

## SERVICE OUT FOR SCANDALISING CONTEMPT: AN INTERNATIONAL CONSTITUTIONAL JURISDICTION?

*Li Shengwu v Attorney-General*

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Service out of jurisdiction is generally permitted only in two situations. First, under the High Court’s international criminal jurisdiction, criminal process can be served out only if the affected foreign state consents. Second, under its international civil jurisdiction, civil process can be served out only if some statutory provision interpreted in accordance with a doctrine of ‘subject-matter jurisdiction’ allows it. However, in *Li Shengwu v Attorney-General*, the Court of Appeal allowed service out of process for scandalising contempt of court, but did not rely, and indeed could not have relied, on either its international criminal or civil jurisdiction to do so. Instead, it could only have allowed such service out by relying on a novel third basis of international jurisdiction, derived from Article 93 of the *Constitution*—in other words, its international constitutional jurisdiction.

### I. INTRODUCTION

Service out of jurisdiction is rarely controversial. It is usually the mere procedural prelude to a substantive dispute. In the case of *Li Shengwu v Attorney-General*,<sup>1</sup> however, service out was highly controversial. It was politically controversial because it involved Li Shengwu (“Li”), a grandson of Singapore’s founding father and first Prime Minister, Lee Kuan Yew. But it was also legally controversial because it involved the question of whether Singapore’s courts could allow service out of jurisdiction for scandalising contempt of court.

The controversy is this. There are only two situations in which Singapore’s courts have asserted an international jurisdiction to allow service out.<sup>2</sup> First, under rules of public international law (“PIL”) applicable in Singapore’s legal system, the extraterritorial service of criminal process is prohibited unless the affected foreign state

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<sup>1</sup> [2019] 1 SLR 1081 (CA) [*Li Shengwu*].

<sup>2</sup> When allowing service out, a court necessarily invokes its international jurisdiction rather than its internal jurisdiction, since it is concerned with the allocation of jurisdiction between Singapore’s courts and those of other states, rather than between Singapore’s courts *inter se* (see *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at paras 118, 119 (CA) [*Rappo*]).

consents. Second, under domestic conflict of laws principles, the extraterritorial service of civil process can only be effected if some statutory provision, on its proper interpretation, vests the court with personal jurisdiction over the defendant.

However, the facts of *Li Shengwu* involved neither of those two situations, because the underlying ‘dispute’ there involved scandalising contempt. The Court of Appeal therefore had to develop a novel third basis upon which service out of jurisdiction could be permitted. This jurisdiction to allow service out was, and could only have, derived from the Court’s judicial power under Article 93 of the *Constitution of the Republic of Singapore*.<sup>3</sup> It was, in other words, the court’s international constitutional jurisdiction—‘international’ because it allowed service out, and ‘constitutional’ because it was derived from its constitutional role. This note unpacks the Court’s decision in *Li Shengwu*, explaining why it should be understood as developing such an international constitutional jurisdiction.

## II. FACTS AND DECISION

On 15 July 2017, Li published a Facebook post (the “Post”) which included the following text:

[T]he Singapore government is very litigious and has a pliant court system. This constrains what the international media can usually report.<sup>4</sup>

The Attorney-General brought contempt proceedings against Li for scandalising contempt under the common law.<sup>5</sup> He obtained leave to serve committal papers on Li in the United States (“US”). Service was effected there on 17 October 2017,<sup>6</sup> though it is unclear how and by whom.<sup>7</sup> Clearly, however, the Attorney-General did not seek the consent of the American authorities to effect such service, since he argued in court that the *Mutual Assistance in Criminal Matters Act*<sup>8</sup> was inapplicable to his case.<sup>9</sup> Li unsuccessfully challenged the extraterritorial service of committal papers on him, then appealed.

Li argued that Singapore’s courts lacked jurisdiction to serve committal papers on him in America. This was because section 16 of the *Supreme Court of Judicature Act*<sup>10</sup> read with Order 11 of the *Rules of Court*<sup>11</sup> provided the sole ‘statutory basis’

<sup>3</sup> (1999 Rev Ed) [*Constitution*].

<sup>4</sup> *Li Shengwu*, *supra* note 1 at para 6.

<sup>5</sup> Proceedings could not be brought under the *Administration of Justice (Protection) Act 2016* (No 19 of 2016, Sing) [*AOJPA*], which came into force only on 1 October 2017.

<sup>6</sup> *Li Shengwu*, *supra* note 1 at para 14 [emphasis in original].

<sup>7</sup> Li alleged that he was “ambush[ed]” with “court papers” by an individual “hired” by “the Singapore government” (see Shengwu Li, “Giving a lecture in Scott Kominer’s brilliant marketing class at Harvard.” (16 October 2019) posted on *Shengwu Li*, online: Facebook <<https://www.facebook.com/li.shengwu01/posts/10156755951393523/>>). The Attorney-General did not respond to this allegation.

<sup>8</sup> (Cap 190A, 2001 Rev Ed) [*MACMA*].

<sup>9</sup> *Li Shengwu*, *supra* note 1 at para 26, 92, 93.

<sup>10</sup> (Cap 322, 2007 Rev Ed) [*SCJA*].

<sup>11</sup> (Cap 322, R 5, 2014 Rev Ed Sing) [*Rules of Court*].

for the court's 'subject-matter jurisdiction' over him,<sup>12</sup> and on the facts, no Order 11 head of jurisdiction was available.<sup>13</sup> The Attorney-General countered that section 15 of the *SCJA* gave the Court jurisdiction over Li, and that service under Order 11 was only necessary to notify Li of contempt proceedings.<sup>14</sup>

The Court of Appeal first noted that its personal jurisdiction over a foreign-located person was established by way of service.<sup>15</sup> However, beyond its personal jurisdiction over the alleged contemnor under section 16 of the *SCJA* read with Order 11, the Court had to further establish 'subject-matter jurisdiction' over the matter before hearing and making extraterritorial contempt orders.<sup>16</sup> If it had such 'subject-matter jurisdiction', the Court would be able not only to try an alleged contemnor's acts in the abstract, but also to "hear and punish for contempt".<sup>17</sup>

The Court's 'subject-matter jurisdiction' was founded on its 'inherent jurisdiction' to "hear" and 'inherent power' to "punish cases of contempt".<sup>18</sup> This 'inherent jurisdiction' and 'inherent power' was a "necessary corollary of the judicial power being vested in the court" under Article 93 of the *Constitution*,<sup>19</sup> and "an integral part of [the judiciary's] constitutional function".<sup>20</sup> This 'inherent jurisdiction' was thus independent of any statute, including section 7(1) of the *SCJA*<sup>21</sup>—stating that "[t]he High Court and the Court of Appeal shall have power to punish for contempt of court"—which "merely *preserves*... but... does not *create* the jurisdiction".<sup>22</sup>

The Court's jurisdiction to hear and power to punish for contempt was not based on its international criminal jurisdiction, since it could not serve criminal process extraterritorially, unless afforded foreign assistance.<sup>23</sup> The Court's jurisdiction was also not based on its international civil jurisdiction under section 16 of the *SCJA* and the *Rules of Court*; while the Court did not expressly state this, such statement was necessarily implied by its rejection of Li's argument to that effect,<sup>24</sup> and by its reasoning.<sup>25</sup> Instead, since "both categories of [criminal and civil] contempt are, at their hearts, directed towards the same goal: preserving the proper administration of justice",<sup>26</sup> the Court's 'subject-matter jurisdiction' to hear and punish contempt was "appropriate[ly]" described as a "*sui generis*"<sup>27</sup> and "inherent" jurisdiction.<sup>28</sup>

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<sup>12</sup> Appellant's Case in CA/CA 166/2018, filed 9 November 2018, at paras 10-35 [Appellant's Case].

<sup>13</sup> *Ibid* at paras 36-117.

<sup>14</sup> Respondent's Case in CA/CA 166/2018, filed 10 December 2018, at paras 36, 51.

<sup>15</sup> *Li Shengwu*, *supra* note 1 at para 94.

<sup>16</sup> *Ibid* at para 97.

<sup>17</sup> *Ibid* at para 100.

<sup>18</sup> *Ibid* at para 104.

<sup>19</sup> *Ibid* at para 99.

<sup>20</sup> *Ibid* at para 109.

<sup>21</sup> This section was subsequently repealed by *Administration of Justice (Protection) Bill 2016* (No 23 of 2016, Sing), s 45.

<sup>22</sup> *Li Shengwu*, *supra* note 1 at paras 112, 113.

<sup>23</sup> *Ibid* at paras 33, 92.

<sup>24</sup> Appellant's Case, *supra* note 12, *cf ibid* at para 97.

<sup>25</sup> This will be discussed in Part IV below.

<sup>26</sup> *Li Shengwu*, *supra* note 1 at paras 63, 67.

<sup>27</sup> *Ibid* at paras 121-123.

<sup>28</sup> *Ibid* at paras 104, 106, 111.

Having established its ‘subject-matter jurisdiction’ to hear and punish scandalising contempt, the Court of Appeal then nevertheless went on to establish personal jurisdiction over Li under section 16 of the *SCJA* and the *Rules of Court*.<sup>29</sup>

The Court of Appeal had such personal jurisdiction over Li under Order 11 rule 1(n), which confers personal jurisdiction for “claim[s]. . . made under. . . any. . . written law”, the “written law” in this regard being *SCJA* section 7(1). Against this, Li argued, *inter alia*, that the Court’s literal reading of “written law” in rule 1(n) was too expansive, since it would allow claimants to rely on any power-conferring provision in any written law to obtain leave for service out, even if the underlying cause of action was insufficiently connected to Singapore.<sup>30</sup> However, the Court did not share Li’s concerns. It noted that, as held in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd*,<sup>31</sup> fulfilling an Order 11 head of jurisdiction was only one of three requirements that claimants had to fulfil before obtaining leave to serve out of jurisdiction—the claimant still had to show a serious issue to be tried, and that Singapore was the *forum conveniens*. This, apparently, ensured that Order 11 rule 1(n) could only be relied on to establish jurisdiction over claims with a “requisite connection with Singapore”.<sup>32</sup>

I will now focus on the Court’s reasoning behind its assertion of international jurisdiction to allow service out of jurisdiction for contempt proceedings, as applied to scandalising contempt proceedings in particular.

### III. STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL JURISDICTION

One might have expected the Court of Appeal in *Li Shengwu* to apply PIL’s rules of international jurisdiction to determine whether it could allow service out of process for scandalising contempt. After all, those rules of international jurisdiction are directly relevant to the question of how a state’s authority *vis-à-vis* other states should be demarcated, and Singapore’s courts also generally apply PIL’s rules of international jurisdiction to disputes before them where relevant, unless there are statutes providing otherwise. This latter point follows from two doctrines of Singapore law, which govern the relationship between Singapore’s domestic legal system and PIL. First, the doctrine of transformation encourages Singapore’s courts to apply PIL’s rules “so far as [those rules are] not inconsistent with rules enacted by statutes or finally declared by [Singapore’s] tribunals”,<sup>33</sup> such as PIL’s rules on international jurisdiction, which form part of classic PIL, and which thus pre-date and have influenced the development of the common law.<sup>34</sup> Second, there is a presumption

<sup>29</sup> *Ibid* at paras 114-123. Although the Court first called this an “engage[ment]” of its “civil jurisdiction” (at para 116), it then (confusingly) said that “the jurisdictional basis for the law of contempt is *sui generis*, and does not cleave cleanly into either the [international] civil or criminal jurisdiction of the High Court” (at para 123).

<sup>30</sup> Appellant’s Case, *supra* note 12 at paras 95-97; *ibid* at paras 156-161.

<sup>31</sup> [2014] 4 SLR 500 at para 26 (CA) [*Zoom Communications*], cited in *Li Shengwu*, *supra* note 1 at para 162.

<sup>32</sup> *Li Shengwu*, *supra* note 1 at paras 156-166.

<sup>33</sup> *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at para 32 (CA).

<sup>34</sup> Classic PIL doctrines, such as those concerning state immunity and consular relations, directly influence the common law in the absence of statute (see *I Congreso del Partido* [1983] AC 244 at 265 (HL); *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR (R) 103 at para 24 (CA)).

of consistency, that ambiguously-worded statutory or constitutional provisions be interpreted in line with Singapore's international obligations,<sup>35</sup> which surely includes PIL's rules of international jurisdiction. Since none of the relevant provisions in force when Li's Post was published—namely, sections 7(1), 15 and 16 of the *SCJA*, Order 11 rule 1(n) and Article 93—were clearly (or even plausibly) worded to exclude those PIL rules, those provisions should have been interpreted in line with those rules.

However, the Court of Appeal did not apply such PIL rules. Had it done so, it would have found that it lacked the requisite jurisdiction, because under PIL, scandalising contempt proceedings are criminal proceedings, and the extraterritorial service of criminal process is an exorbitant and prohibited assertion of a state's enforcement jurisdiction.

First, PIL<sup>36</sup> would characterise scandalising contempt proceedings as criminal proceedings. Any rule for characterisation that PIL might use must derive from PIL's rules on sources of law, which may take different forms—they may be inductive and based on the facts of state practice, or deductive and based on a *a priori* principle<sup>37</sup>—but which would nevertheless all lead to the same answer. A rule of characterisation which is inductive would lead to the conclusion that scandalising contempt proceedings are criminal proceedings, since all states would characterise such proceedings thusly. Even the Supreme Court of Canada, which has developed the common law world's most progressive and internationalist conflict of laws jurisprudence, unanimously affirmed in *Pro Swing v Elta Golf* that “both the process used to issue a declaration of [criminal] contempt and the sanction bear the imprint of criminal law”.<sup>38</sup> A rule of characterisation which is deductive would also lead to that same conclusion; thereunder, proceedings should be characterised based on existing PIL rules of international jurisdiction which protect state sovereignty, such as the rule against the enforcement of foreign ‘penal’ or ‘public’ laws, and so should be characterised as ‘penal’ or ‘public’ if by nature only a sovereign could have carried it out and/or if its purpose is inherently public or governmental.<sup>39</sup> Applying this rule, the institution of scandalising contempt proceedings must be a ‘penal’ act: by nature it can only be performed by the Attorney-General *qua* Public Prosecutor, in her

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<sup>35</sup> *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at para 59 (CA).

<sup>36</sup> Since the question is the applicability of PIL's rules, PIL's own rules of characterisation, which are independent of any single domestic law, must apply (Tan Yock Lin, “Contempt Orders and Judicial ‘Attachment’ of Equitable Property: Jurisdiction, Recognition or Choice of Law?” (2017) 29 *Sing Ac LJ* 401 at 16).

<sup>37</sup> See Stefan Talmon, “Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion” (2015) 26:2 *Eur J Intl L* 417, generally.

<sup>38</sup> [2006] 2 SCR 612 at paras 34–36, 106–108—the only difference between the majority and minority being whether that analysis applied to civil contempt proceedings as well. The Court in *Li Shengwu* also recognised that “an application for committal is quite unlike civil proceedings, but rather is quasi-criminal in nature”, leading to ‘penal’ consequences (*Li Shengwu*, *supra* note 1 at para 138).

<sup>39</sup> *Government of Iran v Barakat Galleries* [2009] QB 22 at paras 96, 97, 112–125 (CA) [*Barakat Galleries*]. Although this rule (and the characterisation process used thereunder) may superficially appear to be one of domestic law, its true source is “the law of nations” (*Huntington v Attrill* [1893] AC 150 at 156 (HL)), and more specifically, the ‘public international law’ rules of ‘international jurisdiction’ (FA Mann, “The International Enforcement of Public Rights” (1987) 19 *NYUJ Intl L & Pol* 603 at 608, 609, 612, 613; *Barakat Galleries* at para 114).

capacity as the protector of the public interest;<sup>40</sup> and its only purpose is the protection of public rather than private interests,<sup>41</sup> namely the maintenance of the “authority of the courts”<sup>42</sup> and “trust in institutions”.<sup>43</sup> Thus, under either of PIL’s potential rules of characterisation, scandalising contempt proceedings would be criminal proceedings.

Second, PIL characterises the institution of criminal proceedings (*ie* the service of criminal process) as an assertion of enforcement jurisdiction. Under PIL’s rules of international jurisdiction, a state exercises enforcement jurisdiction when it executes norms that regulate people or property, as compared to prescriptive jurisdiction when it merely creates those norms.<sup>44</sup> While the actual adjudication of an accused person’s guilt in criminal proceedings involves only a state’s prescriptive jurisdiction, the prior act of serving criminal process on the accused person involves a state’s enforcement jurisdiction.<sup>45</sup> It matters not whether the criminal process takes the form of a criminal charge, or a writ or originating summons like that used under Order 52 of the *Rules of Court* for scandalising contempt proceedings, since PIL’s regulation of the service of process depends not on the form of the instrument served, but on whether the underlying ‘claim’ is ‘criminal’ in PIL’s eyes.<sup>46</sup>

Third, PIL absolutely prohibits states from asserting enforcement jurisdiction outside their territory without the affected foreign state’s consent.<sup>47</sup> This prohibition derives from PIL’s largely factual test for statehood, under which the actual enforcement of governmental authority (*ie* effective control) over a given territory is “the most important single criterion of statehood”.<sup>48</sup> Hence, a state which executes its criminal procedure or norms in the territory of another state threatens that latter state’s very existence under PIL. The only exception to this prohibition is where the affected foreign state gives its consent, since consent evinces a state’s capacity to

<sup>40</sup> As is the case for all forms of criminal contempt (*Aurol Anthony Sabastian v Sembcorp Marine Ltd* [2013] 2 SLR 246 at paras 54, 64 (CA)).

<sup>41</sup> Zhuang WenXiong, “Rethinking the Dichotomy between Civil and Criminal Contempt of Court” (2015) 27 *Sing Ac LJ* 555 at para 14 [Zhuang, “Contempt”].

<sup>42</sup> *Shadrake Alan v Attorney-General* [2011] 3 SLR 778 at para 21 (CA) [*Shadrake*].

<sup>43</sup> *Parliamentary Debates Singapore: Official Report*, vol 94 at p 44 (15 August 2016) (K Shanmugam).

<sup>44</sup> FA Mann, “The Doctrine of Jurisdiction in International Law”, (1964) 111 *Rec des Cours* at 9 [Mann, “Jurisdiction”].

<sup>45</sup> *Ibid* at 132-134; James Crawford, *Brownlie’s Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 479 [*Brownlie’s*]; Neil Boister, *An Introduction to Transnational Criminal Law*, 2d ed (Oxford: Oxford University Press, 2018) at 311.

<sup>46</sup> State practice, in the form of treaties, differentiates between proceedings based on the criminal or civil nature of the ‘claim’, and not the form the process takes (see *Inter-American Convention on Mutual Assistance in Criminal Matters*, 23 May 1992, OASTS 1992 No 75 art 2 (entered into force 14 April 1996) [*IACMACM*]; *European Convention on Mutual Assistance in Criminal Matters*, 20 April 1959, Eur TS 1959 No 30 art 1(1) (entered into force 12 June 1962) [*ECMACM*]; and *United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 UNTS 209 art 2 (entered into force 29 September 2003) [*UNTOC*]). Likewise, Singapore’s *MACMA* also regulates the service of process based on whether it involves a ‘criminal matter’ or an ‘offence’, regardless of the form of the process (see ss 2, 15, 38).

<sup>47</sup> Mann, “Jurisdiction”, *supra* note 44 at 128; Crawford, *Brownlie’s*, *supra* note 45 at 478, 479.

<sup>48</sup> “Sovereignty . . . signifies independence”, and “[i]ndependence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State” (James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2007) at 55-57, 62 [emphasis added]).

enter into international agreements, which proves, rather than derogates from, its sovereignty.<sup>49</sup> For this very reason, states conclude agreements on mutual assistance on criminal matters, which invariably contain provisions on service<sup>50</sup>—without these agreements, every extraterritorial service of criminal process would infringe another state’s sovereignty.<sup>51</sup> Thus, under PIL, the extraterritorial service of any criminal process, including originating summonses for scandalising contempt proceedings, is a prohibited assertion of enforcement jurisdiction, unless the affected foreign state consents.

Thus, had the Court of Appeal in *Li Shengwu* applied PIL’s rules of international jurisdiction to the facts before it, it should have refused to grant leave, because such service of process for scandalising contempt on Li really amounted to an extraterritorial assertion of criminal and enforcement jurisdiction without the consent of the US, which PIL prohibits.

#### IV. SUFFICIENT CONNECTIONS AND INTERNATIONAL CIVIL JURISDICTION

But the Court of Appeal in *Li Shengwu* did not apply any rules of PIL. Instead, it allowed service out of process for scandalising contempt by finding that it had ‘subject-matter jurisdiction’ to hear and punish contempt proceedings under Article 93, and personal jurisdiction over Li under Order 11 rule 1(n). However, this could not have been an invocation of the Court’s civil jurisdiction. After all, the test for service out in civil cases only formally requires a claimant to fulfil some Order 11 head of jurisdiction, and not an additional ‘subject-matter jurisdiction’ requirement. Further, even if the Court was only attempting to assert international civil jurisdiction over Li under Order 11 rule 1(n), that provision, properly interpreted, should not have allowed service out.

First, under *Zoom Communications*’ test for leave to serve out, claimants must, *inter alia*, only fulfil an Order 11 head of personal jurisdiction.<sup>52</sup> Formally, there is no additional requirement that the court have ‘subject-matter jurisdiction’—the Order 11 head itself confers international civil jurisdiction.<sup>53</sup> After all, the High Court’s civil jurisdiction is purely statutory,<sup>54</sup> and its international civil jurisdiction is defined by section 16(1)(a)(ii) of the *SCJA* and the *Rules of Court*.<sup>55</sup> Admittedly, there is a doctrine of ‘subject-matter jurisdiction’ in the conflict of laws which concerns international civil jurisdiction, accepted in Singapore in *Burgundy Global Exploration Corp v Transocean Offshore International Ventures*.<sup>56</sup> However, the *Burgundy* doctrine of ‘subject-matter jurisdiction’ only “giv[es] effect to the presumption against extra-territoriality” by narrowing the ambit of broadly-worded statutory provisions

<sup>49</sup> *Case of the SS “Wimbledon” (United Kingdom et al v Germany)* (1923), PCIJ (Ser A) No 1 at 25.

<sup>50</sup> See eg, *IACMACM* art 7(g), *ECMACM* art 7(1) and *UNTOC* art 18, *supra* note 46.

<sup>51</sup> Boister, *supra* note 45 at 311.

<sup>52</sup> *Zoom Communications*, *supra* note 31.

<sup>53</sup> *Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [1999] 3 SLR (R) 1156 at para 14 (CA).

<sup>54</sup> *Re Nalpon Zero* [2013] 3 SLR 258 at paras 14-20 (CA).

<sup>55</sup> *SCJA*, *supra* note 10, s 16(1)(a)(ii).

<sup>56</sup> [2014] 3 SLR 381 (CA) [*Burgundy*].

conferring personal jurisdiction.<sup>57</sup> Therefore, it is formally a canon of statutory interpretation applicable to Order 11 heads of jurisdiction,<sup>58</sup> not a separate and additional requirement above Order 11 that claimants must fulfil.

Yet, the Court of Appeal in *Li Shengwu* bifurcated its jurisdictional inquiry into two separate and cumulative requirements—‘subject-matter jurisdiction’ over scandalising contempt, and ‘personal jurisdiction’ over Li—and sought two separate substantive legal bases for them, in Article 93 and Order 11 rule 1(n), respectively. Importantly, the Court saw its ‘subject-matter jurisdiction’ not as relevant only to its internal jurisdiction to hear the dispute, but rather as a requirement for its international jurisdiction to allow service out,<sup>59</sup> since the Court’s internal jurisdiction to try cases of contempt was never in dispute,<sup>60</sup> and since the Court noted that in cases of service out the source of its internal jurisdiction would also affect its international jurisdiction.<sup>61</sup> Thus, on its formal reasoning, the Court could not have been applying *Zoom Communications*’ test for service out of civil process, but rather an entirely different test.

Second, even if the Court of Appeal’s discussion on Article 93 concerned only its internal jurisdiction, such that the only issue on its international jurisdiction was whether Order 11 rule 1(n) was fulfilled, the Court of Appeal still should not have allowed service out for scandalising contempt. Rule 1(n), properly interpreted, cannot cover such ‘causes of action’, which are not ‘sufficiently connected’ to Singapore in the *Burgundy* sense. This is because *Burgundy*’s canon of interpretation limits statutory provisions like Order 11 to only allowing service out of civil process when the underlying dispute’s subject-matter is ‘sufficiently connected’ to Singapore,<sup>62</sup> given its ‘foreign elements’.<sup>63</sup> Its basis is ‘comity’, or more precisely, a desire to ensure that the consequences imposed on parties receiving such extraterritorial service are consistent with internationally-acceptable practice.<sup>64</sup> Thus, *Burgundy*’s ‘sufficient connection’ test seeks to ensure “the efficient conduct of litigation in an appropriate forum” based on international consensus on the appropriate jurisdictional links between a particular category of disputes and Singapore.<sup>65</sup> Conversely, Singapore’s

<sup>57</sup> *Ibid* at paras 81, 88.

<sup>58</sup> Zhuang WenXiong, “Burgundy, the Bifurcation of Jurisdiction and Its Future Implications” (2015) 27 *Sing Ac LJ* 207 at paras 26-34. For a criticism (but not a denial) of this understanding of the doctrine, see Maria Hook, “The ‘statutist trap’ and subject-matter jurisdiction” (2017) 13:2 *J Priv Intl L* 435 at 457-460.

<sup>59</sup> See *Rappo*, *supra* note 2 above for a discussion of these terms.

<sup>60</sup> Indeed, Li, who brought the Court’s subject-matter jurisdiction into dispute, cited *Burgundy* in doing so, and defined the issue of subject-matter or ‘substantive’ jurisdiction as one concerned with “what a court is permitted to do in terms of regulating the conduct in *another country* of someone over whom it has personal jurisdiction” (Appellant’s Case, *supra* note 12 at paras 10-15, [emphasis added]). In turn, the Court, when enunciating the requirement for its ‘subject-matter jurisdiction’, agreed with “[Li]’s approach” (*Li Shengwu*, *supra* note 1 at para 97).

<sup>61</sup> *Li Shengwu*, *supra* note 1 at para 92.

<sup>62</sup> *Burgundy*, *supra* note 56 at paras 80, 83, 112-114.

<sup>63</sup> Hook, *supra* note 58 at 445, 446.

<sup>64</sup> See *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450 at paras 35-39, 47 (CA).

<sup>65</sup> *Abela v Baadarani* [2013] 1 WLR 2043 at paras 45, 53 (SC) (per Lord Sumption) [*Abela*]. Here, Lord Sumption was speaking about the existence of civil jurisdiction (*ie* the doctrine of subject-matter jurisdiction), rather than its exercise on grounds of *forum non conveniens* (see *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 at para 31 (SC) [*Four Seasons*]).

courts cannot assert international civil jurisdiction over a dispute simply because it would uphold Singapore's 'public interests' for it to do so.<sup>66</sup> Further, *Burgundy's* 'sufficient connection' test is 'completely different' from the requirement that Singapore be the *forum conveniens*. It is concerned with "the relationship between the *cause of action* and [Singapore]", in other words the jurisdictional link between *juridical categories* of disputes and Singapore; while *forum non conveniens* is concerned with "the practicalities of litigation", or the specific shape of the actual proceedings before the court and how it has been conducted<sup>67</sup>—the fulfilment of the former does not necessarily entail the latter.

If the Court of Appeal in *Li Shengwu* was truly only invoking its international civil jurisdiction to allow service out, it should have interpreted Order 11 rule 1(n) in line with the *Burgundy* canon of interpretation's 'sufficient connection' test. However, had it done so, it should have found that rule 1(n) was not fulfilled. The Court never clearly explained how the underlying 'dispute', concerning Li's allegedly scandalising Post, was connected to Singapore. The Court did state that Singapore's public interests were implicated by the dispute, since it mentioned that Article 93 gave it 'subject-matter jurisdiction' to protect public confidence in the 'administration of justice' by hearing and punishing scandalising contempt<sup>68</sup>—but this is not a 'sufficient connection' in *Burgundy's* eyes. While the Court did also appear to suggest that the 'requisite connection' existed because *Zoom Communications's* *forum conveniens* requirement was satisfied,<sup>69</sup> it did not explain why this was so—and in any case, the *forum conveniens* inquiry is totally different from *Burgundy's* 'sufficient connection' inquiry. Further, even if the Court had squarely addressed the question, the only factor that it could plausibly have relied on to establish a 'sufficient connection', namely the fact that the Post would have been accessible in Singapore,<sup>70</sup> would not have sufficed. After all, the only reason why an online publication might be connected to Singapore simply due to it having been accessed in Singapore is that some 'damage' has been suffered in Singapore because of such access<sup>71</sup>—but in the case of scandalising contempt published online, no 'damage' is suffered by such access, save for damage to the public interest,<sup>72</sup> which again cannot create a

<sup>66</sup> *Burgundy*, *supra* note 56 at para 91.

<sup>67</sup> *Four Seasons*, *supra* note 65 at para 31. English courts adopt the same tripartite test for service out of jurisdiction espoused in *Zoom Communications* (Adrian Briggs, *Civil Jurisdiction and Judgments*, 6th ed (Oxfordshire: Routledge, 2015) at paras 4.59, 4.87).

<sup>68</sup> Which is necessarily a public interest—see *Shadrake*, *supra* note 42, *Parliamentary Debates Singapore: Official Report*, vol 94 at p 44 (15 August 2016) (K Shanmugam), *supra* note 43 and their accompanying texts.

<sup>69</sup> *Zoom Communications*, *supra* note 31; *Li Shengwu*, *supra* note 1 at paras 156-166.

<sup>70</sup> See, for example, *AOJPA*, *supra* note 5, s 11(2), which appears to draw inspiration from a possible 'connecting factor' between the forum and disputes concerning internet defamation (see *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433 at para 44 (HCA)).

<sup>71</sup> *Ibid* ("defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged"). That the place of 'damage' is an established connecting factor for tort claims is supported by Singapore's Order 11 rule 1(f)(ii).

<sup>72</sup> Zhuang, "Contempt", *supra* note 41; *Shadrake*, *supra* note 42; *Parliamentary Debates Singapore: Official Report*, vol 94 at p 44 (15 August 2016) (K Shanmugam), *supra* note 43.

‘sufficient connection’ in *Burgundy*’s eyes.<sup>73</sup> In the final analysis, therefore, had the Court applied *Burgundy*’s canon of interpretation to Order 11 rule 1(n), it should have found that the Attorney-General’s ‘claim’ did not fall within it, because it lacked a ‘sufficient connection’ with Singapore under *Burgundy*’s canon of interpretation.

Thus, the Court of Appeal did not invoke, and could not have invoked, its international civil jurisdiction to allow service out of scandalising contempt proceedings on Li. It must instead have been relying on an entirely different doctrine of international jurisdiction.

#### V. THE JUDICIAL POWER AND AN INTERNATIONAL CONSTITUTIONAL JURISDICTION?

In sum, the Court of Appeal in *Li Shengwu* did not invoke its international criminal or civil jurisdiction to allow service out on Li for his allegedly scandalising Post—it expressly disavowed the use of its international criminal jurisdiction, and its reasoning shows that it applied a test radically different from the one it ordinarily uses to assert international civil jurisdiction. Indeed, the court could not have invoked either jurisdiction: under Singapore law, Singapore’s courts can only allow the extraterritorial service of criminal process when the relevant foreign state consents, or when a statute clearly allows it; and can only allow the extraterritorial service of civil process when some statutory provision, not limited by *Burgundy*’s canon of interpretation, confers personal jurisdiction over the defendant. Neither of those two situations were present on the facts.

Despite this, the Court of Appeal in *Li Shengwu* nevertheless allowed service out for scandalising contempt by developing and applying a ‘*sui generis*’ form of international jurisdiction, which was neither criminal nor civil, but flowed from, and was ‘inherent’ to, Article 93 of the *Constitution*. While cryptic, this holding, when contextualised in the broader landscape of Singapore’s constitutional jurisprudence, provides a possible explanation for the true nature of this novel international jurisdiction. In truth, the Court invoked Article 93 because only the constitutional judicial power of Singapore’s courts could have justified it asserting this international jurisdiction. This jurisdiction had to be, in other words, an international constitutional jurisdiction.

The reason why Singapore’s courts generally cannot assert an international jurisdiction to allow service out, outside the two established grounds for international civil or criminal jurisdiction, is that the judiciary’s role in ‘Westminster model’ constitutional systems<sup>74</sup>—specifically, its passive role in the state’s foreign

<sup>73</sup> Indeed, under *Burgundy*’s test, ‘damage’ which connects an act to the forum can at most include “physical, financial and social” harm to an individual (*Four Seasons*, *supra* note 65 at para 52), not harm to public interests. Further, that *AOJPA*, *supra* note 5, s 11(2) now states that contemptuous acts should be considered ‘connected’ to Singapore for the purposes of Singapore’s criminal jurisdiction is irrelevant, since it operates in a different paradigm of ‘sufficient connections’ than *Burgundy*’s, namely that concerned with Singapore’s international criminal rather than civil jurisdiction.

<sup>74</sup> The term ‘Westminster model’ here is a theoretical and analytical concept which generally resembles the bulk of commonwealth constitutional systems (in other words, a paradigm of legal constitutionalism), rather than the English constitution in particular at any precise moment of time (see Andrew Harding, “The ‘Westminster Model’ Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States” [2004] 4:2 OJCLJ 143 at 146, 147).

affairs—precludes it from doing so. In these constitutional systems, the power to actively conduct the state’s foreign affairs vests entirely in the political branches of government: the executive wields the foreign affairs prerogative, giving it primary control over the state’s day-to-day conduct of foreign relations; and parliament has a residual but final power to circumscribe such foreign relations through legislation.<sup>75</sup> By contrast, the judiciaries of Westminster constitutional systems only have a passive role in the state’s conduct of foreign affairs, limited to the application of either clear statutes or uncontroversial international norms. Courts are, for example, precluded from asserting even the power of judicial review over exercises of the foreign affairs prerogative.<sup>76</sup> This passive role in foreign affairs explains the above two grounds for service out pursuant to the court’s international criminal and civil jurisdiction: in both cases, statutes (such as Order 11 and *MACMA*) confer and clear international norms (such as ‘comity’ or *Burgundy*’s ‘sufficient connection’ requirement, and PIL’s rules of enforcement jurisdiction) regulate such jurisdiction to allow service out. Allowing service out beyond those uncontroversial parameters would not merely be a passive adherence to, but rather an active conduct of, the state’s foreign affairs, contrary to the judiciary’s ordinary role in ‘Westminster model’ systems.

But although Singapore’s constitutional system is generally called a ‘Westminster model’ system,<sup>77</sup> the Court of Appeal in *Li Shengwu* nevertheless actively conducted Singapore’s foreign affairs by asserting a novel jurisdiction to allow service out for scandalising contempt, without any statute or clear international norm providing for such.<sup>78</sup> Why did the Court believe that it was constitutionally legitimate to do this?

The answer is that the Westminster conception of the judiciary’s role in foreign affairs does not entirely apply in Singapore’s constitutional system, because Singapore’s constitutional system is not exactly a ‘Westminster model’ constitutional system. It differs from the ‘Westminster model’ in one crucial aspect: its judiciary is not subordinate to political branches of government in matters of high policy, such as the conduct of foreign affairs, but is instead a co-equal branch of government, vested with a judicial power enshrined in Article 93.<sup>79</sup> As such a co-equal branch of government, Singapore’s judiciary can assert its own constitutional mandate to actively conduct aspects of Singapore’s governance, including Singapore’s foreign relations,<sup>80</sup> which are ‘inherent’ to the judicial power. A good example of this is the judicial review of the foreign affairs prerogative. Since Singapore’s courts consider judicial review “a core aspect of the judicial power”,<sup>81</sup> they can review the legality of any executive act, even those carried out in the realm of foreign relations involving

<sup>75</sup> FA Mann, *Foreign Affairs in English Courts* (New York: Clarendon Press, 1986) at 8, 9, 15-17 [Mann, *Foreign Affairs*]; Campbell McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014) at paras 4.09-4.13, 4.20-4.22, 4.25-4.30.

<sup>76</sup> Mann, *Foreign Affairs*, *ibid* at 18, 19.

<sup>77</sup> *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 at para 11 (HC) [*Faizal*].

<sup>78</sup> This jurisdiction must be considered non-statutory even though the Court relied on Article 93 as this novel jurisdiction’s basis, since Article 93 simply vests the judicial power in the Court, which then begs the question why the Court could assert the judicial power outside the Westminster judiciary’s ordinarily passive role in foreign affairs.

<sup>79</sup> *Faizal*, *supra* note 77 at para 16; *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at para 90 (CA).

<sup>80</sup> See McLachlan, *supra* note 75 at para 2.114-2.117 for similar comments *vis-à-vis* commonwealth constitutional systems which embrace constitutional supremacy, generally.

<sup>81</sup> *Nagaenthran a/l K Dharmalingam v Attorney-General* [2019] 2 SLR 216 at para 71 (CA).

“the transactions of foreign sovereign states”, and even if parliament enacts an ouster clause purporting to exclude such review.<sup>82</sup>

With this constitutional mandate from Article 93, Singapore’s courts can, under Singapore law, assert a jurisdiction to allow service out of jurisdiction when the regulation of the relevant cause of action’s underlying subject-matter is ‘inherent’ to the judicial power. Thus, if “preserving the proper administration of justice” by punishing scandalising contempt is also “an integral part of [the judiciary’s] constitutional function”,<sup>83</sup> then Singapore’s courts are legitimate in asserting international jurisdiction over such matters.

Unfortunately, since the Court of Appeal’s reasoning on this point was brief, the ambit of its international constitutional jurisdiction must remain largely undefined. In particular, it remains unclear what other matters (if any) are ‘inherent’ to the judicial power, which this international jurisdiction may relate to, since few matters are self-evidently ‘inherent’ to the judicial power.<sup>84</sup> While the Court said such matters would include those necessary to “preserv[e] the proper administration of justice”,<sup>85</sup> this definition of that category is vague, potentially covering any matter related to ‘justice’ or ‘the rule of law’. At least, it appears irrelevant that the matter is not considered ‘inherent’ to the judicial power in most other legal systems, since the ability to punish scandalising contempt is rare today even among common law courts.<sup>86</sup> Further, while it appears that the matter must also fall within some Order 11 head of jurisdiction, this will pose no real limitation in practice, given the Court’s expansive reading of Order 11 rule 1(n) in this context.<sup>87</sup> So, we have few clues as to how Singapore’s courts may further define this category of matters in the future. Until they do, the breadth of this international constitutional jurisdiction will remain an open question.

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<sup>82</sup> *Ibid*, where the Court held that, although some issues are “unamenable to being resolved through the judicial process” such as “the transactions of foreign sovereign states” (at paras 59-67), such considerations “do not in any way oust the court’s power of judicial review over the legality of executive actions” (at paras 68-74). See *Air Canada v Attorney-General of British Columbia* [1986] 2 SCR 539 at para 12, for similar comments *vis-a-vis* a legal system (Canada’s) which also embraces constitutional supremacy.

<sup>83</sup> See *Li Shengwu*, *supra* note 20, *Li Shengwu*, *supra* note 26 and their accompanying texts.

<sup>84</sup> Jaclyn Neo, “Autonomy, Deference and Control: Judicial Doctrine of Separation of Powers in Singapore” (2018) 5 J Int’l & Comp L 461 at 464.

<sup>85</sup> *Li Shengwu*, *supra* note 1 at paras 63, 67.

<sup>86</sup> At the time of writing, the UK has abolished it, New Zealand has passed a bill to do the same, and Canadian and Australian courts generally disapprove of its use (see Dr Patricia Londono, Professor ATH Smith & The Hon Sir David Eady, *Arlidge, Eady & Smith on Contempt*, 5th ed (London: Sweet & Maxwell, 2017) at paras 5-227, 5-275, 5-292, and New Zealand Parliament, “Administration of Justice (Reform of Contempt of Court) Bill”, online: New Zealand Parliament <[https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL\\_77664/administration-of-justice-reform-of-contempt-of-court](https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_77664/administration-of-justice-reform-of-contempt-of-court)>. While scandalising contempt is far more popular in Asian common law legal systems, this is often justified on appeals to ‘local conditions’ rather than on the basis of something ‘inherent’ to the judicial power (see Tom Allen, “Scandalising the Court: The Impact of Bills of Rights” (2002) 10:1 Asia Pac L Rev 1 at 16, 17).

<sup>87</sup> See Part IV above.