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THE FREEDOM OF SPEECH AND DEFAMATION

Jeyaretnam Joshua Benjamin v. *Lee Kuan Yew*[1]

THE judgment of the Court of Appeal in what appears to be the latest in a series of significant decisions concerning the former opposition leader Mr. J.B. Jeyaretnam contains pronouncements which have important but disturbing implications for the interpretation and development of the freedom of speech in Singapore and, more generally, for the Constitution of the Republic of Singapore.[2] This note does not hope to deal directly with the law of defamation but with how that branch of tort law is and should be affected by the constitutional entrenchment of the freedom of speech in Singapore.[3] The High Court judgment in this litigation took the position that the constitutional right of free speech was consistent with the common law rules of defamation.[4] More specifically, the implication to be drawn from that first instance judgment seems to be that the common law defences of justification and fair comment sufficiently guarantee the freedom of speech concerning the conduct of public officials in Singapore. I have elsewhere, with another writer, tried to argue that this was wrong.[5] The Court of Appeal has recently reached the same conclusion as the High Court but has given a far more elaborate set of reasons.[6] The Court of Appeal decision ought

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1 [1992] 2 S.L.R. 310. The Court comprised Yong C.J., Chao J. and L.P. Thean J., who delivered the judgment. It is perhaps not overly fastidious to observe that, notwithstanding the significant pronouncements concerning constitutional law in general and freedom of speech in particular, this decision is only indexed under "Tort" and "Defamation". One would have thought that the case should also be indexed under "Constitutional Law".

2 1992 Rev. Ed.

3 The finer points of the law of defamation raised by this decision will have to await treatment by someone more qualified to discuss them. This note is also unconcerned with the precise facts of this case, interesting though they may be, and connected as they are with the sensational suicide of the late Minister for National Development, Teh Cheang Wan, and involving the then Prime Minister of Singapore, Mr. Lee Kuan Yew, and the Leader of the Opposition of the day, J.B. Jeyaretnam.

4 [1990] 3 M.L.J. 322.

5 Michael Hor and Collin Seah, "Selected Issues in the Freedom of Speech and Expression in Singapore" (1991) 12 Sing. L.R. 296, especially pp. 311-318.

6 See *supra,* note 1. The portion of the decision relevant to the freedom of speech is to be found at pp. 325-337.

now to be examined to see whether the reasoning adequately supports the result arrived at.

American "First Amendment" and European Convention on Human Rights

L.P. Thean J. delivered the judgment of the Court of Appeal. His Honour had first to deal with the rising tide of jurisprudence on the First Amendment of the Constitution of the United States of America ("First Amendment") and on the European Convention on Human Rights ("European Convention") which firmly indicate that the traditional common law defences to an action of defamation of public officials concerning their official conduct do not sufficiently give effect to a constitutional (or Conventional) guarantee of the freedom of speech. The United States Supreme Court had in 1965 declared the common law unconstitutional in *New York Times* v. *Sullivan.*[7] The *New York Times* rule, as the holding subsequently became known, meant that, in the words of Thean J.:[8]

> ...the freedom of speech..., in so far as the law of defamation is concerned, extends to publication of anything, including false and defamatory matters, of or concerning a public official or a politician in respect of his official conduct or performance of his duties unless actual malice on the part of the publisher is proved.

The common law, of course, made no distinction between public officials and private individuals or between official conduct and behaviour in which the public has no legitimate interest. Essentially, any defamatory remark had to be justified or had to qualify as fair comment for the speaker to escape liability.[9] This required the speaker to prove the truth of the remark or of the basis of facts on which the fair comment was made.

Then, in 1986, the European Court of Human Rights in *Lingens* v. *Austria*[10] made some pronouncements which put the common law in serious risk of being in breach of the freedom of speech under the Convention. The Court held that:[11]

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[7] (1965) 376 U.S. 254.

[8] See *supra,* note 1 at p. 328.

[9] Or, if the speaker falls under one of very limited categories of absolute or qualified privilege. The Court rejected an argument that there is a general category of speech of public interest attracting qualified privilege.

[10] (1986) 8 E.H.R.R. 407.

[11] *Ibid.,* at p. 419

> The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed..., and he must consequently display a greater degree of tolerance. No doubt art 10(2) (the freedom of expression provision in the Convention) enables the reputation of others ... to be protected, and this protection extends to politicians...; but... the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.

Unlike the United States Supreme Court, the European Court did not lay down a definite rule but appeared to opt for a "case by case" balancing of interests. It is, however, clear that, at some point, the common law will be found wanting because of its refusal to differentiate, in general, between speech of public interest and other kinds of speech.

The Court of Appeal in defending the common law had to deal with the American and European jurisprudence. Thean J. chose to distinguish both on a number of points which ought to be examined in some detail.

The Argument on Constitutional Interpretation

First, Thean J. sought to reject the mounting freedom of speech jurisprudence on the ground that "the terms of Art 14 of the Singapore Constitution differ materially" from its American and European counterparts. Thean J. reasoned:[12]

> The First Amendment, by its express terms, prohibits Congress from making any laws 'abridging the freedom of speech, or of the press'.... No such express prohibition is found in art 14 of our Constitution. On the contrary, the right of free speech and expression under cl 1(a) of art 14 is expressly subject to cl 2(a) of the same article....

It is, of course, true that the American First Amendment (where relevant) says no more than this on its face: "Congress shall make no law ... abridging the freedom of speech."

Art. 14 of the Singapore Constitution reads (where relevant):

> (1) Subject to clause[s] (2) ... (a) every citizen of Singapore has the right to the freedom of speech and expression....
> (2) Parliament may by law impose ... such restrictions as it considers necessary or expedient in the interest of the security of Singapore...,

[12] See *supra,* note 1 at p. 330.

> 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....

The first point of distinction seized upon by the learned Judge was the absence in our Art. 14 of *an express prohibition* on laws in violation of the freedom of speech. This is difficult to understand. None of the fundamental liberties found in our Constitution is phrased in terms of an express prohibition on laws made in violation thereof. It has never been suggested that this is of any significance. Whether it is to be described as express or implied (a difference which can surely justify no distinction of substance), there is no doubt that there is a prohibition on the Legislature from making laws in violation of the freedom of speech as found in Art. 14. It is found in Art. 4 of our Constitution:

> This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution shall, to the extent of the inconsistency, be void.

Art. 14 is clearly to be read in conjunction with Art. 4. The absence of a prohibition in Art. 14 is filled by Art. 4 and can have no possible effect on the interpretation of our provision on the freedom of speech.

Thean J. then makes the distinction that "the right of free speech and expression under cl 1(a) of Art. 14 is expressly subject to cl 2(a) of the same article...."

At first sight, this may seem to be a difference of some substance. The First Amendment appears to guarantee an absolute right to the freedom of speech but our Art. 14 is subject to specified exceptions. Unfortunately, it is now clear that, notwithstanding its literal appearance, the First Amendment does not confer absolute protection of the freedom of speech.[13] In the context

[13] The fiction that defamatory speech does not fall within the First Amendment because it is not speech was debunked in the *New York Times* case (*supra,* note 7). For this discredited absolutist approach to the First Amendment, see *Chaplinsky* v. *New Hampshire* (1942) 315 U.S. 568. The balancing approach has since been the order of the day in the First Amendment jurisprudence. Rehnquist CJ. gave recent expression to this in *Milkovich* v. *Lorain Journal Co.* (1990) 497 U.S. 1: "The numerous decisions...establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendments's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the 'important social values which underlie the law of defamation', and recognize that '[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation....' "
It appears that the Court of Appeal is not alone in making this fundamentally false assumption. See the summary dismissal of First Amendment jurisprudence in *Lee Kuan Yew* v. *Chin Vui Khen* [1991] 3 M.L.J. 494, at p. 503.

of defamation, the *New York Times* rule itself shows that speech is not entitled to absolute protection. Defamatory speech which is shown to be malicious can claim no constitutional protection. The Supreme Court of the United States of America clearly recognised implied limitations on the freedom of speech, the extent of which is to be determined by a balance of interest between speech and reputation. Again, there can surely be no difference of any significance between an exception which is express and one which is implied. One may argue that the balance has not been appropriately struck in America, but that has nothing to do with the absence of an express exception to the First Amendment.

It is probably because of the American experience involving the need to make implied limitations to the freedom of speech, or indeed to any other fundamental liberty, that the more recent formulations of the right to free speech characteristically contain express limitations and exceptions. One of these is found in Art. 10 of the European Convention on Human Rights. It ought to be remembered that Lai Kew Chai J. in the High Court had considered Art. 10 to be "much like" our Art. 14 in its "underlying concepts and constitutional bargain".[14] The Court of Appeal was, however, anxious to emphasise the differences. Art. 10 of the Convention reads (where relevant):

> 10(1) Everyone has the right to freedom of expression ....
> (2) The exercise of these freedoms ... may be subject to such ... restrictions... as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation ... of others....

The Court of Appeal was of the opinion that although "the wording in para 1 (of the Convention) is similar to cl 1(a) of art 14", "para 2 of art 10 is in no way similar to cl (2) of art 14". Two points of dissimilarity are mentioned in the judgment. First, it is said that, unlike the European Convention, Art. 14 contains "two categories of restrictions". One category must satisfy the test of "necessity and expedience" – these are restrictions made in the interest of the security of Singapore, friendly relations with other countries, public order or morality. The second category is not required to satisfy such a test – these are restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence. This observation of the Court means that whenever Parliament makes a law designed to provide against defamation, the freedom of speech is automatically curtailed, but if Parliament were to legislate in the interest of, for example, the security of the State, it must endure constitutional scrutiny by the courts on the necessity and expedience of its action.

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[14] *Supra,* note 4, at p. 333.

Undoubtedly, the literal wording of Art. 14 does point to the meaning ascribed to it by the Court of Appeal. However, to make any sense of it we must look deeper. It would then be immediately obvious that the suggested categorisation is without a convincing rationale. One searches in vain for a reason why restrictions in the interest of the security of Singapore deserve judicial scrutiny but those providing against defamation are automatically immune. Indeed one would have thought that Parliament ought to be given far greater latitude in legislating in the interest of national security or public order than in the context of defamation or the privileges of Parliament.

Quite apart from this unwarranted categorisation of exceptions to the freedom of speech, this construction of our Art. 14 has ominous consequences for the freedom of speech when it concerns exceptions in the immune category. The Constitution and the Courts will be completely powerless in the face of legislation which, say, abolishes all the traditional defences to an action for defamation. It would mean that the freedom of speech no longer has any meaningful content when any of the immune exceptions are implicated.

The Constitution should not be construed as making such a senseless distinction or as crippling a fundamental liberty in such a significant way. It is established constitutional jurisprudence in Singapore that, especially in the context of fundamental liberties, a narrow and literal approach to interpretation will not do. Instead, the court should lean towards a generous interpretation, according to citizens of Singapore the full measure of their fundamental liberties.[15] Seen in this light, Art. 14 expresses a basic commitment to the freedom of speech. Parliament is, however, given the power to derogate from this in the interest of the exceptions mentioned. It must be implicit that the power of derogation cannot be so broad as to eclipse the basic commitment to free speech altogether. The Court must have the supervisory duty to see that such derogations do not get out of hand. It has the constitutional role of ensuring that the balance of free speech and, say, the protection of reputation is kept.

Why then, it may be asked, was Art. 14(2)(a) so worded? It must to a certain extent remain a matter of conjecture, but it is suggested that the particular formulation is entirely a matter of drafting style and is not meant to bear any distinction of substance. The first "category" of exceptions would seem to be principally statutory in origin and to deal mainly with creating exceptions to the freedom of speech as and when the need arises. It is in this sense that Parliament is described as considering the derogation "necessary and expedient". The second "category" is, on the other hand, principally

[15] Lord Diplock's famous pronouncements on constitutional interpretation found in *Ong Ah Chuan* v. *P.P.* [1980] 3 W.L.R. 855 (P.C. Singapore), at p. 864, have stood unchallenged in Singapore for more than a decade and do not need to be set out in full. Indeed, they were cited to the Court of Appeal, see *supra,* note 1, at p. 325.

common law in origin and meant to apply regardless of the exigencies of the situation. It is thus a matter of drafting style that Parliament is not said under these circumstances to "consider" the necessity or expedience of the derogation.

If this analysis is correct, then it would appear that the position is very similar to that of the European Convention where the Court has the duty to scrutinise derogations to see whether they are required in the interest of one of the specified exceptions. The Court of Appeal, however, came to the conclusion that "clearly, the terms allowing restrictions to be imposed under (our) art 10(2) are not as wide as those under (the European) art 14(2)". The Court did not expressly explain why this is so but merely set out the two provisions. It has been argued that the two formulations in Art. 14(2)(a) do not result in any substantive difference. If this is right, then we need only compare the "necessary or expedient" formulation with the European Convention. There are indeed two differences. First, our provision is phrased in the subjective "as it considers" manner while the European provision is cast in the objective "are necessary" form. It is now established law in Singapore that a subjective formulation does not preclude judicial review on the traditional grounds of illegality, irrationality and impropriety. It is, however, equally clear that review of an objectively worded power is potentially wider.[16] The European formulation allows the court to substitute its decision for that of the Legislature but the Singapore wording does not – it allows the Singapore court to intervene only if the traditional administrative law grounds are satisfied. The potential width of the European provision is however off-set by the doctrine of the European Court concerning a "margin of appreciation".[17] This means that the European Legislatures are to be given a certain latitude in deciding for themselves whether the derogation is necessary and it will take a very clear case of a Legislature overstepping the boundary before the Court will intervene. This very closely resembles judicial review on the reasonableness of a subjectively worded power, which ought to obtain under our provision.

The second difference is more significant. The Singapore provision allows derogation where it is "necessary or expedient" whereas the European provision does so only if it is "necessary". To be consistent with the broad and generous approach to the Constitution, however, the word "expedient" cannot be read as widely as meaning mere convenience. That would again reduce the basic commitment to the freedom of speech to mere rhetoric. "Expedience" does mean something less than "necessary", but only a little less. The Legislature must show that although the derogation may not be

[16] See the ground-breaking decision of the Court of Appeal in *Chng Suan Tze* v. *Minister of Home Affairs* [1989] 1 M.L.J. 69.

[17] See, *e.g, Handyside* v. *U.K.* (1976) 1 E.H.R.R. 737 in the context of restrictions on free speech for the protection of morals.

absolutely "necessary" there is strong evidence that it would be highly desirable. Apart from this one difference, there is no reason to make distinctions between the European provision and our own.

It is here contended that there is no convincing ground upon which the American and European jurisprudence ought to be distinguished out of hand. It is not, however, suggested that we should adopt the same rules. Indeed the European decisions reveal an approach markedly different from that of First Amendment case-law. What is instructive and applicable in Singapore is the realisation that it is the constitutional responsibility of the judiciary to ensure that the basic commitment to the freedom of speech is not undermined by giving the Legislature *carte blanche* to derogate therefrom in either some or all of the specified exceptions. Our courts must assume the task of scrutinising the prevailing rules of defamation to ensure that they strike a justifiable balance between the freedom of speech and the need to protect individual reputation.

The Argument from History

Then follows a rather curious paragraph where the Court of Appeal appears to derive some support from Art. 162 of our Constitution. It reads (where relevant):[18]

> All existing laws shall continue in force on and after the commencement of this Constitution..., but all such laws shall ... be construed as from the commencement of this Constitution with such modification, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.

It is difficult to understand how this provision can be used to buttress the position that the Constitution has somehow given an *imprimatur,* as it were, to the common law rules of defamation. There is presumably little doubt that the common law rules were part of the "existing laws". The real issue is whether they need to undergo any change to comply with the requirements of the Constitution. All that the Court has to offer in response (in this paragraph) is a bald assertion that "the law of defamation is not inconsistent with the right of free speech." With respect, this begs the question and contributes nothing to the argument.

The Court then delved deep into history. It recounted the "circumstances in which the Defamation Act became part of the law of Singapore" to come to the conclusion that "... it is implicit that the right of free speech under art 14 is subject to the common law of defamation as modified by ... the Defamation Act (Cap 75)...."

[18] See *supra,* note 1, at p. 331 and *supra,* note 2.

We are taken back to February 1965 when Singapore was part of Malaysia. Art. 10 of the Federal Constitution of Malaysia (which is for our present purposes identical to Art. 14 of the Singapore Constitution) applied to Singapore. Yet the Defamation Ordinance 1957 (now the Defamation Act) was extended by the Federal Government to Singapore. The inference to be drawn from all this is that:

> It was therefore intended by the Malaysian Parliament, acting by the Yang di-Pertuan Agong, that the common law of defamation, as modified by the Defamation Ordinance 1957 (the Malaysian legislation extended to Singapore) should continue to apply in Singapore where the right of free speech was guaranteed by art 10....

The last link in this chain of reasoning appears to be that this intention is imputed to the Parliament of independent Singapore upon separation from Malaysia in 1965 when it provided for the continuation of both Art. 10 and the existing rules of defamation.

Unfortunately, this argument from history suffers from two fatal flaws. First, there is absolutely no evidence that either the Parliament of Malaysia (or the Yang di-Pertuan Agong acting on Cabinet advice) or the Parliament of Singapore expressed any opinion as to the constitutionality of the existing rules of defamation. It is doubtful in the extreme whether either Parliament applied its collective mind to the question of constitutionality. At the highest, all that can be said is that both Governments acted on the assumption that they were entitled to do as they did. This is very far indeed from saying that they have made a considered decision on the constitutionality of the rules of defamation. Indeed, it would have been beyond their competence to do so.

This brings us to the second, and by far the more significant, difficulty. It is difficult indeed to accept the constitutional effect that the Court of Appeal has given to such a purported expression of governmental intention. Even if it could be said that the Governments were under the impression that the existing rules were constitutional, that should surely not influence a court one way or the other when it has to decide the same question. The Court of Appeal cannot be saying that the Government's judgment of the constitutionality of ordinary legislation is decisive. Indeed, all legislation is made by Parliament under the assumption that it is constitutional. It is the duty of the court to decide for itself whether the assumption is correct. The startling effect of giving governmental judgments of constitutionality such undue importance is easily demonstrated. Even if the reasoning is limited to the supposed intention of Parliament at the time the Republic of Singapore

Independence Act (R.S.I.A.) was passed,[19] this would mean that all laws which were continued in force by that Act (and, therefore, all laws in existence then) are automatically constitutional. If this were correct, then in the event of a constitutional challenge, it would be sufficient merely to plead that the law so challenged was continued in force by the R.S.I.A. Moreover, if the supposed intention of Parliament at the time when the R.S.I.A. was passed is held to be dispositive of the issue of constitutionality, then the same reasoning must apply to the imputed intention of Parliament when it subsequently passes legislation. It is not difficult to see that this would spell the end of constitutional law itself.

It seems clear that the argument based on the intention of Parliament imputed from legislative and constitutional history in no way supports the conclusion that the Constitution (and not merely Parliament) has implicitly given the stamp of approval to the existing rules of defamation (and, as the argument must go, to all existing law). Finally, we arrive back where we started, with Art. 162. It cannot be clearer that Art. 162 envisages the possibility that existing laws may be unconstitutional. Otherwise there would not be any need to make "modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution."

The Argument from Precedent

It is necessary to say something about the two precedents which the Court of Appeal prayed in aid to support this dangerously fallacious concept of the imputed intention of Parliament. The first is a decision of the Court of Appeal itself which incidentally bears the same name as this case.[20] The second is a decision of the High Court of Malaya in *Lee Kuan Yew* v. *Chin Vui Khen*.[21] In so far as these cases can be construed to be in support of the doctrine of imputed intention, they are equally wrong. However, in fairness to these two decisions, the pronouncements found in them ought to be read in the light of the particular submissions to which the court had to respond and the precise issue which the court was addressing.

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[19] Such an argument could flow from the suggestion in the article by Andrew Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 Mal. L.R. that the real Constitution in Singapore is the R.S.I.A. This is not the occasion for a comprehensive treatment of that very interesting piece, but suffice to say that the argument seems to rest on a rather technical and controversial analysis of The Constitution and Malaysia (Singapore) Amendment Act 1965 (Act 53 of 1965) and appears to lead to the surprising (and to some, unacceptable) conclusion that Parliamentary, and not Constitutional, supremacy prevails in Singapore.

[20] *Jeyaretnam Joshua Benjamin* v. *Lee Kuan Yew* [1990] 2 M.L.J. 65.

[21] [1991] 3 M.L.J. 492, which incidentally resulted from the former Prime Minister's defamation suit against the editor of *The Star* in Malaysia following the publication of a piece on the same event of the suicide of Teh Cheang Wan.

In the earlier *Jeyaretnam* decision, the Court of Appeal had to deal with what was, in effect, in the words of Wee C.J., a contention that "the right of the freedom of speech and expression conferred by art 14(1)(a) is unrestricted and wholly free of any restraint." It is only in the context of this extreme and clearly unsustainable submission that the Court declared that the right to the freedom of speech is "unarguably restricted by the laws of defamation". The Court was there concerned not with the justifiability of the particular rules of defamation, but with the challenge to the more fundamental question of the *existence* of the law of defamation. It is indeed unarguable that the freedom of speech may be restricted by law concerning defamation – the Constitution says as much.

It is true that the Court did go on later in the same paragraph to say that "it is manifestly beyond argument that art 14(l)(a) is subject to the common law of defamation as modified by the Act." These words do not, however, support the view that the Court has given blanket approval to all the particular rules of defamation. This is because this sentence must again be read in the light of the submission that the freedom of speech cannot be restricted at all by the laws of defamation. The Court seemed especially anxious to show that Parliament has "by law" imposed restrictions to provide against defamation. As the existing law of defamation was common law in origin (though modified by the Defamation Act), the Court had to demonstrate that Parliament had impliedly imposed the common law rules of defamation by virtue of the assumptions made in the Defamation Act. It is in the context of showing that restrictions have been made "by law", that the Court found it decisive that "the legislature has clearly intended that the common law, as modified by the Defamation Act, should continue to apply in Singapore." This use of an imputed intention of Parliament is unexceptionable. Nowhere in the judgment did the Court decide that the particular rules of defamation were necessarily justified or constitutional. The last sentence in that crucial paragraph is telling: "It is manifestly beyond argument that art 14(l)(a) is subject to the common law of defamation as modified by the Act and, accordingly, does not, *in itself,* afford a defence." (Italics mine)

Turning now to the decision of the High Court of Malaya, we must again take cognisance of the precise issues addressed by the Court. The principal submission made was remarkably similar to that which was made in the decision just discussed. In the words of Siti Norma Yaakob J., "what is pleaded in... the statement of defence is that art 10 of the Federal Constitution provides a complete defence in that ... this defamation suit constitutes an unlawful interference of the defendants' right of the freedom of speech."[22] This looks very much like an extreme submission that the possibility of

[22] See *supra,* note 21, at pp. 502-504.

an action for defamation is in itself an infringement of the freedom of speech. The Court quickly dealt with this by showing that the freedom of speech is "not absolute but... subject to restrictions imposed by law under art 10."

The rest of the judgment dealt with two rather more specific (and by now familiar) submissions which turn on the question of whether Parliament had "by law" imposed restrictions in the context of defamation. First, it was contended that "Parliament has not passed any other written law (than criminal defamation in the Penal Code) restricting free speech." The Court relied on certain continuation of law provisions to show that this could not be sustained. It was finally contended that the Defamation Act could not be such law because it was pre-Merdeka legislation. A difference in wording between the Malaysian and Indian Constitutions was seized upon by the defendants. The Indian provision specifically mentions the possibility of "existing law" restricting free speech. The Court disposed of this technical argument and affirmed the need to maintain a proper balance between the freedom of speech and the interest of the public.

It is difficult to understand how this case supports the proposition that all the existing rules of defamation have been given Constitutional approval. The Court was dealing with the entirely different issue of whether Parliament had made any restrictions at all "by law".

The Argument on Principle

In the next and final phase of the judgment, the Court of Appeal came to the heart of the matter. The rationale for the existing common law rules was examined. Yet it was in this crucial part of the reasoning that the judgment was most disappointing. Although the Court affirmed that "a *balance* has to be maintained between the right of free speech on the one hand, and the right to the protection of reputation on the other",[23] it then simply rehearsed the traditional rationale for the common law rules of defamation without any (apparent) consideration of the rationale for the constitutional freedom of speech.

The Court ultimately rejected First Amendment and European jurisprudence because "our law" was not premised "on the proposition that the limits of acceptable criticism of persons holding public office ... in respect of their official duties ... are wider than those of ordinary persons."[24] If "our law" means merely the common law, then there has never been any doubt that is so. But surely "our law" must include the Constitution which is clearly not premised on the proposition that speech on a matter of obvious public interest is entitled only to the same protection as speech of little

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[23] **See *supra*, note 1, at p. 332.**
[24] ***Ibid.***

discernible public concern. I have argued elsewhere that the strongest contemporary rationale for the freedom of speech is to be found in the vital contribution it makes to the proper functioning of democratic government.[25] Essentially a government which seeks legitimacy in popular choice can do so convincingly only if the populace is sufficiently informed of matters of public interest. On this reasoning, it would appear that, whatever the position at common law, our constitutional provision dictates that speech of a public interest is to be protected more extensively than other kinds of speech.

The Court proceeded to set out the reasons for the common law rules through quotations from cases which had applied the common law (and which perhaps had no choice but to do so).[26] In none of these cases did the courts have to consider the implications of a constitutionally enforceable right to the freedom of speech, and the quotations used show this difference with glaring clarity. The key words of Cockburn C.J. in his famous speech in *Campbell* v. *Spottiswoode,*[27] quoted by the Court of Appeal, are that "the public at large have an equal interest in the maintenance of public character, without which public affairs could never be conducted with a view to the welfare and best interests of our country." The learned Chief Justice does not say with equal passion that the public has an interest in the free discussion of matters of public interest, without which democratic government cannot function. This need not surprise us as the common law never had to contend with an enforceable right to the freedom of speech. To be fair, the Chief Justice's words were spoken in response to a particular argument – that "a man's public conduct shall be criticised without any limit, except... that the writer must only write according to what *he thinks* just and true." (Italics mine). I have expressed elsewhere the view that the writer's subjective belief in the truth of his defamatory remark should not be sufficient but that his belief must also be one which is reasonably held.[28]

The next quotation, this time from the Saskatchewan Court of Appeal in *Tucker* v. *Douglas,*[29] reveals the one-sidedness of the common law with even greater clarity. The conclusion which the Court came to in the paragraph quoted is this: "A man's moral character is the same whether in private or public life and is in either case equally entitled to the protection of the law from libellous attacks." This makes absolute sense from the point of view of the protection of reputation. Indeed it may be said that a person engaged in public life has more of a reputation to loose. What this sort of justification completely fails to show is the public interest in the freedom

[25] See *supra,* note 5.
[26] See *supra,* note, at pp. 333-334.
[27] (1863) 32 L.J. Q.B. 185.
[28] See *supra,* note 5.
[29] [1950] 2 D.L.R. 827.

of speech which, it has been argued, is stronger in the context of speech of public concern. This again is not surprising. This Canadian decision was written long before the existence of an enforceable right to the freedom of speech under the Canadian Charter of Rights and Freedoms.[30]

The same is true of the next decision referred to by the Court of Appeal. The Canadian Supreme Court in *The Globe and Mail Ltd* v. *John Boland*[31] cited with approval this footnote in *Gatley on Libel and Slander:*

> It is, however, submitted that so wide an extension of the privilege (as the *New York Times* rule) would do more public harm than good. It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation.

This rather bleak picture of would-be politicians and holders of public office scurrying away from the light of adverse publicity is a startling indictment of our "honourable men". One would have thought that they would be made of sterner stuff. Moreover, the picture is not complete. It fails to show that if less than honourable men gain public office, the public may never know their true colours without a firm protection of speech concerning public affairs.

The use of this footnote, which is in direct response to the *New York Times* rule, is however indicative of what appears to be an underlying misconception that the choice is only between the common law and the *New York Times* rule. The Court of Appeal at one point declares:[32]

> We do not accept that the publication of false and defamatory allegations, even in the absence of malice on the part of the publisher should be allowed to pass with impunity.

It could be that the Court itself was responding to the submissions of counsel for the appellant (which are not available to the writer) urging the Court to adopt wholesale First Amendment jurisprudence. But this should not obscure the fact that there are other more satisfactory positions to take. One such rule is that suggested by the Justice Report, *Law and the Press* which, in the words of *Carter-Ruck on Libel and Slander,*[33] recommended

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[30] Since the advent of the Charter, the common law has been found wanting in some respects. See, for example, *R* v. *Oakes* (1986) 26 D.L.R. 200, where the common law rules on the burden of proof were held to be in contravention of the Charter.

[31] [1960] S.C.R. 203 at p. 208.

[32] See *supra,* note 1, at p. 332.

[33] 4th Ed., 1992, p. 31. The text of the Report is not available to the writer.

that publications of matters of public interest are privileged if "made in good faith, without malice, and ... based upon evidence which might reasonably be believed to be true." It has been argued elsewhere that such a rule more fairly represents the proper balance between speech and reputation and should deserve close consideration by our courts.[34]

We should not start with the assumption that the common law is necessarily constitutional and that the Constitution ought to be interpreted consistently with the common law.[35] That is tantamount to putting the cart before the horse. Constitutional jurisprudence from all over the common law world shows that the common law can on occasion violate constitutional guarantees of rights and freedoms.[36] Not to recognise this makes it rather misleading to say that we have constitutionally entrenched fundamental liberties such as the freedom of speech.

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[34] See *supra,* note 5.

[35] It is not entirely clear whether the Court's treatment of the common law defence of qualified privilege (see *supra,* note 1, at pp. 334-337) was meant to be solely at the level of common law or at the level of the constitutional justifiability of the existing rules on qualified privilege. The Court of Appeal rejected the invitation to extend the defence of qualified privilege to speech made at a political rally, touching on the official conduct of the plaintiff, and concerning which the defendant had a legitimate interest. If this is an application of the common law rules, there is strong authority that the Court is right. The English Court of Appeal decision in *Blackshaw* v. *Lord* [1984] 1 Q.B. 1. (cited in the judgment) is almost exactly on point. If, however, that portion of the judgment was meant to reject the suggestion that Art. 14 may well require such an extension of the privilege, the reasoning is woefully inadequate. The Court merely recites the common law and uses a section in the Defamation Act to show that the privilege cannot be so extended. No assessment of this ruling from the point of view of tort law is intended here, but as far as constitutionality is concerned, neither the common law nor Parliament acting through ordinary legislation can affect the requirements of the Constitution.

[36] In the United States, *New York Times* v. *Sullivan* (1964) 376 U.S. 254 is such a decision. Under the European Convention, the common law rules of contempt of court were found wanting in *Sunday Times* v. *U.K.* [1979] 2 E.H.R.R. 245. Common law rules on the burden of proof in criminal cases were declared to be in violation of the right to the presumption of innocence both in the Canadian Charter and under the recently enacted Bill of Rights in Hong Kong: see generally Michael Hor, "The Burden of Proof in Criminal Justice" (1992) 4 S. Ac. L. J. Part II 267.

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