Libelocracy

Clive Walker*
Russell L. Weaver**

Abstract

"Libelocracy" involves several elements. The first is the deployment of the law of libel by politicians against non-political publishers. Second, the use is tactical in a more directly political sense – in other words, the action is brought against other politicians and is not for the vindication of purely private reputations. Third, the tactic develops into either repeated claims or a single large claim, sufficient to cause significant political damage to a political opponent. Fourth, by combining or repeating these tactics, libelocracy can become a major determinant of political success and failure. The paper will explain how defamation and related litigation, both civil and criminal, has impacted upon recent political life in Malaysia and Singapore in comparison to the United Kingdom. Some corrections, designed to encourage the confinement of political disputes within political forums, are suggested for Malaysia and Singapore, based upon developments in English common law.

I Introduction

Throughout history, governmental officials have striven to repress dissent. In response to Johannes Gutenberg's invention of the printing press in the Fifteenth Century, which gave private individuals the mechanism to mass produce writings for the first time, the English Crown took steps to restrict the public's use of the printing press.[1] In addition to civil law licensing schemes,[2] the Star Chamber created the crime of seditious libel in its 1606 decision in *de Libellis Famosis*.[3] Seditious libel made it a crime to criticise the government or governmental officials and the clergy, and was justified by the notion that criticism of the government "inculcated a disrespect for public authority."[4] Since

* Professor of Criminal Justice Studies, School of Law, University of Leeds.
** Professor of Law & Distinguished University Scholar, Louis D. Brandeis School of Law, University of Louisville.

1 See W.T. Mayton, "Seditious libel and the lost guarantee of a freedom of expression" (1984) 84 Columbia Law Review 91 at pp.97-98. See also N.L. Rosenberg, *Protecting the Best Men* (Carolina University Press, 1986); M.L. Kaplan, *The Culture of Slander in Early Modern England* (Cambridge University Press, 1997); R.L. Weaver & A.D. Hellman, *The First Amendment: Cases, Materials and Problems* (LexisNexis, 2002) p. 279.

2 *Ibid.*, at p.104; see also *Talley v. California* (1960) 362 U.S. 60 at p.65 (describing the fact that John Lilburne was "whipped, pilloried and fined" in England for refusing to answer questions regarding the distribution of books, and the fact that Puritan ministers were sentenced to death for publishing books).

3 77 *Eng.Rep.* 250 (Star Chamber 1606).

4 See W.T. Mayton, "Seditious libel and the lost guarantee of a freedom of expression" (1984) 84 Columbia Law Review 91at p.103. See also M.J. O'Laughlin, "Exigent circumstances" (2002) 70 University of Missouri - Kansas City Law Review 707, at pp.720-21 (discussing the prosecutions of John Wilkes).

upholding the reputation of the government was the goal of this offence, it followed that truth was just as reprehensible as falsehood and therefore was not a defence.[5] Indeed, truthful criticisms were punished more severely because true criticisms were potentially more damaging to the government.

In this paper, we explore a new approach to the repression of dissent which we call "libelocracy" with reference to the jurisdictions of England and Wales, Malaysia and Singapore.[6] "Libelocracy" is here coined as a catch-phrase which involves several cumulative elements (including slander as well as libel). The first is when libel law is invoked by politicians against the media for the vindication of private reputation *simpliciter*. The second is when libel is used in a tactical (political) sense in that an action is brought by one politician against other politicians and is not being brought simply to vindicate purely private reputations. Third, libelocracy involves either repeated claims or a single large claim, sufficient to inflict significant political damage on an opponent. Fourth, by combining or repeating these tactics, libelocracy can become a major determinant of political success and failure. Finally, as well examining civil law libel, it will be shown how criminal law is associated in these endeavours and is a powerful added factor which has affected recent political life in the relevant jurisdictions.

Why does it matter if a polity chooses to establish a libelocracy? The first concern is that libelocracy necessarily runs counter to the fundamental value of free speech which is essential to the vitality of democracies[7] and provides a check on the potential misuse of governmental power.[8] Libelocracy also affects the constitutional principle of the separation of powers.[9] First, it strains the ability of the judicial process to handle litigation which has overtly political purposes. Second, a dispute in court will be heard in public, but it is not a forum for public participation which should be a *sine qua non* for a political dispute.

Having set out the reasons why libelocracy is wrong in principle, the paper will next explore some examples of libelocracy and libelocratic tendencies. For the purposes of this paper, the first element of libelocracy will be discussed alone, whereas the last three will be combined. At the end of this article, we suggest some reforms designed to encourage the proper confinement of political disputes within political forums, as well as considering counter-arguments about whether libelocracy should be so deprecated in Malaysia and Singapore.

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5 See W.R. Glendon, "The Trial of John Peter Zenger" (1996) 68 New York State Bar Journal 48, at p.49.

6 See Chia, D., and Mathiavaranam, R., *Evans on Defamation in Singapore and Malaysia* (3rd Ed, LexisNexis, 2008).

7 See A. Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper, 1948); *Political Freedom* (Oxford University Press, 1965); *R v Secretary of State for the Home Department, ex parte Simms* [2000] AC 115 at p.126 per Lord Steyn.

8 See V. Blasi, "The Checking Value in First Amendment Theory" (1977) 2 American Bar Foundation Research Journal 521; F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982).

9 *Duport Steels v. Sirs* [1980] 1 W.L.R. 142 at p.157 per Lord Diplock.

10 See F. Wilson, *The Courtesan's Revenge* (Faber, 2003).

II Political life (and death) in a libelocracy

A The use of the law of libel by politicians against the media simpliciter

When the courtesan Harriette Wilson threatened to publish memoirs of her liaison with the Duke of Wellington if he did not offer a financial settlement, his famed response was "Publish and be damned".[10] The Duke was exceptionally robust, but many contemporary British politicians have proven themselves to be less thick-skinned.

Even serving UK Prime Ministers have resorted to litigation.[11] The most recent was in 1993, when John Major sued *The New Statesman* and *Scallywag* magazines for allegations of adultery with Clare Latimer.[12] The sting of that libel was somewhat (but not entirely) later drawn by the revelation in 2002 that Major had committed adultery with Edwina Currie, a fellow government minister.[13] Three other contemporary English politicians[14] who have trodden the path to the libel courts may have come to regret more acutely their sensitivities. One is Jeffrey Archer, who, amongst other notable attributes, was a Member of Parliament and Deputy Chairman of the Conservative Party. He was awarded in 1987 the sum of £500,000 against the *Daily Star* over allegations that he had consorted with a prostitute, Monica Coughlan.[15] He was found guilty in 2001 of perjury and perverting the course of justice through the fabrication of an attempted alibi and false diary entries.[16] He agreed to repay more than £1.8m in damages, costs and interest.[17] Another doomed politician-litigant was Jonathan Aitken, Member of Parliament and

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11 Winston Churchill settled out of court after suing the *Daily Mirror* in 1951 over an article which he said implied that he was a warmonger: M. Gilbert, *Winston S. Churchill vol.XIII* (Heinemann, 1988) p.648. Harold Wilson won an apology in the High Court in 1967 from The Move pop group. They published a postcard to promote the group's record, "Flowers in the Rain", which featured a caricature of Wilson in bed with his assistant, Marcia Falkender. He issued two further writs: one was against the *International Herald Tribune* for again alleging adultery and resulted in a settlement; the other was against the BBC which ridiculed various politicians and was settled by an apology: Lord Goodman, "Is John Major right to sue for libel?" *Evening Standard (London)* January 29, 1993 p.9.

12 See *John Major v. The New Statesman* (1993); *John Major v. Scallywag Magazine* (1993), as reported in *The Times* January 29, 1993. The case against the *New Statesman* was settled (*The Times* July 7, 1993 on payment of £1001) and that against *Scallywag* on the basis of an undertaking (*The Glasgow Herald* January 15, 1994 p.6). Other cases of that era include *Neil Hamilton and Gerald Howarth v. B.B.C.* (*The Times* October 22, 1987); *Norman Tebbit v. B.B.C.* (*The Guardian*, December 17, 1987); *Norman Tebbit v. The Guardian* (*The Times* July 29, 1988); *Michael Meacher v. The Observer* (*The Times* July 11, 1988; see further A. Watkins, *A Slight Case of Libel* (Duckworth, 1990)); *Edwina Currie v. The Observer* (*The Times* May 15, 1991); *David Ashby v. The Sunday Times* (*The Times* December 19, 1995); *Peter Bottomley v. Express Newspapers* (*The Times*, December 20, 1995); *Neil Hamilton v. The Guardian* (*The Times* October 1, 1996).

13 The *New Statesman* considered legal action for recovery of its payment and costs but did not pursue it: *The Times* September 30, 2002 p.5. The truth was revealed in Currie's memoirs: *Diaries 1987-1992* (Little Brown, 2003).

14 There is also the case of prominent Scottish politician, Tommy Sheridan. In *Sheridan v News Group Newspapers Ltd* (Unreported, CSOH, 2006; see also *Curran v Scottish Daily Record and Sunday Mail Limited* [2010] CSOH 44), he was awarded £200,000 damages for a libel relating to sexual excesses. However, further witnesses then came forward, and he was convicted of perjury in 2010 and sentenced to three years imprisonment (*HM Advocate v. Sheridan and Sheridan,* Unreported, HCJ, 2010, but see http://sheridantrial.blogspot.com).

15 *The Times* July 25, 1987.

16 *The Times* July 20, 2001.

17 *The Times* August 5, 2002.

government Minister, who sued *The Guardian* for allegations of corruption arising out of his dealings as a government minister with Saudi arms traders. His libel action collapsed when it was shown he had lied about a stay in the Ritz Hotel, Paris.[18] The testimony in that case was later determined to involve perjury, for which he was imprisoned in 1999.[19] Misfortune also befell Neil Hamilton, another Conservative Party MP and former government minister. Following a successful attempt to block the use of parliamentary materials as evidence against him,[20] he lost a libel claim against Mohamed Al Fayed (the owner of Harrods and the Ritz Hotel in Paris). It was sustained before the High Court in 1999 that Hamilton had acted corruptly by accepting money in return for favours such as asking questions in the House of Commons on behalf of his benefactor, but no criminal prosecution followed.[21]

These cases do not transform the United Kingdom into a libelocracy for three reasons. First, the litigation was entirely directed against the media and not against other politicians. The nearest instance to libelocratic tendencies concerned the hounding of *Scallywag* which first appeared in 1989 but was overwhelmed by libel claims (more against its retailers and distributors than directly against it). In 1993, the magazine was sued successfully by the Prime Minister, John Major (as described above). Its end came with litigation by Julian Lewis (who was accused of preparing a dossier on the homosexual activities of Tony Blair and of being himself a secret homosexual transvestite). In 1997, Lewis (who later became a Member of Parliament) succeeded in actions against the printer, six distributors, two retailers and the internet service provider. The editor, Simon Regan, was also convicted in 2000 of an offence under section 106 of the *Representation of the People Act* 1983 relating to false statements about fellow candidates published in the vestigial internet version of the magazine.[22] Were *Scallywag* to have been a leading media outlet of an opposition political party, then an emerging libelocracy could perhaps be alleged. In reality, it assumed no party affiliation and was never more than a very marginal rumour-mill.

The second distinguishing feature of the English litigation is that several of the libels arose from matters of personal rather than political conduct. Of course, there came a point in British politics during the 1990s when it became awkward to separate private and public persona, as when Prime Minister John Major's policy of "Back to Basics" asserted that personal morality was relevant to a swathe of public policies.[23] Equally, some cases did relate to "political" life, such as Aitken and Hamilton.

The third distinguishing feature of the British suits is that the litigation was exclusively of the civil variety. Yet, those who resorted to civil libel often put themselves

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18 *The Guardian* June 21, 1997 p.1. *See also Aitken v Preston* [1997] EMLR 415.

19 *The Guardian* June 9, 1999 p.1. For his account, see *Pride and Perjury* (HarperCollins, 2000).

20 *Hamilton v Al Fayed* [2001] 1 AC 395; *see also Hamilton v Al Fayed, The Independent* December 21, 2000; *Hamilton v Al Fayed (No 2)* [2002] EWCA Civ 665). For a personal account, see C. Hamilton, *For Better, for Worse: Her Own Story* (Robson Books, 2005).

21 *The Times* December 22, 1999.

22 D. Hooper, *Reputations Under Fire* (Little Brown, 2000) p.369. Ejection from office and disqualification for 3 years of a successful candidate under s.106 occurred in *R (Woolas) v Parliamentary Election Court* [2010] EWHC 3169 (Admin).

23 *The Times* October 9, 1993. See R. Brazier, "It is a constitutional issue" [1994] Public Law 431.

at risk of prosecution, as the cases of Aitken and Regan illustrates. At least the potential invocation of criminal libel has now been ruled out because of its abolition in England and Wales by the *Coroners and Justice Act* 2009, s.73.[24]

B The use of the law of libel by politicians against politicians

For more tactical deployments of the libel laws in the political sphere, we must refocus the survey away from England and Wales and towards Malaysia and Singapore, where one can observe significant amounts of politician-on-politician libel litigation. The outcome of such proceedings can affect not only personal reputations but also the financial viability, political careers, public policy,[25] and personal liberty of the implicated individuals.

Turning first to Malaysia, the High Court awarded former deputy Prime Minister, Dato' Seri Anwar bin Ibrahim, RM4.5m in damages for libel arising from the publication of a pamphlet. The pamphlet, *Fifty Reasons Why Anwar Ibrahim Cannot Be Prime Minister*, was published in 1998 and included allegations that Anwar was corrupt and a homosexual.[26] This book carried the by-line, Khalid Jafri, an ex-editor of the newspaper *Utusan Malaysia*, which is often seen as sympathetic to the governing coalition. Anwar was dismissed from government in 1998 and imprisoned in 1999 for corruption and sodomy.[27] The latter conviction was eventually overturned, though not before the Federal Court observed that "we find evidence to confirm the appellants [including Anwar] were involved in homosexual activities, and we are more inclined to believe the alleged incident … did happen."[28] His run of misfortune continued in 2001 when the Federal Court dismissed his defamation claim against the then Prime Minister, Tun Dr. Mahathir bin Mohamad, effectively on grounds of justification.[29] The action concerned remarks made by Mahathir at a news conference, shortly after his deputy's dismissal in 1998. Mahathir asserted that Anwar had breached the sodomy laws and was unfit to hold high political office. However, after Anwar's release from prison in 2004, he prevailed in August 2005 in his claim against Khalid Jafri. Justice Datuk Mohamed Hishamudin Mohamed Yunus set the damages at an extraordinary level (RM4.5M) to reflect the gravity of the allegations, their catastrophic impact on a person who held a high governmental and political office

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24 See *Hansard* HL vol 712 col 843 (July 9, 2009).

25 For an unsuccessful attempt to use defamation in order to enforce 1989 arrangements with the outlawed Communist Party, see *Ong Boon Hua and Chin Peng v Kerajaan Malaysia* [2010] 2 MLJ 794.

26 Homosexuality is unlawful under the Malaysian Penal Code, s.377A.

27 See *Public Prosecutor v Dato' Seri Anwar Ibrahim* [1998] 4 MLJ 481; *Public Prosecutor v Dato' Seri Anwar Bin Ibrahim (No 3)* [1999] 2 MLJ 1; *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 2 MLJ 65; *Public Prosecutor v Dato' Seri Anwar Bin Ibrahim & Anor* [2001] 3 MLJ 193; *Dato' Seri Anwar Bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193 (FC), [2004] 1 MLJ 177, [2004] 1 MLJ 497, [2004] 3 MLJ 405, [2004] 3 MLJ 517. See further http://www.freeanwar.net/index.html.

28 *Dato' Seri Anwar Bin Ibrahim v Public Prosecutor* [2004] 3 MLJ 405 at [202] per Abdul Hamid Mohamad FCJ.

29 *Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr. Mahathir bin Mohamad* [1999] 4 MLJ 58, H.C.; *Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr. Mahathir bin Mohamad* [2001] 1 MLJ 305; *Dato' Seri Anwar Ibrahim v. Dato' Seri Dr. Mahathir bin Mohamad* [2001] 2 MLJ 65.

and the lack of an apology.[30] In the event, the impact of the award was blunted by the death later in 2005 of Khalid Jafri.[31]

This episode is not directly an illustration of libelocracy. The principal legal issues related to the criminal allegations, treatment during custody, and the trial process of Anwar himself rather than the libel action which he subsequently mounted. Furthermore, his own legal suit did not deliver a telling blow against a political opponent – the potential punch was deflected by the fact that it landed on a token minor journalist. Nevertheless, the litigation was an important tactic in Anwar's political rehabilitation. He also won an apology and undisclosed damages in 2005[32] from the ex-Inspector General of Police, Rahim Noor, who admitted assaults on Anwar when in custody in 1998, in consequence of which he resigned from office in 1999 and was convicted in 2000.[33] Furthermore, Anwar filed another defamation suit, in the sum of RM100m, against Mahathir over renewed allegations of sodomy made in response to press questions in 2005, but the High Court struck out the claim in 2007 on the basis of estoppel, justification and qualified privilege (because of the conviction of two others for homosexual acts with Anwar) and fair comment made in the public interest.[34] Anwar issued further defamation proceedings in 2008 against an aide, Mohammed Saiful Bukhari Azlan, whose accusations of sodomy are the basis of another ongoing prosecution.[35]

A bolder version of libelocracy has been pursued in Singapore, where it is claimed that no leader of the ruling People's Action Party has ever lost a defamation action against an opposition politician.[36] The fate of two politicians will illustrate for present purposes. The first concerns the Singapore Workers' Party's leader and its only Member of Parliament between 1981 and 1986, Joshua Benjamin ("JB") Jeyaretnam, who also was the first ever opposition Member of Parliament to be elected since independence.[37]

Even before his election, Jeyaretnam had crossed legal swords with the Prime Minister, Lee Kuan Yew, who had sued him for defamation because of a speech he made, as the Secretary-General of the Workers' Party, during the general election campaign of 1976.[38] The alleged defamation related to a lack of honesty and integrity in the conduct of the Prime Ministerial office. It was held that there was no special defence of qualified

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30 See *„Anwar Bin Ibrahim v Khalid Jafri Bin Bakar Shah* (No 1) [2005] 4 MLJ 87. The Court of Appeal rejected an appeal on October 30, 2007.

31 See *New Straits Times* August 30, 2005 p.26. He also thereby escaped consequences of convictions in 2005 for writing the leaflet in breach of the offence of giving false information contrary to the *Printing Presses and Publications Act* 1984: *New Straits Times* July 9, 2005 p.24.

32 *New Straits Times*, August 4, 2005 p.14.

33 See *New Straits Times*, March 15, 2000 p.1. The charges followed a Royal Commission of Inquiry.

34 *Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2007] 5 MLJ 406. For the unsuccessful appeals, see [2009] 1 MLJ 668, [2010] 2 MLJ 41, [2011] 1 MLJ 145.

35 'Anwar sues for libel and false report' *New Straits Times* July 1, 2008 p.6.

36 See T.H. Tey, "Singapore's jurisprudence of political defamation and its triple-whammy impact on political speech" [2008] Public Law 452.

37 For accounts of his travails, see J.B. Jeyaretnam, *The Hatchet Man of Singapore* (Jeya Publishers, Singapore, 2003); C. Lydgate, *Lee's Law: How Singapore Crushes Dissent* (Scribe, 2003); M.D. Barr, "J.B. Jeyaretnam: Three decades as Lee Kuan Yew's bete noir" (2003) 33(3) *Journal of Contemporary Asia* 299; International Bar Association Human Rights Institute, *Prosperity Versus Individual Rights?* (2008) p.30.

38 *Lee Kuan Yew v Jeyaretnam JB* [1978 - 1979] 1 SLR 429.

privilege at election time, and the comments were not only unfair but actuated by malice. Damages of SGD130,000 were awarded. Appeals against the judgment and award were rejected, including by the Privy Council.[39]

Jeyaretnam went on the offensive in the next bout of litigation, which arose out of his attendance at the inauguration of the Singapore Democratic Party in 1981.[40] The defendant, a government Minister, made public comments to the effect that Jeyaretnam had staged an impressive exodus of his supporters when he left the hall at the end of his speech so as to demonstrate his leadership of the opposition. The claim was dismissed. The slanderous words imputed to the plaintiff dishonourable or discreditable conduct or motive or a lack of integrity but were not calculated to disparage him in his office as the Secretary-General of the Workers' Party. Furthermore, the defence of fair comment prevailed.

In 1986, Jeyaretnam was barred from Parliament (and as a lawyer) owing to convictions relating to election finance breaches, though these proceedings were condemned by the Privy Council as "a grievous injustice".[41] The right of appeal to the Privy Council was severely restricted by an amendment to Singapore law in the following year.[42] Singapore judges then rejected his appeals, preventing him from standing for office until 1997.[43]

Undaunted, at an election rally in 1988, Jeyaretnam asked whether any investigation had been conducted into how the Minister for National Development, Teh Cheang Wan, had obtained the tablets by which he had committed suicide during an investigation for corruption and whether the Prime Minister had replied to a letter written to him by Teh. The Prime Minister commenced proceedings against Jeyaretnam. Jeyaretnam was ordered to pay to Lee damages of SGD260,000[44] and his appeals failed, and the Court of Appeal rejected the development of any wider legal privilege for speech about public affairs.[45] One further reaction to this episode was an amendment to the *Defamation Act* (by Act 11/1991); section 14 restricts expressions by or on behalf of an election candidate by deeming them not to be published in circumstances giving rise to qualified privilege.

Jeyaretnam was re-elected to Parliament in 1997.[46] Following the election campaign, multiple defamation suits were filed against him for a speech that he delivered at an

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39 [1978 - 1979] 1 SLR 197 (CA); [1982 - 1983] 1 SLR 1 (PC).

40 *Jeyaretnam JB v Goh Chok Tong* [1984 - 1985] 1 SLR 516 (HC), [1986] 1 SLR 106 (CA).

41 *Jeyaretnam v Law Society of Singapore* [1989] A.C. 608 at pp.631-632 per Lord Bridge.

42 Malaysia abolished appeals to the Privy Council in criminal and constitutional matters in 1978 and in civil matters in 1985 (*Constitution (Amendment) Act* 1976 and the *Courts of Judicature (Amendment) Act* 1985). Singapore abolished Privy Council appeals in all cases save those involving the death penalty or in civil cases where the parties had agreed to such a right of appeal by the *Judicial Committee (Amendment) Act* 1989. Remaining rights of appeal were abolished by the *Judicial Committee (Repeal) Act* 1994.

43 See J*eyaretnam JB v Attorney General* [1990] 1 SLR 610.

44 *Lee Kuan Yew v Jeyaretnam JB (No 1)* [1990] 1 SLR 688.

45 *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] 1 SLR 38 (CA), [1992] 2 SLR 310 (CA). But see on costs [1993] 1 SLR 185 (CA).

46 In 1998, Jeyaretnam unsuccessfully called for a Commission to examine defamation law: 69 SPR cols.1728-1776, (November 26, 1998).

election meeting in which he stated, "Mr Tang Liang Hong has just placed before me, two reports he has made to the police against, you know, Mr Goh Chok Tong and his people".[47] Alongside other colleagues, the Prime Minister, Goh Chok Tong alleged damage to his reputation but admitted that "it has been a good year" and that his standing as a leader had not been injured.[48] The trial judge, Rajendran J., awarded only "derisory" damages (SGD20,000), but the damages were raised on appeal to SGD100,000.[49]

In 2001, after one of his damages instalment payments became overdue by one day, Jeyaretnam was declared bankrupt, disbarred from office,[50] and prevented from taking part in the elections that year.[51] He resigned from the leadership of the Workers' Party. His application for discharge after three years was rejected.[52]

With Jeyaretnam out of public office, attention can be shifted to his successor as the chief target of libelocracy, namely, Chee Soon Juan, Secretary-General of the Singapore Democratic Party.[53] In 2001, Chee was sued by Prime Minister Goh Chok Tong and Senior Minister Lee Kuan Yew. During the General Election campaign, he had accused both Goh and Lee of not revealing to Parliament an alleged USD17 billion loan to Indonesian President Suharto. The government admitted a USD5 billion loan facility, part of an IMF package of support amounting to USD23 billion. Damages of SGD300,000 were awarded to Goh and SGD200,000 to Lee.[54] In 2006, Chee was declared a bankrupt, after failing to pay these awards. The bankruptcy order meant that Chee became disqualified from elections until 2011.[55] Furthermore, he was also sentenced in 2006 to a day in jail and a fine of SGD6,000 (but he failed to pay the fine and was jailed for an additional seven days) for contempt in the face of the court and scandalising the court arising from scurrilous remarks about the government bias of the Singapore judiciary made in his bankruptcy statement.[56]

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47 See *Lee Kuan Yew v Tang Liang Hong And Other Actions (No 1)* [1997] 2 SLR 233 (HC), [1997] 2 SLR 819 (HC), [1997] 2 SLR 841 (HC), [1997] 3 SLR 91 (HC), [1998] 1 SLR 97 (CA); *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1997] 2 SLR 679 (HC), [1998] 1 SLR 547 (CA).

48 [1998] 1 SLR 547 at [155]. For criticism of the judgment, see the report by Stuart Littlemore QC to the International Commission of Jurists (see http://www.singapore-window.org/icjjbrep.htm).

49 *Goh Chok Tong v Jeyaretnam Joshua Benjamin and another action* [1998] 3 SLR 337.

50 For the disqualification, see Singapore Constitution, art.45. A fine of more than SGD2000 bars citizens from running in parliamentary elections for five years.

51 *Re Jeyaretnam Joshua Benjamin, ex parte Indra Krishnan* [2001] 2 SLR 286 (HC), [2001] 3 SLR 525 (CA). Defamation actions by the Prime Minister and others rising out of the 1997 defamation were dropped in return for an apology in the High Court: *Jeyaretnam v Lee Kuan Yew* [2001] 4 SLR 1; *Agence France Press* April 2, 2002 (copied at http://www.singapore-window.org/sw02/020402af.htm).

52 *Re Jeyaretnam Joshua Benjamin, ex parte Indra Krishnan (no.2)* [2004] 3 SLR 133 (HC), [2005] 1 SLR 395 (CA). His colleague and Workers' Party parliamentary candidate in 1997, Tang Liang Hong was also bankrupted

53 See International Bar Association Human Rights Institute, *Prosperity Versus Individual Rights?* (2008) p.37; R. Amsterdam and D. Peroff, *White Paper on the Repression of Political Freedoms in Singapore: The Case of Opposition Leader Dr Chee Soon Juan* (Amsterdam and Peroff, 2009).

54 *Lee Kuan Yew v Chee Soon Juan* [2003] 3 SLR 8 (HC), [2005] 1 SLR 552 (HC); *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR 32 (HC), [2005] 1 SLR 573 (HC).

55 See http://csj.http3.net/CSJ_Bankruptcy_Press_Statement_2.pdf.

56 *Attorney General v Chee Soon Juan* [2006] 2 SLR 650 (HC).

The next bout of libel litigation arose in 2006, when Chee Soon Juan and 12 other defendants were sued for defamation for remarks in the Singapore Democratic Party's newsletter concerning the government's handling of the National Kidney Foundation (NKF) scandal.[57] The claim was maintained by the former Prime Minister, Lee Kuan Yew, and his eldest son, the Prime Minister Lee Hsien Loong. Most of the original accused apologised, so that only Chee Soon Juan and his sister, Chee Siok Chin, were left as defendants, along with the Party.[58] Summary judgment was entered in 2008, and the order to pay SGD610,000 in damages resulted in its bankruptcy.[59]

Serious and persistent as these defamation suits have been, it was eventually criminal charges and not civil libel which resulted in the political exclusion of Chee. In July 2002, Chee was fined for a speech at a public meeting in Hong Lim Park[60] about the school suspension of three Muslim girls who were not allowed to wear headscarves. As a result of this conviction, Chee became ineligible for the 2006 general election.

This prosecution was not an isolated event. On 1 May 2002, Chee staged a rally in front of the President's official residence and was arrested after he ignored a warning by a police officer to leave. Chee, who had earlier been denied a license to hold the rally, was fined for trespassing and for attempting to hold rally without a license but served the default imprisonment term of five weeks for failure to pay. The attitude of the court can be judged from the following remarks:

> "Before me, Chee had the sheer arrogance to purport to speak on behalf of the people of Singapore, in asking for their right to free speech to be returned to them. I found his impertinence remarkable, particularly since he said that he was not a member of Parliament. He clearly had no mandate to speak on behalf of the people of Singapore."[61]

In June 2006, Chee was again charged with eight counts of speaking in public without a licence in 2005 and 2006 contrary to section 19(1)(a) of the *Public Entertainment and Meetings Act*. He was fined and then jailed for five weeks at the end of 2006 for failing to pay the fine. In 2007, he was imprisoned for attempting to leave the country without a permit despite being a bankrupt. In December 2009, he was found guilty under section 5 of the *Miscellaneous Offences (Public Order and Nuisance) Act* of distributing without a police permit pamphlets during the 2006 election that were critical of the ruling People's Action Party.[62] In March 2010, Chee Soon Juan and colleagues were convicted in

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57 T.T. Durai, the chief executive of NKF was later convicted under the *Prevention of Corruption Act* 1960 s.6(c): *The Straits Times* June 22, 2007. The affair arose when the NKF commenced and then abandoned a libel action against the *Straits Times* (Singapore Press Holdings) and journalist Susan Long.

58 *Lee Hsien Loong v The Singapore Democratic Party* [2006] SGHC 220.

59 See further *Chee Siok Chin v Attorney-General* [2006] SGHC 144, [2006] SGHC 153.

60 http://www.nparks.gov.sg/cms/docs/speakers_terms_n_conditions.pdf.

61 *Chee Soon Juan v Public Prosecutor* [2003] 2 SLR 445 at [27] per Yong Pung How CJ.

62 *Public Prosecutor v. Chee Soon Juan* [2010] SGDC 129. See Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules 1989. These Rules and s.5 have been replaced by the *Public Order Act* 2009, which also amends the *Public Entertainments and Meetings Act*.

connection with a demonstration at Parliament House in 2008, involving the wearing of "*Tak Boleh Tahan*" ("I can't take it anymore") T-shirts in support of a campaign against living costs launched by the Singapore Democratic Party. They were convicted under section 5 of the *Miscellaneous Offences (Public and Nuisance) Act* for demonstrating without a police permit.[63] It was sustained in cross examination in *Chong Kai Xiong v. Public Prosecutor*[64] that "there was a policy not to grant any permit for political events to be held outdoors", but the Singapore Democratic Party demonstrators were still convicted.

More directly related to the foregoing NKF libel action were two prosecutions for scandalising the court. In *Lee Hsien Loong v. Singapore Democratic Party*,[65] the conduct of the defendants in their oral submissions and cross examinations in court was condemned as "outrageous behaviour". A further prosecution for scandalising related to the assistant secretary-general of the Singapore Democratic Party for displaying, outside the Supreme Court building during a hearing to assess damages in the defamation case, T-shirts with a palm-sized picture of a kangaroo dressed in a judge's gown, thus representing a "kangaroo court".[66] Custodial sentences of up to 15 days were awarded.

As sequels to these cases, a commentary entitled "Singapore's Martyr, Chee Soon Juan" and published in the *Far Eastern Economic Review*, was held to defame Prime Minister Lee Hsien Loong and Minister Mentor Lee Kuan Yew in *Review Publishing Co Ltd v. Lee Hsien Loong*.[67] The publishers were also rebuffed in their efforts to retain foreign counsel. Tim Robertson SC was deemed unsuitable in part because of his "proclivity to make such statements which were ill-founded and disrespectful of the judiciary".[68]

This tactic of objecting to foreign lawyers (and thereby reducing foreign media interest) is not an isolated instance, having already been applied in connection with the litigation in *Lee Kuan Yew and Goh Chok Tong v. Chee Soon Juan* [69]in order to block the briefing of Nicholas William Henric Q.C. and Martin Lee Chu Ming QC (founder of Hong Kong's Democracy Party).[70] The services of Gavin Millar Q.C were also deemed unnecessary to argue for a widening of the defence of privilege in defamation because that task would not be so complex as to require that a foreigner be allowed audience rights under section 21 of the *Legal Profession Act*.[71] According to Tay Yong Kwang, J., in so far as more junior defence counsel might feel daunted by becoming "embroiled in a battle of 'David and Goliath' proportions, perhaps he could take comfort in the fact that the little shepherd boy armed with only a sling and stones emerged the victor against the gigantic seasoned soldier wearing a shield, a sword and a spear."[72] No doubt, inequality of arms

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63 *Public Prosecutor v. Chee Soon Juan* [2010] SGDC 238.
64 [2009] SGDC 380 at [19]. See also [2010] SGDC 175.
65 [2009] 1 SLR 642 at p.723.
66 *Attorney-General v Tan Liang Joo John* [2009] SGHC 41.
67 [2009] SGCA 46.
68 *Lee Hsien Loong v Review Publishing Company Ltd* [2007] SGHC 24 at [10].
69 [2003] 3 SLR 8 (HC), [2005] 1 SLR 552 (HC); *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR 32 (HC), [2005] 1 SLR 573 (HC).
70 [2002] 2 S.L.R. 296; [2002] 4 S.L.R. 929.
71 *Re Gavin Millar Q.C.* [2008] 1 S.L.R 297 (H.C.). See also *Re Millar Gavin James Q.C.* [2007] 3 S.L.R. 349 (H.C.); L-A. Thio, "Reading rights rightly" (2008) 6 Singapore Journal of Legal Studies 264.
72 *Ibid.* at p.315.

might be a spur to ambitious young barristers but hardly represents a fair disposition for a respectable justice system.

Another sequel, and one which illustrates how crime is inextricably linked to civil defamation within a libelocracy, is the case of *Attorney-General v. Hertzberg Daniel*, an action to commit for contempt the editor and others of the *Wall Street Journal Asia* for its publication of articles and also of a letter from Chee Soon Juan, all of which contained "insinuations of bias, lack of impartiality and lack of independence and implied that the judiciary is subservient to Mr Lee and/or the PAP and is a tool for silencing political dissent".[73] This argument is thus akin to the thesis of this paper, save that the fault being contended here is one of law more than personal failings. The court found that the offence of scandalising the court was made out, and a fine of SGD25,000 was imposed.

Singapore's record on the use of defamation for political purposes was the subject of a damning report by Amnesty International in 1997.[74] Its analysis was that "Singapore's leaders are in fact resorting to defamation suits as a politically-motivated tactic to silence critical views and curb opposition activity." In characteristically assertive terms, the Law Ministry of Singapore accused Amnesty International of a "coordinated, partisan propaganda campaign" and being "dishonest and disingenuous" in its report.[75] The report's author, Stuart Littlemore, QC, was later barred from the Singapore courts based on, *inter alia*, his disparagement of the Singapore judiciary.[76]

Criminal libel has not been invoked in the foregoing battles in Malaysia[77] and Singapore.[78] Perhaps it would be too blunt and obvious a weapon even for the robust political protagonists in those jurisdictions. However, there is one important exception, namely the prosecution of the blogger, Raja Petra, who operates the *Malaysia Today* website.[79] He had been detained without trial in 2001 and 2008 under the *Internal Security Act* 1960, and his prosecution for criminal defamation and sedition followed his second release when he was accused of implying that the wife of the then Deputy Prime Minister Najib Razak was involved in the notorious killing of a Mongolian translator, Altantuya Shaariibuu. Before his trial commenced (and believing he would be detained without trial), Raja Petra took up residence in England in 2009, where he remains.

Another major criminal law based threat to free speech in Singapore is the offence of scandalising the court. As well as the instances of its use against members of the Singapore Democratic Party already cited, account might be taken of the case of blogger, Gopalan Nair, a former Workers' Party candidate who, during attendance at some hearings relating to Chee Soon Juan, was convicted and sentenced to three months in 2008 for insulting judges under section 228 of the Penal Code[80] for accusing the judge (Belinda

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73 [2008] SGHC 218 at [55].

74 *JB Jeyaretnam - the use of defamation suits for political purposes* (ASA 36/04/97).

75 See http://www.singapore-window.org/1018st.htm.

76 *Re Littlemore Stuart QC* [2002] 1 SLR 296. He had sought leave to represent Chee Soon Juan.

77 Penal Code, s.499.

78 Penal Code, s.499.

79 See *Raja Petra bin Raja Kamaruddin v Pendakwa Raya* (High Court, 2009).

80 By s.228: "Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to $5,000, or with both."

Ang) of prostituting herself to the plaintiffs and he was also barred for life in 2011 from practising as a lawyer.[81] A further incidence of this offence affected Alan Shadrake, a British national and author of *Once a Jolly Hangman* in which Singapore's death penalty was criticised. He was convicted in 2010 of scandalizing the courts and was imprisoned for five weeks.[82]

This brief survey should not be interpreted as an endorsement of all the deeds of the government opponents in Malaysia and Singapore. Yet, it highlights the dangers for jurisdictions where libel law becomes a central arbiter of political discourse. The described events also underline the blurred divide between criminal and civil law and the way in which civil action can herald the prosecution of those whose reputations and finances have been degraded.

III Moving party politics from the law courts

The former Prime Minister of Singapore, Lee Kwan Yew, has stated

> "We're not going to allow foreign correspondents or foreign journalists or anybody else to tell us what to do …. There are very few things that I do not know about Singapore politics, and there are very few things that you can tell me, or any foreign correspondent can tell me, about Singapore."[83]

He is quite right. Likewise, it is wholly understandable that, as was stated for Malaysia in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang* by Hashim Yeop A. Sani, C.J., "We cannot just accept the development of the common law in England."[84] The equivalent judicial statement in Singapore "welcomed that English law is no longer accepted blindly."[85] Nevertheless, principled common law and other developments in favour of free speech should not be denigrated just because they originate from England. Rather, they should be considered as not only persuasive[86] but also potentially very worthwhile for fast developing democracies such as Malaysia and Singapore. There are also several reforms beyond the law of defamation and indeed beyond the law which should equally be considered. Arguments against change, along the lines that libelocracy delivers higher standards of truth or political participation than in countries like England, are not supported by the entrenchment of a one-party (or at least coalition) government in

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81 *The Law Society of Singapore v. Gopalan Nair (aka Pallichadath Gopalan Nair)* [2010] SGDT 11.
82 *Shadrake v Attorney-General* [2011] SGCA 26.
83 S. Mydans, "Change Unlikely as Singapore Votes, but the Young Chafe" *New York Times*, May 6, 2006 p.A7.
84 [1990] 1 MLJ 356 at p.362.
85 *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR 604 at [28].
86 See *Application of English Law Act* s.3 (Singapore); *Civil Law Act* 1956 s.3(1)(a) (Malaysia).

both jurisdictions.[87] As plurality of politics develops in these jurisdiction,[88] so should a plurality of voices be heard.

A Defamation law reform

Given the emphasis placed in this paper on common law comity, it is not intended to examine at length the US constitutional development in *New York Times Co. v. Sullivan*.[89] In that case, the US Supreme Court held for the first time that defamatory statements are entitled to First Amendment protection which goes beyond the common law defences of justification or privilege. The cornerstone of the approach was the requirement of proof by the plaintiff of the "actual malice" standard.

Even though the *Sullivan* standard has achieved considerable impact in the United States, where it has largely quelled defamation claims by both public officials and public figures, it has done so at the expense of providing redress for reputational injury even in cases of sloppy and mistaken journalism.[90] It might also be criticised as being overly fixated on speech about public figures rather than the public interest. As a model for reform of the common law of libel, the *Sullivan* defence has therefore not appealed to the United Kingdom government:

> "It would mean, in effect, that newspapers could publish more or less what they liked, provided that they were honest, if their subjects happened to fall within the definition of 'public figure'. … What matters is the subject matter of the publication and how it is treated rather than who happens to be the subject of the allegations."[91]

Equally, the *Sullivan* doctrine has not commended itself to the Prime Minister of Singapore: "If you don't have the law of defamation, you would be like America, where

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87 See L-A Thio, "'Pragmatism and realism do not mean abdication': A critical and empirical inquiry into Singapore's engagement with international human rights law" (2004) 8 Singapore Yearbook of International Law 41; T.T Hang, "Inducing a constructive press in Singapore" (2008) 10 Australian Journal of Asian Law 202. But criticisms of libelocracy based on the perpetuation of corruption or the governmental bias of judges are more difficult to sustain; in the Transparency International Corruption Perceptions Index 2013, the country rankings are Singapore 5, UK, 14, Malaysia 53.

88 In the 2008 Malaysian election, Opposition parties secured 82 seats out of 222 seats in parliament, the first time since the 1969 election that the ruling Barisan Nasional did not win a two-thirds supermajority. In the Singapore 2011 election, the People's Action Party won 81 out of 87 seats, but even six opposition seats was viewed as a watershed since it was the largest total since 1965.

89 376 U.S. 254 (1964). See R.L. Weaver, A.T. Kenyon, D.E. Partlett, C.P. Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006) chaps.3, 9.

90 See R.L. Weaver, A.T. Kenyon, D.E. Partlett, C.P. Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006) pp.183-200, 290.

91 House of Lords Debates vol.570 cols.607-608 March 8, 1996, Lord Inglewood. Compare I. Loveland, *Political Libels* (Hart Publishing, 2000) p.84. But see *Gertz v. Robert Welch* 418 U.S. 323 (1974) and *Dun & Bradstreet v. Greenmoss Builders* 472 U.S. 749 (1985).

people say terrible things about the president and it can't be proved….".[92] His stance echoed the view of the Singapore Court of Appeal in *Jeyaretnam v. Lee Kuan Yew*,[93] which also rejected *Sullivan* because of the additional argument that Article 14(1) of the Constitution recognised defamation as a legitimate restraint on speech. This verdict was backed in *Goh Chok Tong v. Jeyaretnam*: "Whilst there is an undeniable public interest in protecting freedom of speech as a means of exposing wrongdoing or abuse of office by public officials, there is an equal public interest in allowing those officials to execute their duties unfettered by false aspersions."[94]

But the justification for resistance to any change can no longer be based on a view that traditional common law approaches fail to distinguish between public officials and private persons in defamation cases. Even US law no longer focuses only on status and has shifted towards public interest as part of its analysis. This point will be drawn from two out of the three major common law developments in favour of political speech which albeit that they are not wholly able to avert the chilling impact of libel suits, could be readily adopted by the common law jurisdictions of Malaysia and Singapore.

1 Limits on defamation actions by official bodies

The first common law restraint to be considered is the bar on defamation actions by certain public bodies. The line of doctrine commenced with local authorities following the decision of the House of Lords in *Derbyshire County Council v Times Newspapers*.[95] On a preliminary issue, the House of Lords concluded that the plaintiff could not bring the claim for libel based on allegations of corruption. The House of Lords maintained that a democratically elected governmental corporate body should be open in the public interest to uninhibited public criticism.

The *Derbyshire* privilege represents a bold blow in the cause of political expression, but it is also unsatisfactory in several detailed respects. First, being absolute, there appears to be a disregard for the value of truth. It is not even clear whether malice can terminate the privilege, so that the privilege is arguably more absolute in favour of free speech than the *Sullivan* ruling, though a claim for malicious falsehood remains available,[96] provided there is proof of special damage[97] which might be difficult to show for non-trading entities like governmental bodies. Another concern is that the privilege does not go far enough because there is no equivalent bar on individual officials within corporations. Thus, in the *Derbyshire* case, the council leader could proceed with his action and was paid substantial damages.[98] A third aspect of unease arises from uncertainties over the

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92 S. Mydans, "Change Unlikely as Singapore Votes, but the Young Chafe" *New York Times*, May 6, 2006 p.A7.

93 [1992] 2 SLR 310 at p.333.

94 [1998] 1 SLR 547 at [25]. See also *Lee Kuan Yew v. Vinocur* [1995] 3 S.L.R. 477.

95 [1993] AC 534. For the details, see R.L. Weaver, A.T. Kenyon, D.E. Partlett, C.P. Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006) chap.4.

96 [1993] AC 534 at p.551.

97 See P. Milmo and W.V.H. Rogers (eds), *Gatley on Libel and Slander* (11th ed., Sweet & Maxwell, 2008) chap.21.

98 *The Times* October 13, 1991 (a correction to an article was published on November 26, 1989).

boundaries of the doctrine. One cannot be sure that all institutions of government are barred from suit, assuming that the ratio of *Derbyshire* focuses upon "corporations" which hardly applies to much of British government which operates under prerogative powers. Further uncertainty around the territory of the doctrine is cast by its application to a political party in *Goldsmith and Referendum Party v. Bhoyrul*.[99] The High Court formulated the absolute privilege in very wide terms, without reference to elections or whether the party was a corporation,[100] but it was again made clear that the rule applied to the collective alone and that any individual candidate or official connected with the party who was sufficiently identified could still sue.

The *Derbyshire* case was considered in Singapore by Judge Rajendran in *Goh Chok Tong v Jeyaretnam*.[101] While he acknowledged that it was persuasive as a common law development, he felt constrained by precedent not to pronounce further. The Court of Appeal later ignored the point.[102] *Derbyshire* was recognised but distinguished on the facts in *Tang Liang Hong v Lee Kuan Yew*.[103] In *Chee Siok Chin and Others v Minister for Home Affairs*,[104] it was contended by V.K. Rajah J. that "It can be fairly said that this abrupt change of position in England in 1993 is not a development of the common law but rather a change of the law of a legislative rather than a judicial character …".[105] A *Derbyshire* argument was raised in *Lee Hsien Loong v The Singapore Democratic Party*, but the court distinguished the current claims as "brought by two individuals suing not in their official capacity, but as private citizens who were concerned that their individual reputation had been tarnished".[106]

The *Derbyshire* doctrine has been adopted in 2013 in *Kerajaan Negeri Terengganu v Dr Syed Azman Syed Ahmad Nawawi (No 1)* on the basis that it is not in the interest of the public that the state government be allowed to institute or maintain any action for libel or slander against any person.[107]

2 The extension of qualified privilege

The second common law development in favour of freedom of expression was delivered by the 1999 House of Lords decision in *Reynolds v Times Newspapers*.[108] In response

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99 [1998] QB 459. See I. Loveland, "The constitutionalisation of political libels in English common law" [1998] Public Law 633.

100 [1998] QB 459 at pp.462, 463.

101 *Goh Chok Tong v Jeyaretnam JB* [1998] 1 SLR 547 at [26].

102 *Goh Chok Tong v Jeyaretnam Joshua Benjamin and another action* [1998] 3 SLR 337.

103 [1998] 1 SLR 97 at [116].

104 [2006] 1 SLR 582 at [69] per V.K. Rajah J.

105 The case pre-dated the *Application of English Law Act* s.3.

106 [2006] SGHC 220 at [35]. See further *Lee Hsien Loong v Review Publishing Co Ltd* [2008] SGHC 162 at [204] (leaving open the issue).

107 See [2013] 7 MLJ 52, para.29, and see also *(No 2)* [2013] 7 MLJ 145.

108 [2001] 2 AC 127. See I. Loveland, *Political Libels* (Hart Publishing, 2000) chap.7; R.L. Weaver, A.T. Kenyon, D.E. Partlett, C.P. Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006) chaps.4, 8; P. Milmo and W.V.H. Rogers (eds), *Gatley on Libel and Slander* (11th ed., Sweet & Maxwell, 2008) chap.15. Compare the constitutional developments in *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520, 521; *Grant v. Torstar* (2009) 79 C.P.R. (4th) 407 (S.C.C.); *Defamation Act* 2009 (No. 31, Ir.) s. 26; *Lange v. Atkinson* [1997] 2 N.Z.L.R. 22, 27

to a libel suit by Albert Reynolds, the former Taoiseach (Prime Minister) of the Irish Republic, against the *The Sunday Times* in respect of its British edition, the Court of Appeal[109] and House of Lords[110] reformulated qualified privilege as a wide defence which served the public interest. In the leading judgment in the House of Lords, Lord Nicholls listed ten illustrative factors in a balancing operation as to whether a publication fell within qualified privilege.

> "Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing."[111]

Qualified privilege failed on the facts in *Reynolds* largely because the publisher failed to put Reynolds' side of the story when making serious allegations of misconduct by a political leader.[112] The discrepancy between British and Irish newspaper editions of the story also made it harder to show there was genuine belief in putting facts before the public. Later application also reveals a mixed picture. On the one hand, a wide view has been taken of the "duty" triggered by the public interest,[113] In contrast to the attitude sometimes displayed in Malaysia and Singapore, a further aspect of indulgence is that foreign based publications will potentially not be subject to the same duties of verification and so on as English based publications.[114] On the other hand, the test has sometimes been applied in an overly complex manner and one which takes insufficient account of the realities of journalistic life by imposing unrealistic standards of research, measured tone and regard for subjects.[115]

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[109] [1998] 3 WLR 862.

[110] [2001] 2 AC 127 at p.197.The case was eventually settled: *The Sunday Times* (September 10, 2000).

[111] [2001] 2 AC 127 at p.205.

[112] [2001] 2 AC 127 at p.206 per Lord Nicholls.

[113] See *Al-Fagih v H H Saudi Research & Marketing* [2001] EWCA Civ 1634; *GKR Karate v Yorkshire Post Newspapers (no.2)* [2000] 1 EMLR 410; *Armstrong v Times Newspapers Ltd* [2004] EWHC 2928 (QB).

[114] See *Baldwin v Rusbridger* [2001] EMLR 47; *Lukowiak v United Editorial SA (no.1)* [2001] EMLR 46; *Al-Misnad v Azzaman Ltd.* [2003] EWHC 1783 (QB).

[115] *Grobbelaar v News Group Newspapers Ltd* [2001] EWCA Civ 33, [2002] UKHL 40; *James Gilbert Ltd. v MGN Ltd*. [2000] EMLR 680; *Loutchansky v Times Newspapers (no.4)* [2001] EMLR 38, *(nos.2-5)* [2002] EWCA Civ 1805 and *(no.6)* [2002] EWHC 2490.

Such vagaries of journalistic life were to the fore in *Galloway v Telegraph Group Ltd (2004)*.[116] George Galloway, a Member of Parliament, sued *The Daily Telegraph*, shortly after the invasion of Iraq by coalition forces in 2003, for articles which it said were based upon documents found in Baghdad and which were alleged to show paid collusion between Galloway and the Iraqi regime. The newspaper described its coverage as "reportage" - "a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper"[117]. But the court viewed the newspaper's conduct as being irresponsible and even motivated partisanship by failing to ask Galloway to respond before publication to many of the serious allegations, and in the absence of any urgency to publish ahead of competitors. Further allegations of wrongful conduct were repeated in the privileged setting of hearings before the US Senate, after which both protagonists, George Galloway and Senator Norm Coleman, claimed victory.[118] To ask a newspaper to perform much better may be unduly idealistic.

The House of Lords, in *Jameel v Wall Street Journal Europe SPRL*, took some heed of criticisms that *Reynolds* was being applied in an unduly narrow and technical manner.[119] The *Wall Street Journal Europe* had named the company owned by billionaire Saudi car dealer, Mohammed Jameel, in connection with allegations that bank accounts of several prominent Saudi businessmen were being monitored by Saudi authorities at the request of U.S. authorities so as to ensure that no money was paid to terrorists. The journal had some confirmation of its story through contacts in Riyadh and through a U.S. Treasury source. Furthermore, the claimant had been telephoned in Jeddah, whereupon his assistant had told the journalist that the claimant was asleep and that any publication should be postponed for 24 hours. Their Lordships concluded that the story clearly concerned a matter of public interest and that the measures to gather the information had been responsible and fair in view of the "practical realities" of journalism.[120] Some of their Lordships even signalled a new start, divorced from the old technicalities of the qualified privilege defence, by renaming *Reynolds* the "public interest" defence.[121]

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116 [2004] EWHC 2786 (QB). The appeal of the newspaper was rejected: [2006] EWCA Civ 17.

117 [2004] EWHC 2786 (QB) at [122]. See*Al-Fagih v H H Saudi Research and Marketing (UK) Limited* [2002] EMLR 13 at [6] per Simon Brown LJ.

118 Compare: G. Galloway, *Mr. Galloway Goes to Washington: The Brit Who Set Congress Straight About Iraq* (New Press, 2005); United States Senate Committee on Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations, Report on oil allocations granted to Charles Pasqua & George Galloway prepared by the majority and minority staffs of the permanent subcommittee on investigations released in conjunction with the permanent subcommittee on investigations May 17, 2005, hearing: Oil for influence: how Saddam used oil to reward politicians and terrorist entities under the United Nations oil-for-food program (http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=891f6f42-f3da-4825-8193-91bd9953df98), Report concerning the testimony of George Galloway before the Permanent Subcommittee on Investigations prepared by the majority staff of the Permanent Subcommittee on Investigations for release on October 25, 2005 (http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=37adf64a-1959-4e5f-9cb5-1f758d0697d7).

119 [2006] UKHL 44.

120 *Ibid.*, at [55-56] per Lord Hoffman.

121 *Ibid.*, at [46] per Lord Hoffman and [146] per Baroness Hale.

There is some question about whether *Reynolds*, even as modified by *Jameel*, provides sufficient protection to the media.[122] Regardless, the government's current inclination is not to venture much further, and so its draft Defamation Bill of 2011,[123] including clause 2 ("Responsible journalism on matters of public interest") provides modest clarification rather than major change.

The English Court of Appeal's version of *Reynolds* qualified privilege was rehearsed with some approval by the Federal Court of Malaysia in *Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr. Mahathir bin Mohamad*, ironically in that case offering protection to the "establishment" in so far as its standards were deemed not to have been fulfilled.[124] Adoption of the House of Lords' version has followed in other cases, though with only occasional protection for the press.[125] The Malaysian version of qualified privilege was discussed in *Dato Seri Anwar Bin Ibrahim v The New Straits Times Press*[126] wherein the High Court preferred *Reynolds* to its Australian and New Zealand counterparts. Since then, *Reynolds* has been applied several cases, but only recently, perhaps after a learning curve on the part of the media, has it availed the defence.

But Reynolds has not been unequivocally invoked as an instrument in favour of press freedom in Malaysia, so it is argued that the legal position "remains open".[127]

As for Singapore, *Reynolds* (along with Commonwealth equivalents) was considered in *Lee Hsien Loong v The Singapore Democratic Party* but was quickly dismissed on the grounds that it does not represent the law in Singapore and also because (without explanation) the facts could not support a *Reynolds* defence.[128] A constitutional argument against *Reynolds* was that the list of restrictions on freedom of expression in Article

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122 See R.L. Weaver, A.T. Kenyon, D.E. Partlett, C.P. Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006) pp.215-242.

123 Ministry of Justice, *Draft defamation Bill: Consultation* (CP3/11, 2011); A. Mullis, "Tilting at windmills: the Defamation Act 2013" (2014) 77 Modern Law Review 87. For previous steps in this reform history, see House of Commons Select Committee on Culture Media and Sport, *Press Standards Privacy and Libel* (2009-10 HC 362); Ministry of Justice, *Report of the Libel Working Group* (2010); (Lord Lester's) Defamation Bill 2010-11 HL no.3.

124 *Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr. Mahathir bin Mohamad* [2001] 2 MLJ 65. But the Australian version in *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520 was seemingly preferred (at p.69). It was also applied in *Halim Bin Arsyat v Sistem Televisyen Malaysia Bhd & Ors* [2001] 6 MLJ 353.

125 See *Mark Ignatius Uttley [Commat] Mark Ostyn v Wong Kam Hor*[2002] 4 MLJ 371 ; *Chung Chon Kui and Others v Then Juk Chiew* (High Court (Kuching), December 28, 2007); *Fernandez v. Utusan Malaysia* [2008] 2 Current Law Journal 814; *Datuk Harris Mohd Salleh v Datuk Mohd Shafie Hj Apdal* [2009] 7 MLJ 371; *Tan Sri Dato' Tan Kok Ping v The New Straits Times Press* [2010] 2 MLJ 694; *Sivabalan a/l P Asapathy v The New StraitsTimes Press* [2010] 9 MLJ 320.

126 [2010] 2 M.L.J. 492.

127 Defence sustained: *Dato' Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen (M) Bhd & Anor* [2013] 4 MLJ 448; *Datuk Husam bin Musa v The New Straits Times Press* [2013] MLJU 1169. Compare: *Sivabalan a/l P Asapathy v The New Straits Times Press* [2010] 9 MLJ 320; *Irish International University v New Straits Times Press* [2011] 9 MLJ 40; *Dato Annas bin Khatib Jaafar v Datuk Manja Ismail* [2011] 8 MLJ 747; *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham* [2012] 7 MLJ 301; *Lim Guan Eng v Utusan Melayu* [2012] 2 MLJ 394; *Kesatuan Kebangsaan Pekerja-Pekerja Bank v The New Straits Times Press* [2013] 8 MLJ 199; *Datuk Seri Anwar bin Ibrahim v Utusan Melayu* [2013] 3 MLJ 534; *Mohd Nasir bin Mustafa v Mohd Hanafiah bin Hanafi* [2013] 9 MLJ 811..

128 [2006] SGHC 220 at [74].

10(2) of the European Convention[129] differs from the equivalent list Article 14(2)(a) of the Singaporean Constitution.[130] The Constitution allows restrictions on the guarantee of free speech and expression under Article 14(1)(a) which are not required to be "necessary and expedient" when dealing with "contempt of court, defamation or incitement to any offence", unlike restrictions "in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality".[131] This argument is misconceived on two grounds. One is that *Reynolds* was not expressly grounded in Article 10 jurisprudence but was primarily a common law development.[132] The second is that the interpretation taken of Article 14(2) would render the free speech guarantee in Article 14(1) devoid of value and at the mercy of absolute, and therefore unconstitutional, official discretion.[133] Such a literal approach might also warrant closer consideration of a political party's right to association in Article 14(1)(c) which is subject under Article 14(2)(c) only to restrictions considered necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality - but with no mention of defamation.

The Singapore Court of Appeal confirmed in *Review Publishing Co Ltd v. Lee Hsien Loong*[134] that *Reynolds* is not necessarily declaratory of Singapore law, and the defence would have also failed on the facts since the defendant had not engaged in responsible journalism. More importantly, the Court was again doubtful that the *Reynolds* doctrine could be adopted since "It is clear that the *Reynolds* privilege is not a natural common

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[129] By Art.10(2): "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[130] By Art.14: "(1) Subject to clauses (2) and (3)
(a) every citizen of Singapore has the right to freedom of speech and expression;
(b) all citizens of Singapore have the right to assemble peaceably and without arms; and
(c) all citizens of Singapore have the right to form associations.
(2) Parliament may by law impose
(a) on the rights conferred by clause (1) (a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;
(b) on the right conferred by clause (1) (b), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order; and
(c) on the right conferred by clause (1) (c), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality.
(3) Restrictions on the right to form associations conferred by clause (1) (c) may also be imposed by any law relating to labour or education."

[131] *Ibid.* at [76].

[132] See further A.T Kenyon, and A.H Leng, "Reynolds Privilege, common law defamation and Malaysia" [2010] Singapore Journal of Legal Studies 256 at pp.258, 272.

[133] *Jeyaretnam v Public Prosecutor* [1989] SLR 978 at p.987.

[134] [2009] SGCA 46 at [239, 258]. See further D. Tan, "The Reynolds Privilege in a Neo-Confucianist Communitarian Democracy" 2011 Sing. J. Legal Stud. 456.

law development, but was instead brought about by the European Convention …",[135] thereby repeating the (misconceived) constitutional arguments in *Lee Hsien Loong v The Singapore Democratic Party*. Nevertheless, the Court went on to consider *Reynolds* as a potential basis for future development of the rights to freedom of speech of Singaporean citizens under Art 14(1)(a) of the Singapore Constitution, though this argument could not in event avail the foreign defendants in the instant case.[136] Such a development was not ruled out, but the Court did negatively suggest that the onus would be on future advocates of *Reynolds* to show why a change in Singapore's political, social and cultural values was necessary. The Court also hinted that the English formulation of *Reynolds* could spawn too much irresponsible journalism and that the doctrine might be applied, if at all, in Singapore to the quantum of damages rather than to liability.

3 Limits on the award of large damage sums

A third strand of English common law libel development concerns the increasing willingness of appeal courts to interfere with awards of damages. The courts have allowed appeals against excessive awards on the basis that the common law must give higher weighting to the value of freedom of expression in the determination of an award.

The new disposition was applied first in *Rantzen v. Mirror Group Newspapers*,[137] in which the Court of Appeal concluded that the courts should be readier to reduce awards under section 8 the *Courts and Legal Services Act* 1990[138] because of the requirement of proportionality under Article 10. Accordingly, the £250,000 award to the plaintiff against the defendant, *The People*, was reduced to £110,000. The test expounded by the Court of Appeal has become: "Could a reasonable jury have thought that this award was *necessary* to compensate the plaintiff and to re-establish his reputation?"[139] In *Galloway v Telegraph Group Ltd (2004)*,[140] even in the context of allegations such as "treason", aggravated by the attribution in cross-examination of anti-Semitism, the award was just £150,000.

The trend has been reinforced by the European Court of Human Rights in *Tolstoy Miloslavsky v. U.K.*[141] The size of a libel award (£1.5 million) in favour of Lord Aldington (for the libels accusing him of involvement in war crimes against Cossak and Yugoslav prisoners-of-war and refugees at the end of World War II) could not be viewed as

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135 *Ibid.* at [261].

136 *Ibid.* at [265-297].

137 [1994] Q.B. 670. See also *Gleanor Company Ltd. v. Abrahams* [2003] U.K.P.C. 55; See *C.A. Hopkins,* A terrible (but transient) ordeal (1994) 53 Cambridge Law Journal 9.

138 By section 8:
"(1) In this section 'case' means any case where the Court of Appeal has power to order a new trial on the ground that damages awarded by a jury are excessive or inadequate.
(2) Rules of court may provide for the Court of Appeal, in such classes of case as may be specified in the rules, to have power, in place of ordering a new trial, to substitute for the sum awarded by the jury such sum as appears to the court to be proper."

139 *Rantzen v. Mirror Group Newspapers* [1994] Q.B. 670 at 692. See P. Milmo and W.V.H. Rogers, (eds.), *Gatley on Libel and Slander* (11th ed., Sweet & Maxwell, 2008) paras.9.4, 38.25.

140 [2004] EWHC 2786 (QB).

141 App. no. 18139/91, Ser. A, Vol. 316, 323 (1995). An injunction against repetition of the libel was proportionate: para.54. Compare *Independent News & Media and Independent Newspapers Ireland Ltd. v Ireland* App. no.55120/00, June 16, 2005.

proportionate to the legitimate aim of the protection of a reputation and therefore not necessary in a democratic society. A further refinement occurred in *Steel and Morris v United Kingdom (no.2)*.[142] Steel and Morris, who had been the defendants in domestic libel proceedings brought by McDonalds,[143] were held liable for damages of £36,000 and £40,000 respectively. These awards were condemned as disproportionate not just because of proportionality to the injury to reputation suffered but also because of disproportionality to the modest incomes and resources of the two applicants.[144] This latter reason is inconsistent with the English law's compensatory approach to general damages which is based on loss and not means, but it offers a direct check against the tactic of bankrupting of a political opponent through libel awards.[145]

In the light of this case law, which can be depicted as much as a common law as a European Convention development, a contrast may be made with awards in Singapore where the tendency has been in the opposite direction - to favour public officials through enhanced awards of damages to reflect their "high standing" in public life and to encourage their participation.[146] Especially where members of the ruling party are concerned, rulers who are continually re-elected with huge majorities, several awards seem wholly disproportionate to any damage.[147]

In Malaysia, the highest court award in Malaysia was made in 1995 in favour of the leading Malaysian businessman Vincent Tan, who (with six other plaintiffs) was awarded damages totalling RM10 million for libels to the effect that he was an unscrupulous and dishonourable.[148] The appeal court vigorously defended the award.[149] It was stated that injury to a person's reputation may occasion him at least as much, if not greater, harm than physical injury. According to Datuk Gopal Sri Ram JCA:

> "I must record my strong disapproval of any judicial policy that is directed at awarding very low damages for defamation. … injury to a person's reputation may occasion him at least as much, if not greater, harm than injury to his or her physical self. No one, least of all a journalist, should rest in the comfort that a person's reputation may be injured with impunity on the footing that the consequence would be the payment of a few thousand ringgit in damages. Small or insignificant

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142 App. no. 68416/01, February 15, 2005.

143 See J. Vidal, *McLibel* (Nicholson, 1997); M.A. Nicholson, "McLibel: A case study in English defamation law" (2000) 18 Wisconsin International Law Journal 1; http://www.mcspotlight.org/.

144 App. no. 68416/01, February 15, 2005 at [96].

145 The OSCE's *Paris Recommendations on Libel and Insult Laws* (2003) declare that libel laws should not be used to bankrupt the media.

146 *Lee Kuan Yew v. Vinocur* [1995] 3 S.L.R. 477 at pp.485-6; *Goh Chok Tong v. Jeyaretnam Joshua Benjamin* [1998] 3 SLR 337 at [57]; *Goh Chok Tong v Chee Soon Juan* [2005] 1 SLR 573 at [42]; *Lee Kwan Yew v Tang Liang Hong* [1998] 1 SLR 97 at [118]. See T.H Tey, "Singapore's jurisprudence of political defamation and its triple-whammy impact on political speech" [2008] Public Law 452 at p.461.

147 For a survey of awards between 1959 and 1997, see International Bar Association Human Rights Institute, *Prosperity Versus Individual Rights?* (2008) p.60.

148 *Tan Sri Dato Vincent Tan Chee Yioun v Haji Hasan Bin Hamzah & Ors* [1995] 1 MLJ 39. An award of RM16m was made out of court: *New Straits Times* August 19, 2001 p.9.

149 *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & Other* [1995] 2 MLJ 493.

> awards by courts in libel actions will certainly provide that comfort. As I indicated to counsel in the course of argument, the time has arrived for this court to send a strong and clear signal to all and sundry that libel does not come cheap."[150]

The Malaysian courts have since reacted against this trend. Chief Justice Tun Mohamad Dzaiddin Abdullah, stated in 2001 that "Defamation cases and exorbitant awards sought and obtained by litigants reached dizzying levels recently and this approach seems troubling" and that massive awards were "a blot on the legal landscape".[151] His cue was reflected in *Liew Yew Tiam & Ors v Cheah Cheng Hock & Ors*,[152] where the RM1 million award was reduced to RM100,000. Court of Appeal judge Datuk Gopal Sri Ram stated:

> "The underlying philosophy of that decision is that injury to reputation is as, if not more, important to a member of our society than the loss of a limb. But we think the time has come when we should check the trend set by that case. This is 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."[153]

In 2001, Abdul Hamid Mohamad JCA, in the case of *D.P. Vijandran v Karpal Singh* in 2001 depicted the *Vincent Tan* case as "an isolated pinnacle in an otherwise undulating plain"[154] and reduced the damages from RM500,000 to 100,000. In *Joceline Tan Poh Choo & Ors v V Muthusamy*,[155] the libel in a newspaper affected the plaintiff, who was a practicing lawyer and a state assemblyman. The award of general damages was reduced from RM300,000 to RM100,000, the court noting that the there was no clear evidence that the episode had damaged the political career of the assemblyman, even though he has not been readopted as a candidate at the following election. In *Y.B. Dato' Dr. Hasan bin Mohamed Ali v Y.B. Mulia Tengku Putra bin Tengku Awang*, the plaintiff, a member of a regional legislature and government,[156] was awarded RM20,000,000, but this amount was reduced on appeal to RM50,000. Finally, the case of *Dato Seri Anwar Bin Ibrahim v The New Straits Times Press*[157] concerned an alleged link to a controversial US lobby group for which the plaintiff sought general damages of RM100 million as well as aggravated and exemplary damages. The Court found for the plaintiff but viewed the claim as a "gross exaggeration" and confined the award to RM100,000.

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150 *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & Other* [1995] 2 MLJ 493 at pp.522-523.

151 C. Hong, "CJ says time judiciary checks size of defamation awards" *New Straits Times* March 18, 2001 p.1 (reporting a speech at the Malaysian Bar annual dinner).

152 [2001] 2 CLJ 385 on appeal from *Cheah Cheng Hock & Ors v Liew Yew Tiam & Ors* [2000] 6 MLJ 204.

153 [2001] 2 CLJ 385 quoted in *Karpal Singh A/L Ram Singh v DP Vijandran* [2001] 4 MLJ 161 at p.184.

154 *Karpal Singh A/L Ram Singh v DP Vijandran* [2001] 4 MLJ 161 at p.185 per Abdul Hamid Mohamad JCA, on appeal from *DP Vijandran v Karpal Singh A/L Ram Singh* [2000] 3 MLJ 22. See also the Federal Court decision on the interest payable on damages: *Karpal Singh A/L Ram Singh v DP Vijandran* [2003] 2 MLJ 385.

155 [2003] 4 MLJ 494

156 [2010] 8 MLJ 269.

157 (High Court, 2009).

These recent trends are welcome, but there remains some danger that, without a clear grounding in principle, the trend could change again. The Chief Justice in 2001 did avert to an equalisation with awards in personal injury cases,[158] but the initial award in *Anwar* shows that the scales are not so fixed.

4 Related criminal offences

The threat of criminal libel (and scandalising) should be removed, as has occurred in England and Wales, or at least confined to grave cases such as speech which incites violence.[159] One further problem in Singapore is that, in *Attorney-General v Hertzberg Daniel*,[160] the test for liability for this offence was held to be an "inherent tendency" rather than a "real risk" of undermining the authority of the judiciary. In *Shadrake v Attorney-General*,[161] the Court of Appeal clarified that the "real risk" test would not be satisfied where the risk to public confidence in the administration of justice was remote or fanciful, but it did not have to amount to a "clear and present danger" nor even betray an "inherent tendency". Arguments that this lower threshold is needed either because of the ease of spread of information in a city state or the fact that judges are triers of fact appear shallow because of the development of widespread electronic communications and the greater need to subject judges to scrutiny when they assume greater public duties such as by acting as triers of fact and not just law.[162]

B Reforms beyond defamation law

As well as directly limiting libel law and related criminal offences, one can conceive of indirect devices beyond libel law which seek to dampen the political threat of libelocracy.

1 Ministerial Code

Cabinet Ministers in the United Kingdom are deterred from litigation by provisions in the Ministerial Code.[163] According to paragraph 7.16:

> "Where Ministers become involved in legal proceedings in a personal capacity, there may be implications for them in their official position. Defamation is an example

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158 C. Hong, "CJ says time judiciary checks size of defamation awards" *New Straits Times* March 18, 2001 p.1.

159 *Raichinov v Bulgaria* App. No.47579/99, April 20, 2006, at [50]. For its confinement in other jurisdictions, including the US, see Walker, C., "Reforming the crime of libel" (2005-2006) 50 New York Law School Law Review 169.

160 [2008] SGHC 218.

161 [2011] SGCA 26.

162 See Lee, J.T., "Freedom of speech and contempt by scandalizing the court in Singapore" (Research Collection School of Law, Singapore Management University, 1-2009) pp.5, 6. The first point may now offer a distinction from the view in *Ahnee v. Director of Public Prosecutions* [1999] 2 AC 294 at pp. 305-306 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 ...".

163 Ministerial Code (Cabinet Office, 2010) (http://www.cabinetoffice.gov.uk/sites/default/files/resources/ministerial-code-may-2010.pdf). See generally, O. Gay and P. Leopold, (eds.), *Conduct Unbecoming: The Regulation of Parliamentary Behaviour* (Politico's Publishing, 2004).

> of an area where proceedings will invariably raise issues for the Minister's official as well as his or her private position. In all such cases, Ministers should consult the Law Officers in good time and before legal proceedings are initiated so that they may offer guidance on the potential implications and handling of the proceedings."

The extent to which Ministers consult and have been deterred is not disclosed.[164] The fact that the Ministerial Code is only enforceable by the Prime Minister, the chief supporter of the Minister, may diminish its effectiveness.[165] Nevertheless, the Ministerial Code does offer an important warning signal concerning private litigation. The example set by successive Prime Ministers in Singapore provides a sharp contrast.

2 Adjudication Panel for England

The Adjudication Panel for England was established under the *Local Government Act* 2000 to monitor compliance with the Model Code of Conduct for local authorities.[166] Complaints that the Code has been breached could be made to the Standards Board, and there may then follow an investigation by an Ethical Standards Officer (ESO) who can make a reference (under section 59) to the Adjudication Panel for England. The ESO could alternatively refer the complaint to a local Standards Committee, with the possibility of an appeal from it to the Adjudication Panel.[167] Its procedures were not set by law, but in practice it was chaired by a lawyer.

In February 2006, the Adjudication Panel for England suspended from office Ken Livingstone, Mayor of London, for slanderously comparing Oliver Finegold, a Jewish journalist working for the *London Evening Standard*, to "a German war criminal" and "a concentration camp guard".[168] The Panel ruled that Livingstone had brought his office or authority into disrepute when he acted in an "unnecessarily insensitive and offensive" manner contrary to the Greater London Authority Code of Conduct.[169] The High Court has reversed the Panel's ruling.[170] In the view of Mr Justice Collins, the Code must be limited to "activities which are apparently within the performance of a member's functions".[171] Action undertaken in a private, off-duty capacity can only fall within the Code if it involves a misuse of office.[172] At that point, the conduct becomes a matter for the judgment of the official's political party on reselection or of the electorate when

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164 A request for data has been refused under the *Freedom of Information Act 2000* s.35(1)(c).

165 See Committee on Standards and Privileges, Complaint against Mr Keith Vaz (2000-01 HC 314 and 2001-02 HC 605); Committee on Standards in Public Life, Ninth Report: Defining the boundaries within the Executive (Cm.5775, 2003) para.5.7; Government Response (Cm.5963, 2003); Select Committee on Standards and Privileges, Thirteenth Report, Conduct of Mr John Prescott (2005-06 HC 1553) para.17; Public Administration Committee, The Ministerial Code: the case for independent investigation (2005-06 HC 1457).

166 Local Authorities (Model Code of Conduct) (England) Order 2001 SI no.3575.

167 Local Authorities (Code of Conduct)(Local Determination) Regulations 2003 SI no.1483, 2004 SI no.2617.

168 APE0317, 2006, Appendix.

169 Local Authorities (Model Code of Conduct) (England) Order 2001 SI no.3575.

170 *Livingstone v Adjudication Panel for England* [2006] EWHC 2533.

171 *Ibid.* at [27].

172 *Ibid.* at [28].

voting. It followed that the suspension also violated Article 10 since it was not necessary in a democratic society.[173]

Is the Adjudication Panel a worthwhile alternative to libel action or criminal prosecution? The censure of elected politicians has the opposite effect to the general thesis of this paper, which is to encourage unsanctioned robust political speech, even if it is tainted with inaccuracies or asinine qualities. As Livingstone commented:

> "This decision strikes at the heart of democracy. Elected politicians should only be able to be removed by the voters or for breaking the law. Three members of a body that no one has ever elected should not be allowed to overturn the votes of millions of Londoners."[174]

In so far as the Adjudication Panel sought to intercede between voter and elect by divining fitness for office, the system has not proven to be a helpful device in response to libelocracy. Reforms ensued in 2007, when powers were placed in the hands of Standards Committees within local authorities.[175] The Panel was then abolished in 2010 and its functions transferred to the more formal First-tier Tribunal. In addition, the whole of the "Standards Board Regime" (including this new form of adjudication) are being ended by the Localism Bill 2010-11, leaving the regulation of conduct to local authorities and to the criminal law.[176]

3 Press Complaints Commission

Finally, the threat of legal action, civil or criminal, may be averted by the non-legal mode of resolution of complaints against the press offered by the Press Complaints Commission.[177] This body was established in 1991 to provide an independent, relatively rapid and, to the claimant, cost-free way of challenging press coverage which is inaccurate or invades privacy. The PCC can demand the publication of its adjudication but not compensation. A Privacy Commissioner, with special responsibility for handling complaints about alleged intrusion into privacy, was appointed 1993. In 1996, a commitment to observe the Code was written into the employment contracts of relevant newspaper editors.

> Clause 1 of the PCC code of practice states as follows:
> "1. Accuracy:
> i) The Press must take care not to publish inaccurate, misleading or distorted information, including pictures.

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173 *Ibid.* at [38].

174 See *The Times* February 25, 2006 p.4.

175 *Local Government and Public Involvement in Health Act* 2007, Pt.X.

176 See http://www.standardsforengland.gov.uk/news/futureofthelocalstandardsframework/.

177 http://www.pcc.org.uk/. See Report of the Committee on *Privacy and Related Matters* (Cm. 1102, 1990); National Heritage Select Committee, *Privacy and Media Intrusion* (1992-3 H.C. 294) and Government Response (Cm.2918, 1995); Report of the Committee on *Privacy and Related Matters* (Cm. 2135, 1993; Culture, Media and Sport Committee, Media and Press Intrusion (2002-03 HC 458), Government Response (Cm. 5985, 2003); M. Tugendhat and I. Christie, *The Law of Privacy and the Media* (Oxford University Press, 2002) para.13.37.

> ii) A significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and - where appropriate - an apology published.
> iii) The Press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact.
> iv) A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published."[178]
>
> Clause 2 goes on to require a fair opportunity to reply when reasonably called for.

Political bodies and politicians all the way up to Prime Minister have become devotees of the Press Complaints Commission.[179] For example, it is revealed in the PCC Annual Review for 2005[180] that 2.7% of the 3,654 complaints were from "people in the national or public eye" and 4.8% were from organisations and public bodies. Significant customers have been the Royal family,[181] as well as national[182] and local[183] politicians and political groups. As a result, there is some danger that the promise of *Derbyshire* and *Reynolds* will be undercut by the Press Complaints Commission which does not directly recognise equivalent doctrines. A particularly disturbing example was the attempt to use the Press Complaints Commission in an overtly political argument by John Prescott, the then Deputy Prime Minister. In his complaint against the *Sunday Express* in 2005, he averred that a series of articles published in the *Sunday Express* on September 12, 2004, headlined "Terror escape fiasco", "Six million will be left behind to die" and "Half-baked plans leave our cities vulnerable to terror", contained inaccuracies in breach of Clause 1 (Accuracy) of the Code of Practice and that he had not received an opportunity to reply in breach of Clause 2 (Opportunity to reply). He also complained that a further article, published in the *Sunday Express* on September 26, 2004 and headlined "Cover-up that risks the safety of us all", was inaccurate in breach of Clause 1 (Accuracy) of the Code.

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178 http://www.pcc.org.uk. In 2010, 87% of complaints were about inaccurate or misleading publication.

179 See Prime Minister and Mrs. Blair v Daily Telegraph and Daily Mail (Report 47, 1999); Prime Minister and Mrs. Blair v Daily Sport (Report 49, 1999).

180 http://www.pcc.org.uk/assets/111/PCC_Annual_Review2005.pdf. In preceding years, the figure was as follows: 2001 = 10%; 2002 = 9%, 2003 = 6%.

181 Miss Penny Russell-Smith on behalf of HRH The Duke of Edinburgh v Express (Report 38, 1997); Prince and Princess Michael of Kent v Daily Mail (Report 60, 2002)

182 For examples of claims during the past 10 years, see Dr Phill Edwards, National Press Officer of the British National Party v The Times (Report 58, 2002); Mishcon de Reya, solicitors on behalf of the Embassy of Israel and Ariel Sharon v The Independent (Report 62, 2003); Tony Baldry MP v The Daily Telegraph (Report 68, 2004); Mr. Tim Bonner, Head of Media for the Countryside Alliance v Western Daily Press (Report 68, 2004); Mr Brian Binley MP v The Daily Telegraph (Report 79, 2009); Dr Tony Wright MP v The Sunday Times (Report 79, 2009); Dr Julian Lewis MP v News of the World (Report 79, 2009); Dr Julian Lewis MP v The Sunday Telegraph and The Daily Telegraph (Report 80, 2009); Mr Alex Salmond MSP v Scottish Mail on Sunday (03/06/2010); Michael McCann MP v East Kilbride News (02/02/2011).

183 Messrs Nicholson Graham and Jones, on behalf of Dame Shirley Porter v Westminster and Pimlico News (Report 39, 1996); Mohan Singh Sihota v Slough Express (Report 40, 1997); Bob Lacey OBE v Eastbourne Gazette; Transport for London v Evening Standard (Report 73, 2006); Forest of Dean District Council v Forest of Dean and Wye Valley Review (08/11/2010).

The articles concerned the evacuation plans for London in the event of a terrorist attack. Though the complaints were rejected on the facts, the PCC concluded that

> "It is not precluded by its rules from dealing with complaints of a political nature – although it does have the discretion to decline to deal with complaints for any reason if it considers it appropriate to do so. It may be that at certain times – during an election campaign, for instance – it would be appropriate to suspend the investigation of complaints of a political nature. In this case, however, there did not seem to be any particular reason why the Commission should not entertain the complaint."

The PCC can perform a useful function of channelling away personal attacks from the libel courts, but its doctrine is underdeveloped and it lacks the legal protections adduced earlier. It also runs the danger of amplifying libelocracy when it goes beyond personal attacks to matters of public debate in which the voice of the ballot box is the only acceptable system for divination of political truths. These criticisms have now been overshadowed by its track-record on responding to allegations of phone hacking by journalists. As a result, the government has indicated that it will provide for a statutory alternative.[184]

Corresponding statutory complaints systems apply to broadcasting.[185] The various review bodies have been consolidated by the *Communications Act* 2003 within the Office of Communications (Ofcom), which must issue a Standards Code (section 319) and complaints procedures (section 325). The Ofcom Broadcasting Code,[186] rule 7, imposes duties to "avoid unjust or unfair treatment of individuals or organisations in programmes" and goes on to elaborate more specific requirements.[187] These include, in terms reminiscent of *Reynolds*:

> "7.9 Before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that:
> - material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation; and
> - anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute.
>
> 7.11 If a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond."

The right to reply is also specified by the European Union Television without Frontiers Directive.[188]

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184 See Leveson Inquiry, *Report into the Culture, Practices and Ethics of the Press* (2012-13 HC 780; https://www.ipso.co.uk/IPSO/. An alternative regulator set up by Royal Charter has not been implemented: P.Ward, *The Leveson Report: implementation* (SN/HA/6535, House of Commons Library, 2014).

185 See M. Tugendhat and I. Christie, *The Law of Privacy and the Media* (Oxford University Press, 2002) para.13.24.

186 See http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/.

187 The BBC Editorial Guidelines 2010 are similar: http://www.bbc.co.uk/guidelines/editorialguidelines/guidelines/, ss.3, 6.

188 89/552 EEC, as amended by 97/36/EC, Art.23.

IV Conclusion

There are two principal reflections to be offered here. The first is that these applications of libelocracy reveal a complex and subtle interplay between criminal and civil law. Whilst most of the action has occurred in the civil courts, that action has frequently interacted with criminal prosecution, with consequential barring of individuals from holding office or even travel. This interplay has even occurred with perjury charges in England and Wales, but the linkage to a variety of crimes is more explicit and common in Malaysia and Singapore.

The second reflection is that the weightings accorded to reputation and speech ultimately reflect the policy and normative choices of legal systems and indeed societies. Each society discussed in this paper faces a choice as to whether criticism should be inhibited by ignorance, by malice, or by falsity. So far as English law is concerned, both are valued, but the worth of reputation has often been seen as a more valuable commodity[189] than the value of political debate. Perhaps this balance reflects, on the one hand, a society where reputation and trust is vital because social networks are relatively closed and have depended on family, friendship and social class to a greater extent than, say, in the U.S. Perhaps it reflects a lesser degree of faith than in the U.S. in the value of political debate and the function of the citizen critic as compared to the trust in authority.

Such a weighting might, it is suggested, be reflected more heavily in Malaysia and Singapore where the absence of a vibrant opposition and the pre-eminence of the collective goods of stability and multi-racial harmony may better accord with communitarian "Asian values"[190] which are to some extent expressed as "soft law" declarations in those jurisdictions.[191] They are also reflected in both countries by their refusal to sign fundamental international legal protections such as the International Covenant on Civil and Political Rights of 1966. It has been claimed that the "Asian values" approach successfully generates "a substantial degree of democracy with a substantial degree of illiberalism."[192] Yet, the evidence of this paper[193] is that the enjoyment of both individual liberal rights and democracy has been diminished by libelocracy: "Absolute political dominance and disregard for political and cultural minority concerns not only alienates,

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189 See R.C. Post, "The social foundations of defamation law" (1986) 74 California Law Review 691.

190 See F. Fukuyama, "The illusion of exceptionalism" (1997) 8.3 Journal of Democracy 146; D.A. Bell, "The East Asian challenge to human rights: Reflections on an East West dialogue" (1996) 18 Human Rights Quarterly 641; A.K. Sen, "Human Rights and Asian Values" (Carnegie Council on Ethics and International Affairs, 1997); J.R. Bauer and D.A. Bell (eds.), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999); M.R. Thompson, "Whatever happened to 'Asian values'?" (2001) 12.4 Journal of Democracy 154.

191 See Malaysia's Rukunegara ("National Principles") of 1971 and Singapore's White Paper on Shared Values (Cmd 1, 1991): L-A. Thio, "Soft constitutional law in nonliberal Asian constitutional democracies" (2010) 8 International Journal of Constitutional Law 766 at pp.776-780.

192 F. Zakaria, "The Rise of Illiberal Democracies" (1997) 76 Foreign Affairs 22 at p.24, as applied by L-A. Thio, "Soft constitutional law in nonliberal Asian constitutional democracies" (2010) 8 International Journal of Constitutional Law 766 at pp.791-792.

193 See also International Bar Association Human Rights Institute, *Prosperity Versus Individual Rights?* (2008) pp.21-22.

but thwarts constitutionalism."[194] It is no use expressing the ambition of having the maturity to develop, say, in Singapore "a world-class opposition, not this riffraff"[195] if the laws ensure that vituperative and immature political pups cannot learn from their errors but are suppressed at the earliest opportunity.[196] A vibrant democratic system and fundamental respect for individual autonomy necessarily entail the give and take of free expression and intermittent offensiveness to public officials and politicians. Some relatively modest adjustments to the civil laws of defamation and the criminal laws of defamation and scandalising are required if Malaysia and Singapore are to emerge from the shackles of libelocracy.

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[194] L-A. Thio, "The Right to Political Participation in Singapore: Tailor-Making a Westminster-Modelled Constitution to Fit the Imperatives of 'Asian' Democracy" (2002) 6 Singapore Journal of International and Comparative Law 181 at p.243.

[195] *New York Times*, May 6, 2006 p.A7.

[196] It is claimed elsewhere that libelocracy also undermines crucial foreign economic activity (see C. Sim, "The Singapore Chill" (2011) 20 Pacific Rim Law & Policy Journal Association 319), but countries such as China and Vietnam suggest a less dependent relationship between foreign economic investment and democracy.