

Freedom of Speech and Contempt by Scandalizing the Court in Singapore[©]

Jack Tsen-Ta Lee*
School of Law
Singapore Management University
60 Stamford Road, #04-11, Singapore 178900
jacklee@smu.edu.sg • <http://www.law.smu.edu.sg>

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,² 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,³ one of the most recent being *Attorney-General v Hertzberg and others*,⁴ 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

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* LLB (Hons) (Nat’l University of Singapore), LLM (Lond); PhD candidate (Birmingham Law School, University of Birmingham, United Kingdom); Advocate & Solicitor (Singapore), Solicitor (England & Wales); Assistant Professor of Law, School of Law, Singapore Management University; 2009–2010 Lee Foundation Fellow.

2 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

3 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.

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

respondents in the case were Daniel Hertzberg, editor of 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.⁵ 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\$10,000.⁶ 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."⁷ The third respondent denied that the items published constituted a contempt of court.

I. JUSTIFICATIONS FOR THE 'INHERENT TENDENCY' TEST

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".⁸ Put another way, such words must convey to an average reasonable reader allegations of bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function.⁹ 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.¹⁰ He noted that this test had been widely adopted in other common law jurisdictions.¹¹ However, the Court 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".¹²

5 Id at 1109, [3].

6 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).

7 Hertzberg, above, n 4 at 1113, [8].

8 Attorney-General v Wain [1991] SLR 383 at 397, [50], HC (Singapore), cited in Chee Soon Juan, above, n 3 at 661, [30]–[31]; and Lee Hsien Loong, above, n 3 at 714, [174].

9 Hertzberg, above, n 4 at 1124–1125, [31].

10 Id at 1117, [17].

11 Attorney-General v Times Newspapers Ltd [1974] AC 273 at 299, HL; Solicitor-General v Radio Avon Ltd [1978] 1 NZLR 225 at 234; Ahnee, above, n 2 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).

12 Hertzberg, above, n 4 at 1125, [33].

In support of these justifications, the Court relied on its earlier decision *Attorney-General v Chee Soon Juan*.¹³ The judge in that case expressed the view that “the geographical size of Singapore renders its courts more susceptible to unjustified attacks”,¹⁴ relying on *Ahnee v Director of Public Prosecutions*.¹⁵ 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. 218–219.¹⁶

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.¹⁷ Singapore is generally regarded as having become a developed nation in the mid-1980s,¹⁸ and has a literate and well-educated population.¹⁹ There is little reason to assume that members of the public are incapable of assessing for themselves any allegations made against the judiciary.²⁰

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”²¹ as they are deciders of both law and fact;²² jury trials were removed for all criminal proceedings except capital cases in 1960, and entirely abolished in

13 *Chee Soon Juan*, above, n 3.

14 *Id* at 659, [25].

15 Above, n 2.

16 *Id* at 305–306.

17 See, eg, *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1998] 1 SLR 547 at 563, [31]–[32]; *Chee Soon Juan*, above, n 3 at 665–666, [50].

18 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.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>>).

19 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.

20 Michael Hor & Collin Seah, “Selected Issues in the Freedom of Speech and Expression in Singapore” (1991) 12 *Sing L Rev* 296 at 309–310; 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].

21 Wain, above, n 8 at 394, [34].

22 *Hertzberg*, above, n 4 at 1125, [33]; *Chee Soon Juan*, above, n 3 at 659–660, [26].

1970.²³ 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 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.²⁴ 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.²⁵ 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.²⁶

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,²⁷ which states that “every citizen of Singapore has the right to freedom of speech and expression”.²⁸ However, the right is subject to Article 14(2)(a):

Parliament may by law impose... on the rights conferred by clause (1)(a)...
restrictions designed... to provide against contempt of court...

In *Chee Soon Juan*, the view was taken that where the High Court and Court of Appeal²⁹ were concerned, the restriction imposed by Parliament pursuant to the Article took the form of section 7(1) of the Supreme Court of Judicature Act³⁰ 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).³¹ The constitutionality of the offence was not challenged in *Hertzberg*.³²

Article 4 of the Constitution expressly affirms that ordinary legislation that is inconsistent with the constitutional text is void to the extent of the inconsistency. Since section 7(1) of the Supreme Court of Judicature Act was enacted to place the common law offence of contempt of

23 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.

24 Hor & Seah, above, n 20 at 306–307.

25 Thio, “An ‘i’ for an ‘l’”, above, n 20 at 175.

26 Thio, *ibid*. See also Hor & Seah, above, n 20 at 307; Thio, “Administrative and Constitutional Law”, above, n 20 at 33, [1.94].

27 1999 Reprint.

28 Note that the right is expressly reserved to Singapore citizens and therefore may not be availed of by foreign nationals (see *Wain*, above, n 8 at 398, [54]–[55]), presumably even if they have permanent residency status in Singapore.

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

30 Cap 322, 2007 Rev Ed.

31 *Chee Soon Juan*, above, n 3 at 660–661, [29], citing *Wain*, above, n 8 at 394, [35].

32 *Hertzberg*, above, n 4 at 1119, [21].

court on a statutory footing, any such common law principles that are inconsistent with Article 14 are void.

However, in *Chee Siok Chin v Minister for Home Affairs*,³³ the High Court held that the phrasing of the exceptions to the right to freedom of assembly contained in Article 12(2)(b) – which is worded similarly to Article 12(1)(b) – means that courts cannot question whether ordinary legislation is reasonable. Rather,

[t]he 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.³⁴

The High Court came to this conclusion after comparing Article 19(3) of the Indian Constitution, which refers to “reasonable restrictions”, with Singapore’s Article 14(2)(b), which speaks only of “restrictions”.

With respect, there is insufficient reason for holding that the absence of the word *reasonable* in the Singapore Constitution indicates that Singapore courts are not to have regard to the reasonableness of legislation as against constitutional rights. Singapore’s bill of rights is derived from the Malaysian Federal Constitution as Singapore was a state of Malaysia between 1963 and 1965. A study of relevant secondary legislative materials such as the reports of constitutional commissions,³⁵ drafts of the Malaysian Constitution,³⁶ and legislative debates in Malaysia and Singapore reveals 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 and not in a manner that curtails rights unless the legislature has unambiguously expressed its intention to do so, it cannot conclusively be said that Parliament intended to deprive the courts of the discretion to consider the rationality of statutory restrictions on free speech. 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.³⁷

I submit that the ‘inherent tendency’ test does not meet the standard of rationality required by Article 14. First, when the test is applied, it does not matter whether there is any truth in the utterance by the alleged contemnor.³⁸ 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

33 [2006] 1 SLR 582, HC (Singapore).

34 *Chee Siok Chin*, above, n 33 at 601, [45]–[46].

35 Report of the Federation of Malaya Constitutional Commission (Chairman: Lord Reid) (London: HMSO, 1957); Report of the Constitutional Commission, 1966 (Chairman: Wee Chong Jin CJ) ([Singapore: Printed by the Government Printer], 1966).

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

37 See Hor & Seah, above, n 20 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.

38 Unlike the law of defamation, justification is currently not a defence to the offence of scandalizing the court in Singapore: Hertzberg, above, n 4 at 1121, [23], citing *Chee Soon Juan*, above, n 3 at 665, [47].

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.³⁹

Hertzberg gave two reasons for preferring the ‘inherent tendency’ 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.⁴⁰ These reasons, which were mentioned in a 1987 report on contempt of court by the Australian Law Reform Commission (ALRC),⁴¹ 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. 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.

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”.⁴² In addition, since the 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.⁴³ 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”⁴⁴ – that the administration of justice will be adversely affected. In the United States the offence of scandalizing the court is unknown,⁴⁵ but in *Bridges v California*,⁴⁶ which involved a contempt of court action for comments relating to pending litigation, the Supreme Court

39 Hor & Seah, above, n 20 at 310.

40 Hertzberg, above, n 4 at 1125, [33].

41 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.*

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

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

44 *Times Newspapers*, above, n 11 at 298–299, citing *R v Duffy, ex parte Nash* [1960] 2 QB 188 at 200; Hertzberg, above, n 4 at 1125, [33]. See also Mamabolo, above, n 11 at 68, [45].

45 *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.”

46 *Bridges, ibid.*

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”.⁴⁷ 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*.⁴⁸

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.”⁴⁹ North of the border, Cory JA accorded the right to freedom of expression in section 2(b) of the Canadian Charter⁵⁰ the exalted status given to it in the United States. The Charter was intended to effect a decisive break with the past.⁵¹ 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”,⁵² 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”.⁵³

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.⁵⁴ I cannot agree with the proposition that laws pre-dating the Constitution must be taken to be consistent with it. But I accept that the balance struck by the Singapore Constitution between rights and other interests sought to be protected by the government may not be the same as that in Canada and the United States.⁵⁵ 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 paramount over other interests. It remains to be seen whether the judiciary’s opinion of the importance of free speech will evolve and align

47 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.

48 *R v Kopyto* (1987) 47 DLR (4th) 213, per Goodman and Cory JJA.

49 *Bridges*, above, n 45 at 265.

50 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...”

51 See, for instance, *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 359, SC (Can), cited in *Kopyto*, above, n 48 at 224.

52 Canadian Charter, s 1.

53 *Kopyto*, above, n 48 at 226–227.

54 See, eg, *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] SLR 38, CA (Singapore); *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310, CA (Singapore).

55 Compare *Radio Avon*, above, n 11 at 234; *Mamabolo*, above, n 11 at [40]–[41].

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 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.
