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LEGAL OPINION SUPPORTING THE CASE OF THE DEFENDANT IN *LEE HSIEN LOONG (PRIME MINISTER OF SINGAPORE) V. ROY NGERNG YI LING* – SUIT NO. 569/2014

The International Commission of Jurists (ICJ) submits this legal opinion to the Chief of the High Court in support of the case of the defendant in *Lee Hsien Loong (Prime Minister of Singapore) v. Roy Ngerng Yi Ling* (Suit No. 569/2014).

The ICJ is composed of 60 eminent judges and

lawyers from all regions of the world. It promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

The ICJ considers the legal questions raised in this case of compelling importance, not only in Singapore, but also internationally. It is a serious concern of the ICJ to see increasing numbers of cases in Southeast Asia where the exercise of the right to freedom of expression is being impaired or denied. It is also a serious concern of the ICJ to see measures imposed in the region that cast a chilling effect on freedom of expression of human rights defenders. Against that background, the ICJ submits this legal opinion for the attention of the High Court in its consideration of this case.

Respectfully submitted,

Sam Zarifi

Regional Director for Asia and the Pacific

INTERNATIONAL COMMISSION OF JURISTS LEGAL OPINION

SUPPORTING THE CASE OF THE DEFENDANT IN

LEE HSIEN LOONG (PRIME MINISTER OF SINGAPORE) V. ROY NGERNG YI LING

(SUIT NO. 569/2014)

The right to freedom of expression of human rights defenders

Freedom of opinion and expression are fundamental rights of every human being and are indispensable for the fulfillment and enjoyment of many other human rights. It has been recognized in multiple international instruments, including in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, standards that are now part of general international law and customary international law.[1] The UN Human Rights Committee has provided the most authoritative interpretation of the scope of the right to freedom of expression In its General Comment No. 34, which stated that this right includes "the expression and receipt of communications of every form of idea and opinion capable of transmission to others such as political discourse, commentary on one's own and on public affairs".[2] The European Court of Human Rights has similarly ruled that the right to freedom of opinion and expression also covers "information or ideas that may be regarded as critical or controversial by the authorities or by a

[1] Universal Declaration on Human Rights, Article 19; International Covenant on Civil and Political Rights, Article 19.

[2] UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, UN Doc CCPR/C/GC/34 (2011), para. 11.

majority of the population, including ideas or views that may 'shock, offend or disturb'".[3]

The right to freedom of expression protects every form of expression including electronic and Internet-based.[4] The UN Special Rapporteur on freedom of expression has underscored that, since the Internet has become a major means by which individuals can exercise their rights, including freedom of expression, the framework of international human rights law is applicable to this context as well.[5] The Special Rapporteur has also highlighted that, even though restrictions on this right are allowed under certain conditions, there are some aspects that should never be limited, such as reporting on government activities and corruption in government or engaging in peaceful demonstrations.[6]

The defendant in this case, Mr. Roy Ngerng, is a human rights defender. Through his blog, he expresses his views on sociopolitical issues in Singapore, including the human rights situation in the country. He has also campaigned for the promotion of the rights of people living with HIV. Freedom of expression is inherent to the work of human rights defenders. The UN Declaration on Human Rights Defenders reaffirms the rights "to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and

[3] *Handyside v. United Kingdom*, Judgment of the European Court of Human Rights, 7 December 1976, para. 49.
[4] General Comment 34, *op. cit.*, para. 12.
[5] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc A/HRC/17/27 (2011), paras. 20-21.
[6] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc A/HRC/14/23 (2010), para. 81.

fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters".[7] It also recognizes the right "to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms".[8]

If the High Court imposes a disproportionately high amount of damages in this case, this would cast a chilling effect on freedom of expression in Singapore. Freedom of expression is a cornerstone in the existence itself of a democratic society and the ICJ respectfully submits that it would not be legitimate to impose sanctions that impede or restrict the necessary critical work of human rights defenders like Mr. Roy Ngerng when they scrutinize people in public office.[9]

Disproportionate sanctions would silence such criticism. The Inter-American Commission on Human Rights has recognized that restricting freedom of expression through disproportionate sanctions transforms democracy into a system where authoritarianism and human rights violations find fertile ground for imposing themselves on the will of society.[10]

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[7] UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Doc A/RES/53/144 (1999), Article 6.
[8] *Idem*, Article 8.
[9] Inter-American Commission on Human Rights, *Report on the situation of human rights defenders in the Americas*, OEA/Ser.L/V/II.124 (2006), para.81.
[10] *Ibid*.

Defamation of public figures

The right to freedom of expression may be limited in certain circumstances, but these limitations cannot be justified based on the protection of State authorities from public opinion or criticism. As confirmed by the UN Human Rights Committee, "all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition."[11] Statements concerning public officials and other individuals who exercise public functions enjoy greater protection, as they foster democratic debate regarding matters of public interest.

The questions raised by Mr. Roy Ngerng in his blog are of significant interest for the public in Singapore, as they address the Central Provident Fund (CPF). Mr. Roy Ngerng's statement is part of the democratic debate in Singapore regarding this matter of public interest.

This does not mean, however, that the honor and reputation of public officials such as the Prime Minister, Mr. Lee Hsien Loong, are not protected. There is nevertheless a different threshold of protection, not based on the quality of the individual, but rather on the public interest attending the activities the officer performs.

[11] UN Doc A/HRC/14/23 (2010), *op. cit.*, para. 82; and General Comment 34, *op. cit*., para. 84.

Regional courts have been very clear on the higher threshold of protection for freedom of expression regarding the official conduct of public officials. For example, the Inter-American Court of Human Rights ruled that in a democratic society, "public officials are more exposed to scrutiny and criticism by the general public. This different protection threshold is justified by the fact that public officials have voluntarily exposed themselves to a stricter scrutiny. Their activities go beyond their private life and expand to enter the arena of public debate."[12] The European Court of Human Rights has also followed this line of reasoning, holding that: "Senior civil servants acting in an official capacity are subject to wider limits of acceptable criticism than private individuals".[13]

For these reasons, civil actions for defamation should not be admissible when the statements in question involve a civil servant or the performance of his or her duties.[14] The UN Human Rights Committee has stressed that allowing these kinds of suits would be detrimental and could have a chilling effect on the exercise of freedom of expression of the person concerned and of the society as a whole.[15]

Assessment of damages in civil defamation suits

Under international human rights law and standards, careful consideration must be taken when deciding damages in defamation cases to "avoid excessively punitive

[12] *Case of Tristán Donoso v. Panamá* (Preliminary Objection, Merits, Reparations, and Costs), judgment of 27 January 2009 of the Inter-American Court of Human Rights, para. 115.
[13] *Ŝabanović v. Montenegro and Serbia*, European Court of Human Rights Application No. 5995/06, judgment of 31 May 2011, para. 37.
[14] UN Doc A/HRC/14/23 (2010), *loc. cit.*
[15] General Comment 34, *op. cit.*, para. 47.

measures or penalties".[16] The Special Rapporteur on promotion and protection of the right to freedom of opinion and expression has cautioned that high and disproportionate financial sanctions "can bankrupt small and independent media" and have "adverse consequences on media freedom in a country".[17] It also "paralyzes journalistic investigation and generates an atmosphere of intimidation, which constitutes a form of judicial harassment" that generates a climate of fear and self-censorship.[18]

Pecuniary awards should be imposed only when non-pecuniary remedies, including apology, rectification and clarification, are insufficient.[19] Where a court considers pecuniary awards to be necessary, key considerations should be factored in, namely: the potential chilling effect of the award on freedom of expression; the proportionality of the award to the actual harm caused; the combination of the award alongside any non-pecuniary remedies; and the need to ensure that the award does not act as a form of punishment against the defendant.[20]

Compensation for actual financial loss, or material harm, caused by a defamatory

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[16] General Comment 34, *op. cit.*, para. 47.
[17] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc A/HRC/20/17 (2012), para. 85.
[18] *Ibid*, paras. 53 and 86.
[19] *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, Principle 15(a);
UN Doc A/HRC/14/23 (2010), *op. cit.*, para. 83.
[20] *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, Principle 15(b); UN Doc A/HRC/14/23 (2010), *op. cit.*, para. 83.

statement should only be awarded when such loss is specifically established.[21] Damages pertaining to non-material harm to reputation should be applied only in the most serious cases and be subject to a fixed ceiling.[22] Pecuniary awards aimed at going beyond compensating for harm caused to reputation should only be used in highly exceptional cases where the plaintiff has proven that the defendant acted with knowledge of the falsity of the statement and with the specific intention of causing harm to the plaintiff.[23]

In the summary judgment of this case, it was noted by Judge Lee Seiu Kin that defamation laws in Singapore originated from Malaysia's 1957 Defamation Ordinance, and that Article 14 of Singapore's Constitution on freedom of expression is identical to Article 10 of Malaysia's Federal Constitution. For this reason, reference to Malaysian jurisprudence is of assistance to this case.

In *Liew Yew Tiam & Ors v. Cheah Cheng Hoc & Ors* ([2001] 2 CLJ 385), while revisiting the existing trend where defamation awards ran into several millions of ringgit, the Malaysian Court of Appeal said that it was time that such a trend be checked "to ensure that an action for defamation is not used as an engine of oppression. Otherwise, the constitutional guarantee of freedom of expression will be rendered illusory". The Court also cited the European Court of Human Rights case of *Tolstoy Miloslavesky v. The United Kingdom* ([1995] 20 EHRR 442), in

[21] *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, Principle 15(c).
[22] *Ibid*, Principle 15(d).
[23] *Ibid*, Principle 15(e).

which it was held that the award of £1.5 million by an English jury violated the freedom of expression guaranteed under Article 10(1) of the European Convention of Human Rights because "an award of damages for defamation must bear a reasonable relationship of proportionality to the injury the reputation suffered".

In the current case, when assessing quantum of damages, emphasis should be placed on the fact that non-pecuniary measures had already been taken by Mr. Roy Ngerng soon after receiving the letter of demand from the plaintiff. According to the Malaysian High Court in the case of *Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor* ([2010] 5 CLJ 301), a case similarly involving a high profile political public figure, minimal damages would occur if there was "an almost immediate and prominent apology… or retraction by the defendant". If such an act is followed with a court order requiring the correction, this would be "just as well if not better in the vindication or restoration of a damaged reputation than large money damages". The Court in that case reduced damages sought of RM100 million to RM100,000 (SGD35,668), but this sum was contributed to by the fact that vindication achieved came late in the case.

On 23 May 2014, a week after the offending article was published, Mr. Ngerng published an apology to the plaintiff and made an undertaking that he will not make further allegations that has the same or similar effect. This apology and undertaking continues to remain on his blog to date. The offending article and its

links, as well as other related materials such as the YouTube video and four articles that make specific references to the offending article have also been removed by Mr. Ngerng since the end of May 2014. Moreover, on 7 November 2014, the High Court found the published article to be defamatory and ordered that the defendant not further publish or disseminate words or images of the offending article.

Applying the *ratio* in the *Dato' Seri Anwar Ibrahim* case, the plaintiff in the present case has thereby already successfully achieved some measure of vindication and remedy in his standing in society. Any pecuniary damages awarded in this case must bear these points in mind in order to avoid a harsh and excessive sum and thereby ensure that damages are not disproportionate to the harm caused and do not create a chilling effect on the freedom of expression in Singapore.

Conclusion

It is humbly submitted that a decision awarding a disproportionately high amount of damages to the plaintiff in this case would cast a chilling effect on freedom of expression in Singapore. This case presents a unique opportunity for the Court to firmly establish at the domestic setting standards conforming to international human rights law. This is an opportunity for the Court to make an unambiguous commitment ensuring freedom of expression and underlining the fact that it is essential to a democratic society.