John (n 78 above), para 12.
82 Hertzberg Daniel (n 47 above), para 34.
83 Ibid. para 33.
84 Wain (No 1) (n 70 above), p 393G.
of their case law in Singapore, preferring instead a crude “guillotine” approach to weed out post-legislative-development case authorities from abroad. For instance, Sinnathurai J in Wain (No 1) held:

"Concerning the English cases, those from the beginning of the last decade onwards are, in my view, of no guidance to me on the law of contempt applicable in Singapore. This is because our law of contempt of court is derived from the common law of England before major changes were affected to this law by statute in England. The change was made, following the recommendations of the Phillimore Report, by the enactment of the Contempt of Court Act 1981 which, in codifying the law, has changed the common law. Another change is that the United Kingdom is now bound by the decisions of the European Court of Human Rights ... These changes have materially affected the application of the law of contempt of court in the administration of justice in England."85

However, as recognised by Lai J in Attorney-General v Chee Soon Juan,86 the offence of scandalising the court in the United Kingdom is not regulated by the Contempt of Court Act 1981: "[a]dmittedly, the UK position on scandalising the court still falls to be regulated by the common law since the 1981 UK Act does not address the offence of scandalising the court."87 Therefore, the post-legislative developments in case law pertaining to the offence of scandalising the judiciary should still be of relevance. Unfortunately, Lai J eventually decided to reject the recent case authorities from the United Kingdom by pointing out that:

"the UK’s accession to the European Convention on Human Rights and Fundamental Freedoms ... has indirectly incorporated the jurisprudence of the European Court of Human Rights ... and pegs the UK position on the offence of scandalising the court to the standard imposed by the European Convention."88

The rejection of case authorities from the United Kingdom is therefore premised upon its accession to the European Convention on Human Rights and Fundamental Freedoms.89 Lai J seemed to have overlooked

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85 Ibid. p 393D-F.
86 [2006] 2 SLR 650.
87 Ibid. para 23.
88 Ibid.
the fact that, in effect, all the case authorities in all areas of law in United Kingdom are influenced by the decisions of the European Court of Human Rights. In that case, it would mean that all UK cases decided after the accession to the European Convention would have to be rejected.

However, this is not the case, since many recent UK cases are relatively unreservedly considered in many other areas of law in Singapore. This inherent inconsistency is unfortunately not explained.

Before leaving this discussion, an even more fundamental point should be examined. In Attorney-General v Hertzberg Daniel and Others, Tay J reiterated some judicial opinion on the nature of the “local conditions” that made Singapore so unique that foreign decisions adopting the “real risk” test must not be followed locally:

“I agree with the AG that what are acceptable limits to the right to freedom of speech and expression imposed by the law of contempt vary from place to place and would depend on the local conditions (McLeod v St Aubyn [1899] AC 549; Wain ([13] supra) at 393–394, [29]–[34]), as well as the ideas held by the courts about the principles to be adhered to in the administration of justice (Re Tan Khee Eng John [1997] 3 SLR 382 at [13]). As pointed out by Lai J in Chee Soon Juan ([17] supra at [25]–[27]), conditions unique to Singapore (ie, our small geographical size and the fact that in Singapore, judges decide both questions of fact and law) necessitate that we deal more firmly with attacks on the integrity and impartiality of our courts.”

Kevin Tan, however, recently criticised such reasoning as follows:

“Tay J opined that in a legal system where the jury still existed, the jurors were the triers of fact, and allegations of bias made against the jury did not quite have the same deleterious effect as an attack on a judge who was both a trier of fact and of law. This point had been made by Sinnathuray J in Wain’s case back in 1991.

So far so good, but it is difficult to discern why the small size of Singapore is relevant or germane to the test to be applied. Is the Court suggesting that

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92 Hertzberg Daniel (n 47 above), para 33.
scurrilous attacks against the judiciary are more likely to be taken seriously by the population of a small island such that confidence in the judiciary would correspondingly evaporate more quickly? Surely, factors like the level of education of the population, the context in which the attack was launched, and the prevailing prestige of the bench generally, are far more relevant to reasoning.  

A Test Predicated on the Ordinary Reader, not the Reasonable Reader

In Wain (No 1), Sinnathuray J stated:

"no doubt whatsoever that any ordinary reader of the article, and by that I mean a business executive or other professional who read the AWSJ that morning, would find it to be contemptuous of the judge and of the High Court of Singapore. Clearly, the reader would conclude that the plaintiff won the libel action against the defendants because he was the Prime Minister and not on the merits of the case."  

In coming to his conclusion, Sinnathuray J put himself in the shoes of an ordinary reader, rather than a reasonable reader. No reason was given as to why preference for the terminology "ordinary person" was given, as opposed to the phrase "reasonable reader" or "reasonable man" which has been widely adopted and applied in other areas of law such as tort law.

Did the High Court intend for the "ordinary reader" to be synonymous with a "reasonable reader"? Although it is unclear whether the Singapore courts would in practice accept that the "ordinary reader" may well be an unreasonable one, the theoretical possibility, in future cases, of such a construction of the "ordinary reader" test is also not foreclosed.

Indeed, in the subsequent case of Attorney General v Lingle and Others, the presiding judge, Goh J, applied the "ordinary reasonable reader" test:

94 Wain (No 1) (n 70 above), p 399H.
95 For instance, the reasonable man test is used in determining the standard of care expected from an individual, having determined that a duty of care is owed under the tort of negligence.
96 For Sinnathuray J did not specifically reject the "reasonable reader" standard in his judgment.
"The general test applicable is clearly an objective one. The question is whether an ordinary reasonable reader of the publication would reasonably conclude that the words referred to the plaintiff. The words complained of should be construed in the context of the entire statement and the plaintiff can show by extrinsic facts and circumstances that the words used referred to him.

... 

Lord Donovan explained this test further at p 1179.98

The plaintiff must prove that the words of the article would convey a defamatory meaning concerning himself to a reasonable person possessed of knowledge of the extrinsic facts. This requirement postulates ... not merely a reasonable person but also a reasonable conclusion.

In deciding whether a reasonable person would understand the words to refer to the plaintiff, the court does not expect such a person to consider the matter in detail."99

Christopher Lingle, the author of an article100 published in the International Herald Tribune, was convicted together with four other parties of contempt by scandalising the court with words in that article that suggested that the Singapore judiciary was “compliant” to its government.101

Goh J readily accepted the Attorney-General’s submission that “although the article did not refer to any specific country, the words ‘relying upon a compliant judiciary to bankrupt opposition politicians’ when read in the context of the article, were intended, and did refer, or would be easily understood, to refer to Singapore.”102 Goh J reasoned:

99 See n 97 above, pp 702–703.
101 See n 97 above, p 699G. The disputed section of the article reads: “Intolerant regimes in the region reveal considerable ingenuity in their methods of suppressing dissent. Some techniques lack finesse; crushing unnamed students with tanks or imprisoning dissidents. Others are more subtle; relying upon a compliant judiciary to bankrupt opposition politicians, or buying out enough of the opposition to take control ‘democratically’. Trade unionists in Europe seldom face such pressures.”
102 Ibid. p 703D–E.
"the ordinary reader would have read the words 'to bankrupt opposition politicians' to be in reference to the defamation suits brought by government politicians against opposition politicians and which resulted in these opposition politicians being served with bankruptcy proceedings and some adjudged bankrupt on their failure to pay the damages and costs awarded. All the suits were given substantial media coverage at the material time and the ordinary reader in Singapore would have knowledge of these suits though he might not have known the full details. Read in that context and bearing in mind that the article was written in response to Mr Kishore Mahbubani's article,¹⁰³ there could not be any doubt that the offending passage referred to and was intended by the first respondent to refer to the Singapore judiciary.”¹⁰⁴

That there is some laxity in the choice of language between “ordinary reasonable reader” and “ordinary reader” could a priori give rise to difficulties in relation to the exact standard of test to be applied by the Singapore courts.

In any event, while Goh J noted that the court does not expect the “ordinary reasonable reader” to consider the matter in detail,¹⁰⁵ this was overlooked in his application of the test. In coming to his conclusion, Goh J had to take into account several factors. If one were to take into account several differing factors in coming to a particular conclusion, one must have considered the matter in some detail.

In this respect, the stated test and the test applied therefore seem to be two different tests. This observation is significant, because the stated test appears to be much more favourable towards the accused than the test actually applied by Goh J.

**Derogation that Renders the Right Meaningless**

Although the Constitution sanctions the law of contempt as a restriction on the freedom of speech and expression, it does not provide for

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¹⁰³ See “You may not like it, Europe, but this Asian medicine could help”, *International Herald Tribune*, 1 Oct 1994, available at http://www.singapore-window.org/1028kish.htm (visited 21 June 2010). The author, Kishore Mahbubani, was then the Permanent Secretary of the Ministry of Foreign Affairs, Singapore.

¹⁰⁴ See n 97 above, p 710H–I.

¹⁰⁵ Lord Pearson’s judgment in *Morgan v Odhams Press* [1971] 2 All ER 1156, 1184 was cited: “I do not think the reasonable man — who can also be described as an ordinary sensible man — should be envisaged as reading this article carefully. ... The relevant impression is that which would be conveyed to an ordinary sensible man (in this case having knowledge of the relevant circumstances) reading the article casually and not expecting a high degree of accuracy.”
the manner of application of the law of contempt. The Singapore judges have sworn to “preserve, protect and defend the Constitution”. Since rights enshrined in the Constitution are not absolute and subject to various restrictions, it is all the more crucial that the courts adopt a generous interpretation of the Constitution in relation to individual fundamental liberties.

Given that freedom of expression is incontrovertibly recognised worldwide as a basic human right, it is also all the more important that any derogation from the right of free speech must not be lightly sanctioned by the courts, lest there be undesirable consequences such as an uncritical press resulting from defensive reporting practices.

However, the Singapore judiciary has adopted a tough stance against publications which may have the effect of scandalising the judiciary. This harsh position would lead to the undesirable consequence of an uncritical press resulting from defensive reporting practices.

The jurisprudence shows that, whilst the Singapore judiciary has moulded a strict law of contempt of court against any publication or

106 Constitution, First Schedule.
107 See art 19 of the Universal Declaration of Human Rights: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” While Singapore is not a member of the Human Rights Council in the United Nations, it has obligations with respect to the adoption of the Universal Declaration of Human Rights made by the General Assembly on 10 Dec 1948. See United Nations, “The Universal Declaration of Human Rights”, available at http://www.un.org/en/documents/udhr/ (visited 21 June 2010).
109 See the harsh allegations made by a range of international bodies in questioning the integrity of the Singapore judiciary: Asian Human Rights Commission, “SINGAPORE: Statement of Chee Soon Juan submitted to the High Court, Singapore at the Bankruptcy Petition Hearing on 10 Feb 2006”, available at http://www.ahrchk.net/statements/mainfile.php/2006statements/431/ (visited 21 June 2010) (“What emerges ... is a government that has been willing to dictate the rule of law for the benefit of its political interests. Lawyers have been cowed to passivity, judges are kept on a short leash, and the law has been manipulated so that gaping holes exist in the system of restraints on government action toward the individual. Singapore is not a country in which individual rights have significant meaning.”); International Commission of Jurists, “Singapore – ICJ Condemns Parody of Justice in Singapore”, available at http://icj.org/news.php?id_article=3334&lang=en (visited 21 June 2010) (“These legal actions, before compliant courts, which result in political opponents being silenced through crippling awards of damages, undermine the rule of law and infringe the right to freedom of expression.”); Amnesty International, “Amnesty International Report 2007”, available at http://www.slideshare.net/AmnestyKorea/2007-1430905 (visited 21 June 2010).
conduct injurious of its integrity, it has failed to undertake a searching or meaningful analysis of the issue of the permissibility of derogation from the constitutional right of free speech. It has also failed to appreciate the importance of achieving an appropriate balance between the social interests in preserving its integrity and the freedom of critical reporting.

Instead, there seems to be a lack of analytical rigour in judicial reasoning which categorically undermines free speech protection. For instance, the High Court once simply held that:

"[T]he short answer to the [argument that the offence of scandalising the court is inconsistent with Article 14(1)(a)] is to be found in art 14(2) of the Constitution."\[112\]

Traces of National Formalism and textual literalism, as well as conclusions borne out by insufficiently articulated assertions, can also be observed from judgments on contempt of court actions. It is common to observe the Singapore courts citing from other judgments without giving much input into the rationales and reasons behind the application of the law.

The rigour and depth in the reasoning employed in judgments pertaining to other areas of the law seem to be lacking in contempt of court judgments handed down in Singapore. The following discusses this in greater detail.

\[111\] Recent developments indicate that the law enforcers are swiftly and decisively enforcing Singapore's law of contempt against enemies exhibiting behaviour of various types, namely, contemptuous blogging on the internet and the writing of insulting emails to judges (as seen in the conviction by Kan J of one former Singapore citizen and one-time Workers' Party election candidate Mr Gopalan Nair; see "Insult to judge: Nair's trial opens", Straits Times, 11 Sept 2008 (Factiva); "Nair denies insulting judge", Straits Times, 13 Sept 2008 (Factiva); "Nair gets 3 months' jail", Straits Times, 18 Sept 2008 (Factiva); "Nair apologises for insulting judiciary", Straits Times, 14 Nov 2008 (Factiva). See also the wearing of T-shirts imparted with images of a kangaroo dressed in a judge's robe while appearing at the public gallery of the Supreme Court courtroom: "Kangaroo court T-shirt case: judge grants trio more time to prepare defence", Straits Times, 5 Nov 2008 (Factiva); "A-G takes trio to court for 'scandalising judiciary'", Straits Times, 15 Oct 2008 (Factiva). See further the Attorney-General's committal for contempt proceedings against Dow Jones Publishing for three allegedly contemptuous articles published in Wall Street Journal Asia in June and July 2008: "Singapore proceedings target Wall Street Journal", The Wall Street Journal Online, 12 Sept 2008 (Factiva); "Singapore seeks contempt proceedings vs Dow Jones", Reuters, 13 Sept 2008 (Factiva); "AG asks for deterrent fine for newspaper", Straits Times, 5 Nov 2008 (Factiva); "A-G draws the line on freedom of speech", Straits Times, 5 Nov 2008 (Factiva); "Western media: High priests of new religion?", Straits Times, 5 Nov 2008 (Factiva); "Free media advocate?", Straits Times, 5 Nov 2008 (Factiva); "Articles only 'criticised libel law, not the courts'; Attorney-General must prove there was contempt, says WJSJ's defence", Straits Times, 5 Nov 2008 (Factiva).

\[112\] Weir (No 1) (n. 70 above), p 398). See also n 97 above, p 701B–F; n 86 above, paras 28–29.

Emasculating Freedom of Expression

In Wain (No 1), while accepting that the court “has duty to uphold the right to freedom of speech and expression”,\textsuperscript{114} Sinnathuray J noted that “this right must be balanced against the needs of the administration of justice, one of which is to protect the integrity of the courts.”\textsuperscript{115} The submission that “the latter should prevail only in cases where the criticism is dishonest or false, and where the circumstances in which it is made create a real and present danger to the administration of justice”\textsuperscript{116} was rejected. Sinnathuray J simply reasoned:

“as has been said in different words many times, criticism of the courts will constitute scandalizing the court where it is scurrilous abuse or when it ‘excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office’.”\textsuperscript{117}

This means that the right of free speech can be abrogated rather easily, since one would strictly be found guilty of scandalising the court once a criticism of the courts is found to “[excite] misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office”.

In other words, it does not matter if one had made criticisms honestly in exercise of the right of free speech. This approach would be tantamount to the imposition of a strict liability offence and would render the right of free speech virtually obsolete (at least with regard to the criticisms one can make of the courts). This renders the recognition of the right to freedom of speech and expression superfluous and meaningless.

It should be noted that this right to freedom of speech and expression is seen as being distinct from the same right guaranteed by the Constitution. This distinction between citizens and non-citizens was expressly recognised in Wain (No 1) when Sinnathuray J remarked that:

“there was a submission on the freedom of expression. I recognize that this court has duty to uphold the right to freedom of speech and expression

... The other is an argument raised on the constitution.”

\textsuperscript{114} Wain (No 1) (n 70 above), p 397H.
\textsuperscript{115} Ibid.
\textsuperscript{116} Ibid. p 397l.
\textsuperscript{117} Ibid. pp 397l–398A.
For one, the constitutional right to freedom of speech and expression is only extended to "every citizen of Singapore". Newspapers and non-citizens are therefore, strictly speaking, ineligible for the constitutional protection of free speech. Neither has Singapore ratified the International Covenant on Civil and Political Rights which provides, inter alia, the guarantee of free expression for "everyone".

However, the treatment of the two seemingly different rights to freedom of speech and expression is similar. The court rejected that "the common law offence of scandalizing the court is inconsistent with the written constitutional guarantee of freedom of expression." The court observed that while:

"art 14(1)(a) of our Constitution which provides that:

every citizen of Singapore has the right to freedom of speech and expression;

I cannot see how the first three respondents can rely on it because they simply do not qualify to claim that right in Singapore. In any event, the short answer to the argument is to be found in art 14(2) of the Constitution, the relevant part of which is:

(2) Parliament may by law impose —
(a) on the rights conferred by clause (1)(a) … restrictions … to provide against contempt of court …"

Such reasoning is the mark of a literal approach to constitutional interpretation shorn of a proper balancing exercise between the competing interests involved. In dealing with both arguments on the right to

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118 See art 14(1)(a) of the Singapore Constitution.
119 Arts 19 for both.
120 Wain (No 1) (n 70 above), p 398B.
121 ibid. p 398C-E.
122 Sinnathuray J continued at ibid. p 398F: "Inasmuch as Parliament has the power, it has provided in s 8(1) of the Supreme Court of Judicature Act (Cap 322) that 'The High Court, the Court of Appeal and the Court of Criminal Appeal shall have power to punish for contempt of court'. Here, the argument was that art 162 would apply to require that the common law offence of scandalising the court should be read down so that it conforms with the right of freedom of speech and expression set out in art 14(1) … I reject this submission. In my view, it is not open to the respondents to seek in aid art 162 to read down the offence of contempt of court provided in s 8(1). Article 162, which is the last article in the Constitution, is a saving provision which preserves, as provided therein, 'all existing laws' after the commencement of the Constitution. The Supreme Court of Judicature Act, however, was not an existing law at the time of the enactment of the Constitution. It was enacted in 1969, some six years after the Constitution, and art 162 can have no application to it whatsoever."
freedom of speech and expression, the court has been rather dismissive of it in a categorical manner, as seen in Sinnathuray J’s “short answer” above. The court cites either the Constitution or the established definition of scandalising the court in Singapore to support its rejection of the arguments based on the right to freedom of speech and expression. There was no further reasoning or justification furnished by the court to justify its decision to limit such a right.

This would seem to contradict the duty that the court has to uphold the rights it is sworn to protect. If all rights were subject to limitations via a “categorisation” approach,¹²³ rather than by a proper balancing exercise, few rights at all would be left to be protected.

Even when a “balancing” between the right of free speech and the protection of judicial reputation under the law of contempt was claimed to be attempted by the courts, a formulaic line of reasoning that lacks a fully articulated reasoning is often employed. For instance, in Attorney General v Lingle and Others, Goh J adopted a formulaic line of reasoning in attempting to carry out a balancing exercise between the right to fair criticism and the law of contempt:

"The right to fair criticism is also protected by art 14(1)(a) of our Constitution which entrenches a citizen's right to freedom of speech and expression. But this right is not and cannot be absolute. Anyone exercising that right must observe a corresponding duty of responsibility. No one is entitled under the guise of freedom of speech and expression to make irresponsible accusations against, inter alia, the judiciary, otherwise public confidence in the administration of justice will be undermined.

..."

[The] right to criticise is, however, exceeded and contempt of court is committed if the publication impugns the integrity and impartiality of the court, even if it is not so intended."¹²⁴

Goh J was quick to recognise that, while there is indeed a right of free speech, this right cannot be absolute and must be exercised responsibly. A duty is found upon the right to freedom of speech and expression.

With respect, this is at odds with the description of the courts as protectors of rights and the Constitution. The acceptance that a right ought

¹²⁴ See n 97 above, p 701 B–F.
to be limited and curtailed is much too quick and unsubstantiated to befit the role played by the court. However, this does not mean that the right should be interpreted as absolute. The court may well be justified in taking the current position. What it needs to provide is the justification.

In *Attorney-General v Chee Soon Juan*, the High Court again applied the same reasoning methodology with little analytical rigour. In this case, an order of committal was made against the respondent for contempt *in facie curiae* (contempt in the face of the court) and in contempt of the court by scandalising the Singapore judiciary through his statement entitled “Statement of Chee Soon Juan submitted to the High Court, Singapore at the Bankruptcy Petition hearing on 10 Feb 2006.” In a similar dismissive fashion, the court held:

“The gravamen of the argument put forward by counsel for the Respondent as his client’s defence was that the Respondent was exercising his right to freedom of speech under Art 14 of the Constitution. Contrary to the Respondent’s thinking, however, there is no right of *absolute* freedom of speech in Art 14 of the Constitution. The right to free speech there enshrined is expressly subject to sub-para (2)(a), which stipulates certain permissible restrictions on this right.

...

The offence of scandalising the court falls within the category of exceptions from the right to free speech expressly stipulated in Art 14(2)(a). Article 14(2)(a) clearly confers Parliament with the power to restrict a person’s right to free speech in order to punish acts of contempt. Pursuant to Art 14, Parliament has, by way of s 7(1) of the [Supreme Court of Judicature Act], empowered the High Court and the Court of Appeal with jurisdiction to punish for ‘contempt of court’. These provisions amount to statutory recognition of the common law misdemeanor of contempt of court: (see *Wain’s case*). This power under s 7(1) of the [Supreme Court of Judicature Act] to punish for contempt would undoubtedly

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125 See n 86 above.

126 The respondent, Chee Soon Juan, is the secretary-general of the Singapore Democratic Party. He lost a defamation suit brought by former Prime Ministers of Singapore – Lee Kuan Yew and Goh Chok Tong. See *Lee Kuan Yew v Chee Soon Juan* [2003] 3 SLR 6; *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR 32. For the statement, see Asian Human Rights Commission (n 109 above).

127 (Cap 322, 2007 Rev Ed Sing).

128 *Wain (No 1)* (n 70 above).

129 See n 127 above.
extend to the offence of scandalising the court as that is a form of contempt recognised by Singapore law (AG v Wong Hong Toy [1982–1983] SLR 398; AG v Zimmerman [1984–1985] SLR 814). The Respondent's submissions on this point were therefore entirely devoid of merit.” (emphasis in original)\textsuperscript{10}

It is evident that the starting position for the Singapore courts remains the same. As quickly as the court is to readily recognise the right to freedom of speech and expression, it also warns that such right is not absolute and is subject to multiple limitations.

This is in stark contrast with the jurisprudence in other jurisdictions and even in other areas of law in Singapore. While no right can be absolute, the courts ought to engage in a rigorous analysis to find the right balance between the competing interests, before setting down limitations to the rights it is sworn to protect. The rights of the people should be given maximum space and recognition, for the entire purpose of rights is to guarantee the fundamental liberties of the people. If such rights were to be curtailed and limited right from the outset, there would not be much to guarantee and uphold.

Rendering the Defences of Fair Comment, Justification and Fair Criticism Meaningless

The seemingly harsh regime of contempt laws discussed above could have been less unsettling, if the courts had only generously recognised the availability of certain defences to the charge of contempt. However, this is not the case in Singapore.

The defence of fair comment, for example, was rejected outright in Wain (No 1). The court stated that while it:

“has duty to uphold the right to freedom of speech and expression ... this right must be balanced against the needs of the administration of justice, one of which is to protect the integrity of the courts. But ... the latter should [not] prevail only in cases where the criticism is dishonest or false, and where the circumstances in which it is made create a real and present danger to the administration of justice ... [C]riticisms of the courts will constitute scandalising the court where it is scurrilous abuse or when it 'excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the

\textsuperscript{10} See n 86 above, paras 28–29.
judicial office'... In this context the defence of fair comment analogous to the defence in the law of defamation which was raised for the respondents is not a defence available to them in contempt of court proceedings.\textsuperscript{111}

The defence was rejected because the need to protect the integrity of the courts does not only arise when criticism is dishonest and false. With the decision to adopt such a position, the defence of fair comment can no longer stand.

While the Singapore judiciary is free to adopt this position, little explanation has been given for this choice. As noted previously, this is clearly a derogation of the right to freedom of speech, and ought to have received more attention, and rigorous reasoning.

Lai J affirmed the rejection\textsuperscript{132} of the defence of fair comment along with the defence of justification in Attorney-General v Chee Soon Juan:

"It is imperative that the integrity of our judges is not impugned without cause. The overriding interest in protecting the public's confidence in the administration of justice necessitates a rejection of the defences at law for defamation, particularly where accusations against a judge's impartiality are mounted. In the words of the authors of Borrie & Lowe ([21] supra) at p 351, "[a]llegations of partiality are treated seriously because they tend to undermine confidence in the basic function of a judge".\textsuperscript{133} (emphasis in original)

Lai J reasoned that:

"[a]llowing the defence of fair comment would expose the integrity of the courts to unwarranted attacks, bearing in mind that a belief published in good faith and not for an ulterior motive can amount to 'fair comment' even though the belief in question was not reasonable (see Slim v Daily Telegraph Ltd [1968] 2 QB 157). Singapore judges do not have the habit of issuing public statements to defend themselves (as some UK judges have been prone to do). Our judges feel constrained by their position not to react to criticism and have no official forum in which they can respond. That does not mean that they can be attacked with impunity."\textsuperscript{134}

Accordingly to Lai J, the recognition of the defence of fair comment would inevitably expose the integrity of the courts to unwarranted

\textsuperscript{111} Wain (No 1) (in 70 above), pp 397H–398A.
\textsuperscript{132} See n 86 above, para 44.
\textsuperscript{133} Ibid. para 45.
\textsuperscript{134} Ibid. para 46.
attacks and hence must be rejected. Lai J took issue with the fact that the
defence would succeed even if the belief in question were unreasonable.

However, the fact that the defence of fair comment was rejected for
fear that a bona fide comment could still amount to fair comment “even
though the belief in question was not reasonable” was crude. Bona fide
comments grounded on objectively reasonable beliefs are also denied a
good defence. If the only issue were that of acquittal of the accused holding
unreasonable beliefs, the defence could always be qualified in the
realm of contempt of court, rather than a wholesale rejection of it.

Lai J subsequently fortified her position with the fact that Singapore
judges do not issue public statements to defend themselves. With respect,
this is not a good reason for rejecting the defence, for it is a matter of
practice rather than a stipulated regulation that judges cannot issue pub-
lic statements to defend themselves. Such a practice ought to be weighed
against the importance of the right to freedom to speech. If this prac-
tice stands in the way of the right to freedom of speech, it ought to be
replaced and rectified.

In rejecting the defence of justification, Lai J further commented that:

"admitting the defence of justification would, in effect, allow the court hear-
ing the allegation of contempt to 'sit to try the conduct of the Judge': (see
Attorney-General v Blomfield (1914) 33 NZLR 545 at 563). Recognising
the defence of justification would give malicious parties an added oppor-
tunity to subject the dignity of the courts to more bouts of attacks; that is
unacceptable."

The concern raised here is the subjugation of the dignity of the courts.
However, as stated earlier, the rationale behind the law of contempt is
"not to vindicate the dignity of the court or the person of the judge,
but to prevent undue interference with the administration of justice."

While the dignity of the courts is important and should be protected, it is
not for the law of contempt to do so. Hence, this reason should not have
surfaced at all – it is irrelevant to the law of contempt in question here.

As regards the effect of allowing the defence of justification, that is
to “try the conduct of the Judge”, the learned judge in this case seems to
have overlooked the implication of rejecting the defence of justification
altogether.

135 Ibid.
136 Ibid. para 47.
137 R v Davies [1906] 1 KB 32, 40, quoted in Pang Cheng Lian (n 40 above), p 662. See also Hertzberg
Daniel (n 47 above), para 20.
An accused, regardless of whether he or she was justified in his or her statements, would be found guilty as long as the statements scandalised the judiciary. Therefore, in effect, no one can make any adverse comments on the judiciary, regardless of the extent of truth there is in the comments.

This is an untenable position. It amounts to derogation from the right to freedom of speech and expression without a proper justification. It may potentially condone judges who do not act in the best interests of justice. Furthermore, the rejection of the defence on the sole basis of the fear of “giv[ing] malicious parties an added opportunity to subject the dignity of the courts to more bouts of attacks”\textsuperscript{138} is crude reasoning which deprives genuine defendants of the defence simply because it is possible for a black sheep to exist in society.

In Attorney General v Hertzberg Daniel and Others, Tay J furnished another reason for the rejection of the defences available in the law of defamation (defence of fair comment and justification) in contempt of court cases. The case concerns an order of committal made against three respondents in respect of three publications\textsuperscript{139} which allegedly (by implication) scandalised the Singapore judiciary. Tay J opined that:

“[o]ne should be circumspect about drawing parallels between the law of contempt (especially that relating to the offence of ‘scandalising the court’) and the law of defamation. Both impose restrictions on the right to freedom of speech and expression. ... As noted by the learned author of Contempt of Court,\textsuperscript{140} the points of similarity between the law of defamation and “scandalising the court” prompt one to inquire whether the defences one associates with defamation, such as justification and fair comment, are similarly available in a case of contempt (at para 12.31). In my view, it is clear that parallels should not be drawn between the two branches of law despite the similarities that they seem to share, given that they exist essentially for different purposes; the law of contempt (as already seen above) is concerned with the protection of the administration of justice and is grounded in public interest but the law of defamation is concerned with the protection of a private individual’s reputation (see generally Patrick Milmo QC and WVH Rogers (gen eds), Gatley on Libel and Slander (Sweet & Maxwell, 10th Ed, 2004) at para 1.1 and Evans on Defamation at p 1). I agree with both T S Sinnathuray J (‘Sinnathuray J’) and Lai Siu Chiu J (‘Lai J’) that defences in defamation

\textsuperscript{138} See n 86 above, para 47.
\textsuperscript{139} See Hertzberg Daniel (n 47 above), paras 5–7.
\textsuperscript{140} C. J. Miller, Contempt of Court (Oxford: Oxford University Press, 3rd edn, 2000).
have no application in the realm of contempt of court (see Wain\textsuperscript{141} ([13] supra) at 397–398, [49]–[56] and Chee Soon Juan\textsuperscript{142} ([17] supra) at [44]–[47])." [This is a very long quotation – could it be shortened perhaps by removing the citations.]

The different rationales behind the law of defamation and the law of contempt were identified as a reason to break the connection between the two areas of law, and hence to reject the application of defences available in the law of defamation and in the law of contempt.

However, differences in rationale do not necessitate a total rejection of the applicability of defences from the law of defamation. The defences in the law of defamation could well serve the same rationale in the law of contempt. Tay J did not discuss this possibility. Given the similar nature of the two areas of law (as recognised by Tay J himself), it would not be surprising that the same defences could apply in both areas of law, albeit with slightly different elements to give effect to the different rationales behind the two different areas of law.

While the defences of fair comment and justification have been rejected, the court in Attorney General v Lingle and Others held that there was the defence of fair criticism in the law of contempt:

"The locus classicus of this area of the law is the statement of Lord Russell of Killowen CJ in R v Gray\textsuperscript{143} at p 40:

... Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court. The law ought not to be astute in such cases to criticize adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen.

This right to criticise is explained by Lord Atkin in Ambard v A-G of Trinidad and Tobago\textsuperscript{144} at p 335:

But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any

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\textsuperscript{141} Wain (No 1) (n 70 above).
\textsuperscript{142} See n 86 above.
\textsuperscript{143} [1900] 2 QB 36.
\textsuperscript{144} [1936] AC 322.
member of the public who exercises the ordinary right of criticizing, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments, of ordinary men.145

Goh J subsequently qualified the defence of fair criticism:

"The right to fair criticism is also protected by art 14(1)(a) of our Constitution which entrenches a citizen's right to freedom of speech and expression. But this right is not and cannot be absolute. ... No one is entitled under the guise of freedom of speech and expression to make irresponsible accusations against, inter alia, the judiciary, otherwise public confidence in the administration of justice will be undermined.

..."

This right to criticise is, however, exceeded and contempt of court is committed if the publication impugns the integrity and impartiality of the court, even if it is not so intended."146

In effect, the court artificially divorced the defences of fair comment and fair criticism by pinning an unbearably high standard for the defence of fair criticism to succeed. Notwithstanding that an alleged contemnor was genuine, and harboured no malicious intentions,147 he or she would still be guilty of contempt as long as the publication impugned the integrity and impartiality of the court.

The defence of fair criticism is thus not applicable once the publication impugns the integrity and impartiality of the court. This formulation of the defence of fair criticism should be contrasted with Lord Russell and Lord Atkin's judgments, which were followed by Goh J.

Lord Atkin stated that there were elements to the defence of fair criticism. These were namely: (i) no imputation of improper motives;

145 See n 97 above, p 700D–H.
146 Ibid. p 701A–F.
147 Which generally would render a criticism permissible as "fair criticism": Lee Hsien Loong v Singapore Democratic Party (n 46 above), paras 172–173.
(ii) genuinely exercising a right of criticism; (iii) not acting in malice or attempting to impair administration of justice. Under this formulation, the defence was able to succeed even if the publication had impugned the integrity and impartiality of the court. As long as the author did not impute any improper motives to the judges and wrote the article in good faith, the defence would succeed.

The qualification given by Goh J is unduly restrictive and would render this defence superfluous – its application is severely limited. This is ultimately an objective standard that most accused would probably fail. It is too high a standard for any accused – he or she would almost always be convicted once charged with contempt.

Fortunately, there seems to be a return to Lord Atkin’s formulation in subsequent cases. In *Lee Hsien Loong v Singapore Democratic Party and Others*, the respondents were cited for contempt of court at the close of the assessment hearing for accusing the court of bias and of prejudging the quantum of damages to be awarded to the plaintiff. Citing Lord Atkin’s judgment in *Ambard v A-G of Trinidad and Tobago*, Belinda Ang J held:

"[t]he criticism of a judge’s conduct or the conduct of the court does not constitute contempt of court so long as fair criticism is not exceeded, i.e., so long as the criticism is fair, temperate, made in good faith and not directed at the personal character of a judge or at the impartiality of a judge or a court ... It follows that the facts forming the basis of the criticism must be accurately stated. On the subject of what qualified as fair criticism, Sinnathuray J in *Wong Hong Toy* ([168] supra), citing and adopting the reasoning in the Australian High Court's decision in *The King v Fletcher* (1935) 52 CLR 248, held that an untruthful statement of facts upon which the comment was based might vitiate a comment which might otherwise be considered 'fair'. He also agreed with O'Bryan J in *R v Brett* [1950] Vict LR 226 at 229 that the motive of the writer was an important element in determining whether the criticism was fair (per Sinnathuray J in *Wong Hong Toy* at 405–406, [37]). Similarly, Evatt J in *The King v Fletcher* (at 257–258) said:

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149 This was an assessment of damages arising from defamation actions brought by the Prime Minister and Minister Mentor of Singapore against the Singapore Democratic Party and members of its Central Executive Committee who had published an article in their party newspaper comparing the plaintiffs to the management of the National Kidney Foundation and alleging that they were dishonest and unfit for office.

150 [1936] AC 322, 335.

Fair criticism of the decisions of the Court is not only lawful but regarded as being for the public good; but the facts forming the basis of the criticism must be accurately stated, and the criticism must be fair and not distorted by malice ...“152

In Attorney General v Hertzberg Daniel and Others, Tay J further elaborated upon the defence of fair criticism:

“What can be observed from the above passages is that so long as the criticism is within the boundaries of ‘reasonable argument or expostulation’, is made in good faith and is not directed at the impartiality of the courts or seeks to impute improper motives to the judges, it will not constitute contempt of court.”153

Even more recently, in Attorney-General v Tan Liang Joo John, Prakash J held that bona fide, temperate and balanced criticism of conduct by a judge or court, “allows for rational debate about the issues raised and thus may even contribute to the improvement and strengthening of the administration of justice”.154 She further rejected as a limitation on the right of criticism that allegations of improper motives, bias or impropriety could not constitute fair criticism,155 the reason being judges and courts are not “infallible or impervious to human sentiments” and “[t]he fear of baseless imputations of bias or impropriety is unfounded as the court is able to take into account factors such as the existence of evidence for such allegations under the requirement of bona fides”.156

In other words, although the intention of the alleged contemnor is irrelevant in determining liability for contempt and the inherent tendency test continues to apply, the courts in Prakash J’s opinion, should be slow to find liability lest the law of contempt becomes “overly restrictive of legitimate criticism”.157

Unfortunately, despite this, the defence of fair criticism was not successfully pleaded in all the three cases. It remains to be seen what factual matrix would allow for the defence’s successful plea.

152 Lee Hsien Loong v Singapore Democratic Party (n 46 above), para 173.
153 Hertzberg Daniel (n 47 above), para 54.
154 See n 78 above, para 19.
155 Ibid, para 21.
156 Ibid, paras 22–23.
157 Ibid, para 23.
Conclusion

The reputation of the Singapore judiciary has suffered a great deal from the way in which it has moulded its inflexible and illiberal regime of political defamation. The need to maintain its institutional integrity becomes critical. That need – whether consciously or unconsciously – has prompted the Singapore judiciary to mould an illiberal and literalist jurisprudence of scandalising the judiciary.

This jurisprudence in turn creates an additional obstacle for losers of political defamation cases to challenge the correctness of decisions handed down. It discourages the foreign media from reporting incisively and critically on such decisions – again insulating the first foundational myth.

Due process is often sacrificed, resulting in a failure by the Singapore judiciary to properly weigh the competing interests at stake. In dealing with foreign jurisprudence, the Singapore judiciary has exhibited an inconsistent stance. When foreign authorities are found to be adverse to the preferred judicial outcome, they are dismissed with the Singapore judiciary seizing on insignificant differences and unargued assertions. On the other hand, when foreign authorities are found to be favourable to the preferred judicial outcome, they are seized upon, with their differences conveniently ignored.

Such jurisprudence has allowed defamation and contempt of court to become effective tools in suppressing robust political speech both within Singapore, and from outside. As a result, the role of the Singapore judiciary as guardians of fundamental liberties can no longer be taken for granted.