

THE SINGAPORE CHILL: POLITICAL DEFAMATION AND THE NORMALIZATION OF A STATIST RULE OF LAW

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Abstract: Recent cases involving opposition politicians and foreign publications, in which allegations of corruption leveled against both the executive and the judiciary were found to be defamatory and in contempt of court, struck at the heart of Singapore's ideological platform as a corruption-free meritocracy with an independent judiciary. This article examines the implications of these cases for the relationship between the courts, the government, and the rule of law in Singapore. It is argued that judicial normalization of the government's politics of communitarian legalism has created a statist and procedural rule of law that encourages defamation laws to chill political opposition. The dual state construct in Singapore, under which commercial law remains depoliticized and readily enforceable, has been distorted, which creates uncertainty across all areas of Singapore's common law and thereby undermines the government's economic agenda.

I. INTRODUCTION

A key concept in the ideological framework of Singapore's governing People's Action Party ("PAP") is providing certainty and security for Singapore's economy through the centrality of a platform of anti-corruption.¹ Part of the emphasis on international investment and economic development in Singapore is premised on the basis that Singapore is corruption-free.² Preventative legislation,³ departments such as the Corrupt Practices Investigation Bureau, and high salaries paid to public servants,⁴ all serve to strengthen this anti-corruption platform. Singapore consistently ranks highly in international corruption standings.⁵ When the integrity of the government is brought into question, it is not uncommon for Singapore's

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¹ LEE KUAN YEW, FROM THIRD WORLD TO FIRST, THE SINGAPORE STORY: 1965-2000 157 (2000).

² See Li-Ann Thio, *Rule of Law within a Non-Liberal "Communitarian" Democracy: The Singapore Experience*, in ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 183, 192-3 (Randall Peerenboom ed., 2004).

³ See, e.g., Prevention of Corruption Act, ch. 241 (1960) (Sing.).

⁴ High salaries paid to public servants are allegedly seen by the government as affirming an ancient Confucian precept to pay good people to encourage them to work for the government. See Goh Chok Tong, Senior Minister of the Republic of Singapore, Speech at the 2000 National Day Rally (Aug. 9, 2000), in STRAITS TIMES (Sing.), Aug. 21, 2000, at 35.

⁵ In 2010, Singapore was ranked first in the World Competitive Yearbook. See INTERNATIONAL INSTITUTE FOR MANAGEMENT DEVELOPMENT, WORLD COMPETITIVE YEARBOOK 1 (2010), <http://www.imd.ch/research/publications/wcy/upload/scoreboard.pdf>.

government to protect this image through the courts by launching defamation suits as a mechanism to deny these allegations. The trend of the past four decades in this area of the law is striking in its consistency: neither former Prime Minister Lee Kuan Yew nor current Prime Minister Lee Hsien Loong have ever lost a defamation action.⁶ Singapore's Court of Appeal has even stated that Lee Kuan Yew "is almost universally acknowledged as the architect of Singapore's corruption-free government,"⁷ and it is within Singapore's courts that Lee Kuan Yew's reputation has always been successfully defended.

The government of Singapore perceives that there is a campaign being waged against Singapore's courts, which seeks to cast doubt on the integrity and independence of the judiciary.⁸ The judiciary has made clear that it will not tolerate any attempts to undermine public confidence in the courts "by making false and scandalous allegations."⁹ In July 2005, a scandal erupted in Singapore over the handling of the National Kidney Foundation's ("NKF") funds (commonly referred to as the "NKF scandal"). The judiciary has since said that to link an institution with the NKF scandal is to "sully their standing and integrity,"¹⁰ and that NKF has become a "byword for corruption, financial impropriety and the knowing abuse of unmeritorious defamation suits."¹¹ Such an association would be patently at odds with the government's ideological, corruption-free framework. In two recent sets of

⁶ See, e.g., *Harbans Singh Sidha v. Pub. Prosecutor*, 1 Malayan L. J. 41 (1973); *Lee Kuan Yew v. J.B. Jeyaretnam*, 1 Malayan L. J. 281 (1979); *J.B. Jeyaretnam v. Lee Kuan Yew*, 1 Malayan L. J. 239 (1982); *J.B. Jeyaretnam v. Lee Kuan Yew*, 1 Malayan L. J. 97 (1984); *Lee Kuan Yew v. Scow Khee Leng*, 1 Malayan L. J. 11 (1986); *Lee Kuan Yew v. Scow Khee Leng*, 1 Malayan L. J. 172 (1989); *Lee Kuan Yew v. Derek Gwyn Davis & Ors*, 1 Malayan L. J. 390 (1990); *Lee Kuan Yew v. Jeyaretnam JB (No. 1)*, 1 Sing. L. Rep. 688 (1990); *Lee Kuan Yew v. Chin Vui Khen & Anor*, 3 Malayan L. J. 494 (1991); *Jeyaretnam J.B. v. Lee Kuan Yew*, 2 Sing. L. Rep. 310 (1992); *Lee Kuan Yew v. Devan Nair (Straits Times Press (1975) Ltd. & Anor, third parties)*, 1 Sing. L. Rep. 723 (1993); *Lee Kuan Yew & Anor v. Vinocur & Ors*, 3 Sing. L. Rep. 477 (1995); *Lee Kuan Yew v. Tang Liang Hong (No. 1)*, 2 Sing. L. Rep. 819 (1997); *Lee Kuan Yew v. Tang Liang Hong (No. 2)*, 2 Sing. L. Rep. 833 (1997); *Lee Kuan Yew v. Tang Liang Hong (No. 3)*, 2 Sing. L. Rep. 841 (1997); *Lee Kuan Yew v. Tang Liang Hong & Anor*, 3 Sing. L. Rep. 178 (1997); *Tang Liang Hong v. Lee Kuan Yew & Anor*, 1 Sing. L. Rep. 97 (1998); *Lee Kuan Yew v. Chee Soon Juan*, 3 Sing. L. Rep. 8 (2003); *Lee Kuan Yew v. Chee Soon Juan (No. 2)*, 1 Sing. L. Rep. 552 (2005); *Lee Hsien Loong v. Singapore Democratic Party & Ors*, 1 Sing. L. Rep. 675 (2007); *Review Publ'g Co. v. Lee Hsien Loong*, 1 Sing. L. Rep. 52 (2010).

⁷ *Review Publ'g Co. v. Lee Hsien Loong*, 1 Sing. L. Rep. 52, 85 (2010).

⁸ See Walter Woon, Professor of Law at the National University of Singapore, Speech at the Singapore Academy of Law (Jan. 3, 2009), available at <http://www.sal.org.sg/Lists/Speeches/DispForm.aspx?ID=60>.

⁹ See Chan Sek Keong, Chief Justice of the Republic of Singapore, Speech at the Singapore Academic of Law (Jan. 3, 2009).

¹⁰ *Chee Siok Chin v. Minister for Home Affairs*, 1 Sing. L. Rep. 582, 626 (2006).

¹¹ *Lee Hsien Loong v. Singapore Democratic Party*, 1 Sing. L. Rep. 675, 702 (2007).

defamation cases, the opposition Singapore Democratic Party,¹² and foreign publication the *Far Eastern Economic Review*,¹³ both dared to make an association between the government and the NKF scandal. These cases provide a practical paradigm within which the rule of law in Singapore can be situated. At the same time, consideration of related contempt of court proceedings allows for an examination of the government's claim that the integrity and independence of the judiciary is under attack.¹⁴ Together, these cases provide a unique insight into the relationship between the courts, the government, and the rule of law in Singapore.¹⁵

This article suggests that the applicability of any dual state construct in Singapore, where economic liberalism coexists with political illiberalism, is inconsistent and has become distorted. Whilst Singapore's statist limitation of rights has been justified as necessary to create a stable state and economic regime, this limitation has now undermined those goals through increasing uncertainty in Singapore's common law. In a dual state system, it is alleged that the rule of law is used not to subvert or restrain the power of the state, but to reinforce it and provide for an expansion and rationalization of state power.¹⁶ The rule of law is manipulated as a legitimating ideology to show that the economy is strong because of effective forms of governance, but at the same time it is abused to silence opposition politicians and create a system of rule through law.¹⁷ The law is thereby bifurcated,¹⁸ insofar as commercial law remains depoliticized and paramount to encourage investment, facilitated through strong legal institutions, yet there

¹² Lee Hsien Loong v. Singapore Democratic Party & Ors, 1 Sing. L. Rep. 675 (2007), *aff'd*, Lee Hsien Loong v. Singapore Democratic Party, 1 Sing. L. Rep. 757 (2008).

¹³ Lee Hsien Loong v. Review Publ'g Co., 1 Sing. L. Rep. 167 (2009), *aff'd*, Review Publ'g Co. v. Lee Hsien Loong, 1 Sing. L. Rep. 52 (2010).

¹⁴ Lee Hsien Loong v. Singapore Democratic Party, 1 Sing. L. Rep. 642 (2009); Att'y-Gen. v. Tan Liang Joo John & Others, 2 Sing. L. Rep. 1132 (2009); Att'y-Gen. v. Hertzberg Daniel, 1 Sing. L. Rep. 1103 (2009).

¹⁵ Even more recent developments involving contempt and criminal defamation proceedings against Alan Shadrake following the publication of his book, *ONCE A JOLLY HANGMAN: SINGAPORE JUSTICE IN THE DOCK* (2010), occurred too late for consideration in this article. Comments made in the book were held to impugn the impartiality, integrity, and independence of the Singapore judiciary. See Att'y-Gen. v. Shadrake Alan, S.G.H.C. 339 (2010). Shadrake was sentenced to six weeks' imprisonment for contempt of court. Criminal defamation proceedings, which carry imprisonment terms of up to two years, are pending at the time of publication of this article. Future analysis of the outcome of these cases will undoubtedly be beneficial for understanding these areas of Singapore law.

¹⁶ See Kanishka Jayasuriya, *The Rule of Law and Governance in the East Asian State*, 1 AUSTRALIAN J. OF ASIAN L. 107, 112 (1999).

¹⁷ *Id.* at 117-8.

¹⁸ See Ross Worthington, *Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore*, 28(4) J. OF L. & SOC'Y 491, 497 (2001).

is no expansion of rights in the public sphere.¹⁹ This article suggests that the economic ramifications of political decisions, exemplified by the recent defamation and contempt cases, erodes the foundations of any dual state construct and creates uncertainty in Singapore's legal precedent, which thereby undermines and frustrates the government's agenda of effective governance in a strong and stable corruption-free market economy.

This article begins by scrutinizing the concept of the rule of law, and questions whether a statist and procedural rule of law has emerged in Singapore. Next, the article examines freedom of speech in Singapore. This is followed by an analysis of recent defamation cases and contempt of court proceedings concerning the NKF scandal, and their implications for opposition politicians and foreign publications in Singapore. The article concludes that Singapore's defamation laws are used to chill political opposition and promote a judicially-accepted narrow framework within which the rule of law fails to attain sufficiently meritorious value. As this article terms it, the tropical island state thereby subsists under "the Singapore Chill," whereby the risks of legal liability deter Singaporeans and others from making socially valuable comments and instead persuades them to maintain their silence.²⁰ This leads to a chilling effect on the freedom of speech and political opposition in Singapore and has the unintended consequence of chilling investment stability.²¹

II. THE RULE OF LAW IN SINGAPORE

The application of normative and Eurocentric jurisprudential concepts to places with different legal traditions must be undertaken with caution, and the rule of law must always be placed in its historical and political context.²² However, Lee Kuan Yew has said that the rule of law in Singapore is "no cliché,"²³ not "an empty slogan,"²⁴ and that Singapore's reputation for the

¹⁹ See Roman Tomasic & Bahrin Kamarul, *The Rule of Law and Corporate Insolvency in Six Asian Legal Systems*, 7 CANTERBURY L. REV. 140, 147 (1998-2000).

²⁰ See Andrew Kenyon, *Investigating Chilling Effects: News Media and Public Speech in Malaysia, Singapore and Australia*, 4 INT'L J. OF COMM. 440, 442 (2010), for a useful discussion of the concept of chilling speech.

²¹ See also *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²² See, e.g., PENELOPE NICHOLSON, *BORROWING COURT SYSTEMS: THE EXPERIENCE OF SOCIALIST VIETNAM* 11-30 (2007).

²³ Lee Kuan Yew, First Prime Minister of the Republic of Singapore, Speech at the Opening of the Singapore Academy of Law (Aug. 31, 1990) (Yew stated, "[i]f the government had failed to establish the basics for political stability and social cohesion, the rule of law would have become an empty slogan in a broken-backed Singapore. But we have succeeded, and the rule of law today in Singapore is no cliché.").

²⁴ *Id.*

rule of law “has been and is a valuable economic asset,”²⁵ which is “[i]mportant for investors and economic growth.”²⁶ Therefore, concerns about exporting a foreign concept are not central in the Singaporean context.

A. *Substantive versus Procedural*

The value of a rule of law depends on the value of law, which itself depends on how law is conceived. The rule of law in Singapore is seen to have European origins, which invites an analysis of what that rule signifies.²⁷ Whilst by no means the only approach to the rule of law, Dicey enunciated three tenets:²⁸ first, that law has supreme authority and limits the arbitrary exercise of power;²⁹ second, that all are equally subject to the law;³⁰ and third, that the law is maintained by an independent judiciary which protects the rights of citizens.³¹ The liberal origins of Dicey’s tenets recognize the principle of parliamentary sovereignty in addition to the rule of law.³² Dicey argued that this parliamentary sovereignty however exists alongside the authority of judges determining the meaning of the law,³³ and the principle of representative democracy.³⁴ Dicey’s thoughts were premised on the assumption that all liberal democracies have functioning oppositions. Whilst from one perspective the Diceyan concept represents a thin rule of law, insofar as it might allow unjust laws to come into being through an overly formalistic approach, the presence of a functioning opposition generally dilutes any such concerns.

However, the assumption that state acts and laws can be tested by an independent judiciary is not necessarily guaranteed where one party controls the political scene. Singapore’s judiciary has indicated that it will only test laws to confirm they have been enacted in accordance with correct procedure and will remain indifferent as to whether the law was “fair, just

²⁵ See Eugene Kheng-Boon Tan, *Law and Values in Governance: The Singapore Way*, 30 HONG KONG L. J. 91, 110 (2000) (citing 65 SINGAPORE PARLIAMENTARY REPORTS, col 236 (Nov. 2, 1995)).

²⁶ Lee Kuan Yew, First Prime Minister of the Republic of Singapore, Keynote Address at the Opening of the International Bar Association Conference (Oct. 14, 2007).

²⁷ HAN FOOK KWANG, WARREN FERNANDEZ, & SUMIKO TAN, LEE KUAN YEW: THE MAN AND HIS IDEAS 411 (1998) (citing Lee Kuan Yew, First Prime Minister of the Republic of Singapore, Speech to the University of Singapore Law Society (Jan. 18, 1962) (Yew stated, “[t]he rule of law talks of ... concepts which first stemmed from the French Revolution and were later refined in Victorian England.”)).

²⁸ ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188-96 (10th ed. 1959). Cf. RONALD DWORKIN, LAW’S EMPIRE (1986).

²⁹ DICEY, *supra* note 28, at 188.

³⁰ *Id.* at 193.

³¹ *Id.* at 195-6.

³² *Id.* at 39-40.

³³ *Id.* at 407.

³⁴ *Id.* at 83.

and reasonable.”³⁵ In following a thin interpretation of a thin rule of law, where the judiciary is apathetic to the fairness, justness, and reasonableness of laws imposed by government,³⁶ Singapore’s judiciary might thereby give deference to the executive in interpreting those laws.

This distinction highlights that there is a need to distinguish between a procedural, rule-book, and thin rule of law, and a substantive, rights-based, thick rule of law.³⁷ With the concession that the rule of law is such a contested concept,³⁸ what the rule of law embodies in Singapore will depend on which side of politics the inquiry is addressed to. According to Li-Ann Thio, the PAP favors a thinner rule of law, whereas opposition politicians desire a thicker and more rights-based rule.³⁹ The government’s rule of law has been used as a tool to stabilize the country to enable certainty in investment and commerce.⁴⁰ The rule of law has been “Singaporeanized” and is politically inert in an otherwise economically dynamic country where “economic modernisation [has] occurred sans political liberalisation.”⁴¹ Singapore’s rule of law is not focused on democracy, but is rather concerned to secure stability to entice foreign investment.⁴² This stability is further secured through the prioritization of community interests and constructed Confucianist values.⁴³

On one analysis, Singapore’s judiciary has embraced a form of communitarian legalism, whereby the rights of the state trump those of the individual.⁴⁴ In defamation cases, the courts must determine the balance between protecting free speech, and protecting the perceived integrity of

³⁵ Jabar bin Kadermastan v. Pub. Prosecutor, 1 Sing. L. Rep. 617, 631B (1995).

³⁶ *Id.*

³⁷ See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 11 (1985); Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PUBLIC L. REV. 476 (1997); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 BOSTON U. L. REV. 781, 784-91 (1989). See also LON FULLER, THE MORALITY OF THE LAW (2nd ed. 1969).

³⁸ See, e.g., HLA Hart, *Book Review of the Morality of Law*, 78 HARVARD L. REV. 1281, 1285-6 (1965).

³⁹ See Thio, *supra* note 2, at 183-4.

⁴⁰ See Li-Ann Thio, *Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore*, 20 UCLA PAC. BASIN L. J. 1, 22, 24 (2002).

⁴¹ *Id.* at 25.

⁴² *Id.* See also Thio, *supra* note 2, at 191-3; Lee Kuan Yew, *supra* note 1, at 73 (Yew stated, “[t]he history of our financial centre is the story of how we built up credibility as a place of integrity, and developed the officers with the knowledge and skills to regulate and supervise the banks, security houses, and other financial institutions so that the risk of systemic failure is minimized.”). Lee Kuan Yew, *supra* note 1, at 491 (Yew stated, “Singapore depends on the strength and influence of the family to keep society orderly and maintain a culture of thrift, hard work, filial piety, and respect for elders and for scholarship and learning. These values make for a productive people and help economic growth.”).

⁴³ See Thio, *supra* note 40, at 26.

⁴⁴ See Eugene Kheng-Boon Tan, “We” v. “I”: *Communitarian Legalism in Singapore*, 4 AUSTRALIAN J. OF ASIAN L. 1, 11-18 (2002).

Singapore's leaders. This is more than a "subtle tension" between protecting the interests of the community at large over constitutional protection to individuals.⁴⁵ It is a fundamental tension. The PAP justifies this approach by the concept of the *junzi*,⁴⁶ part and parcel of their emphasis placed on Asian values,⁴⁷ and moral legitimacy,⁴⁸ in order to protect the economic stability of Singapore. The method of using the rule of law to entice foreign investment through public order has gained judicial acceptance.⁴⁹ However, this method of protecting economic stability is questionable. One perception is that commercial laws are developed through harmonization and a universalist approach to ensure commercial certainty and stability,⁵⁰ whereas non-commercial laws are applied with this emphasis on communitarian and essentially relativist values.⁵¹

B. *Judicial Normalization of a Statist Rule of Law*

The judiciary's acceptance of the PAP's framework can be viewed as implicit approval of the policy of exceptionalism so fundamental to the PAP's rule. Rather than focusing on civil-political rights, the focus from 1959 to 1990 was on socio-economic rights.⁵² According to Lee Kuan Yew, Singapore has shaken itself free "from the confines of English norms which did not accord with the customs and values of Singapore society," as a result of Singapore's "traditional Asian value system, which places the interests of the community over and above that of the individual."⁵³ Elements of British colonialism, which emphasized strong executive power to establish the colony, have remained.⁵⁴ In the words of Yong Pung How, C.J., the "sovereignty, integrity and unity of Singapore are undoubtedly the paramount mandate of the Constitution and anything ... which tend[s] to run

⁴⁵ Cf. *id.* at 7.

⁴⁶ *Junzi* is a Confucian term referring to the ideal human.

⁴⁷ See also *White Paper on Singapore's Shared Values* (Cmd. 1 of 1991), 8 (stating that, "[t]he concept of government by honourable men (*junzi*) who have a duty to do right for the people, and who have the trust and respect of the population, fits us better than the Western idea that a government should be given as limited powers as possible, and should always be treated with suspicion unless proven otherwise.").

⁴⁸ Thio, *supra* note 40, at 27.

⁴⁹ See, e.g., Yong Pung How, Former Chief Justice of Singapore, Speech at the Legal Service Dinner (Apr. 6, 2001). See *infra* note 229 and accompanying text.

⁵⁰ See Thio, *supra* note 40, at 29. See also Tan, *supra* note 25, at 91-92.

⁵¹ See Thio, *supra* note 40, at 29.

⁵² See Tan, *supra* note 44, at 11.

⁵³ See Lee Kuan Yew, First Prime Minister of the Republic of Singapore, Speech at the Opening of the Singapore Academy of Law (Aug. 31, 1990), available at 2(2) SING. ACADEMY OF LAW JOURNAL 155, 155 (1990).

⁵⁴ See Tomasic & Kamarul, *supra* note 19, at 147. See also Lee Kuan Yew, *supra* note 23, at 412.

counter to these objectives must be restrained.”⁵⁵ The judiciary has taken judicial notice of the community in Singapore, and that political debate and commentary in many Western liberal democracies is “anathema” to Singapore’s political system.⁵⁶

On this approach, the relationship between the judiciary and the executive then becomes closer and results in acceptance of a thin rule of law under which the judiciary has normalized, legitimized, and augmented the PAP’s desired state of affairs.⁵⁷ This “close and consultative relationship”⁵⁸ between the executive and the judiciary might better be characterized as a division of power within the executive, rather than some broader separation of powers.⁵⁹ This does not mean that there is direct and deliberate executive interference with (or consultation on) judicial decision-making. Rather, the judiciary’s normalization of the executive’s agenda is more subtle and indirect. This state of affairs is part of a statist regime of legalism: branches of government are not separated, but divided. Criticisms of this argument, leveled at the fact that the Singaporean legal system has international legitimacy,⁶⁰ ignore the rival fact that this international legitimacy is largely based on perceptions of commercial certainty and an impressive speed for processing claims. International concerns are generally not directed towards the rights of individual Singaporeans, and when they are, they do not see the judiciary as holding international legitimacy, but as embodying empty legalism.⁶¹

After colonial and then emergency beginnings amidst fears of communist insurgencies, the power of Singapore’s executive was gained at the expense of these rights—a regime of exception. Executive power was removed from criticism and justified in the name of national unity and public order,⁶² whilst rudimentary civil and political constitutional rights

⁵⁵ Chan Hiang Leng Colin & Ors v. Pub. Prosecutor, 3 Sing. L. Rep. 662, 684 (1994).

⁵⁶ Tan, *supra* note 44, at 14.

⁵⁷ Cf. Lee Kuan Yew v. Vinocur & Ors, 2 Sing. L. Rep. 542, 545 (1996) (concluding that “[a]n independent and impartial judiciary is a fundamental pillar of our society”).

⁵⁸ See Kanishka Jayasuriya, *Corporatism and Judicial Independence within Statist Legal Institutions in East Asia*, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS 170, 181 (Kanishka Jayasuriya ed., 1999).

⁵⁹ *Id.* at 182.

⁶⁰ See, e.g., Tan, *supra* note 44, at 15.

⁶¹ See, e.g., The Decline of the Rule of Law in Malaysia and Singapore Part II—Singapore, A Report of the Committee on International Human Rights of the Association of the Bar of the City of New York, 46 RECORD 5, 17 (1991); INTERNATIONAL BAR ASSOCIATION, HUMAN RIGHTS INSTITUTE REPORT, PROSPERITY VERSUS INDIVIDUAL RIGHTS? HUMAN RIGHTS, DEMOCRACY, AND THE RULE OF LAW IN SINGAPORE (2008), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=93326691-c4da-473b-943a-dd0fc76325e8>.

⁶² See CHRISTOPHER TREMEWAN, THE POLITICAL ECONOMY OF SOCIAL CONTROL IN SINGAPORE 204-06 (1994).

were suspended.⁶³ However, this exception has become the norm, as there has never been a return to a state of normalcy.⁶⁴ Executive institutions remain insulated from any political criticism or scrutiny.⁶⁵ Using the courts and the defamation and contempt laws they enforce to silence opposition through standard civil and criminal proceedings, rather than, for example, the *Internal Security Act* (Cap. 143), has normalized this exception.⁶⁶ The law itself strengthens political rule, and legitimizes a rule by law, not a rule of law.⁶⁷ An emphasis is placed on public order,⁶⁸ even if this means preempting disruption.⁶⁹

III. CHILLING POLITICAL OPPOSITION

A. *Freedom of Speech*

Such preemption of disruption is evident in the development of Singapore's defamation laws. In shielding the articulation of public critique of the government, Singapore's defamation laws are strongly linked to ideas of Singaporean exceptionalism and the role of law in nation building. Article 14(1)(a) of the Constitution provides every citizen with the right to freedom of speech and expression. However, this right is qualified by the power given to Parliament to impose necessary or expedient restrictions in the interest of the security and public morality of Singapore, including restrictions against defamation.⁷⁰ The interpretation of this qualification,⁷¹ and enacted legislation,⁷² has led to description of the article as "the most circumscribed in the Constitution."⁷³ It has even been suggested that these restrictions have led to Singaporeans being cautious to publicly express non-

⁶³ See Kanishka Jayasuriya, *The Exception Becomes the Norm: Law and Regimes of Exception in East Asia*, 2(1) ASIAN-PAC. L. & POL'Y J. 108, 109 (2001).

⁶⁴ *Id.* at 110.

⁶⁵ *Id.* at 114.

⁶⁶ See also FRANCIS T. SEOW, *THE MEDIA ENTHRALLED: SINGAPORE REVISITED* (1998).

⁶⁷ See Jayasuriya, *supra* note 63, at 113.

⁶⁸ Chan Hiang Leng Colin & Ors v. Pub. Prosecutor, 3 Sing. L. Rep. 662, 688 (1994).

⁶⁹ *Id.* See also Li-Ann Thio, *The Secular Trumps the Sacred: Constitutional Issues Arising from Colin Chan v. Pub. Prosecutor*, 16 SINGAPORE L. REV. 26, 88 (1995). See also Eugene Kheng-Boon Tan, *Harmony as Ideology, Culture and Control: Alternative Dispute Resolution in Singapore*, 9 AUSTRALIAN J. OF ASIAN L. 120 (2007).

⁷⁰ CONSTITUTION OF THE REPUBLIC OF SINGAPORE art. 14(2)(a).

⁷¹ See, e.g., Lee Kuan Yew v. J.B. Jeyaretnam, 1 Malayan L. J. 281 (1979); Jeyaretnam J.B. v. Lee Kuan Yew, 2 Sing. L. Rep. 310 (1992); Lee Kuan Yew & Anor v. Vinocur & Ors, 3 Sing. L. Rep. 477 (1995).

⁷² See, e.g., Defamation Act, ch. 75 (1965) (Sing.); Penal Code, ch. 224 (1872) (Sing.); Supreme Court of Judicature Act, ch. 322 (1970) (Sing.) § 8; Official Secrets Act, ch. 213 (1935) (Sing.).

⁷³ See Walter Woon, *Singapore*, in ASIAN LEGAL SYSTEMS 314, 321 (Poh-Ling Tan ed., 1997).

official views.⁷⁴ The judiciary has recognized that the right to freedom of speech cannot be absolute.⁷⁵ Much like the circulation of foreign publications, freedom of speech is seen as a privilege rather than a right.⁷⁶ By example, police must sanction all public gatherings in Singapore, unless the event is being held under the auspices of the government.⁷⁷

In Singapore's jurisprudence of political defamation,⁷⁸ there has been judicial acceptance of executive policy that freedom of speech must end where individual rights begin; that criticisms of public officials in respect of their official conduct must respect the bounds set by the law of defamation.⁷⁹ This approach does not define where individual rights begin, and in this respect short-circuits the constitutional balancing exercise with which the courts are entrusted.⁸⁰ While vehement attacks may be leveled against public officials, they must not infringe on the right for protection of reputation.⁸¹ As the extent of protection is not defined, it is afforded at the expense of individual rights. In this way, defamation laws protect the executive from criticism in a manner that reflects the statist nature of Singapore's courts.

Political defamation jurisprudence in Singapore is different from other common law jurisdictions. Whereas in many other common law jurisdictions, any injury caused to reputation is a necessary sacrifice for politicians, false speech itself does not gain protection under the democratic rationale.⁸² Nonetheless, in those jurisdictions, the idea that entering public

⁷⁴ *Id.* at 321-22.

⁷⁵ *See, e.g.,* Attorney General v. Lingle & Ors, 1 Sing. L. Rep. 696, 701 (1995) (concluding that allegations made against the judiciary "under the guise of freedom of speech and expression" were held to undermine public confidence in the administration of justice).

⁷⁶ *See* James Gomez, *Free Speech and Opposition Parties in Singapore*, 5 ASIA RTS. J. 1, 3 (2005).

⁷⁷ Public Entertainments and Meetings Act, ch. 257 (1959) (Sing.) § 3.

⁷⁸ *See also* Tsun Hang Tey, Singapore's Jurisprudence of Political Defamation and its Triple-Whammy Impact on Political Speech, PUBLIC L. REV. 452 (2008).

⁷⁹ *See, e.g.,* Lee Kuan Yew v. Jeyaretnam Joshua Benjamin, 1 Malayan L. J. 281 (1979); Jeyaretnam Joshua Benjamin v. Lee Kuan Yew, 2 Malayan L. J. 282 (1979); Goh Chok Tong v. Jeyaretnam Joshua Benjamin & Anor, 3 Sing. L. Rep. 337 (1998). *See also* Michael Hor, *The Freedom of Speech and Defamation: Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*, SINGAPORE J. OF LEGAL STUD. 542 (1992).

⁸⁰ *See* Michael Hor & C.S.L. Seah, *Selected Issues in the Freedom of Speech and Expression in Singapore*, 12 SINGAPORE L. REV. 296, 312 (1991).

⁸¹ Jeyaretnam J.B. v. Lee Kuan Yew, 2 Sing. L. Rep. 310, 332H-I, 333A (1992) (concluding that "politicians ... are equally entitled to have their reputations protected as those of any other persons ... the publication of false and defamatory allegations, even in the absence of actual malice on the part of the publisher, should [not] be allowed to pass with impunity.").

⁸² In England, it has been held to be contrary to public interest for a government body to have standing in a defamation action because of the importance of government bodies being open to uninhibited public criticism. *See* Derbyshire County Council v. Times Newspapers Ltd., [1993] A.C. 534 (U.K.). A cogent summary was provided by Lord Bridge of the Privy Council accurately describing the balance of the position of politicians in English-speaking democracies, including Australia and New Zealand: "In a free democratic society it is almost too obvious to need stating that those who hold office in government and

life includes an assumption of risk of public scrutiny prevails.⁸³ For example, under the public figure doctrine of the United States, a public official can only recover damages for defamation where the defendant had actual malice, which is a high threshold to meet.⁸⁴ Singapore's courts have openly rejected the public figure doctrine under U.S. law,⁸⁵ and instead have turned the doctrine inside-out by awarding higher damages to public figures, rather than private citizens, in defamation actions.⁸⁶ In Singapore, the rights of those in power are preferred, as persons in public positions of great responsibility and trust are felt to be more vulnerable. According to Goh Joon Seng, J., "[t]he greater the reputation of the person defamed, the greater the damage award that will be made—on the basis that these persons are vulnerable in so far as they are well known ... and have a wider circle of social and business contacts."⁸⁷ On this view, the best people must be attracted to serve the Singaporean leadership without fear of damage to their reputations.⁸⁸

This divergent approach taken by the judiciary to freedom of speech is similar to other freedoms, such as the right to freedom of religion,⁸⁹ which can be circumscribed if its exercise is prejudicial to the common good.⁹⁰ Singapore's courts only place selective use upon foreign precedents, and reject foreign precedents in relation to defenses for defamation. The "Singaporeanisation" of English defamation laws is consistent with the judiciary's general approach to adjudication. After appeals to the Privy Council were abolished in 1994,⁹¹ there has been a surge in developing "a body of autochthonous case law,"⁹² which must reflect the fundamental

who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind." See *Hector v. Att'y-Gen. of Antigua & Barbuda*, [1990] 2 All E.R. 103, 106 (U.K.). The position in EU law should also be noted. See *Lingens v. Austria*, 8 Eur. Ct. H.R. 407, 419 (1986) (concluding that "[t]he limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.").

⁸³ See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 173-4 (1981).

⁸⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁸⁵ *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*, 1 Sing. L. Rep. 97 (1998).

⁸⁶ See Tey Tsun Hang, *Inducing a Constructive Press in Singapore: Responsibility Over Freedom*, 10 AUSTRALIAN J. OF ASIAN L. 202, 217 (2008).

⁸⁷ *Lee Kuan Yew & Anor v. Vinocur & Ors*, 3 Sing. L. Rep. 477, 485-6 (1995) (quoting KEITH R. EVANS, *THE LAW OF DEFAMATION IN SINGAPORE AND MALAYSIA* 104-05 (2d ed. 1993)).

⁸⁸ See also Tan, *supra* note 25, at 106-8.

⁸⁹ CONSTITUTION OF THE REPUBLIC OF SINGAPORE art. 15.

⁹⁰ *Nappalli Peter Williams v. Inst. of Technical Educ.*, 2 Sing. L. Rep. 569, 576 (1999).

⁹¹ See also Application of English Law Act, ch. 7A (1993) (Sing.).

⁹² *1994 Practice Statement (Judicial Precedent)*, 2 Sing. L. Rep. 689 (1994) (concluding that "[t]he development of our law should reflect these changes and the fundamental values of Singapore society.").

values of Singaporean society.⁹³ This autochthonous jurisprudence accepts parliamentary ascendancy and a positivist interpretation of constitutional provisions,⁹⁴ to the extent that constitutional interpretation in Singapore is now to come primarily “from within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia.”⁹⁵ One explanation for this approach is that there are felt to be “conditions unique to Singapore” such as its “small geographical size;”⁹⁶ yet there remains selective acceptance of precedents from other common law jurisdictions. Whilst this has been felt to imply that Singapore’s courts have embraced cultural relativism, even if deviating from common law norms,⁹⁷ it must be said that this approach augments uncertainty in Singaporean law. It is by no means clear as to when “unique conditions” might lead to Singapore’s law diverging from precedents currently based on broad common law principles. At present this divergence is apparent in laws concerning individual rights and freedoms, including defamation proceedings.

In Singapore, it has been argued that the value of free speech, in particular for opposition politicians, is limited through the pressure created by these defamation laws. This is felt to be compounded by an alleged fear it instills in local media not to disseminate opposition comments.⁹⁸ Despite these concerns, Singapore’s judiciary feels there is a need to protect the government’s reputation and to defend stability and order, even if this means providing new grounds for executive power.⁹⁹ In *Lee Kuan Yew v. Vinocur*,¹⁰⁰ Goh, J. held that an accusation against three ministers of government of corruption and nepotism “was an attack on the very core of their political credo [and] would undermine their ability to govern.”¹⁰¹

This development had already included the introduction of the Singapore Law Reports in 1992. It has continued with the launch of Halsbury’s Laws of Singapore in 1999, and of the Singapore Academy of Law Annual Review of Singapore Cases in 1999.

⁹³ *Id.*

⁹⁴ *Jabar bin Kadermastan v. Pub. Prosecutor*, 1 Sing. L. Rep. 617, 631 (1995).

⁹⁵ *Nappalli Peter Williams v. Inst. of Technical Educ.*, 2 Sing. L. Rep. 569, 574 (1999). See generally Li-Ann Thio, *Beyond the “Four Walls” in an Age of Transnational Judicial Conversations—Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore*, 19 COLUM. J. ASIAN L. 428 (2005-2006).

⁹⁶ *Att’y-Gen. v. Hertzberg Daniel*, 1 Sing. L. Rep. 1103, 1125 (2009).

⁹⁷ See Tan, *supra* note 44, at 7.

⁹⁸ See Gomez, *supra* note 76. See also INTERNATIONAL BAR ASSOCIATION, HUMAN RIGHTS INSTITUTE REPORT, PROSPERITY VERSUS INDIVIDUAL RIGHTS? HUMAN RIGHTS, DEMOCRACY, AND THE RULE OF LAW IN SINGAPORE (2008), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=93326691-c4da-473b-943a-dd0fc76325e8>.

⁹⁹ See Jayasuriya, *supra* note 63, at 115.

¹⁰⁰ *Lee Kuan Yew v. Vinocur*, 3 Sing. L. Rep. 491 (1995).

¹⁰¹ *Id.*

Singapore's judiciary feels there is a need to afford protection to the executive in the hope that it will assist the day-to-day functioning of the executive. Indeed, Chua, J. elucidated precisely this view in *Lee Kuan Yew v. Seow Khee Leng*.¹⁰² There, his Honor held that "[m]oral authority is the cornerstone of effective government. If this moral authority is eroded, *the government cannot function*."¹⁰³ It is in the context of this statism and protection afforded to the executive within which Singapore's courts operate.

B. *Defamation and Contempt*

The government's use of defamation cases in Singapore might lead to the perception that their use silences political opposition. Lee Kuan Yew argues that if he does not launch defamation actions on allegations made against him, the claims will be seen as true.¹⁰⁴ Those who allege his defamation actions are designed to silence the opposition "do not understand how readily an allegation of dishonesty or corruption would be believed in a region where corruption, cronyism, and nepotism are still a plague."¹⁰⁵ Lee Kuan Yew sees it as his duty to preserve a climate of confidence and discipline, "without which Singapore will wither away and die."¹⁰⁶ Recent cases involving the NKF scandal,¹⁰⁷ the opposition, and foreign publications are illustrative of the proposition that this use of defamation suits leads to a chilling effect on the freedom of speech and political opposition in Singapore,¹⁰⁸ or more figuratively, "the Singapore Chill," whereby the risks of legal liability deter Singaporeans and others from making socially valuable comments and instead maintain their silence.¹⁰⁹

¹⁰² *Lee Kuan Yew v. Seow Khee Leng*, 1 Malayan L. J. 172 (1989).

¹⁰³ *Id.* at 176 (emphasis added).

¹⁰⁴ See HAN, FERNANDEZ, & TAN, *supra* note 27, at 222 (citing Interview by British Broadcasting Corporation, Interview with Lee Kuan Yew, First Prime Minister of the Republic of Singapore (June 14, 1995)); see also *Lee Kuan Yew*, *supra* note 1, at 130.

¹⁰⁵ *Lee Kuan Yew*, *supra* note 1, at 131.

¹⁰⁶ See *Lee Kuan Yew*, First Prime Minister of the Republic of Singapore, Speech to PAP MPs After the Anson By-Election Loss (Nov. 17, 1981) in JAMES MINCHIN, *NO MAN IS AN ISLAND: A PORTRAIT OF SINGAPORE'S LEE KUAN YEW* 199 (2d ed. 1990).

¹⁰⁷ See *supra* notes 10-11 and accompanying text.

¹⁰⁸ See also *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁰⁹ For a useful discussion of the concept of chilling speech, see Andrew Kenyon, *Investigating Chilling Effects: News Media and Public Speech in Malaysia, Singapore and Australia*, 4 INT'L J. OF COMMUN 440, 442 (2010).

1. *Opposition Politicians*

a) *Lee Hsien Loong v. Singapore Democratic Party*

In *Lee Hsien Loong v. Singapore Democratic Party*, Lee Kuan Yew and Lee Hsien Loong sued the Singapore Democratic Party (“SDP”), its secretary-general, Dr. Chee Soon Juan, and a member of its Central Executive Committee, Ms. Chee Siok Chin, for defamation in respect of two articles and a photograph concerning the NKF scandal published in *The New Democrat*, the SDP’s own newspaper. The following words were *inter alia* the subject of dispute:¹¹⁰

It is impossible not to notice the striking resemblance between how the NKF operated and how the PAP runs Singapore ... Singaporeans must note that the NKF is not an aberration of the PAP system. It is, instead, a product of it. ... With the PAP monopolizing power and making sure that no one has the means to challenge that hold on power ... are we not witnessing the NKF but on a larger and national scale?

Belinda Ang Saw Ean, J. granted summary judgment for the plaintiffs, which is possible because the courts of Singapore have assumed jurisdiction to award summary judgments in defamation cases.¹¹¹ In this case, her Honor held that the disputed words and photograph constituted defamation by implication.¹¹² In congruence with the consistency of the success of Lee Kuan Yew and Lee Hsien Loong in defamation actions,¹¹³ the Court of Appeal dismissed an appeal against this decision.¹¹⁴

According to Belinda Ang Saw Ean, J. the “sting” in the disputed words was that they highlighted commonalities between the government and the NKF, namely, “lack of transparency and lack of accountability,” and implied “that the PAP and the political elite are not transparent about the finances of the Government ... because they want to conceal their financial improprieties.”¹¹⁵ They implied that Lee Kuan Yew had set up “a corrupt political system for the benefit of the political elite ... ;”¹¹⁶ that Lee Hsien

¹¹⁰ *Lee Hsien Loong v. Singapore Democratic Party*, 1 Sing. L. Rep. 675, 684-5 (2007).

¹¹¹ *See, e.g., Microsoft Corp. v. SM Summit Holdings Ltd.*, 4 Sing. L. Rep. 529 (1999).

¹¹² *Lee Hsien Loong v. Singapore Democratic Party*, 1 Sing. L. Rep. 675, 700 (2007).

¹¹³ *See supra* note 6 and accompanying text.

¹¹⁴ *Lee Hsien Loong v. Singapore Democratic Party*, 1 Sing. L. Rep. 757 (2008).

¹¹⁵ *Lee Hsien Loong v. Singapore Democratic Party*, 1 Sing. L. Rep. 675, 701 (2007).

¹¹⁶ *Id.* at 702.

Loong had perpetuated this corrupt system,¹¹⁷ and that both men were dishonest and unfit for office.¹¹⁸ Another “sting” was felt to be that Lee Hsien Loong and Lee Kuan Yew brought defamation actions “not to vindicate their reputations but to suppress allegations which were true and which they knew to be true,” which “has led to a situation where wrongdoings cannot be exposed.”¹¹⁹

The court dismissed all defenses, but in so doing adopted an overwhelmingly black letter law approach by omitting to pay due regard to all relevant circumstances. Belinda Ang Saw Ean, J. dismissed the defense of justification on the basis that the matter was in the public interest for a lack of particulars;¹²⁰ similarly, her Honor held that the defense of fair comment was lacking in particulars and was full of generalizations and vagueness which were “symptomatic of a sham defence.”¹²¹ Despite these strong words, the judgment did not subject these first two defenses to lengthy analysis. Finally, her Honor dismissed the defense of qualified privilege.¹²² Her Honor mentioned the position in other common law jurisdictions, but ultimately concluded that these positions were “inconsistent” with Singapore’s defamation laws;¹²³ in other words, cultural relativism precluded their application. Belinda Ang Saw Ean, J. encountered no difficulties whatsoever in finding in favor of the plaintiffs.

The defendants, as members of an opposition political party, argued they had a duty to publish their views as a matter of public interest.¹²⁴ This position is similar to one advanced by Associate Professor Tsun Hang Tey of the National University of Singapore, who has argued that current defamation laws in Singapore cause a serious imbalance between society’s interests in political speech and individual reputation, and are “seriously discouraging” of criticism of government policies.¹²⁵ However, Belinda Ang Saw Ean, J. stated that the defendant’s argument was a “distortion,” and “[t]he mere fact that a publication relates to ‘political information’ or ‘matters of serious public concern’ does not entail that qualified privilege therefore attaches to its dissemination to the world at large.”¹²⁶ Regardless of her Honor’s intentions, dismissing not unmeritorious defenses in such an

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 703.

¹²⁰ *Id.* at 704-5.

¹²¹ *Id.* at 705.

¹²² *Id.* at 705-9.

¹²³ *Id.* at 709.

¹²⁴ *Id.* at 705.

¹²⁵ Tey, *supra* note 78, at 461.

¹²⁶ Lee Hsien Loong v. Singapore Democratic Party, 1 Sing. L. Rep 675, 706 (2007).

inflexible manner silences criticisms of the government made by opposition politicians and weakens opposition in Singaporean politics.

Whilst no defense to defamation has ever been successful against a government politician, it is clear that defenses are available for application in Singapore courts.¹²⁷ In *Jeyaretnam v. Goh Chok Tong*,¹²⁸ a defense of fair comment was made out by the Minister for Defense against Singapore's iconic opposition figure of the time. Whilst defamatory words imputing dishonorable conduct or a lack of integrity were proven, the courts held that a fair-minded person could have honestly arrived at the same conclusion.¹²⁹ Regardless of whether the conclusion was biased, prejudiced, or grossly exaggerated, it fell within the limit of fair comment.¹³⁰ This highlights that the current state of the law discourages the opposition from commenting on government policy whilst affording protection to the executive. This state of affairs is exacerbated by the fact that public protests have been stopped through public order regulations;¹³¹ the circulation of domestic and foreign newspapers is regulated and has been reduced,¹³² ensuring PAP control of print media;¹³³ and fines have been introduced for delivering a political speech without a permit.¹³⁴ As Singapore has not ratified the International Covenant on Civil and Political Rights, these restrictions are easily enforceable.

b) Related Contempt Proceedings

Apart from defamation laws, the right of freedom of speech and expression guaranteed by the Constitution is also subject to the law

¹²⁷ *Workers Party v. Tay Boon Too*, Sing. L. Rep. 621 (1972-74).

¹²⁸ *Jeyaretnam v. Goh Chok Tong*, 1 Malayan L. J. 334 (1985), *aff'd*, *Jeyaretnam v. Goh Chok Tong* Sing. L. Rep. 106 (1986), *aff'd*, *Jeyaretnam v. Goh Chok Tong*, Sing. L. Rep. 4 (1989).

¹²⁹ *Jeyaretnam v. Goh Chok Tong*, 1 Malayan L. J. 334, 340-41 (1985).

¹³⁰ *Id.* at 341.

¹³¹ This included: an amendment to § 4 of the Societies Act in 1988 to permit deregistration of any society that made political statement beyond its stated mandate; further, the passing of the Maintenance of Religious Harmony Act, ch. 167A (1992) (Sing.), which prohibits religious groups from conducting political activities that are disguised as religious; and amendments to the Films Act, ch. 107 (1981) (Sing.), to ban political advertising using film-related mechanisms (§ 33). *See also* the Undesirable Publications Act, ch. 338 (1967) (Sing.).

¹³² The Newspapers and Printing Presses Act, ch. 206 (1975) (Sing.) was amended in 1974 to give the Minister discretionary powers to deem if foreign publications were interfering in Singapore's domestic politics. This can be done through the publication of an order in the *Gazette*, which leads to the restriction of its circulation (§ 24).

¹³³ This culminated in the 1984 merger of The Straits Times group and Singapore News and Publications Ltd. into Singapore Press Holdings—which is presided over by a former PAP cabinet minister and has been previously headed by former internal security chiefs S.R. Nathan and Tjung Yuk Min.

¹³⁴ Public Entertainments and Meetings Act, ch. 257 (1959) (Sing.) § 3 (a police permit is required to hold a public talk or to deliver a political speech).

concerning contempt of court.¹³⁵ The legislature has granted the High Court and the Court of Appeal the power to punish any individual for contempt of court,¹³⁶ which includes any comment which scandalizes the court or damages the credibility of the judiciary's independence.¹³⁷ Whilst Singapore's government has stated that it does not intend to inhibit the interchange of views on matters of public interest, it has made clear that any deliberate attempt to undermine the authority of the courts "by casting aspersions on the integrity of the judges in order to further a political or ideological agenda" will be met with contempt proceedings,¹³⁸ yet feels that "[t]his principle is also accepted in other democratic societies".¹³⁹ However, legal precedent in other democratic common law countries is premised on the assumption that democratic societies have functioning oppositions. Therefore contempt proceedings instituted in Singapore must be viewed against this different background.

(1) Singapore Democratic Party

Subsequent to the defamation proceedings, Dr. Chee Soon Juan and Ms. Chee Siok Chin were also found guilty of contempt of court for their behavior during the case and sentenced to terms of imprisonment.¹⁴⁰ Questions asked and comments made by the defendants in their cross-examinations and oral submissions were felt to constitute "outrageous behaviour,"¹⁴¹ and "in a small country like Singapore," felt to undermine public confidence in the judiciary and impair and bring into disrepute the administration of justice.¹⁴² Belinda Ang Saw Ean, J. felt that, "under the guise of cross-examination," the defendants used the hearing "as an occasion to indict a political regime, publicise their personal and political agenda as well as stir up political controversy,"¹⁴³ an objective which perpetuated "the myth of a defence."¹⁴⁴

Her Honor seemed outraged that the defendants suggested in her courtroom that in defamation cases involving the government, the PAP "will interfere with the judicial process so as to procure a favourable verdict,"

¹³⁵ CONSTITUTION OF THE REPUBLIC OF SINGAPORE art. 14(2)(a).

¹³⁶ Supreme Court of Judicature Act, ch. 322 (1970) (Sing.).

¹³⁷ Att'y-Gen. v. Chee Soon Juan, 2 Sing. L. Rep. 650 (2006).

¹³⁸ See Walter Woon, *supra* note 8.

¹³⁹ *Id.*

¹⁴⁰ Lee Hsien Loong v. Singapore Democratic Party, 1 Sing. L. R. 642 (2009).

¹⁴¹ *Id.* at 723.

¹⁴² *Id.* at 729.

¹⁴³ *Id.* at 724.

¹⁴⁴ *Id.*

and/or that the judge will “decide the case in a way that will please or curry favour with the PAP.”¹⁴⁵ These arguments advanced by the defendants embodied a direct attack on the PAP’s ideological platform, one which the judiciary strives to uphold.¹⁴⁶ Taken as a whole, Belinda Ang Saw Ean, J.’s comments seemed to suggest that the defendants had broken an unwritten rule to subordinate themselves as citizens to the deference of their leaders, and that such a breach would not go unpunished.

For Dr. Chee Soon Juan, this was his second sentence for contempt imposed in less than two years. In *Attorney-General v. Chee Soon Juan*,¹⁴⁷ Dr. Chee Soon Juan was held in contempt for alleging that the judiciary acted at the instance of the government in cases involving opposition politicians, and insinuating that judges were removed from office if they were perceived as lenient towards opposition politicians.¹⁴⁸ This statement was made at the hearing of a bankruptcy petition against him. In 2001, Dr. Chee Soon Juan could not find local representation to defend defamation suits he was facing against Lee Kuan Yew and then Prime Minister Goh Chok Tong, and was thrice denied permission for representation by a foreign lawyer.¹⁴⁹ Eventually, summary judgment against Dr. Chee Soon Juan was granted.¹⁵⁰ In subsequent bankruptcy proceedings, instituted against him for failure to pay damages awarded in the summary judgment, Dr. Chee Soon Juan was again unable to find representation, and a judicial declaration of bankruptcy blocked his right to contest the 2006 General Election.¹⁵¹ On the basis of such analogies, it has been argued defamation suits are exploited to silence and eliminate members of the opposition through the twin swords of bankruptcy and defamation law.¹⁵² In light of the restrictions on political speeches and protest in Singapore,¹⁵³ it is not startling that opposition politicians might attempt to use the sanctum of the courtroom to voice their

¹⁴⁵ *Id.* at 727.

¹⁴⁶ See *supra* notes 52-69 and accompanying text.

¹⁴⁷ *Att’y-Gen. v. Chee Soon Juan*, 2 Sing. L. Rep. 650 (2006).

¹⁴⁸ *Id.* A similar argument has been advanced by the International Bar Association. See INTERNATIONAL BAR ASSOCIATION, HUMAN RIGHTS INSTITUTE REPORT, PROSPERITY VERSUS INDIVIDUAL RIGHTS? HUMAN RIGHTS, DEMOCRACY, AND THE RULE OF LAW IN SINGAPORE 49-61 (2008), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=93326691-c4da-473b-943a-dd0fc76325e8>.

¹⁴⁹ *Re Littlemore Stuart Q.C.*, 1 Sing. L. Rep. 296 (2002); *Re Nicholas William Henric Q.C.*, 2 Sing. L. Rep. 296 (2002); *Re Lee Chu Ming Martin Q.C.*, 4 Sing. L. Rep. 929 (2002).

¹⁵⁰ *Lee Kuan Yew v. Chee Soon Juan*, 3 Sing. L. Rep. 8 (2003); *Goh Chok Tong v. Chee Soon Juan*, 3 Sing. L. Rep. 32 (2003).

¹⁵¹ See also Hang, *supra* note 86, at 215-16.

¹⁵² See KELLY BRYAN & HOWARD RUBIN, LAWYERS’ RIGHTS WATCH CANADA, MISUSE OF BANKRUPTCY LAW IN SINGAPORE: AN ANALYSIS OF THE MATTER OF RE JOSHUA BENJAMIN JEYARETNAM, EX PARTE INDRA KRISHNAN (2004), <http://www.lrwc.org/documents/Misuse%20of%20Bankruptcy%20Law.Bryan&Rubin.22.10.04.pdf>.

¹⁵³ See *supra* notes 70-77 and accompanying text.

political concerns, however it is clear that the judiciary will not provide any such sanctuary.

(2) *Kangaroo Court Allegations*

At the hearing for the assessment of damages for *Lee Hsien Loong v. Singapore Democratic Party* held in May 2008,¹⁵⁴ three men appeared in the Supreme Court wearing t-shirts each imprinted with a picture of a kangaroo dressed in a judge's gown. One of the men pointed to his t-shirt and said "this is a kangaroo court" to Lee Kuan Yew as he walked past him outside the court in which the damages hearing was proceeding. All three men were later found in contempt of court for stigmatizing that the Singapore judiciary operates in a kangaroo court.¹⁵⁵

Judith Prakash, J. found that this "amounted to a deliberate and provocative attack,"¹⁵⁶ which was "intended to cast aspersions on the way in which the assessment of damages hearing was being conducted,"¹⁵⁷ as well as on the justice system in general.¹⁵⁸ All three men were sentenced to terms of imprisonment. The explicit message conveyed in this case is that the Singaporean judiciary will not allow itself to be implicated in accusations of bias. Combined with the use of defamation proceedings, the precedent for opposition politicians in Singapore is that they must only cautiously express their public views lest they be found guilty of defamation or contempt of court.

2. *Foreign Publications*

a) *Review Publishing Co. Ltd. v. Lee Hsien Loong*

In *Review Publishing Co. Ltd. v. Lee Hsien Loong*,¹⁵⁹ the *Far Eastern Economic Review*, a Hong Kong based English language Asian news magazine, was found to have published an article defamatory of both the former and current Prime Ministers. The article was largely based on

¹⁵⁴ *Lee Hsien Loong v. Singapore Democratic Party*, 1 Sing. L. R. 642 (2009).

¹⁵⁵ *Att'y-Gen. v. Tan Liang Joo John & Others*, 2 Sing. L. Rep. 1132 (2009). The Attorney-General's submissions contended, following BLACK'S LAW DICTIONARY 382 (8th ed. 2004), that a kangaroo court is a self-appointed tribunal or mock court in which the principles of law and justice are disregarded, perverted, or parodied, in a sham legal proceeding, characterized by unauthorised or irregular procedures, especially so as to render fair proceedings impossible. See *Att'y-Gen. v. Tan Liang Joo John & Others*, 2 Sing. L. Rep. 1132, 1136 (2009).

¹⁵⁶ *Att'y-Gen. v. Tan Liang Joo John & Others*, 2 Sing. L. Rep. 1132, 1142 (2009).

¹⁵⁷ *Id.* at 1141.

¹⁵⁸ *Id.*

¹⁵⁹ *Review Publ'g Co. v. Lee Hsien Loong*, 1 Sing. L. Rep. 52 (2010).

criticisms of the government leveled against it by Dr. Chee Soon Juan, including in respect of the NKF scandal, and comments on the defamation actions he was facing at the time. Unlike some foreign publications faced with defamation actions, the *Far Eastern Economic Review* was not willing to settle.¹⁶⁰ Instead, the *Far Eastern Economic Review* sought to exert pressure on the government to allow for greater criticism, and to argue that Lee Kuan Yew's use of defamation suits are an impediment to a pluralist and fully democratic Singapore.¹⁶¹ The following words in the *Far Eastern Economic Review*'s article were *inter alia* the subject of dispute:¹⁶²

[The NKF corruption scandal] raises the question of whether Singapore deserves its reputation for squeaky-clean government The government ... openly uses the funds for refurbishing apartment blocks as a bribe for districts that vote for the ruling party.¹⁶³ Singaporeans have no way of knowing whether officials are abusing their trust ... Singaporean officials have a remarkable record of success in winning libel suits against their critics. The question then is, how many other libel suits have Singapore's great and good wrongly won, resulting in the cover-up of real misdeeds? And are libel suits deliberately used as a tool to suppress questioning voices?

The defendants stated that these and other words meant that Lee Kuan Yew has persecuted political opponents under unaltered and antiquated defamation laws that favor political plaintiffs.¹⁶⁴ However, the defendants denied that these words implicated Lee Hsien Loong in any manner, except to the extent that they presented him "as a victim of his father's culture of non-transparency."¹⁶⁵ In summary judgment, Woo Bih Li, J. found against the defendants.¹⁶⁶ His Honor reiterated that there was no need for a trial to

¹⁶⁰ Bloomberg, The Economist, and FinanceAsia.com all published apologies, paid damages, and indemnified Lee Kuan Yew for costs after defamation actions were launched against them in Singapore.

¹⁶¹ Hugo Restall, *From the Editor*, FAR EASTERN ECONOMIC REVIEW, October 2006.

¹⁶² *Review Publ'g Co. v. Lee Hsien Loong*, 1 Sing. L. Rep. 52, 64 (2010).

¹⁶³ It should be noted that the Housing and Development Act, ch. 129 (1960) (Sing.), regulates the supply and control of public housing to over 90% of the population. Further, there exists no constitutional provision for an Independent Electoral Commission, and the Elections Department within the Prime Minister's Office administers this duty. Electoral ballots are also numbered, which leads to speculation that votes are monitored. See Parliamentary Elections Act, ch. 218 § 40 (1954) (Sing.).

¹⁶⁴ *Lee Hsien Loong v. Review Publ'g Co.*, 1 Sing. L. Rep. 167, 197 (2010).

¹⁶⁵ *Id.* at 200.

¹⁶⁶ *Id.*

take place.¹⁶⁷ Both defendants suggested that there ought to be a trial to do justice to them, because of the stature of the plaintiffs; but his Honor said that allowing this to occur would place foreign defendants in a more favorable position than local defendants.¹⁶⁸ This is a curious position, given the positions of power held by the plaintiffs as Prime Minister and Minister Mentor.

The Court of Appeal upheld the decision at first instance, and found that the natural and ordinary meaning of these words was that Lee Kuan Yew and Lee Hsien Loong are corrupt; have been running and continue to run Singapore in the same corrupt manner as the NKF was run; and have been using libel actions to cover up their misdeeds.¹⁶⁹ To be sure, these allegations of corruption strike at the heart of Singapore's ideological platform as a corruption-free meritocracy with an independent judiciary.

As in *Lee Hsien Loong v. Singapore Democratic Party*,¹⁷⁰ the court rejected all defenses raised, in a manner imbued with black letter law and insufficient regard to all relevant circumstances, as well as a selective application of common law precedent. The defense of justification was held inapplicable, because it was found that the disputed words bore the meaning pleaded by the plaintiffs, and the defendants had not pleaded justification in relation to that meaning.¹⁷¹ The defense of fair comment was rejected on the basis that the defense only applies to comments and not imputations of facts, and here there were not found to be any supporting facts behind the allegations of corruption.¹⁷² The defense of derivative qualified privilege, under which the defendants argued that Dr. Chee Soon Juan was entitled to repel accusations made against him by Lee Hsien Loong and Lee Kuan Yew, also failed on the grounds that "the law does not allow a free-for-all tit for tat," and that a "retaliatory attack" by Dr. Chee Soon Juan on Lee Hsien Loong and Lee Kuan Yew was "wholly unnecessary" for the purposes of defending his own reputation.¹⁷³ This finding was made despite the fact that Dr. Chee Soon Juan is subject to constant attacks by the most powerful men in the island state.

The Court of Appeal, in a stunning performance of common law legitimacy, considered at length the defense of qualified privilege and the

¹⁶⁷ *Id.* at 241.

¹⁶⁸ *Id.*

¹⁶⁹ Review Publ'g Co. v. Lee Hsien Loong, 1 Sing. L. Rep. 52, 101-02 (2010).

¹⁷⁰ See *supra* notes 120-26 and accompanying text.

¹⁷¹ Review Publ'g Co. v. Lee Hsien Loong, 1 Sing. L. Rep. 52, 116-18 (2010).

¹⁷² *Id.* at 118-23.

¹⁷³ *Id.* at 126.

approach taken in other jurisdictions.¹⁷⁴ This spanned frequently considered jurisdictions such as England,¹⁷⁵ Australia,¹⁷⁶ New Zealand,¹⁷⁷ and Canada,¹⁷⁸ but also included an assortment of other jurisdictions such as Hong Kong,¹⁷⁹ Malaysia,¹⁸⁰ Jamaica,¹⁸¹ South Africa,¹⁸² Ireland,¹⁸³ and Samoa.¹⁸⁴ Whilst undertaking any such review might be seen to be inconsistent with the idea of Singaporeanising common law precedent,¹⁸⁵ the court seemed to suggest that the review of these jurisdictions revealed there is no such common law precedent in relation to the defense of qualified privilege. Instead, courts in these jurisdictions have demonstrated there is a need to decide how to strike an appropriate balance between the “competing” interests of freedom of speech and protection of reputation in the context of local conditions.¹⁸⁶ The court found that there existed three approaches to striking this balance.¹⁸⁷ First, a “preferential right” approach, where freedom of speech is preferenced over protection of reputation if it is reasonable and relates to government and political matters.¹⁸⁸ Second, a “fundamental right” approach, where freedom of speech trumps protection of reputation, unless the defamatory statement was published with malice.¹⁸⁹ Third, a “co-equal rights” approach, where neither freedom of speech nor protection of reputation takes precedence over the other.¹⁹⁰ It is notable that under none of the three approaches was protection of reputation preferred over freedom of speech.

However, the court found that, in this instance, because the defendants were not citizens of Singapore, they were not entitled to enjoy constitutional free speech, and so there was no need to decide what approach the courts should adopt to the interpretation of such freedom.¹⁹¹ Nonetheless, the court

¹⁷⁴ *Id.* at 129-188.

¹⁷⁵ *Id.* at 137-50.

¹⁷⁶ *Id.* at 151-54.

¹⁷⁷ *Id.* at 154-59.

¹⁷⁸ *Id.* at 159.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 159-60.

¹⁸¹ *Id.* at 160.

¹⁸² *Id.* at 160-61.

¹⁸³ *Id.* at 161.

¹⁸⁴ *Id.*

¹⁸⁵ *See supra* notes 91-97 and accompanying text.

¹⁸⁶ *Review Publ'g Co. v. Lee Hsien Loong*, 1 Sing. L. Rep. 52, 132 (2010).

¹⁸⁷ *Id.* at 183-84.

¹⁸⁸ *See, e.g., Lange v. Australian Broad. Corp.*, (1997) 145 A.L.R. 96 (Austl.).

¹⁸⁹ *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Lange v. Atkinson*, [2000] 3 N.Z.L.R. 385.

¹⁹⁰ *See, e.g., Mosley v. News Group Newspapers Ltd.*, [2008] E.M.L.R. 20 (U.K.).

¹⁹¹ *Review Publ'g Co. v. Lee Hsien Loong*, 1 Sing. L. Rep. 52 (2010).

outlined in dicta some interesting considerations it thought pertinent in deciding the limits of constitutional free speech in Singapore.¹⁹² The court suggested that Singapore has no place in its political culture for the making of “false defamatory statements which damage the reputation of a person (especially a holder of public office) for the purposes of scoring political points,”¹⁹³ because of the “heavy emphasis” placed in Singapore’s culture on “honesty and integrity in public discourse on matters of public interest.”¹⁹⁴ The court felt that it was “one thing to falsely claim that an UFO has been spotted over the skies of Singapore,” and “quite another to falsely assert that a person is a crook or a charlatan, especially if that person is also a holder of public office.”¹⁹⁵ This hyperbolized dictum reveals a judicial unwillingness to change the direction of Singapore’s jurisprudence of political defamation and instead to maintain the protection afforded to the executive by the judiciary.

The court ventured to make some astounding comments that there is no evidence that Singapore’s circumstances have changed significantly since the founding of the island state, which it will be recalled took place in a climate of fear and instability. The court held that the balance struck on September 16, 1963, the day freedom of speech became a constitutional right in Singapore, between constitutional free speech and protection of reputation is still “appropriate in the prevailing circumstances in Singapore today.”¹⁹⁶ The court felt that “[p]roponents of change must produce evidence of a change in [Singapore’s] political, social and cultural values in order to satisfy the court that change is necessary”¹⁹⁷ In so stating, the court demonstrated how the exception truly has become the norm.¹⁹⁸ By implication, the judiciary appears to accept that it has normalized the PAP’s exceptionalist platform and has no intent of renormalizing the regime of exception to reflect the position in which Singapore now finds itself in the 21st century. It is doubtful whether defendants would be able to demonstrate such change has occurred, without mitigating the risk of falling foul of both the executive and the judiciary.

¹⁹² *Id.* at 175-88.

¹⁹³ *Id.* at 183.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 182.

¹⁹⁶ *Id.* at 178.

¹⁹⁷ *Id.*

¹⁹⁸ See *supra* notes 63-69 and accompanying text; see generally Jayasuriya, *supra* note 63.

(1) *Risk of Restriction of Circulation of Publications*

Lee Kuan Yew demands that the media operate in Singapore to reinforce and not to undermine the cultural values and social attitudes of the government.¹⁹⁹ On this view, freedom of the press must be subordinated to the need to sustain the integrity of Singapore. The government will take “firm measures” to ensure that unity of purpose in Singapore remains.²⁰⁰ For example, the *Media Development Authority of Singapore Act* (Cap. 172) is not merely regulatory in nature; it criminalizes certain acts or omissions.²⁰¹ According to Lee Kuan Yew, foreign publications must not assume a role in Singapore of “invigilator, adversary, and inquisitor of the administration,” as Singaporean society is not perceived as strong enough to withstand such treatment.²⁰²

Foreign publications require a permit to circulate in Singapore, and the Minister of Information, Communication and the Arts may give or refuse approval of the distribution of a foreign publication in Singapore without assigning any reasons.²⁰³ It is seen as a privilege and not a right for this circulation, and restrictions have been imposed on other large-scale publications.²⁰⁴ To underline how serious the government is about keeping the foreign media under check, a ban was imposed on the *Far Eastern Economic Review*'s distribution following publication of the article and the *Far Eastern Economic Review*'s refusal to comply with new conditions imposed.²⁰⁵ Thus, there appears to be no commercial certainty (apart from the PAP line) for foreign media enterprises operating in Singapore, and their commercial rights to bring foreign capital into the Singaporean economy are not upheld. Notably, this lack of commercial certainty is also inconsistent with the government's economic agenda of encouraging international investment.

¹⁹⁹ HAN, FERNANDEZ, & TAN *supra* note 27, at 430 (citing Lee Kuan Yew, First Prime Minister of the Republic of Singapore, Speech at the General Assembly of the International Press Instituted (June 9, 1971)).

²⁰⁰ *Id.*

²⁰¹ See, e.g., *Media Development Authority of Singapore Act*, ch. 172 § 63 (2003) (Sing.).

²⁰² HAN, FERNANDEZ, & TAN, *supra* note 27, at 438 (citing Lee Kuan Yew, First Prime Minister of the Republic of Singapore, Speech to the American Society of Newspaper Editors (Apr. 14, 1988)).

²⁰³ *Newspaper and Printing Presses Act*, ch. 206 § 24(3) (1975) (Sing.).

²⁰⁴ Other publications on which restrictions have been imposed include *Time Magazine*, the *International Herald Tribune*, *The Economist*, *Newsweek*, and the *Financial Review*.

²⁰⁵ *Newspaper and Printing Presses Act*, ch. 206 § 24 (1975) (Sing.).

b) *Related Contempt Proceedings*

The judiciary has also shown that it too will take firm measures to ensure that its decisions are not brought into contempt by foreign media. In *Attorney-General v. Hertzberg Daniel*,²⁰⁶ Dow Jones Publishing Company (Asia) Inc., the proprietor and publisher of the Wall Street Journal Asia, and sister publication of the *Far Eastern Economic Review*, was found in contempt of court. The contempt related to two articles and a letter by Dr. Chee Soon Juan published in the Wall Street Journal Asia. Their content largely related to the circumstances considered in both *Lee Hsien Loong v. Singapore Democratic Party* and *Review Publishing Co. Ltd. v. Lee Hsien Loong*. Dow Jones had already been found guilty of contempt of court on two previous occasions.²⁰⁷

The court found that all three publications “contained insinuations of bias, lack of impartiality and lack of independence and implied that the judiciary is subservient to Mr. Lee and/or the PAP and is a tool for silencing political dissent.”²⁰⁸ The most recent article was found to imply that the suppression of political dissent is achieved by way of damages awarded by the courts in defamation suits; that the judiciary is a tool to muzzle political dissent and lacks impartiality and independence where opposition politicians are concerned; and that everything in Singapore, including the judiciary, is controlled by Lee Kuan Yew.²⁰⁹

Tay Yong Kwang, J. appeared overwhelmingly unimpressed by these claims. His Honor was especially unenthusiastic with their implications that “the price of political dissent equals the monetary damages payable in defamation actions commenced by Mr. Lee and his son,”²¹⁰ and that judicial bias towards Lee Kuan Yew and Lee Hsien Loong “assists them in the suppression of political dissent among opposition politicians” through these damages.²¹¹ The article was found to imply that defamation cases are not

²⁰⁶ *Att’y-Gen. v. Hertzberg Daniel*, 1 Sing. L. Rep. 1103 (2009). The Court also found Melanie Kirkpatrick, Deputy Editor of the Wall Street Journal Asia, guilty of contempt in related proceedings. See SINGAPORE GOVERNMENT, THE ATTORNEY-GENERAL’S CHAMBERS, MEDIA BRIEF: CONTEMPT PROCEEDINGS AGAINST MELANIE KIRKPATRICK (2009), http://www.agc.gov.sg/docs/Media_Brief_Contempt_of_Court_Melanie_Kirkpatrick_Wall_Street_Journal.pdf.

²⁰⁷ *Att’y-Gen. v. Zimmermann*, Sing. L. Rep. 814 (1984-85); *Att’y-Gen. v. Wain* (No. 1), Sing. L. Rep. 383 (1991).

²⁰⁸ *Att’y-Gen. v. Hertzberg Daniel*, 1 Sing. L. Rep. 1103, 1133 (2009).

²⁰⁹ *Id.* at 1127-8.

²¹⁰ *Id.* at 1128.

²¹¹ *Id.*

decided based on their merits, “but for the ulterior purpose of penalising political dissent.”²¹²

Finally, his Honor was particularly scathing about reference in one article to a recent report of the International Bar Association. This report, eponymously entitled “Prosperity Versus Individual Rights,” was damning in its assessment of defamation actions. The report concluded that Singapore cannot claim that civil and political rights must be secondary to economic rights, as the island state now has a highly sophisticated and prosperous economy,²¹³ and that “the slim likelihood” of a successful defense to defamation, combined with high damages awarded in cases involving PAP officials, “sheds doubt on the independence of the judiciary in these cases.”²¹⁴ The offending article stated that “when the country is ready to join the ranks of modern democracies, the IBA’s recommendations provide a good checklist of how to do so.”²¹⁵ In his Honor’s view, this was nothing short of a “triumphalist note” and a “mocking stance,”²¹⁶ insidiously insinuating through the need for reform of the court system that the judiciary “is not independent and impartial in cases involving the ruling party or its interests.”²¹⁷ Notwithstanding these remarks, no charges or proceedings have been brought against the International Bar Association.

In any event, here the court felt it needed to find contempt because of the serious nature of the allegations made. The defense of fair criticism could not succeed in this context, as the offending publications attacked the impartiality of Singapore’s judiciary and did not contain reasonable argument or expostulation.²¹⁸ Most notably, Tay Yong Kwang, J. felt that in Singapore, “impartiality and independence are the judiciary’s crucial cornerstones. Putting these qualities into question destabilizes the edifice of the rule of law and, consequently, threatens to bring down [Singapore’s] reputation.”²¹⁹ Therefore the publications could not be countenanced without punishment for contempt. Damage to the reputation of Singapore would have ramifications for the executive’s task of nation building, and would allegedly damage stability and economic growth. The precedent here is clear: Singapore’s courts will not tolerate press commentary which

²¹² *Id.*

²¹³ See INTERNATIONAL BAR ASSOCIATION, HUMAN RIGHTS INSTITUTE REPORT, PROSPERITY VERSUS INDIVIDUAL RIGHTS? HUMAN RIGHTS, DEMOCRACY, AND THE RULE OF LAW IN SINGAPORE 69 (2008), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=93326691-c4da-473b-943a-dd0fc76325e8>.

²¹⁴ *Id.* at 59.

²¹⁵ *Att’y-Gen. v. Hertzberg Daniel*, 1 Sing. L. Rep. 1103, 1132 (2009).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 1133.

²¹⁹ *Id.* at 1135.

undermines the judiciary and, by implication, the executive. Moreover, when comments destabilize the edifice of the rule of law, creating potential to erode Singapore's corruption-free reputation, the courts will defend the integrity of Singapore with vigor.

c) *Legal Representation*

Whilst Singapore's judiciary may continue to defend Singapore's reputation, it appears that some defendants will forego adequate legal representation in proceedings in Singapore's courts. Whilst there is not a lack of counsel who are adequately experienced or trained to litigate an issue, there is a lack of experienced counsel who are willing to take on politically-unpopular cases. This is a prime example of the effect of a statist, thin rule of law on the functioning of Singapore's legal system. Denying adequate legal representation both quells dissent and further demonstrates the hollowness of the government's cultural relativist claims. In *Review Publishing Co. Ltd. v. Lee Hsien Loong*, the *Far Eastern Economic Review* experienced denial of its chosen legal representation when the courts refused to allow representation by a British Queen's Counsel in the defamation proceedings.²²⁰ The emphasis on communitarian legalism under a statist conception of the rule of law questions the value of a thin rule of law where defendants are not able to secure adequate representation. In rejecting the *Far Eastern Economic Review's* appeal against this decision, Tay Yong Kwang, J. said should FEER's counsel (alleged to be inadequate and inexperienced) feel:

he would be embroiled in a battle of 'David and Goliath' proportions, perhaps he could take comfort in the fact that the little shepherd boy armed with only a sling and stones emerged the victor against the gigantic seasoned soldier wearing a shield, a sword and a spear.²²¹

This dictum is astonishing on two levels (despite his Honor's laodicean characterization of this issue as being "on a lighter note").²²² First, it is tantamount to an unequivocal recognition by his Honor that Singapore operates in an unfairly weighted adversarial system. Second, this acceptance of Singapore's adversarial system can be contrasted with the emphasis

²²⁰ Re Millar Gavin James Q.C., 1 Sing. L. Rep. 297 (2008).

²²¹ *Id.* at 315.

²²² *Id.*

placed on communitarian values by the judiciary, in line with Lee Kuan Yew's emphasis on Asian and Confucian values.

Imagery of a stereotypical courtroom battle is not assuaged by any emphasis on communitarianism, Confucianism, "Asianism" and similar constructs. As a result of Confucian beliefs, it is said that Singaporeans view authorities not as adversarial but as an "extension of familiar rule,"²²³ with a cultural preference for dispute resolution mechanisms other than litigation.²²⁴ Even under this familiar rule, political reputations and defamation suits seem "unsusceptible to negotiation."²²⁵ Communitarian legalism then becomes untenable, because defamation suits are meant to protect the community from instability in Singapore, but at the same time they emphasize the cultural norm of adversarialism said to be so foreign to Singapore. His Honor's statement either reveals a road-to-Damascus conversion on the conceptualization of the place of courts in Singaporean society, or more likely, a miscellany of arguments: cultural norms are only reverted to when congruent with PAP policy. The value of the rule of law is lowered when the judiciary, so accepting of the PAP's politics of exception, then undermines the cultural values they espouse and, moreover, their allegedly autochthonous jurisprudence, hitherto seen as so pivotal because of conditions supposedly unique to Singapore. Finally, the fact remains that despite Tay Yong Kwang, J.'s reassurances that the litigation might be a David-and-Goliath battle, in *Lee Hsien Loong v. Review Publishing Co. Ltd.*, the "gigantic seasoned soldier" emerged the victor by way of summary judgment: it will be recalled that no battle took place in the form of a trial.

As a result of this adversarial system, the issue of representation under the rule of law is brought into question.²²⁶ Especially for the *Far Eastern Economic Review*, if as according to Tay Yong Kwang, J. the case was going to be so adversarial, a "slingshot" was never going to be sufficient to create a watershed in Singapore's legal history and persuade the judiciary to abandon its literalist approach to constitutional interpretation. It will also be recalled that Dr. Chee Soon Juan could not find local representation to defend defamation suits he was facing from Lee Kuan Yew and then Prime Minister Goh Chok Tong and was denied permission for representation by a foreign lawyer.²²⁷ It is not surprising that such defendants would encounter

²²³ See Thio, *supra* note 40, at 39.

²²⁴ *Id.* See also Karen Blöchlinger, *Primus Inter Pares: Is the Singapore Judiciary First Among Equals?*, 9 PAC. RIM. L. & POL'Y J. 591, 597-606 (2000).

²²⁵ See Thio, *supra* note 40, at 39.

²²⁶ See also *Re Littlemore Stuart Q.C.*, 1 Sing. L. Rep. 296 (2002); *Re Caplan Jonathan Michael Q.C.* (No. 2), 1 Sing. L. Rep. 440 (1998).

²²⁷ See *supra* note 149 and accompanying text.

difficulties in finding adequate local representation. The government's use of market power, accounting for around 60 percent of the capitalization of the Singapore Stock Exchange, includes a lot of business for law firms. This has even been said to encourage lawyers to avoid confrontation with the government.²²⁸ If judicial interpretation of the rule of law in Singapore means that defendants might forego adequate legal representation, then it must be questioned as to whether Singapore's rule of law attains sufficient meritorious value to be worthy of protection.

IV. INCREASING UNCERTAINTY IN SINGAPORE'S COMMON LAW

A. *Precedent Set by Recent Cases*

Whilst Singapore's government might hope that the strong message sent by the judiciary in the recent defamation and contempt decisions will relax debate on Singapore's legal system, it is likely that the converse will be true. This issue of adequate legal representation reminds us in a very real and confronting manner of the practical implications the court's decisions have on Singapore's rule of law. This issue can be placed in the wider context of the recent defamation and contempt judgments, themselves so edifying of the relationship between the courts, the government, and the role of law in Singapore. These decisions exemplify how Singapore's defamation laws are used to promote a judicially accepted procedural framework within which the rule of law is weakened.

A subsidiary ground for the defamation actions launched in both *Lee Hsien Loong v. Singapore Democratic Party* and *Review Publishing Co. Ltd. v. Lee Hsien Loong* might have been to justify the plaintiffs' role in the NKF scandal, and to avoid damage to the reputation of Singapore, perceived as so crucial to its economic and political legitimacy. However, another purpose for the lawsuits may have been that the plaintiffs do not want to risk one of their key ideological foundations becoming unstuck. If they let the comments pass without resort to litigation, and Singapore's economy continues to thrive, this would cast doubt on the PAP's rhetoric of Singapore's exceptional fragility without one of its key foundational pillars and, moreover, would open the door to the public articulation of critique. This would mean that insisting on the importance of a stable economy is merely a pretext behind the intended purpose of consolidating statist rule.

The precedent set by the two sets of cases is unambiguous: any comments regarded by Lee Hsien Loong or Lee Kuan Yew as defamatory

²²⁸ See Worthington, *supra* note 18, at 509.

will be met with defamation suits in Singapore's courts, where it is possible that no trial will take place and summary judgment might be awarded. Any comments made either outside or within the courts, which question the independence of Singapore's judiciary, will be punishable for contempt of court. Whilst it is undisputed that in any jurisdiction such criticism leveled at both the executive and the judiciary would not pass without examination, the approach taken by Singapore's government to allow criticism to become increasingly vociferous and to continue the approach of the past four decades without further reflection can only have a pejorative impact on perceptions of the nature of Singapore's common law.

B. Impact on the Government's Economic Agenda

The rule of law in Singapore might appear at times to be more a rule of economics. Singapore's rule of law might seem to be merely a balancing exercise between economic prosperity and individual freedom, the balance leaning towards prioritization of the former. However, the Diceyan rule of law is exactly that—a rule. It is not to be derogated from. Instead, this rule of law seeks to support competing rights, without which they would have no substance. Rights are bare without the rule of law. Lee Kuan Yew's acceptance of a thin rule of law, justified by reference to economic considerations, distorts the “rule” of law. These economic arguments become a competing policy consideration and diminish the capacity of the rule of law to provide substance to the rights it seeks to protect.

Moreover, the commercial viability of the current divergent judicial approach might be untenable in the long-term, insofar as it has the potential to destabilize Singapore's common law through creating inherent uncertainty in all legal precedents. This is in stark contrast to a position advocated by Yong, C.J. in 2001, when his Honor stated that:

Singapore is a nation which is based wholly on the Rule of Law It is the certainty which an environment based on the Rule of Law guarantees which gives our people ... and other foreign investors, the confidence to invest in our physical, industrial as well as social infrastructure.²²⁹

²²⁹ See Yong Pung How, Former Chief Justice of Singapore, Speech at the Legal Service Dinner (Apr. 6, 2001).

The potential erosion of this confidence would be damaging to Singapore's economy and therefore reconsideration by Singapore's political elite of issues raised in this article is warranted.

In neither the case of *Lee Hsien Loong v. Singapore Democratic Party* nor in the case of *Review Publishing Co. Ltd. v. Lee Hsien Loong* would Dicey's tenets of the rule of law be satisfied. The application of the law is arbitrary insofar as certain foreign publications are allowed uncircumscribed circulation,²³⁰ and the executive is given preference over the opposition to voice its views, which also means the law is not applied equally to those groups.²³¹ Further, such an arbitrary and unequal application of the law does not protect the rights of foreign media or opposition politicians to basic political freedom, and certainly does not protect the rights of Singapore's citizens.²³² Singapore's thin and statist rule of law continues to diverge from the rule of law in other jurisdictions to which Singapore strives to maintain continuity with precedent in commercial cases. There is a need to recognize that any balancing exercise between economic prosperity and individual freedom is at odds with the approach taken in other common law jurisdictions, where instead economics and individual rights go hand in hand.

The divergent nature of Singapore's common law might be of concern to foreign corporations operating in what to date has been a haven in a region beset by political instability and corruption. It appears that companies are willing to openly question the viability of Singapore as an acceptable forum for the settlement of commercial disputes. In *Oakwell Engineering v. Enernorth Industries*,²³³ an application to enforce a Singaporean judgment in Ontario was opposed on the basis that there is an institutional bias in Singapore's courts and that Singapore's justice system was contrary to the Canadian concept of justice. Ontario's Court of Appeal upheld the decision at first instance to enforce the judgment.²³⁴ At first instance, Day, J. held that Singapore's courts "have a reputation for fairness in deciding cases between private commercial parties."²³⁵ Whilst the defendant tendered evidence in respect of possible government interference in trials, Day, J. found that such evidence pertained only to "political cases,"

²³⁰ DICEY, *supra* note 28, at 188.

²³¹ *Id.* at 193.

²³² *Id.* at 195-6.

²³³ *Oakwell Eng'g Ltd. v. Enernorth Indus. Inc.*, [2005] 76 O.R.3d 528 (Can.), *aff'd*, *Oakwell Eng'g v. Enernorth Indus.*, [2006] 81 O.R.3d 288 (Can.); leave to appeal was refused by the Supreme Court of Canada, *see Enernorth Indus. Inc. v. Oakwell Eng'g Ltd.*, [2007] 1 S.C.R. ix (Can.).

²³⁴ *Oakwell Eng'g v. Enernorth Indus.*, [2006] 81 O.R.3d 288 (Can.).

²³⁵ *Oakwell Eng'g Ltd. v. Enernorth Indus. Inc.*, [2005] 76 O.R.3d 528, 538 (Can.).

and that the case under consideration was a “commercial case.”²³⁶ Whilst the defendants provided reports that Singapore’s rule of law does not meet the standards of the rule of law in Canada, Day, J. held that such evidence went against the “formal legal structure” of Singapore evidenced in its constitution and laws.²³⁷ Day, J. granted the application for enforcement of the Singaporean judgment in the absence of evidence that Singapore’s courts are biased when deciding a commercial case between private parties.²³⁸

Both the first instance and appellate judgments show that the Canadian judiciary was not inclined to enter into scrutinization of Singapore’s judiciary, perhaps in the interests of comity. That said, Day, J.’s judgment might be interpolated to reveal that his Honor did agree that “political cases” in Singapore might not necessarily be judged in an unbiased manner, by dichotomizing between “political” and “commercial” cases. However, his Honor did not expand on when cases might fall into either category, and it might be that such a distinction is not so clear-cut. It is unclear to what extent the government would need to have an interest in a company or other legal entity for it to be considered a “political” case. Here, the dual state construct yet again becomes unstuck. It is blurred as to when cases in Singapore might be considered political and subject to special treatment by the judiciary, which creates uncertainty in Singapore’s common law and undermines the government’s economic agenda.

Oakwell Engineering v. Enernorth Industries is also significant because it is likely to create a future trend, in which Singapore’s reputation as a center for commercial legal certainty will be subject to examination by courts in other jurisdictions. Whilst Singapore’s courts have legitimized their judgments and certainty provided by the legal system through an application of common law principles, the increasing divergent attitude displayed by the judiciary typifies an exceptionalist platform on which many of Singapore’s policies are formulated. If Singapore’s courts come under increasing scrutiny, this is likely to erode the foundations of the certainty provided by common law precedent. Foreign companies would then become increasingly reluctant to submit to the jurisdiction of Singapore’s courts and they would be less inclined to include Singaporean jurisdiction and/or choice of law clauses in their contractual arrangements. Instead, foreign companies would be likely to opt instead for the selection of fora where there is no controversy surrounding the state of judicial independence. Again, any such actions would be inconsistent with the government’s economic agenda of

²³⁶ *Id.* at 543.

²³⁷ *Id.* at 545.

²³⁸ *Id.* at 543.

attracting international investment. The avoidance of Singaporean governing law clauses would not only harm Singapore's law firms, but would also result in international investment being directed towards other jurisdictions.

Moreover, if foreign companies are seeking for their contractual arrangements to be governed by laws which provide for commercial certainty, then it is doubtful whether Singaporean law is in a position to guarantee such certainty. It might be expected that recognition of other supposed conditions "unique" to Singapore has the potential to lead to rapid and unanticipated departures from common law precedent.²³⁹ Indeed, it would be a paradoxical—or at the very least perplexing—state of affairs if the cultural relativist approach adopted by Singapore's judiciary does not eventually alter other laws. There is no justifiable explanation as to why these departures might not occur in other areas of the law, including contract and company law, and why they instead should be limited to cases concerning individual rights. Whilst it might be argued that *Oakwell Engineering v. Enernorth Industries* shows precisely the opposite, namely that commercial cases have in fact been successfully separated from political cases, the judiciary's cultural relativist approach in relation to individual rights can only be expected to be considered increasingly anomalous and is likely to come under increasing levels of international scrutiny.

The dual state construct in Singapore, under which commercial law remains depoliticized and readily enforceable, has thereby been distorted by the increasingly statist rule of law. Lee Hsien Loong and Lee Kuan Yew, by strengthening their rule through a mountain of defamation actions, have destabilized the government's economic agenda—the very outcome which their actions have sought to avoid. Singapore's common law cannot be bifurcated because the government's economic agenda appears to have become undermined through increasing uncertainty in Singapore's common law foundations.

Singapore's government is no longer in a position to manipulate the concept of the rule of law to construct the perception of effective forms of governance in a stable and prosperous market,²⁴⁰ at the same time using these arguments of effective governance to reinforce illiberal political practices.²⁴¹ Commercial law can no longer remain depoliticized to encourage investment, facilitated through strong legal institutions,²⁴² given that it has been subjected to increasing levels of international scrutiny. If

²³⁹ *Att'y-Gen. v. Hertzberg Daniel*, 1 Sing. L. Rep. 1103, 1125 (2009).

²⁴⁰ See Jayasuriya, *supra* note 16, at 110.

²⁴¹ *Id.* at 111.

²⁴² *Id.*

Singapore is to maintain a rule of law, which is respected by others, then the rule of law can no longer be used as a legitimating ideology to show that the economy is strong, but at the same time to silence political opposition and rule through law.²⁴³ Singapore's rule of law has peaked in its ability to reinforce and provide for an expansion and rationalization of state power. Singapore has a unitary system of common law, and it cannot reasonably be expected that those who have been satisfied to use Singapore law to govern their commercial transactions will not begin to question where political influence stops and certainty of common law precedent begins.

V. CONCLUSION

The recent defamatory and contemptuous allegations of corruption leveled against both the executive and the judiciary not only struck at the heart of Singapore's ideological, corruption-free platform buttressed by judicial independence, but also brought into question the extent to which the approach emphasized by both the judiciary and the executive is tenable in the long-term without eroding the government's economic agenda. This article raises confronting questions for those with interests in Singapore's legal system. It casts doubt on the extent to which judicial acceptance of the government's politics of communitarian legalism will not infiltrate Singapore's commercial law. Judicial normalization of a statist rule of law, of which but one example is the manner in which defamation laws are applied to chill political opposition, determines that no area of Singapore's common law can remain forever depoliticized and readily enforceable, and that any boundaries between "political" cases and "commercial" cases will only become ever more distorted and uncertain. This contention has been reached following consideration of several key issues.

First, Singapore's use of the rule of law as an economic asset means that the analysis of the applicability of such a normative and Eurocentric jurisprudential concept to an Asian legal system is justified. The value of Singapore's rule of law depends on how law in Singapore is conceived. Irrespective of whether a preference for a thick rule of law and an independent judiciary might be seen as a Western approach, it has been shown that under Singapore's cultural relativist approach, the statist, procedural, thin rule of law is used as a tool to entice economic investment, without concern as to whether laws on individual rights and freedoms are fair, just, or reasonable. The judiciary has accepted the PAP's exceptionalist platform that Singapore is vulnerable and in so doing affords additional

²⁴³ *Id.* at 117-18.

protection to the executive at the expense of individual rights. The relationship between the executive and the judiciary has become so close that their interaction might be better characterized as a division of power within the executive, rather than some broader separation of powers.

Second, restrictions on freedom of speech in Singapore discourage the public from becoming politically active. Defamation laws in Singapore give greater rights to those in positions of power, which is indicative of Singapore's selective judicial application of common law precedent. Under the Singapore Chill, the risks of legal liability are so substantial that the law deters Singaporeans and others from criticizing the government and instead persuades them to maintain their silence.

Third, the recent sets of defamation and contempt cases have significant implications for the state of Singapore's legal system. The cases highlight that neither the executive nor the judiciary will tolerate accusations of corruption leveled against Singapore's system of governance. The precedent for opposition politicians, foreign publications, and anyone considering accusing the executive of corruption and the judiciary of lacking independence, is unmistakable: defamation suits and contempt proceedings will be used to defend the government's reputation whenever it is brought into question. Defendants might expect to encounter difficulties in obtaining adequate legal representation in Singapore's courts.

Finally, the applicability of any dual state construct in Singapore is an unsatisfactory explanation for the government's justification of the adequacy of Singapore's legal system. It can never be clear as to where the divide between political and commercial cases lies, and the determination of the judiciary to diverge from sound common law precedent based on the recognition of conditions "unique" to Singapore creates uncertainty in Singapore's common law. This has the potential to frustrate the government's economic agenda of effective governance in a strong and stable corruption-free market economy, as foreign players might become disinclined to use Singapore law to govern their transactions, or Singapore's courts as an appropriate forum for the resolution of their commercial disputes. Until such time as the Singapore Chill lifts, it should only be expected that the legitimacy of Singapore's legal system will be the subject of progressively more intensive debate, which can only serve to damage the government's priority of securing economic prosperity for the future.