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Dreaded defamation

It's time to rethink Singapore's most chilling speech law.

Anyone who engages in public debate needs to beware of defamation laws, which serve as electric fences deterring irresponsible attacks on people's reputations. That's true anywhere, but what's unusual about Singapore is how much government leaders feel they need to depend on this protective barrier, and how power-packed is the shock it delivers when anyone tries to cross the line. The government says it is so sensitive about defamation only because it places an exceptionally high value on having a clean reputation. But whatever the reasons for its proclivity to launch libel suits, the effect on public debate is not in doubt: it is one of the main reasons people are fearful of criticising the government too openly. There's little chance of Singapore becoming a more open society if the government does not outgrow its penchant for libel suits.

This does not mean we should abandon defamation law. People do need to be able to safeguard their reputations from lies that are said about them. Your reputation is intangible, but when it's tainted, the effects can be material and severe, harming your ability to make a living and to function in society. Article 14 of the

Singapore Constitution, which upholds the right to freedom of speech and expression, specifically states that parliament can limit this right with defamation law. Even in the freest of societies and in international human rights law, the right to free speech doesn't completely protect expression that defames others (Chapter 18). Over the decades, however, democracies have given more space to political speech because of its importance in promoting participatory democracy and keeping governments accountable. Since the 1960s, the United States has set an exceptionally high bar for public officials who want to sue, such that most don't even try. Britain's 2013 defamation law has also moved in this direction, giving more latitude to the press to run stories on matters of public interest. Singapore's courts, though, have stuck with tradition and opted not to give more protection to political speech.

Lee Kuan Yew, and later his successors, regularly invoked defamation law, particularly in battles with opposition politicians and foreign media. Opposition politicians successfully sued for defamation include J.B. Jeyaretnam (in multiple cases spanning three decades), Seow Khee Leng (in the 1980s), Tang Liang Hong (1990s), and Chee Soon Juan (2000s). These cases were usually brought because they alleged dishonesty, corruption or abuse of power on the part of government leaders. Damages have ranged from around \$200,000 to \$300,000 per plaintiff. Tang Liang Hong was ordered to pay more than \$8 million to 13 plaintiffs.

Foreign media have gotten sued when they suggested that members of the Lee family have gotten to where they are thanks to their illustrious surname, or when they implied that Singapore's leaders are corrupt, including by claiming they have silenced critics in order to conceal wrongdoing. The now extinct *Far Eastern Economic Review*, Malaysia's *Star* newspaper, the *International Herald Tribune* (precursor to the *International New York Times*), and the Bloomberg financial news agency all had to pay up. Other cases have probably been settled out of court without coming to light.

All in all, impugning the honour of Singapore government leaders without proof is as advisable as trying to steal a favourite

bone from an unchained Rottweiler. Two cases in the 1990s showed how sensitive the government could be. One centred on a commentary in the *International Herald Tribune* that didn't actually mention Singapore. Lee Kuan Yew's lawyers, nonetheless, managed to persuade the court that his reputation was being attacked. The newspaper eventually settled.

The other case saw Jeyaretnam sued for stating in an election rally speech that his teammate Tang Liang Hong had just handed him two police reports lodged against Prime Minister Goh Chok Tong and other leaders. (Ironically, Tang filed the police reports because he himself felt he had been defamed by government leaders when they called him an anti-Christian, Chinese chauvinist.) Jeyaretnam's matter-of-fact one-liner was judged to imply that Goh had done something wrong worthy of police investigation. The trial judge awarded only \$20,000 in damages, feeling that Goh's lawyers had overstated their case. The Court of Appeal upped the award to \$100,000.

Jeyaretnam's successor as Workers' Party leader, Low Thia Khiang, has been criticised by opposition supporters for being too careful, but when you remember what he's witnessed, it's not surprising Low has decided to err on the side of caution. Foreign media that regularly report on Singapore also learnt their lesson, passing stories on Singapore politics through an extra layer of legal checks before publication. For a while, it looked as though political defamation suits would become a thing of the past.

Then, a whole new breed of inexperienced critics appeared: the bloggers. The democratisation of dissent (now, anybody can loudly disparage Singapore's leaders) resulted in the democratisation of punishment (now, even a one-man-operated blog like Alex Au's *Yawning Bread* would merit the nerve-wracking attention of the Istana and Drew & Napier).

When informed that their articles were defamatory, most bloggers, including Au, averted lawsuits by apologising promptly and taking down their posts. But in 2014, activist Roy Ngerng refused to kowtow, thus becoming the first individual blogger to

be sued for defamation by a government leader. The High Court ordered Ngerng to pay damages of \$150,000.

The way Singapore leaders use defamation law is not one of the more admired features of their governance model. Even when Singaporeans believe a critic was wrong, many consider defamation suits to be an excessive response. The PAP has heard it all, and is able to roll out rehearsed rejoinders on cue. First, it argues it is operating entirely within Singapore defamation law, which is available to any person whose reputation has been wrongly attacked. Second, it asserts that democratic debate should be based on truthful claims, and if opponents cannot agree on important facts, it is best to arrive at the truth in open court.

The first argument is legalistic, explaining Singapore's defamation law and how the judiciary works. The idea is to establish that the PAP's lawsuits and their outcomes have been consistent with our laws. These clarifications don't really settle the debate, because a lot depends on what one means by the rule of law. Legal scholars have pointed out that the government prefers a thinner conception of rule of law, hinging on whether rules and procedures have been followed. Critics, on the other hand, are pushing for a thicker understanding of rule of law that emphasises the impact on people's democratic rights. The latter standpoint would take more seriously how libel suits have a chilling effect, undermining our constitutionally recognised right to freedom of expression. Furthermore, robust criticism of the powerful is so essential for democracy that it needs extra leeway. From this perspective, public officials should not get to sue as easily as private citizens.

But even if you accept PAP leaders' first argument, this only establishes that they have the prerogative to use defamation law the way they have. According to the law, they can. What this doesn't answer is whether they should. In civil law, it is entirely up to the aggrieved party whether to take action. Just because you are allowed to use a weapon doesn't mean you must.

That's where the government's second argument comes in. This is a political argument: the government says it has to take such

matters to court to demonstrate that critics' allegations are untrue. This is not a persuasive line. Defamation trials are hardly fail-safe diviners of truth. The main problem is that the burden of proof is on the defendant. In other words, it is up to the defendant to prove—through a financially draining process—that his accusations were true. The plaintiff does not have to prove that he was innocent of the allegations. When a defendant loses a defamation suit, it may simply mean that he was unable to substantiate his claims to the court's satisfaction—not necessarily that what he said was untrue.

An example of this emerged in one of Singapore's most traumatic corruption scandals, centred on National Kidney Foundation chief T.T. Durai. Durai sued *The Straits Times* for an article that reported his excesses, like gold bathroom fittings and first-class air travel. During the dramatic 2005 trial, the newspaper was able to show that the article was accurate, precipitating both the collapse of Durai's lawsuit and his eventual conviction on corruption charges. In this case, the law worked as it's supposed to. However, it emerged during the trial that Durai had successfully used defamation law to silence two earlier accusers. The individuals he sued in 1998 realised they could not compete with Durai's resources. They settled and paid damages and costs rather than risking a costly trial. Durai did not have truth on his side, but he was able to use defamation law to muffle critics and prolong his corrupt reign over Singapore's largest charity for seven more years. He only got his comeuppance when he made the mistake of suing an organisation with an even bigger legal budget than his own. *The Straits Times'* lawyer was none other than the formidable Davinder Singh, to whom government leaders regularly entrust their own defamation suits.

I'm not suggesting that any of the offending statements that attracted government defamation threats and suits were true. Indeed, most defendants did not even try to use the truth defence; they usually argued that their words did not mean what the government said they meant. For example, when Jeyaretnam was sued for telling the rally crowd about Tang Liang Hong's police

report, his defence was that his words and actions meant something more innocent than the malicious innuendo the government perceived.

Rather, my point is that libel law is an imperfect litmus test of truth, and that members of the public intuitively understand this. Therefore, as a matter of practical politics, defamation suits are neither a necessary nor sufficient instrument for settling debates. The government's own actions have implicitly acknowledged this. There have been instances where its leaders have chosen not to sue despite being obviously defamed. The non-suit everyone was talking about in 2017 involved the allegations against the prime minister by his siblings Lee Wei Ling and Lee Hsien Yang. But the most bizarre example of official self-restraint occurred when dissident lawyer Gopalan Nair literally asked to be sued. In 2008, he fired off a blog calling Lee Kuan Yew and Lee Hsien Loong "tin pot tyrants" and describing their alleged abuses of power. He went on to say that, by Singaporean standards, his blogs were undoubtedly defaming the Lees. He provided his hotel room number (he was visiting from the United States, where he lived) and said he was now within the authorities' reach. "What are you going to do about it?" he asked. Nair was jailed for contempt of court—but the Lees chose not to sue him for defamation.

Because the government is aware that a judge's verdict is not the final word in political debates, it continues to use its public communication to get its arguments across, even after it has prevailed in court. In the Roy Ngerng case, for example, the lawsuit was just a sideshow in a major effort to prove that, contrary to critics' claims, the Central Provident Fund is a well-managed and trustworthy institution. If most Singaporeans feel assured, it is because Tharman Shanmugaratnam won them over with persuasive data, and not because Ngerng lost in court.

Furthermore, only a tiny fraction of political debates could ever end up in court. Most of the time, the government's actions are attacked without defaming any individual politician, so libel suits are not even an option. Many of these non-libellous criticisms are

no more truthful than the defamatory statements that have been taken to court. Yet, despite the fact that government leaders couldn't drag the critics before the judges, they have been able to win over most of the people, most of the time. The government defends its integrity and its competence by delivering results and countering critics' arguments in parliament, in the press, in social media, and in face to face interactions—without any help from the courts.

The government is selling itself and the public short if it believes that this legal weapon is still needed to secure its long-term reputation. Most citizens trust that ministers are not personally corrupt. As for the minority who think otherwise, it is fanciful to imagine that the PAP can change their minds through defamation suits. They will probably get more convinced that the government is silencing dissent because it cannot survive a free marketplace of ideas.

One way for the government to wean itself off its addiction to defamation suits is to switch to seeking the right of reply. Under the Protection from Harassment Act, which came into force in 2014, a victim of “false statements of fact” can seek a court order requiring that the offender stop publishing the falsehood unless he inserts a notice setting the record straight. If the court agrees to issue this right-of-reply order only on condition that the victim won't get greedy and also sue for defamation, such a law could be a major improvement. It would reduce elected officials' use of excessively punitive libel law and replace it with the less chilling and more reasonable right of reply.

Libel suits are a pointless way to settle political debates, with more costs than benefits. They preach to the choir, while pushing the unconverted even further away. Government leaders should review how they have used this law and what it has actually accomplished. An honest appraisal might conclude that it's just an old habit that is hard to shake off—more muscle memory than a rational response to the communication challenges that come with democratic debate.