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Jack Tsen-Ta *Lee*

The offence of scandalizing the court, a form of contempt of court, is regarded as obsolete in the United Kingdom. However, it continues to be imposed in other Commonwealth nations and remains very much alive in Singapore, having been applied in a crop of cases between 2006 and 2009. This short commentary examines one of these cases, *Attorney-General v Hertzberg and others* [2009] 1 *Singapore Law Reports* 1103, which has generated worldwide interest as it arose out of articles published in the *Wall Street Journal Asia*. In *Hertzberg*, the High Court of Singapore held that utterances by an alleged contemnor are actionable if they merely have an inherent tendency to affect the administration of justice. Drawing comparisons from other common law jurisdictions, it is contended that this traditional conception of the offence held by the court is inconsistent with the constitutionally guaranteed right to freedom of speech and expression, properly understood. The offence should therefore be fine-tuned by applying a more stringent standard for liability.

THE SPECIES OF the offence of contempt of court colourfully termed 'scandalizing the court', often regarded as having fallen into desuetude in the United Kingdom,[1] has continued to be imposed in other parts of the Commonwealth. In particular, it remains very much alive in Singapore. It has been applied in a crop of cases over the past few years,[2] one of the most recent being *Attorney-General v Hertzberg and others*,[3] a decision of the High Court of Singapore.

Hertzberg has generated a fair amount of interest around the world as it arose out of two articles and a letter published in the *Wall Street Journal Asia* (WSJA) in June and July 2008. The respondents in the case were Daniel Hertzberg, editor of

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1 In *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 at 305, Lord Steyn, delivering the judgment of the Privy Council on appeal from Mauritius, noted: "In England such proceedings are rare and none has been successfully brought for more than 60 years." A person was last found guilty of the offence by an English court in *R v Colsey*, *The Times* (9 May 1931): Colin Munro, Case Comment, "More Heat than Light from *Anwar*" (2009) 13 Edin L Rev 104 at 107. In *Colsey*, the editor of a magazine was found guilty of scandalizing the court for publishing an article suggesting that a judge could hardly be "altogether unbiased" when dealing with legislation he had helped to steer through Parliament as a law officer in an earlier Labour government. C J Miller has remarked that the case "is, by general consent, singularly difficult to defend... It seems most unlikely that an English court would adopt a similar attitude to such an innocuous publication today.": Miller, *Contempt of Court* (2nd ed) (Oxford: Clarendon Press, 1989) at 374.

2 See *Attorney-General v Chee Soon Juan* [2006] 2 SLR 650, HC (Singapore), *You Xin v Public Prosecutor* [2007] 4 SLR 17, HC (Singapore), *Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642, HC (Singapore), and *Attorney-General v Tan Liang Joo John* [2009] 2 SLR 1132, HC (Singapore). The *Singapore Law Reports* (SLR) is Singapore's official series of law reports.

3 *Attorney-General v Hertzberg* [2009] 1 SLR 1103.

the WSJA; Christine Glancey, WSJA's managing editor; and Dow Jones Publishing Company (Asia) Inc, the proprietor and the publisher of the WSJA. The present case only involved Dow Jones, as the parties had agreed to hold the matters in respect of the first and second respondents in abeyance pending the outcome of this case and any consequent appeal.[4] After having been found guilty of scandalizing the court, Dow Jones elected not to appeal. The Attorney-General's Chambers eventually brought further contempt proceedings only against Melanie Kirkpatrick, deputy editor of the WSJA's editorial page, as it was her decisions that had led to the pieces being published. In March 2009, Kirkpatrick acknowledged responsibility for the publication of the pieces through her solicitors and was fined S$10,000.[5] It does not appear that she appealed against the sentence.

According to the Attorney-General, the articles and letter published in the WSJA, "individually and taken together, impugn the integrity, impartiality and independence of the Singapore Judiciary. It is implied that the Singapore courts do not dispense justice fairly in cases involving political opponents and detractors of Minister Mentor Lee Kuan Yew and other senior government figures, and the courts facilitate the suppression of political dissent or criticism in Singapore through the award of damages in defamation actions."[6] The third respondent denied that the items published constituted a contempt of court.

I. JUSTIFICATIONS FOR THE 'INHERENT TENDENCY' TEST

It is well established that the offence of scandalizing the court serves to protect the administration of justice, and is not intended to protect the dignity of the courts or judges.[7] At common law, there are no legal limits to the quantum of fine or imprisonment that the court may impose,[8] and it is open to the court to deal with the matter summarily.[9]

One of the main issues in *Hertzberg* was the appropriate test for determining if the offence had been made out. According to prior Singapore case law, the words complained of had to possess an "inherent tendency to interfere with the administration of justice".[10] Put another way, such words must convey to an average

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4 *Id* at 1109, [3].

5 Zakir Hussain, "Govt to Take WSJ Editor to Court for Contempt: A-G Taking Action for Articles that 'Scandalise the Singapore Judiciary'", *The Straits Times* (14 March 2009); Zakir Hussain, "WSJ Senior Editor Fined $10,000 for Contempt of Court: Editor Responsible for Three Articles in its Sister Paper", *The Straits Times* (20 March 2009).

6 *Hertzberg*, above, n 3 at 1113, [8].

7 *Id* at 1118, [20], referring to *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 322, HL; *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 at 229, CA (NZ); *Attorney-General v British Broadcasting Corporation* [1981] AC 303 at 344, HL; *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC* [2007] 2 SLR 518 at [22], HC (Singapore) (citing *Times Newspapers* with approval); *You Xin*, above, n 2 at [14].

8 *Radio Avon*, above, n 7 at 229; *Ahnee*, above, n 1 at 307. In the Singapore context, the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (Singapore), O 52 r 1(1), provides that "[t]he power of the [High] Court or the Court of Appeal to punish for contempt of Court may be exercised by an order of committal in Form 109". That form states, in part: "And it appearing to the satisfaction of the Court that the said defendant has been guilty of contempt of Court in (state the contempt): ... It is ordered that for his said contempt, the defendant do stand committed to prison to be there imprisoned for [*blank*] (or until further order) (and/or be fined $[*blank*])." Neither the Rules nor any other pieces of legislation set limits for these sanctions: *Hertzberg*, *id* at 1136, [62].

9 *You Xin*, above, n 2 at 32–33, [34]–[35].

10 *Attorney-General v Wain* [1991] SLR 383 at 397, [50], HC (Singapore), cited in *Chee Soon Juan*, above, n 2 at 661, [30]–[31]; and *Lee Hsien Loong*, above, n 2 at 714, [174].

reasonable reader allegations of bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function.[11]

Counsel for the respondent submitted that the test of whether there existed a "real risk" of prejudicing the administration of justice ought to be adopted, since it was clearer and struck a more appropriate balance between protecting the institution of an independent judiciary and the right to freedom of expression.[12] He noted that this test had been widely adopted in other common law jurisdictions.[13] However, the Court declined to accept the submission. It justified the rejection of the 'real risk' test on the ground that "conditions unique to Singapore (i.e., our small geographical size and the fact that in Singapore, judges decide both questions of fact and law) necessitate that we deal more firmly with attacks on the integrity and impartiality of our courts".[14]

In support of these justifications, the Court relied on its earlier decision *Attorney-General v Chee Soon Juan*.[15] The judge in that case expressed the view that "the geographical size of Singapore renders its courts more susceptible to unjustified attacks",[16] relying on *Ahnee v Director of Public Prosecutions*.[17] There, the Privy Council on appeal from Mauritius reasoned as follows:

> [I]t is permissible to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater: see Feldman, *Civil Liberties & Human Rights in England and Wales* (1993), pp. 746–747; Barendt, *Freedom of Speech* (1985), pp. 218–219.[18]

However, the thrust of the academic opinions referred to in *Ahnee* is that a lower threshold for determining whether a court has been scandalized may be appropriate in jurisdictions where the position of the judiciary is unstable and vulnerable to undue pressure from the executive or segments of the public. It can be questioned whether this is an accurate description of the situation in present-day Singapore. There is no history of civil unrest directed at the courts that threatens their operation. Singapore judges have themselves rejected accusations of being under executive influence.[19] Singapore is generally regarded as having become a developed nation in the mid-1980s,[20] and has a literate and well-educated

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11 *Hertzberg*, above, n 3 at 1124–1125, [31].

12 *Id* at 1117, [17].

13 *Times Newspapers*, above, n 7 at 299, HL; *Radio Avon*, above, n 7 at 234; *Ahnee*, above, n 1 at 306; *Wong Yeung Ng v Secretary of State for Justice* [1999] 2 HKC 24 at 59, CA (HK); *S v Mamabolo* 2001 (5) BCLR 449 at [45], Const Ct (S Africa).

14 *Hertzberg*, above, n 3 at 1125, [33].

15 *Chee Soon Juan*, above, n 2.

16 *Id* at 659, [25].

17 Above, n 1.

18 *Id* at 305–306.

19 For instance, in *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1998] 1 SLR 547 at 563, [31]–[32], the High Court stated that Singapore had "an open system of justice" and that there were "no private directives to a judge from the executive or from anyone one else on how a case is to be conducted"; while the judge in *Chee Soon Juan*, above, n 2 at 665–666, [50], said that Ross Worthington's article "Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore" (2001) 28 J of Law & Society 490, which cast aspersions on the independence of the judiciary, "expressed the views of an individual who had made erroneous assumptions based on his own beliefs and inaccurate and/or wrong information. I could not accept the speculative conclusions, which the author arrived at, as the truth."

20 According to Table 1 ("Human Development Index Trends") of the United Nations Development Programme's report *Human Development Indices: A Statistical Update 2008 <http://hdr.undp.*

population.[21] There is little reason to assume that members of the public are incapable of assessing for themselves any allegations made against the judiciary.[22]

It might also be argued that a finding that the courts of a small nation have been scandalized should be readily made because false claims about the judiciary can spread quickly throughout the community. It is submitted that the geographical size of a jurisdiction *per se* is irrelevant in the age of blogs, text messaging and Twitter.

The second justification for preferring the 'inherent tendency' test relied on in *Chee Soon Juan* and *Hertzberg* is that the administration of justice in Singapore is "wholly in the hands of judges and other judicial officers"[23] as they are deciders of both law and fact;[24] jury trials were removed for all criminal proceedings except capital cases in 1960, and entirely abolished in 1970.[25] This rationalization was first given in the 1991 decision *Attorney-General v Wain*, and explained thus:

> [B]ecause judges in Singapore are judges of facts, the contempt of scandalizing the court by imputing bias to a judge, or attacking his impartiality, his propriety and integrity in the exercise of his judicial functions, must be firmly dealt with. This is for the reason that such imputations and allegations strike at the very core of the functions of a judge. Such accusations are harmful to public interest and are clearly calculated to undermine public confidence in the administration of justice and must necessarily lower the authority of the courts.[26]

Michael Hor and Collin Seah have pointed out that if it is significant that the judge is a trier of fact, one would expect the threshold for determining if the court has been

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org/en/media/HDI_2008_EN_Complete.pdf> (accessed 2 July 2009, archived at <*http://www.webcitation.org/5iVtL40fe*>) at 25, in 1985 Singapore had a human development index that took it into the list of countries regarded as having 'high human development'. As of 2006 it was 28th out of 75 countries on the list. The International Monetary Fund (IMF) regards Singapore as one of 33 countries with 'advanced economies': IMF, "World Economic Outlook: Database—WEO Groups and Aggregates Information" (April 2009) <*http://www.imf.org/external/pubs/ft/weo/2009/01/weodata/groups.htm*> (accessed 2 July 2009, archived at <*http://www.webcitation.org/5iVtTF1il*>).

21 According to the most recent national census conducted in 2000, 93% of the resident population of Singapore aged 15 years and older were literate (defined as the ability to read with understanding in specified languages), some 57% of the non-student population aged 15 years and older had at least secondary school qualifications, and 12% of the non-student population were university graduates: Leow Bee Geok, *Census of Population 2000 Statistical Release 2: Education, Language and Religion* (Singapore: Department of Statistics, Ministry of Trade and Industry, 2000), <*http://www.singstat.gov.sg/pubn/popn/c2000sr2/cop2000sr2.pdf*> (accessed 2 July 2009, archived at <*http://www.webcitation.org/5iVtc3t3D*>) at 9, paras 1 and 2, and at 10, para 7.

22 See Michael Hor & Collin Seah, "Selected Issues in the Freedom of Speech and Expression in Singapore" (1991) 12 Sing L Rev 296 at 309–310: "The implication [in *McLeod*] is clearly that the 'coloured populations' of these colonies are not to be trusted to assess for themselves the accuracy of scandalizing speech, unlike the inhabitants of the mother country. This view is perhaps excusable, being made almost a century ago with the British Empire at its zenith, by a court of the colonial masters. It would be ludicrous and inexcusably insulting if the same view were taken of the people of modern Singapore after almost 30 years of independence and long after the establishment of a comprehensive education system." This article was written 18 years ago. See also Thio Li-ann, "An 'i' for an 'I'? Singapore's Communitarian Model of Constitutional Adjudication" (1997) 27 HKLJ 152 at 180–181; Thio Li-ann, "Administrative and Constitutional Law" (2006) 7 Sing Acad of L Ann Rev 1 at 33, [1.94].

23 *Wain*, above, n 10 at 394, [34].

24 *Hertzberg*, above, n 3 at 1125, [33]; *Chee Soon Juan*, above, n 2 at 659–660, [26].

25 Andrew Phang Boon Leong, "Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution" (1983) 25 Malaya L Rev 50 at 51. Juries have never been used in civil trials in Singapore: *id* at 50, n 1.

26 *Wain*, above, n 10 at 394, [34].

scandalized to be lower in non-jury trials in jurisdictions such as the United Kingdom. However, this is not the case – the same rules apply to both jury and non-jury trials.[27] Thio Li-ann suggests the reasoning in *Wain* may be that since Singapore judges have a heavier responsibility as triers of both law and fact, they need greater protection from critical speech since such criticism potentially has a more damning effect on judicial reputation.[28] However, in a non-jury legal system there is arguably a greater public interest in ensuring that judges remain accountable to the people. Hence, there should be greater freedom to discuss the manner in which judges carry out their functions.[29]

II. CONSTITUTIONALITY

It is evident that an offence that penalizes persons for speaking their minds potentially infringes the right to freedom of speech that is constitutionally protected in most democratic jurisdictions. This right is guaranteed by Article 14(1)(a) of the Constitution of the Republic of Singapore,[30] which states that "every citizen of Singapore has the right to freedom of speech and expression".[31] However, the right is subject to Article 14(2)(a):

> *Parliament may by law impose... on the rights conferred by clause (1)(a)*, such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and *restrictions designed* to protect the privileges of Parliament or *to provide against contempt of court*, defamation, or incitement to any offence... [Emphasis added.]

In *Chee Soon Juan*, the view was taken that where the High Court and Court of Appeal[32] were concerned, the restriction imposed by Parliament pursuant to the Article took the form of section 7(1) of the Supreme Court of Judicature Act[33] which provided that these courts had "power to punish for contempt of court". This was statutory recognition of the common law misdemeanour of contempt of court, and included the offence of scandalizing the judiciary. Thus, the offence could not be regarded as contrary to Article 14(1)(a).[34] The constitutionality of the offence was not challenged in *Hertzberg*.[35]

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27 Hor & Seah, above, n 22 at 306–307.

28 Thio, "An 'i' for an 'I'", above, n 22 at 175.

29 Thio, *ibid*. See also Hor & Seah, above, n 22 at 307; Thio, "Administrative and Constitutional Law", above, n 22 at 33, [1.94].

30 1999 Reprint.

31 Note that the right is expressly reserved to Singapore citizens and therefore may not be availed of by foreign nationals (see *Attorney-General v Wain* [1991] SLR 383 at 398, [54]–[55], HC (Singapore)), presumably even if they have permanent residency status in Singapore.

32 The High Court is Singapore's superior court with unlimited original jurisdiction, while the Court of Appeal is its final appellate court.

33 Cap 322, 2007 Rev Ed.

34 *Chee Soon Juan*, above, n 2 at 660–661, [29], citing *Wain*, above, n 31 at 394, [35].

35 *Hertzberg*, above, n 3 at 1119, [21]: "Given the public importance of protecting the administration of justice, the law of contempt has been considered, not just in Singapore, but in other jurisdictions as well, to be a justifiable restriction on the right to freedom of speech... . The Singapore High Court has consistently upheld the constitutionality of the law of contempt... on the basis that that the right to freedom of speech and expression guaranteed under Art 14(1)(a) of the Constitution is not absolute and no one is entitled 'under the guise of freedom of speech and expression' to make irresponsible accusations against the Judiciary so as to undermine public confidence in the administration of justice... . Mr Jeyaretnam [the respondent's solicitor] is also not contending to the contrary in the instant case before me." [Citations omitted.]

Article 4 of the Constitution expressly affirms that ordinary legislation must be consistent with the constitutional text:

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

Counsel for the respondent in *Wain* did not contend that the offence had been abolished by the Constitution,[36] and I agree with this. It is difficult to claim that the offence serves no purpose whatsoever and must be abrogated in order to vindicate the right to free speech. Nonetheless, it may be argued that since section 7(1) of the Supreme Court of Judicature Act was enacted to place the common law offence of contempt of court on a statutory footing, any such common law principles that are inconsistent with Article 14 are void to the extent of the inconsistency. We may therefore question whether the 'inherent tendency' test is consonant with the freedom of speech and expression, and if not, whether an appropriate alternative exists.

Recall, however, the apparent latitude granted by Article 14(2)(a) to the legislature: "Parliament may by law impose... restrictions designed to... provide against contempt of court". In *Chee Siok Chin v Minister for Home Affairs*,[37] one of the issues facing the court was whether certain provisions of the Miscellaneous Offences (Public Order and Nuisance) Act[38] were consistent with the right to freedom of assembly guaranteed by Article 14(1)(b) of the Constitution.[39] This right is subject to Article 14(2)(b), which reads: "Parliament may be law impose... on the right conferred by clause (1)(b), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order". The court compared this provision with Article 19(3) of the Indian Constitution:

> Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, *reasonable restrictions* on the exercise of the right conferred by the said sub-clause. [Emphasis added.]

Noting the absence of the word *reasonable* in Singapore's Article 14(2)(b), the judge concluded:

> In contrast to the Indian Constitution, there can be no questioning of whether the legislation is "reasonable". The court's sole task, when a constitutional challenge is advanced, is to ascertain whether an impugned law is within the purview of any of the permissible restrictions. ... All that needs to be established is a nexus between the object of the impugned law and one of the permissible subjects stipulated in Art 14(2) of the Constitution.[40]

No stretch of the imagination is required to apply this interpretation to Article 14(2)(a) which also refers to "restrictions", rather than the term "reasonable restrictions" which appears in Article 19(2) of the Indian Constitution.

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36 *Ibid*.

37 [2006] 1 SLR 582, HC (Singapore).

38 Cap 184, 1997 Rev Ed (Singapore).

39 The Constitution, Art 14(1)(b), states: "[A]ll citizens of Singapore have the right to assemble peaceably and without arms".

40 *Chee Siok Chin*, above, n 37 at 601, [45]–[46].

Is there sufficient reason for holding that the presence of the word *reasonable* in the Indian Constitution and its absence in corresponding provisions of the Singapore Constitution indicates that Singapore courts are not to have regard to the reasonableness of legislation as against constitutional rights? Singapore gained a bill of rights for the first time when it became one of the states of the Federation of Malaysia in 1963, and the Federal Constitution of Malaysia was extended to it. Following Singapore's separation from Malaysia in 1965, Singapore made the bill of rights in the Federal Constitution applicable to its new Constitution.[41] Malaysia itself had received the fundamental liberties in a new constitution upon its independence from Great Britain in 1957. In February that year, a draft constitution with copious borrowings from the Indian Constitution[42] had been drawn up and submitted together with a report to Her Britannic Majesty and their Highnesses the Rulers of the Malay States by a Constitutional Commission under the chairmanship of Lord Reid, a member of Judicial Committee of the House of Lords.[43] Article 10(1) of the draft constitution stated:

> Every citizen shall have the right to freedom of speech and expression, subject to any *reasonable restriction* imposed by federal law in the interest of the security of the Federation, public order, or morality, or in relation to contempt of court, defamation, or incitement to any offence. [Emphasis added.]

On the other hand, in the finalized draft which was eventually enacted into law the word *reasonable* had been dropped.[44] It is not clear why this was done. Debates in the Federation legislature shed little light on the intended meaning or scope of provisions of the bill of rights:

> As contemporary evidence of the meanings of controversial provisions the debates on the Constitution in the Legislative Council [of the Federation of Malaya] are not too helpful... No real discussion was had of its provisions. The Chief Minister restated some of them; but members were generally keenly conscious of the fact that they were expected to act favourably and quickly on the Constitution as a whole. Indeed, any desire to delay impending Merdeka[45] by constitutional controversy was pointedly eschewed by more than one speaker, most of whom rose simply to defend, or occasionally attack, not to debate or expound or clarify any section of, the Constitution. Many took the floor for the sole purpose of congratulating the Chief Minister.[46]

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41 Republic of Singapore Independence Act 1965 (No 9 of 1965, 1985 Rev Ed), s 6(1): "The provisions of the Constitution of Malaysia, other than those set out in subsection (3), shall continue in force in Singapore subject to such modifications, adaptations and qualifications and exceptions as may be necessary to bring them into conformity with the independent status of Singapore upon separation from Malaysia."

42 R[eginald] H[ugh] Hickling, *Malaysian Public Law* (Petaling Jaya, Selangor, Malaysia: Pelanduk Publications, 1997) at 15.

43 *Report of the Federation of Malaya Constitutional Commission* (Chairman: Lord Reid) (London: HMSO, 1957), App II. The report, but not its appendices, is reproduced as App A of Kevin Y[ew] L[ee] Tan & Thio Li-ann, *Tan, Yeo & Lee's Constitutional Law in Malaysia and Singapore* (2nd ed) (Singapore: Butterworths Asia, 1997).

44 See the *Proposed Constitution of Federation of Malaya* (Kuala Lumpur, Malaysia: Printed at the Government Press by G A Smith, Government Printer, 1957) at 4.

45 *Merdeka* is a Malay word meaning 'independence'. Used in this context, it refers to the independence of the Federation of Malaya – now the Federation of Malaysia – from the United Kingdom on 31 August 1957, now celebrated as Merdeka Day.

46 Harry E Groves, "Fundamental Liberties in the Constitution of the Federation of Malaya – A Comparative Study" (1959) 5 Howard LJ 190 at 214.

Following Singapore's own independence from Malaysia in 1965, a constitutional commission chaired by the then Chief Justice Wee Chong Jin was appointed to formulate constitutional safeguards for multiracialism and equality of all citizens.[47] The commission, which presented its report in August 1966, generally approved the fundamental liberties imported from the Malaysian Constitution without detailed discussion of them. The Singapore Government made known its views on the report in Parliament on 21 December 1966 and legislative debates were held in March 1967. Neither the Wee Commission report nor the subsequent Parliamentary debates on it provide assistance as to how Article 14(2)(a) of the Singapore Constitution should be interpreted.

In the circumstances, it is submitted there is a distinct lack of evidence as to why the word *reasonable* was omitted from the Malaysian predecessor of Article 14(2)(a). Since the fundamental liberties in a constitution should be interpreted generously[48] and not in a manner that curtails rights unless the legislature has unambiguously expressed its intention to do so,[49] it cannot conclusively be said that Parliament did not intend to confer on the courts the discretion to consider the rationality of statutory restrictions on free speech, even if they fall within the exceptions set out in Article 14(2)(a). Another way of interpreting the Article, which is more consonant with the right to freedom of speech, is that the Constitution's framers found it unnecessary to state that limitations imposed on the right had to be reasonable since it is inherent in rights interpretation that the judiciary must assess the reasonableness of such limitations.[50]

Indeed, Singapore courts have on occasion asserted this duty. In *Jeyaretnam v Public Prosecutor*,[51] for instance, Chan Sek Keong J (who has subsequently become Chief Justice of Singapore) held that if a statute vested absolute and untrammelled discretion in a public official to deny a citizen a licence to hold a public event, this would be an unconstitutional deprivation of the citizen's right to freedom of speech and expression.[52] Furthermore, in *Wain* Sinnathuray J said: "I recognize that this court has duty to uphold the right to freedom of speech and expression, and I accept that this right must be balanced against the needs of the administration of justice, one of which is to protect the integrity of the courts."[53] He went on to find that the 'inherent tendency' test achieved an appropriate balance.

Contrary to the view expressed in *Wain*, it is submitted this test does not give adequate recognition to the right to free speech. A widely accepted method for weighing governmental interests against rights is the proportionality analysis

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47 *Report of the Constitutional Commission, 1966* (Chairman: Wee Chong Jin CJ) ([Singapore: Printed by the Government Printer], 1966) at 1, para 1. The report is reproduced as App D of Tan & Thio, above, n 43.

48 *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 at 670, [1980–1981] SLR 48 at 61, [23], PC (on appeal from Singapore), citing *Minister of Home Affairs v Fisher*, [1980] AC 319 at 328, PC (on appeal from Bermuda).

49 See, for instance, *Morguard Properties Ltd v City of Winnipeg* (1983) 3 DLR (4th) 1 at 13, SC (Can); *Wheeler v Leicester City Council* [1985] AC 1054 at 1065, HL; and *Coco v The Queen* (1994) 179 CLR 427 at 437, HC (Aust).

50 See Hor & Seah, above, n 22 at 298; Michael Hor, Case Note, "The Freedom of Speech and Defamation: *Jeyaretnam Joshua Benjamin v Lee Kuan Yew*" [1992] Sing J Legal Studies 542 at 544–549, particularly 547.

51 [1989] SLR 978, HC (Singapore).

52 *Id* at 987, [27].

53 *Wain*, above, n 10 at 397, [52].

undertaken in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*.[54] Lord Steyn said that the court must ask itself

> whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[55]

The offence of scandalizing the court satisfies the first limb of the analysis since its objective of protecting the administration of justice is certainly of high importance. On the other hand, the 'inherent tendency' test may lack a rational connection to this objective, and may infringe free speech more than is necessary to accomplish the objective.

First, it is questionable whether the offence in its present incarnation is truly effective in upholding public confidence in the administration of justice. When the 'inherent tendency' test is applied, it does not matter whether there is any truth or not in the utterance by the alleged contemnor.[56] A court may convict so long as it takes the view that the utterance poses some hazard, even if slight, to the administration of justice. This approach seems apt to create the impression that the court is more concerned with suppressing criticism to avoid trouble than investigating if the criticism is justified. Moreover, by finding too easily that an utterance amounts to contempt, the court may inadvertently give it undeserved credence.[57]

Secondly, it may be contended that the 'inherent tendency' test does not satisfy the last limb of the proportionality analysis. The judge in *Hertzberg* gave two reasons for preferring this test: it does not require detailed proof of what will often be unprovable – that public confidence in the administration of justice really was impaired by the relevant publication; and it enables the court to intervene before any impairment of public confidence in the administration of justice actually occurs.[58] These reasons, which were mentioned in a 1987 report on contempt of court by the Australian Law Reform Commission (ALRC),[59] are problematic. Tests that are stricter than the 'inherent tendency' test, such as the 'real risk' test, do not require proof that public confidence in the administration of justice has actually been impaired, only that there exists a genuine and substantial risk that it may be affected. Similarly, since the offence is established by showing the existence of risk and not its eventuation, the court is not required to wait till public confidence in the administration of justice has already been impaired.

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54 [1999] 1 AC 69, PC (on appeal from Antigua and Barbuda). See also *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800 at 844, [93], HL; *R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391 at 1416, [64], CA; and *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 at 753, [51], and 789, [181], CA (Civil Div). Compare *R v Oakes* [1986] 1 SCR 103, SC (Can); *R v Kopyto* (1987) 47 DLR (4th) 213 at 238–239 and 252, CA (Ont); *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 at [160], SC (Can); *Libman v Quebec (Attorney General)* [1997] 3 SCR 659, at [58], SC (Can).

55 *De Freitas*, *id* at 80.

56 Unlike the law of defamation, justification is currently not a defence to the offence of scandalizing the court in Singapore: *Hertzberg*, above, n 3 at 1121, [23], citing *Chee Soon Juan*, above, n 2 at 665, [47]. This issue is explored below in Pt II of the article.

57 Hor & Seah, above, n 22 at 310.

58 *Hertzberg*, above, n 3 at 1125, [33].

59 The Australian Law Reform Commission's report *Contempt* (Report No 35) (Canberra: Australian Government Publishing Service, 1987) at 247–248, [427], cited in *Hertzberg*, *ibid*.

The ALRC also pointed out counterarguments to the above reasons, notably that the 'inherent tendency' test "inhibits freedom of expression... to an unjustifiable degree, because criminal liability is imposed without it being necessary to establish that the community, or any institution or person within it, has been harmed or put in jeopardy in any significant way".[60] In addition, since the 'inherent tendency' test opens the door to courts clamping down on conduct or speech that may not be significantly harmful, this infringes the principle that prior restraints on publication are only justifiable on the most compelling grounds.[61] The law frowns upon prior restraints as they have an inhibiting or 'chilling' effect on speech, causing people to censor themselves which leads to potentially valid criticism not being articulated.

III. 'REAL RISK' OR 'CLEAR AND PRESENT DANGER'?

If the 'inherent tendency' test is inconsistent with the right to freedom of speech and expression, what alternatives are there? We have already encountered the 'real risk' test, which requires a genuine and significant risk – certainly much more than a "remote possibility"[62] – that the administration of justice will be adversely affected. In the United States the offence of scandalizing the court is unknown,[63] but in *Bridges v California*,[64] which involved a contempt of court action for comments relating to pending litigation, the Supreme Court adopted an even higher standard – the 'clear and present danger' test, which requires that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished".[65] This test was applied to the offence of scandalizing the court by two of the three majority judges of the Ontario Court of Appeal in *R v Kopyto*.[66]

In *Bridges*, the 'clear and present danger' standard was justified on the basis of the history of the United States Bill of Rights: "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. ... [T]he only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."[67] North of the border, Cory JA accorded the right to freedom of expression in section 2(b) of the Canadian Charter[68] the exalted status given to it

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60 ALRC, *Contempt*, *id* at 248, [428].

61 *Id* at 248, [429], citing *Waterhouse v Australian Broadcasting Corporation* (1986) 68 ALR 75, HC (Aust).

62 *Times Newspapers*, above, n 7 at 298–299, citing *R v Duffy, ex parte Nash* [1960] 2 QB 188 at 200; *Hertzberg*, above, n 3 at 1125, [33]. See also *Mamabolo*, above, n 13 at 68, [45].

63 *Bridges v California* 314 US 252 at 287 (1941) *per* Frankfurter J (dissenting in part), Stone CJ and Roberts and Byrnes JJ concurring: "Some English judges extended their authority for checking interferences with judicial business actually in hand, to 'lay by the heel' those responsible for 'scandalizing the court', that is, bringing it into general disrepute. Such foolishness has long since been disavowed in England and has never found lodgment here."

64 *Bridges*, *ibid*.

65 *Id* at 263 *per* Black J for the majority. See also *Pennekamp v Florida* 328 US 331 (1946) at 1031, SC (US); *Craig v Harney* 331 US 367 at 376 (1947), SC (US); *Wood v Georgia* 370 US 375 (1962), SC (US); H[arry] E Groves, "Scandalizing the Court – A Comparative Study" (1963) 5 Malaya L Rev 58.

66 *Kopyto*, above, n 54, *per* Goodman and Cory JJA.

67 *Bridges*, above, n 63 at 265.

68 The Canadian Charter, s 2(b), reads: "Everyone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication..."

in the United States. The Charter was intended to effect a decisive break with the past.[69] Hence, despite the right being expressly subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society",[70] the judge commented that "it is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression"; therefore, it should be restricted "only in the clearest of circumstances".[71]

As with Canada, the introduction of a bill of rights into Singapore was intended to establish a new legal order. Under the common law, the rights enjoyed by the people were the residual liberties remaining after their freedom of action had been restricted by statutes. The bill of rights that came into force tasked the judiciary with the responsibility of determining if statutory provisions are consistent with fundamental liberties, and striking down those that are not. However, unlike Canada, Singapore courts have not endorsed the view that free speech should be accorded pre-eminence among the fundamental liberties guaranteed by the Constitution. Rather, they have emphasized the continuity of the ordinary law before and after the Constitution's commencement. In two defamation cases involving the opposition politician J B Jeyaretnam and the then Prime Minister Lee Kuan Yew,[72] the Court of Appeal noted that the legislature had applied the Defamation Ordinance 1957[73] of Malaysia to Singapore while it was part of the Federation, in the face of the right to freedom of speech and expression in the Federal Constitution. The Ordinance was premised on the continuing existence of the common law of defamation. On Singapore's independence from Malaysia, the Republic of Singapore Independence Act 1965[74] provided for the continued application in Singapore of both the law of defamation and the right to free speech. Thus, the Court took the position that it was implicit that the right of free speech is subject to the common law of defamation as modified by the Defamation Ordinance.[75] With respect, this is an unsatisfactory conclusion. A court must exercise discretion to determine if common law and statutory principles are consonant with constitutional rights, instead of assuming that they are.[76]

Nonetheless, it may reasonably be argued that the balance struck by the Singapore Constitution between rights and other interests sought to be protected by the government is not the same as that in Canada and the United States.[77] Like the Canadian Charter, the Singapore Constitution explicitly permits legislative limitations on the right to freedom of speech and expression, in particular to provide against contempt of court. This suggests that the right is not intended to be

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69 See, for instance, *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 359, SC (Can), cited in *Kopyto*, above, n 54 at 224.

70 Canadian Charter, s 1.

71 *Kopyto*, above, n 54 at 226–227.

72 *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] SLR 38, and *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310. Lee Kuan Yew stepped down as Prime Minister in 1990, but remains a Member of the Singapore Parliament. He assumed the designation of Minister Mentor in 2004.

73 No 20 of 1957 (Malaysia).

74 Above, n 41.

75 *Jeyaretnam*, above, n 72, [1992] 2 SLR at 331, [58]. The Defamation Ordinance is now the Defamation Act (Cap 75, 1985 Rev Ed) (Singapore).

76 The Court also held that the law of defamation is not inconsistent with the right of free speech under Art 14(1)(a) and, accordingly, no modification, adaptation or qualification of, or exception to, the law was necessary under Art 162 of the Constitution: *id* at 331, [57]. For criticism of this view, see Hor, "The Freedom of Speech and Defamation", above, n 50.

77 Compare *Radio Avon*, above, n 7 at 234; *Mamabolo*, above, n 13 at [40]–[41].

paramount over other interests, especially as it remains to be seen whether the judiciary's opinion of the importance of free speech will evolve and align itself with the attitude of the North American courts. When that happens, it will be appropriate to prefer the 'clear and present danger' test to the 'real risk' test. In the meantime, for the reasons already mentioned, I contend that Article 14(1)(a) of the Singapore Constitution requires the rejection of the present 'inherent tendency' test in favour of at least the 'real risk' standard.

IV. CONCLUDING REMARKS

Although the text of Article 14(2)(a) of the Singapore Constitution appears to confer on the legislature a wide discretion to enact legislation abridging the right to freedom of speech and expression to provide against contempt of court, it is inherent in the nature of bills of rights that courts have a duty to balance the right against the government's interest in protecting the administration of justice. It is submitted that nothing in the history of the Constitution's framing prevents courts from taking such a view. In carrying out its responsibility, the court should apply a proportionality analysis and ensure, among other things, that there is a rational link between the law supported by the government and the legislative objective sought to be achieved, and that the law does not impair the right more than is necessary to accomplish the objective. For the reasons given above, the current 'inherent tendency' test applicable to the offence of scandalizing the court does not satisfy the second and third limbs of the proportionality analysis, and is therefore unconstitutional.

Hertzberg and other recent cases demonstrate that the Singapore courts hold a very traditional conception of the offence of scandalizing the court. This conception gives high priority to the protection of the administration of justice over the freedom of speech and expression in the Singapore Constitution. Thus, words and conduct that merely have an inherent tendency to affect the administration of justice are actionable, even if there is no real likelihood that this will happen. If the right to free speech is to have substantive meaning rather than be a meaningless mantra, the 'inherent tendency' test should be replaced by at least a 'real risk' test. The right seeks to vindicate certain key interests, such as ensuring that democracy thrives and mistakes are exposed and remedied. These interests are better served by a more stringent standard which counsels judges to punish only for statements creating a genuine and substantial risk of damage to the administration of justice.