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REYNOLDS PRIVILEGE, COMMON LAW DEFAMATION AND MALAYSIA

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The defence of qualified privilege has developed in the defamation law of many countries that share English legal heritage. Malaysian cases have applied, in particular, English or Australian developments in qualified privilege. However, Malaysian judgments have not engaged in a close analysis of how the foreign changes arise under Malaysian law. This article explains how the Australian developments appear difficult to apply within the Malaysian context, while the English developments offer a clear avenue for Malaysian defamation law's modernisation. The key reason for this is the way in which the English *Reynolds* privilege can be seen to have its origins, at least in part, within the common law as well as within European human rights standards. The common law aspects of *Reynolds*, apparent from a wide range of English judicial statements, offer a doctrinal basis for the existing and future application of the *Reynolds* defence in Malaysian defamation law.

I. DEVELOPMENTS IN QUALIFIED PRIVILEGE

The law of defamation in England and other common law jurisdictions has long faced questions about whether and how media publications could be protected through the defence of qualified privilege. With the exception of fair reports of proceedings in parliaments and courts,[1] many of the clearly established categories of qualified privilege applied to publications to a limited audience. Classic examples include employment references and reports alleging wrongdoing that are made to an authority with power to investigate the allegation.[2] However, it is now clear that defendants in many common law jurisdictions can seek to rely on qualified privilege where material of public

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1 See *e.g.*, *Defamation Act 1996* (U.K.), 1996, c. 31, ss. 14, 15 and Schedule; *Defamation Act 1957* (Act 286) (Revised 1983) (Malaysia), ss. 11, 12 and Schedule; and *Houses of Parliament* (*Privileges and Powers*) *Act 1952* (Act 347) (Revised 1988) (Malaysia), s. 27.

2 See *e.g.*, *Adoko v. Lewis* [2002] EWHC 848 (QB) (communication of grievance to the person with power to grant redress covered by qualified privilege); *Hoe Thean Sun & Anor v. Lim Tee Keng* [1999] 3 M.L.J. 138 (H.C.) (primary purpose of police report to set in motion investigation of alleged offence and bring offender before legal process). The historical legal importance of references about servants is examined by Paul Mitchell, *The Making of the Modern Law of Defamation* (Oxford: Hart Publishing, 2005) 146-150.

interest is published to a wide audience. In such instances, defendants generally need to show that publication was made responsibly or reasonably to establish a form of duty-interest qualified privilege.[3] In English law, the defence is available through the test set out in *Reynolds v. Times Newspapers*[4] and protects "responsible journalism".[5] In deciding whether the publication occurred responsibly, Lord Nicholls set out ten indicative factors relating to the nature of the material, its source, the steps taken in verification, the urgency of publication, whether comments were sought from the person or entity defamed (or their side of the story included in the publication) and the tone with which the publication was made.[6] Although the defence refers to journalism, the label of responsible journalism is merely a shorthand means of identifying the defence. It is in no way limited to journalistic publications; in principle, the defence can apply to any publication made to a wide audience on a matter of public interest. Given the jurisdictional focus of this article, it is also significant to note that the term "responsible" is not used in the same manner as sometimes occurs within Southeast Asia, where it can suggest a focus on supporting the government and nation building.[7] Instead, the term primarily concerns the investigation and other circumstances that precede publication, and the way in which they relate to the content, form and style of the publication. If anything, public interest might be a more suitable label for this form of qualified privilege,[8] although as yet it is a less common label.[9]

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3 See *e.g.*, *Reynolds v. Times Newspapers* [2001] 2 A.C. 127 (H.L.) (U.K.; defence for responsible journalism); *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520 (H.C.A.) (Australia; reasonable publication on a matter of government and political communication); *Grant v. Torstar* (2009) 79 C.P.R. (4th) 407 (S.C.C.) (Canada; responsible communication on matters of public interest); *Rajagopal v. State of Tamil Nadu* [1995] All India Reporter, Supreme Court 264 (India; publication with respect to discharge of public duties by public official made after reasonable verification); *Lange v. Atkinson* [2000] 3 N.Z.L.R. 385 (C.A.) (New Zealand; publication directly concerning functioning of representative and responsible government, including statements about performance of specific individuals in elected office or candidates); *National Media v. Bogoshi* [1999] 1 Butterworth's Constitutional Law Reports 1 (S. Afr. S.C.) (South Africa; reasonable publication in the particular circumstances). See also, in Ireland, *Hunter v. Gerald Duckworth & Co Ltd.* [2003] IEHC 81 [*Hunter v. Duckworth*], The Irish Times Law Report (8 December 2003) 18; and Ireland's *Defamation Act 2009* (No. 31 of 2009) which includes a statutory defence for "fair and reasonable publication on a matter of public interest" in s. 26.

4 [2001] 2 A.C. 127 (H.L.) [*Reynolds*]. The most significant subsequent decision is *Jameel v. Wall Street Journal* (*Europe*) (*No. 2*) [2007] 1 A.C. 359 (H.L.).

5 The term was used in *Reynolds*, *ibid.* at 202, Lord Nicholls: "The common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse".

6 *Ibid.* at 205, Lord Nicholls lists ten illustrative factors.

7 See *e.g.*, Kai Hafez, "Journalism Ethics Revisited: A Comparison of Ethics Codes in Europe, North Africa, the Middle East, and Muslim Asia" (2002) 19 Political Communication 225 at 237; Mohd Aizuddin Mohd Sani, "Media Freedom in Malaysia" (2005) 35 Journal of Contemporary Asia 341 at 343-344; Thio Li-ann, "The Virtual and the Real: Article 14, Political Speech and the Calibrated Management of Deliberative Democracy in Singapore" (2008) Sing. J.L.S. 25 at 33, 42; Tey Tsun Hang, "Inducing a Constructive Press in Singapore: Responsibility over Freedom" (2008) 10 Australian Journal of Asian Law 202 at 205: "The press control regime must therefore be calibrated at the right level, to ensure that it plays both a constrained, and yet 'constructive', role in nation-building".

8 See *e.g.*, *Jameel v. Wall Street Journal* (*Europe*) (*No. 2*) [2007] 1 A.C. 359 (H.L.) at para. 46, Lord Hoffman: "It might more appropriately be called the *Reynolds* public interest defence"; and at para. 146, Baroness Hale: "In truth, it is a defence of publication in the public interest."

9 But see *Grant v. Torstar*, *supra* note 3.

These developments extend the tradition of qualified privilege, which has always been envisaged as a defence that adapts to the "common convenience and welfare of society".[10] The duty-interest form of qualified privilege has the traditional flexibility of the common law and, at times, has protected publications to wide audiences.[11] It has been difficult to determine when the duty-interest privilege would apply to widespread publications, but this appears to be somewhat less so after decisions such as *Reynolds*. The flexibility of qualified privilege is important to appreciate because the traditional common law can properly be seen as *one* of the sources for the development of the *Reynolds* privilege in England. Of course, *Reynolds* was decided in the shadow of the *Human Rights Act 1998*,[12] which was due to enter into force soon after the House of Lords' decision in the case. Undoubtedly, the protection of free speech under the *European Convention of Human Rights*[13] and the *Human Rights Act* can also be seen as an influence on *Reynolds*. However, the European material is far from the only influence.

Reynolds having a common law basis helps to underpin the application of the privilege in jurisdictions such as Malaysia.[14] *Reynolds* and *Jameel v. Wall Street Journal* (*Europe*)[15] have been applied in Malaysian law, with *Reynolds* having been endorsed in the highest court.[16] However, Malaysian judgments have also applied the Australian and New Zealand approaches, in *Lange v. Australian Broadcasting Corporation* [*Lange*][17] and *Lange v. Atkinson*[18] respectively. But none of the Malaysian decisions have analysed the reasons why any form of the defence arises in Malaysian law. This article suggests that the basis must lie in the common law, which means that only the *Reynolds* privilege has a clear doctrinal basis in Malaysia.

Part II outlines historical approaches to qualified privilege in Malaysia, which closely tracked the English common law. It is useful to appreciate the historical closeness with English common law when considering the application of the *Reynolds*

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10 *Toogood v. Spyring* (1834) 1 Cr. M. & R. 181 at 193, 149 E.R. 1044 at 1050 (Ex.).

11 See *e.g.*, the discussion by the English Court of Appeal in *Reynolds v. Times Newspapers* [1998] 3 W.L.R. 862 at 895-896; and *e.g.*, *Wason v. Walter* (1868) L.R. 4 Q.B. 73; *Adam v. Ward* [1917] A.C. 309 (H.L.); *Cox v. Feeney* (1863) 4 F. & F. 13 (Q.B.D.); *Perera v. Peiris* [1949] A.C. 1 (P.C.); *Roberts v. Bass* (2002) 212 C.L.R. 1 (H.C.A.).

12 *Human Rights Act 1998* (U.K.), 1998, c. 42 [*Human Rights Act*].

13 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Art. 10 [*European Convention on Human Rights*].

14 Malaysia is an interesting jurisdiction within the common law tradition to consider these matters because it is not party to international agreements such as the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Art. 19 [*ICCPR*] of which provides a qualified protection for speech in way that is similar to the *European Convention on Human Rights*, *ibid*. Helen Fenwick & Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford: Oxford University Press, 2006) 46 and 314 note that Art. 19 of *ICCPR* and Art. 10 of the *European Convention on Human Rights* are broadly equivalent, with both containing wide protection for speech and wide permissible exceptions to that protection.

15 [2007] 1 A.C. 359 (H.L.) [*Jameel*].

16 *Dato' Seri Anwar Bin Ibrahim v. Dato' Seri Dr Mahathir Bin Mohamad* [1999] 4 M.L.J. 58 (H.C.); *Dato' Seri Anwar Bin Ibrahim v. Dato' Seri Dr Mahathir Bin Mohamad* [2001] 1 M.L.J. 305 (C.A.); *Dato' Seri Anwar Bin Ibrahim v. Dato' Seri Dr Mahathir Bin Mohamad* [2001] 2 M.L.J. 65 (F.C.); *Halim bin Arsyat v. Sistem Televisyen Malaysia Bhd* [2001] 6 M.L.J. 353 (H.C.); *Mark Ignatius Uttley @ Mark Ostyn v. Wong Kam Hor* [2002] 4 M.L.J. 371 (H.C.) [*Mark Ostyn v. Wong Kam Hor*]; *Irene Fernandez v. Utusan Melayu* (*M*) *Sdn Bhd* [2008] 2 Current Law Journal 814 (H.C.).

17 (1997) 189 C.L.R. 520 (H.C.A.) [*Lange*].

18 [2000] 1 N.Z.L.R. 257 (P.C.).

privilege. Contemporary Malaysian judgments on qualified privilege are examined in Part III. Almost all judgments have applied the *Reynolds* privilege, although some reference continues to be made to the Australian *Lange* defence. The possible basis for each defence within Malaysia is considered in Part IV, which argues that *Reynolds* should be preferred in both legal and policy terms. The analysis points to the viability of the common law as a sufficient basis for the *Reynolds* privilege—even if it is not the only possible basis—a status which should serve to secure its continued role in Malaysian defamation law.

II. Qualified Privilege in Malaysia: Older Instances

Within the English legal tradition, the defence of qualified privilege is usually said to protect various occasions of publication for the "common convenience and welfare of society".[19] Courts have recognised that there is value in some statements being made, even if the statements cannot later be proven true. The protection, being qualified rather than absolute, is defeated by malice.[20] The most general form of the defence can apply where publishers act under a legal, social or moral duty, or act to protect an interest, and recipients also have a duty or interest in the publication.[21]

Judicial recognition of common law qualified privilege is longstanding in what is now Malaysia. For instance, the 1928 Kuala Lumpur decision of *Haji Jallaluddin bin Ismail v. Buyong*[22] involved a petition, signed by the defendants and presented to the religious officer of the Selangor state, which accused the plaintiff religious teacher of unorthodox teaching and practice. The matter was subsequently reported to the Sultan of Selangor who appointed a commission of inquiry. The court appears to have found that each defendant had a duty to make the accusation, and the recipient religious officer, Sultan and others had an interest in receiving it.[23] On this issue, the court stated simply that "the defence of privileged occasion" is to be "available to each and every one of the defendants".[24] The point was not contentious enough to warrant an elaborated discussion. The duty-interest form of qualified privilege was a well established aspect of the English law, and reporting suspected wrongdoing to relevant authorities is a classic example of the privilege.[25]

The position of the common law defence did not change under the 1957 Defamation Ordinance—later the *Defamation Act 1957*.[26] Section 12 of the *Defamation Act*

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19 *Toogood v. Spyring*, *supra* note 10; *Hasnul bin Abdul Hadi v. Bulat bin Mohamed* [1978] 1 M.L.J. 75 at 78.

20 *Horrocks v. Lowe* [1975] A.C. 135 (H.L.); *S Pakianathan v. Jenni Ibrahim* [1988] 2 M.L.J. 173 (S.C.).

21 *Adam v. Ward*, *supra* note 11 at 334 (Lord Atkinson); *Karthak v. Damai* [1962] 1 M.L.J. 423; *Puneet Kumar v. Medical Centre Johore Sdn Bhd* [2004] 5 M.L.J. 573 (H.C.).

22 (1928) 6 Federated Malay States Law Reports 144 (S.C.).

23 In this case, the core issue was whether evidence of malice found against two defendants could be used to defeat the defence of qualified privilege in relation to the other defendants. The case cited by counsel, *Smith v. Streatfield* [1913] 3 K.B. 764, was held not to support the transfer of malice.

24 *Supra* note 22 at 144.

25 See *e.g.*, *Lightbody v. Gordon* (1882) 9 R. 934 (Ct. Sess.); *JD v. East Berkshire Community Health NHS Trust* [2005] 2 A.C. 373 at para. 77 (H.L.) (Lord Nicholls).

26 *Defamation Act 1957* (Act 286) (Revised 1983) (Malaysia) [*Defamation Act 1957*]. The Defamation Act's predecessor, the Defamation Ordinance, was enacted in 1957 and came into force on 1 July 1957. The statute was revised in 1983 pursuant to a law revision exercise. Nothing substantial changed as a result of the revision.

1957 provides for various categories of qualified privilege for certain publications in a newspaper, being modelled on the report privileges of the U.K. *Defamation Act 1952*.[27] Under s. 12(4) of the *Defamation Act 1957*, however, the section does not limit or abridge any privilege existing prior to the Act. There is no doubt that the intention in the *Defamation Act 1957* was to recognise the continued application of common law privilege, absolute and qualified.[28] In relation to the application of common law principles and developments, it is important to appreciate that Malaysian defamation judgments continue to make frequent reference to English common law. Although the revised *Civil Law Act 1956* (Act 67) (Malaysia) provides for the reception of English law until 1956 in Peninsula Malaysia, 1952 in Sabah and 1949 in Sarawak,[29] English law remains a standard point of reference in Malaysian defamation decisions and in the literature.[30]

With regard to qualified privilege, the general principle in Malaysia has remained the same as English law—publications at large can be privileged where there is a duty or interest to publish them and the audience has a corresponding duty or interest to receive the publication.[31] As to whether such duty or interest exists, regard must be had to the circumstances of the case. Historically, this would not often be established for media defendants. Two qualified privilege decisions from the 1960s and 1970s illustrate this situation. The defendants in those cases failed to establish qualified privilege but, more importantly for present purposes, the cases did not introduce local principles that differed from the English approach.

Abdul Rahman Talib v. Seenivasagam[32] concerned allegations of corruption made against a government minister by the two defendants, a politician and a business person. The politician had previously raised the allegations in Parliament, which had received wide media coverage. Then both defendants made statements at a meeting, outside the protection of parliament, and they were sued by the minister. Among other things, the first defendant relied on qualified privilege, arguing that his comments were privileged because they constituted information on a matter of public interest.[33]

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27 *Defamation Act*, *1952* (U.K.), 15 & 16 Geo. VI & 1 Eliz. II, c. 66 [U.K. *Defamation Act 1952*].

28 Philip Lewis, ed., *Gatley on Libel and Slander*, 8th ed. (London: Sweet & Maxwell, 1981) at para. 678 notes that the corresponding section in the U.K. *Defamation Act 1952* (s. 7(4)) saved common law privilege.

29 Officially, English common law was legislatively introduced in the Federated Malay States (FMS) in 1937 by the *Civil Law Enactment 1937* (No. 3 of 1937) (Malaysia), and extended to the Unfederated Malay States (UMS) by the *Civil Law (Extension) Ordinance 1951* (No. 49 of 1951) (Malaysia). Both contain provisions providing for the application of English law "subject to such qualification as local circumstances render necessary". In 1956, when the FMS and UMS combined to form the Federation of Malaya, the *Civil Law Ordinance* was enacted in place of the earlier provisions. The reception of English common law was maintained under a revised *Civil Law Act 1956* (Act 67) (Malaysia), s. 3(1). After the enlargement of the Federation of Malaya in 1963, the provision was extended to the East Malaysian states of Sabah and Sarawak.

30 See *e.g.*, Doris Chia & Rueben Mathiavaranam, eds., *Evans on Defamation in Singapore and Malaysia*, 3rd ed. (Singapore: LexisNexis, 2008) at 3-4 note: "As a general proposition, the starting point for the law of defamation in Singapore and Malaysia is the English common law" and, notwithstanding the extensive domestic case law "English authority will continue to play a significant role for some time to come".

31 *Bre Sdn Bhd v. Tun Datuk Patinggi Haji Abdul Rahman Ya'kub* [2005] 3 M.L.J. 485 (C.A.); *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd* [1996] 1 M.L.J. 393 (H.C.) [*Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd*].

32 [1965] 1 M.L.J. 142 (C.A.).

33 *Ibid.* at 154; see *e.g. Adam v. Ward*, *supra* note 11; *Perera v. Peiris*, *supra* note 11 at 21.

The High Court ruled that the defendant was not under a duty to inform the public of the information, "even though it might be said to be a matter of public interest".[34] The court reasoned that the "public had already been informed" of the defendant's motion in Parliament and that his "statement there had been very fully reported".[35] Therefore, there was "no need for the public to be further informed".[36] (Although qualified privilege failed, the defendants succeeded in justification, under Defamation Ordinance 1957, s. 8 (Malaysia), which is equivalent to the U.K. *Defamation Act 1952*, s. 5).

In *Hasnul bin Abdul Hadi v. Bulat bin Mohamed*,[37] the plaintiff politician launched a defamation suit over an article in the Malay-language newspaper, *Utusan Melayu*, which the plaintiff said called him a liar. One of the defences was qualified privilege. The defendants argued that the information was of public interest and the persons receiving the information had an interest to receive it, because of the plaintiff's candidacy in general elections held that year, his membership of a political party and his position as a municipal president.[38] The High Court rejected this defence, ruling that as the information was published *after* the election, the occasion was no longer privileged.[39] In reaching this decision, the court considered the early English decision of *Dickeson v. Hilliard*.[40] There, allegations of bribery against an individual made after an election were not privileged because the recipient election agent no longer had an interest in the election. He was not a person who had jurisdiction to punish, to inquire into, or to institute proceedings about, alleged bribery by the plaintiff.[41] However, an occasion of privilege may have arisen if the allegations in *Dickeson* had been made during the election.[42] It is open whether the court in *Hasnul* would also have found that the constituents had a common interest in the defamatory publication had it been made during the election. At the least, the court in *Hasnul* did see qualified privilege as a flexible defence capable of development, quoting a passage from the seventh edition of *Gatley on Libel and Slander* that: "the rule being founded on the general welfare of society, new occasions for its application will necessarily arise with continually changing conditions".[43]

More recent decisions continued to reflect the English position, with the rejection of any generic category of privilege to protect media publications made to the public.

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34 *Supra* note 32 at 154. The Federal Court upheld this aspect of the decision on appeal, citing Lord Atkinson in *Adam v. Ward*, *supra* note 11 at 334: see *Abdul Rahman Talib v. Seenivasagam* [1966] 2 M.L.J. 66 at 78 (F.C.) (Thompson L.P.).

35 *Supra* note 32 at 154.

36 *Ibid.*

37 [1978] 1 M.L.J. 75 (H.C.) [*Hasnul*].

38 *Ibid.* at 78.

39 *Ibid.*

40 (1873-74) L.R. 9 Ex. 79 [*Dickeson*].

41 *Ibid.* at 82, 85.

42 *Ibid.* Three separate judgments were delivered, each holding there was no qualified privilege. Pigott B. stated (at 85) that the publication "contains grossly defamatory matter; and I cannot see any interest or duty which rendered it privileged. The defendants were committeemen of one candidate, and Hall was agent of the other, and *if the election had been proceeding*, *possibly an interest or duty might have been held to exist*. But on the 24th the election was at an end. Hall had no authority to prosecute the plaintiff, nor any legal control over him. His interest or duty, if he ever had one, had ceased". (emphasis added).

43 Robert McEwen & Philip Lewis, eds., *Gatley on Libel and Slander*, 7th ed. (London: Sweet & Maxwell, 1974) at paras. 441-442, cited in *Hasnul* at 78.

Hence, there have been judicial comments such as: "journalists, editors and newspapers do not have any special positions so as to entitle them to rely on the defence of qualified privilege on any matters which they may publish".[44] However, as in England, there have been instances where the media has possessed the requisite duty to publish such that qualified privilege has been arguable. In at least some cases the occasions appear to have involved the media relying on a 'derivative' privilege—that is, the media was assisting another person to fulfil their own duty to publish. For example, in the late 1990s decision of *Mohd Jali bin Haji Ngah v. The New Straits Times Press*,[45] the defendant newspaper had published allegations that the plaintiff was operating a banned and illegal society and was obtaining money under false pretences. The articles were published after a media interview held with a person, identified in the judgment only as SD2, whose official duties were said to include informing, advising and warning the public of bogus advertisements. The interview was called by SD2, who appears to have been a member of the police, when SD2 had received reports about the society's activities. During the interview SD2 requested that reporters publish the information. The defendants were found to be entitled to qualified privilege because "SD2 was under a legal and moral duty to inform the public about the activities" of the society "and the defendants had a moral and social duty to inform their readers about it".[46] It is not stated in the judgment on what basis the duties of SD2 were 'official'; that is, no particular legal basis for them was explained. Thus it is unclear why SD2 was under a legal duty to inform the public, as well as being under a moral one. Rather, the role may have been a duty of SD2—perhaps one imposed by a superior officer or government official—that would be recognised by "people of ordinary intelligence and moral principle".[47] In any event, the defendants were held to have a moral and social duty to publicise the information, and no malice was found on their part to defeat the privilege. There was no direct reference to the interest that the public had in receiving the information. However, implicit within the court's approach is the belief that the public had a right to know the information which SD2 had a duty to inform the public about.[48]

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44 *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd*, *supra* note 31 at 411.

45 [1998] 5 M.L.J. 773 (H.C.).

46 *Ibid.* at 780 (Mohd Noor Ahmad J.).

47 *Stuart v. Bell* [1891] 2 Q.B. 341 at 350 (C.A.).

48 Some other decisions of media qualified privilege have a less clear doctrinal basis. For example, in *Pustaka Delta Pelajaran Sdn Bhd v. Berita Harian Sdn Bhd* [1998] 6 M.L.J. 529 (H.C.), it was stated that the media had a duty to communicate to the general public in relation to the contents of a secondary school textbook, which had just been introduced under a new secondary school curriculum and was expected to be used for some years. It concerned a fictitious story of a Malay man receiving RM100,000 for being the 1000th visitor to a Kite Festival, with the winner stating that he intended to purchase a colour television with the money. The defamatory matter included criticism that the story insulted Malays, and that ghost-writers authored the book instead of a well-known linguist credited as the author of the book. The basis of the found duty and interest qualified privilege is unclear. Instead, it appears that public interest in the publication was the motivating factor; the court noted that publication concerned current and future students, parents, guardians, Ministry of Education officials, academics and members of the public.

III. Qualified Privilege in Malaysia: Contemporary Instances

As with other English defamation authorities from recent decades, *Reynolds* and *Jameel* have been applied in Malaysia. The timing of some decisions (and perhaps the arguments of counsel) meant that the English Court of Appeal judgment in *Reynolds* received greater early attention and endorsement in Malaysia than the speeches in the House of Lords. More recently, however, the current English law set out in *Jameel* has been applied. But it remains useful to note the decisions related to *Reynolds* as formulated in the English Court of Appeal as well as the more recent consideration of the House of Lords decisions in *Reynolds* and *Jameel*. In addition to English developments, Australian and New Zealand changes in qualified privilege have been considered in some Malaysian judgments. As is shown by the review of judgments below, Malaysian law has reached the awkward position of the Federal Court having endorsed both the English *Reynolds* defence and the Australian *Lange* defence.

A. *Anwar Ibrahim v. Mahathir Mohamad*

In 1998, Anwar Ibrahim was deputy prime minister of Malaysia and, by tradition, next in line to succeed Mahathir Mohamad as prime minister. This was the general expectation of the public. In September 1998, Anwar was suddenly dismissed from government and subsequently expelled from the United Malays National Organisation (UMNO).[49] Initially, Mahathir did not disclose reasons for Anwar's dismissal. Some time later, in response to a journalist's question, Mahathir revealed that Anwar was dismissed because he had engaged in homosexual activities unfitting for a person in such a position of leadership in Malaysia. Anwar sued Mahathir for defamation and the defence, among other arguments, successfully relied on qualified privilege at a pre-trial hearing which saw the plaintiff's case dismissed. One ground for the privilege was quite traditional: Mahathir's spoken words were held to be issued in reply to an attack by Anwar that his dismissal resulted from "a political conspiracy of the highest level".[50] This occasion of privilege would more often be available for non-media communications.[51] Here, the reply happened to be in the public, but so was the attack.

However, the High Court also held that the publication satisfied the *Reynolds* privilege in the formulation of the defence as set out by the English Court of Appeal. The subject matter was of public interest, concerning the country's government and political affairs related to the removal of Anwar from the cabinet and UMNO. As in the English Court of Appeal, *Reynolds* was applied in a manner tracking the traditional duty-interest form of qualified privilege: duty and interest are key elements, with the

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[49] See *e.g.*, Jesse Wu Min Aun, "The Saga of Anwar Ibrahim" in Andrew Harding & Hoong Phun Lee, eds., *Constitutional Landmarks in Malaysia*: *The First 50 Years*, *1957-2007* (Petaling Jaya, Malaysia: LexisNexis, 2007) 273-290.

[50] *Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr Mahathir bin Mohamad* [1999] 4 M.L.J. 58 at 70 (H.C.) [*Anwar Ibrahim*].

[51] The High Court quoted Patrick Milmo & W. V. H. Rogers, eds., *Gatley on Libel and Slander*, 9th ed. (London: Sweet & Maxwell, 1998) at para. 14.49; see *e.g.*, *Turner v. Metro-Goldwyn-Mayer Pictures* [1950] 1 All E.R. 449 (H.L.).

wider circumstances of publication also being considered. Kamalanathan Ratnam J. stated:

> As the chief executive of the government, the defendant was in my view under a legal, moral and social duty to inform the nation of the matters concerning the plaintiff and at the same time to explain to the nation the response of the government and UMNO to the several attacks made by the plaintiff as they were matters of general public interest which the public had every reason, and an interest, to know.[52]

The above is a clear statement of duty and interest. In relation to the circumstances underlying this occasion of duty and interest, the status of the information—including police reports and convictions[53]—was highlighted. "The higher the status of the information or the report on which the defendant had based his pronouncement, the greater the weight for such information to command respect and thus the need to disseminate such information to the public as being a matter of public concern".[54] The court also considered malice. No malice was established because the defendant spoke only after the conviction of two individuals charged with criminal sexual acts involving the plaintiff and not, for example, immediately after the defendant received police reports about the allegations.[55]

As well as considering *Reynolds*, the High Court referred to developments in Australia in *Lange v. Australian Broadcasting Corporation*[56] and New Zealand in *Lange v. Atkinson*.[57] Not all aspects of these developments were considered; for instance, whether the publication met the requirement of "reasonableness" discussed by the Australian High Court in *Lange* was not addressed.[58]

The view that the publication was an occasion of privilege on the traditional category of reply to an attack could be taken as the dominant reason that qualified privilege was available. However, the High Court also emphasised Mahathir's duty to inform and the corresponding interest on the part of the Malaysian public. These circumstances meant that publication to a general audience was warranted.

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52 *Supra* note 50.

53 The convictions arose out of pleas of guilt by Munawar A. Anees and Sukma Darmawan Sasmitaat Madja who were each sentenced to six months of imprisonment. Munawar served his sentence but has since unsuccessfully sought to quash his conviction in a bid to clear his name, on the basis that his plea was coerced. In 1998, Munawar affirmed a statutory declaration claiming that he had been forced to confess following brutal mental and physical torture by the police while in detention. Sukma, however, successfully challenged his guilty plea which led to sodomy charges against him being withdrawn: Beh Lih Yi, "Court throws out Munawar's appeal", *Malaysiakini* (30 October 2008).

54 *Supra* note 50 at 71. A somewhat curious aspect of the decision was the apparent emphasis placed on the fact the statement was made by the prime minister in response to numerous requests for an explanation of the dismissal. While the prevalence of questions underscores why the court would find the matter to be of public interest (rather than just being of interest to the public), it is the wider context such as Anwar's position within government before his dismissal that is more significant.

55 *Ibid.* at 72.

56 *Supra* note 17.

57 *Lange v. Atkinson* [1998] 3 N.Z.L.R. 424 (C.A.) [*Lange v. Atkinson*] This was before the case went to the Privy Council, and then returned to New Zealand: see *infra* note 61.

58 On reasonableness see *e.g.*, Des Butler & Sharon Rodrick, *Australian Media Law*, 3rd ed. (Pyrmont, N.S.W.: Lawbook Co., 2007) at 77-82; Andrew T. Kenyon, *Defamation*: *Comparative Law and Practice* (London: UCL Press, 2006) at 212-222.

Overall, the judgment reads as an attempt to synthesise contemporary developments in qualified privilege from several jurisdictions—developments which are relevant to publications to a wide audience such as media publications—and to place those developments within the common law tradition of recognising various categories of qualified privilege for the "common convenience and welfare of society".[59] While judgments from Australia and New Zealand were mentioned, the English approach in *Reynolds* received by far the greatest attention in the High Court decision.

The *Anwar Ibrahim* litigation was unsuccessfully appealed. The Court of Appeal found no error in the High Court's judgment on qualified privilege.[60] As well as that finding, the appellate court cited New Zealand's acceptance in *Lange v. Atkinson* of qualified privilege being available for "generally published statements made about the actions and qualities" of elected politicians "so far as those actions and qualities directly affected their capacity (including their personal ability and willingness) to meet their public responsibilities".[61] Leave to the Federal Court was sought, but not granted as the appeal was bound to fail.[62] The Federal Court said the separate finding of justification could not be successfully challenged, which rendered an appeal pointless.[63]

Although it refused leave, the Federal Court did endorse the High Court's application of the law on qualified privilege. The Federal Court affirmed the judgment of the High Court, stating that it had properly dealt with qualified privilege: "After reading the grounds of judgment of the trial judge… we find he has correctly addressed the issues of… qualified privilege raised by the respondent in his defence".[64] The Federal Court stated that the trial judge "applied the correct test and law to the facts and circumstances of the case".[65] However, in relation to the Court of Appeal's reliance on *Lange v. Atkinson*, the Federal Court then continued: "In fact, the correct authority on qualified privilege in the context of the respondent's defence is *Lange v. Australian Broadcasting Corp*[oration] … and not *Lange v. Atkinson*".[66] While no elaboration was provided by the Federal Court as to how this observation was arrived at, it is worth emphasising that the Federal Court *also* stated that the trial judgment correctly applied the *Reynolds* defence (in its English Court of Appeal formulation).[67]

Thus, the Federal Court's reasons for refusing leave in this case left the Malaysian law apparently endorsing two different and not entirely consistent developments in qualified privilege: the defence of qualified privilege for the *reasonable* publication of defamatory *political* communication under the Australian *Lange* decision, and

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59 *Toogood v. Spyring*, *supra* note 10; *Hasnul*, *supra* note 37 at 78.

60 *Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr Mahathir bin Mohamad* [2001] 1 M.L.J. 305 at 310 (C.A.).

61 *Ibid*. The reference was to the first NZ Court of Appeal decision, which preceded the House of Lords decision in *Reynolds* and which was later set aside by the Privy Council; see *Lange v. Atkinson*, *supra* note 57 (Court of Appeal) and *supra* note 18 (Privy Council). The NZ Court of Appeal then substantially reaffirmed its earlier judgment: *Lange v. Atkinson* [2000] 3 N.Z.L.R. 385 (C.A.).

62 *Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad* [2001] 2 M.L.J. 65 (F.C.).

63 *Ibid.* at 68-69.

64 *Ibid.*

65 *Ibid.* at 69.

66 *Ibid.*

67 *Ibid.*

the English defence for *responsible journalism* on matters of *public interest* under *Reynolds*.

B. *Subsequent Decisions*

Only one judgment since *Anwar Ibrahim* subscribes to the view that the Australian approach represents the law in Malaysia. And no subsequent judgments endorse the New Zealand approach. Instead, *Reynolds* has been applied.

For example, Ratnam J., who was the High Court judge in *Anwar Ibrahim*, has only applied the English developments. In 2001, he delivered judgment in *Halim Arsyat v. Sistem Televisyen Malaysia*, citing only the English approach.[68] A news broadcast reported that an opposition political party newspaper had accused the prime minister of apostasy. Among other matters, Ratnam J. considered the defence of qualified privilege. The judge noted that he had canvassed the law in the High Court decision in *Anwar Ibrahim*, above, and that appeals against that judgment failed. He stated: "It is clear, therefore, that our highest court has accepted, following *Reynolds v. Times Newspapers* [in the English Court of Appeal]… the test for determining privileged occasions as being crystallized into three specific questions".[69]

He held that the television station had satisfied all three questions set out by the English Court of Appeal in *Reynolds*. Such a report on Muslim law was a matter of proper public interest, as was the status of the prime minister in relation to that. The "defendants were under a duty to speak and the public under a corresponding interest to hear what was said… In any case, this is clearly a case where the circumstantial test can well apply".[70] However, as can be seen in a number of Malaysian defamation judgments, there is not a detailed explanation of how all the elements of the defence apply in this case. Here, for example, how and why the circumstantial test was met could have usefully been explained.

The House of Lords decision in *Reynolds*[71] entered Malaysian case law in the 2002 decision in *Mark Ostyn v. Wong Kam Hor*.[72] A report in a Chinese daily, *Nanyang Siang Pau*, reproduced the text of a press statement issued by an opposition member of a state legislature. The statement and report, among other allegations, questioned the qualifications of the resident conductor of the state symphony orchestra and chorus. Ratnam J. described the allegations as "very serious":

> [The plaintiff] is a professional musician and resident conductor… and it was foreseeable that the allegations, that he is not qualified to be the conductor and to teach other musical instruments besides violin, would have serious repercussions for him… The nature of the information was such that it only concerned a narrow section of the public involved with [the orchestra] namely the students and their parents. The information was not of concern to the general public.[73]

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68 *Supra* note 16.
69 *Ibid.* at 366.
70 *Ibid*.
71 *Reynolds*, *supra* note 4.
72 *Supra* note 16.
73 *Ibid.* at 385.

The newspaper argued the report was published on an occasion of qualified privilege because it concerned matters of public interest. As the above quotation would suggest, that argument failed.[74] The publication was found not to be of concern to the general public.[75] A point of significance for the *Reynolds* defence was that the defendants had repeated the press statement without canvassing the plaintiff's point of view although, at the time of publication, the plaintiff had already issued a media statement denying the allegations.[76]

More recently, in 2007, Tee Ah Sing J. in the High Court considered the *Reynolds* privilege and the ten indicative factors set out by Lord Nicholls.[77] *Irene Fernandez v. Utusan Malaysia* involved a newspaper article which criticised the conduct of Irene Fernandez, a social activist in a non-governmental organisation, Tenaganita.[78] The article said she had avoided police interviews in an investigation after her own exposure of the ill-treatment of illegal migrant workers held in detention centres. It was said that Fernandez, having raised the matter, deliberately avoided the police and provided false excuses of illness. The tone of the article was said to be "cynical throughout" and aimed against Fernandez.[79]

The newspaper defended the article as a piece of "responsible journalism" in line with the *Reynolds* defence. The High Court found the newspaper failed to satisfy the ten *Reynolds* factors. As is quite often done in England, the judge considered each of the ten factors while also noting that the list was non-exhaustive and the weight to be given to each of them would vary.[80] Difficulties facing the defence were that the article contained no comment from Fernandez and relied on unsuitable sources of information. The journalist did not verify or attempt to verify the contents of the article with Fernandez. Instead, the journalist relied for information primarily on officers from the Home Affairs Ministry. In the circumstances, they were an unreliable source of information. Tee Ah Sing J. said:

> The objectivity of the Home Affairs Ministry officers is questionable as they were employed by the Ministry in charge of the police and detention camps. The Ministry would be directly affected by the Press Release and the Memorandum by Tenaganita. In fact the then Deputy Home Affairs Minister spoke extensively to the press in defence of the treatment of migrant [workers] in detention camps… Further it is questionable whether officers from the Home Affairs Ministry would know anything about the investigation into the plaintiff. This places a greater

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74 *Ibid.* at 387.

75 *Ibid.* at 384. It is not clear why the qualifications of a conductor in a publicly funded orchestra were not a matter of public interest. This would not appear to have been the only possible finding, given that the orchestra was (and remains) funded by the Penang state government, and matters of maladministration of funds would be of public interest (at 376). The judge gave some emphasis to an underlying dispute between different political parties, which appears to have prompted the making of the statement at issue in the case. It may be that the plaintiff was seen as having been used, inadvertently, in that larger dispute; a dispute which, presumably, could have been seen as being of proper public interest.

76 *Ibid*.

77 *Reynolds*, *supra* note 4 at 205.

78 *Irene Fernandez v. Utusan Melayu* (*M*) *Sdn Bhd* [2008] 2 Current Law Journal 814 [*Fernandez*].

79 *Ibid.* at 825.

80 See *e.g*., *James Gilbert Ltd v. MGN Ltd* [2000] E.M.L.R. 680 at 693, 699-703 (Q.B.).

> obligation on the [journalist] to verify the allegations… by contacting the plaintiff to offer an opportunity to respond.[81]

In addition, the article contained no reference to Fernandez's concerns. After she had made public her memorandum, the police had commenced a criminal defamation investigation against her.[82] The police interviews would have formed a part of an investigation process into Fernandez where she was the suspect, quite different from the investigation into the ill-treatment of illegal immigrants. None of this was stated in the article. Neither was it revealed that Fernandez had prior travel commitments, which meant she was unable to attend some of the interviews scheduled by the police.[83]

As well as considering *Reynolds*, Tee Ah Sing J. drew a contrast with the situation in *Jameel*, the most significant subsequent decision on the defence in the English law:[84]

> The Impugned Article read in its entirety clearly put the blame entirely on the plaintiff, taking sides with the police… There was no urgency to have published [it]… Unlike in *Jameel*'s case where the plaintiff… would not know that he was being monitored and as such [would be] unable to deny [or provide information]… the plaintiff in the matter at hand could easily provide her comments and explanation. Therefore I am of the view that the Impugned Article was not a piece of responsible journalism. Thus I reject the *Reynolds* defence.[85]

While the publication in *Fernandez* was not a piece of responsible journalism, the High Court clearly endorsed *Reynolds* privilege as a matter of law. The judgment is also a useful example of considering those factors that are relevant for the publication at issue, out of the indicative list in *Reynolds*.[86]

However, *Fernandez* does not represent the only approach to expanded qualified privilege in Malaysia. In a single 2009 High Court decision, the Australian approach has been applied. *Dato' Seri Anwar bin Ibrahim v. New Straits Times Press*[87] saw Anwar Ibrahim win a defamation claim when a defence of qualified

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81 *Supra* note 78 at 846.

82 However, no criminal defamation charges were ultimately laid against Fernandez. A year after releasing her memorandum, she was prosecuted for publication of false news, an offence under s. 8A(1) of the *Printing Presses and Publications Act 1984* (Act 301) (Malaysia). After 13 years during which she was convicted and sentenced to 12 months' imprisonment but freed on bail pending appeal, the High Court on 24 November 2008 acquitted Fernandez after the prosecution decided not to challenge Fernandez's appeal: Lester Kong, "Activist Irene Fernandez acquitted" *The Star* (Malaysia) (25 November 2008); S Pathmawathy, "Irene Fernandez acquitted" *Malaysiakini* (24 November 2008). On criminal defamation more generally, see *e.g.*, Clive Walker, "Reforming the Crime of Libel" (2005) 50 N.Y.L. Sch. L. Rev. 169; Doris Chia & Rueben Mathiavaranam, *supra* note 30 at 243-253.

83 *Supra* note 78 at 847, 835-8.

84 *Jameel*, *supra* note 15.

85 *Supra* note 78 at 847-8.

86 *Ibid.* at 845.

87 [2010] 2 M.L.J. 492 (H.C.) [*Anwar v. NSTP*].

privilege failed.[88] The *Anwar v. NSTP* judgment noted the earlier Malaysian references to Australian, New Zealand and English developments in qualified privilege.[89] Harmindar Singh Dhaliwal J.C. also observed that the Federal Court, in refusing leave in *Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad*,[90] stated that "the correct authority on qualified privilege in the context of the respondent's defence is *Lange v. Australian Broadcasting Corp*[oration]".[91] Perceptively, the judicial commissioner in *Anwar v. NSTP* noted that the exact approach to qualified privilege for widespread publications remains open in Malaysian law.[92] This is because the key House of Lords decision of *Reynolds* was not directly before the Federal Court in the earlier *Anwar Ibrahim* litigation. In that appeal to the Federal Court, leave was sought to determine whether the Court of Appeal had been correct to apply the New Zealand form of qualified privilege. However, as we have emphasised above, as well as commenting on the *Lange* decisions,[93] the Federal Court explicitly endorsed the approach of the High Court, an approach which was based overwhelmingly on *Reynolds*.[94]

Notwithstanding this ambiguity about the Federal Court comments, in *Anwar v. NSTP* Harmindar J.C. felt bound to apply *Lange v. Australian Broadcasting Corporation*.[95] *Lange* was applied reluctantly, however, because it appeared to be a less suitable form of qualified privilege. We agree with the assessment that, in policy terms, *Reynolds* is preferable for Malaysia because it is a stronger and wider defence. But there is one point to note about the analysis in *Anwar v. NSTP* that may not be entirely accurate. In that decision, reasonableness in the *Lange* defence was understood to be more difficult to establish than responsible journalism under the *Reynolds* privilege. Other research has shown that this may be likely *in practice*,[96] but it does not follow from the wording of the two defences as is suggested in *Anwar v. NSTP*.[97] The key issue facing the court in both defences is whether, in all the circumstances, publication has been responsible or reasonable. And a similarly wide range of factors can be taken into account in each inquiry. Thus, just as the ten factors listed in *Reynolds* "are not hurdles to be negotiated by a publisher but rather… pointers to be considered before a publisher can successfully rely on qualified privilege",[98] the factors that arise under *Lange* should be understood in the same manner. However,

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88 The newspaper defendant had published allegations that Anwar had placed very substantial sums of money in foreign accounts and had links to Western interests.

89 *Anwar v. NSTP*, *supra* note 87 at 510-9. The decisions in *Lange v. Australian Broadcasting Corporation*, *supra* note 17, *Lange v. Atkinson*, *supra* note 57 (note this is the initial Court of Appeal decision, rather than the later [2000] 3 N.Z.L.R. 385 decision, *supra* note 61) and *Reynolds*, *supra* note 4 are all considered.

90 *Supra* note 62.

91 *Ibid.* at 69 and see text accompanying note 66.

92 *Supra* note 87 at para. 43.

93 The Lange decisions commented on comprise *Lange, supra* note 17 and *Lange v. Atkinson, supra* note 57.

94 See text accompanying note 64.

95 *Supra* note 87 at para. 61 ("*Lange v. ABC* has been declared as the authority on qualified privilege").

96 See *e.g.*, more generally on the Australian approach to qualified privilege: Michael Chesterman, *Freedom of Speech in Australian Law*: *A Delicate Plant* (Aldershot: Ashgate, 2000); and in relation to *Lange* and *Reynolds*: Kenyon, *supra* note 58 at 202-237.

97 *Cf. Anwar v. NSTP*, *supra* note 87 at paras. 55-57.

98 *Ibid*. For the ten factors in *Reynolds*, see text accompanying note 6.

we agree with the *Anwar v. NSTP* judgment that, for "a modern pluralistic democracy"[99] like Malaysia, the standard that has emerged in the application of *Reynolds* in England is certainly preferable to the Australian experience under *Lange*.[100] As the judicial commissioner observed, the Australian experience "has shown a relative lack of success on the part of the media in establishing 'reasonableness"' and the test has been "rather rigid and inflexible" in its application.[101] In addition, the *Reynolds* defence is wider in its scope, which is more suitable to contemporary, plural democracies. As noted in *Anwar v. NSTP*, *Reynolds* applies to matters of public interest, which offers wide protection, whereas *Lange* is constrained to defamatory speech about government and political matters.[102]

As well as these policy reasons in support of *Reynolds*, there is an overriding legal question about how either the Australian *Lange* defence or the *Reynolds* privilege arises legally within Malaysia. It appears that *Lange* faces very difficult obstacles, largely because of its particular Australian constitutional basis. There is a clearer argument, however, for the application of *Reynolds* because it can be seen as a development that has been informed by the English common law of defamation. As we suggest below, that appears to be the preferable approach for the Malaysian courts to follow.

IV. The Basis for *Lange* or *Reynolds* in Malaysian Law

A. *Malaysian Law and the* Lange *privilege*

The *Lange* qualified privilege defence exists under the Australian common law of defamation due to the Australian constitution. That document contains no express protection for speech, but the constitutional text and structure itself implies a protection for political communication.[103] In *Lange*, the Australian High Court emphasised

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[99] *Ibid*. at para 66.

[100] As is noted in *Anwar v. NSTP*, *ibid.*, reference can also usefully be made to the former statutory defence in the Australian state of New South Wales (*Defamation Act 1974* (N.S.W.), s. 22) which, in part, informed the test of reasonableness that was set out in *Lange*. Now also relevant is the statutory defence that applies throughout Australia under largely uniform defamation legislation that applies across all states and territories (see *e.g.*, *Defamation Act 2005* (N.S.W.), s. 30).

[101] *Anwar v. NSTP*, *ibid.* at paras. 57-59.

[102] *Ibid.* at paras. 55-56. It is also notable that the judgment in *Anwar v. NSTP* (paras. 74-80) discusses reportage as it has developed in England, without mentioning the basis of the reportage defence in *Reynolds* or stating that the reportage defence is generally seen as a particular form or example of the *Reynolds* privilege; see *e.g.*, *Roberts v. Gable* [2008] 2 W.L.R. 129 (C.A.). The Malaysian judgment may also be stricter than English law in stating that *both* sides of a dispute must be presented in a publication in order for reportage to be arguable; *cf.* para. 76 and, *e.g.*, *Mark v. Associated Newspapers* [2002] E.M.L.R. 38 at para. 35 (C.A.) (Simon Brown L.J.); Charman v. Orion Publishing [2008] 1 All E.R. 750 at para. 91 (C.A.) (Sedley L.J.). For a detailed analysis of reportage under English law, which questions whether the theoretical basis of the defence lies within the *Reynolds* privilege, see Jason Bosland, "Republication of Defamation Under the Doctrine of Reportage: The Evolution of Common Law Qualified Privilege in England and Wales" Oxford J. Legal Stud. [forthcoming in 2011] online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619735>.

[103] There is an extensive literature on *Lange*, *supra* note 17, encompassing constitutional and defamation law aspects. For useful commentary on it and the constitutionally significant later decision of *Coleman v. Power* (2004) 220 C.L.R. 1 (H.C.A.), see *e.g.*, Tony Blackshield & George Williams, *Australian Constitutional Law and Theory*, 4th ed. (Sydney: Federation Press, 2006) at c. 28 and 29; Butler & Rodrick, *supra* note 58 at 13-19, 77-82.

that: "[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates".[104] This constitutional protection for speech meant that the traditional common law of defamation failed to provide adequate protection for political speech. Many widespread publications could only be defended if they were proven true (or proven to be honest opinion or comment based on true or privileged facts).[105] The Australian High Court held that a further defence was required. Thus the *Lange* defence was crafted to protect reasonable publication on government and political matters, even where those allegations cannot be proven true.

How could the *Lange* qualified privilege arise under Malaysian law? There appears to be two possibilities. First, perhaps it could be based on the express protection for speech in the *Federal Constitution of Malaysia*.[106] However, this appears most unlikely. Article 10(1)(a) of the *Malaysian Constitution* states that "every citizen has the right to freedom of speech and expression". However, in Article 10(2) the constitutional grant of freedom of speech is expressly qualified by a legislative power to impose restrictions that parliament "deems necessary or expedient" to provide, among other things, against defamation. In general, courts have not seen this constitutional protection for speech as requiring alteration to traditional defamation law, although some aspects of the relationship between Article 10 and defamation remain "uncharted".[107] Defences related to truth, opinion or comment and traditional categories of privilege have been seen as adequate for the requirements of Article 10, and traditional common law principles in relation to fair comment have been applied in the face of constitutional free speech arguments.[108] Similarly, traditional approaches have been maintained in relation to pre-trial injunctions to restrain defamatory publications.[109] The quantum of damages is the only notable issue where constitutional free speech arguments have been referred to approvingly within defamation judgments. The Court of Appeal has stated that the unchecked award of extremely high amounts would mean that "the constitutional guarantee of freedom of expression will be rendered illusory".[110] While it could be argued that the express constitutional protection for speech should mean there is a broader qualified privilege defence for widespread publications, the argument faces a background of generally unsupportive case law. And it is not clear how the existence of *Lange* in Australia would change that analysis.

Second, perhaps it could be argued that the *Malaysian Constitution* itself implies a protection for political speech, in a manner resembling the Australian approach. It is true that the *Malaysian Constitution* sets out provisions somewhat similar to those

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104 *Supra* note 17 at 560.

105 The non-privilege defences that are generally arguable for media defendants, justification and fair comment, each require facts to be proven true; see *e.g.*, *Kenyon*, *supra* note 58 at 195-196.

106 *1957 Constitution of the Federation of Malaysia* [*Malaysian Constitution*].

107 *Re Geoffrey Robertson QC* [2001] 4 M.L.J. 307 at 317-318 (H.C.) (KC Vohrah J.).

108 Tjanting Handicraft Sdn Bhd v. Utusan Melayu (Malaysia) Sdn Bhd [2001] 2 M.L.J. 574 (H.C.) (Kamalanathan Ratnam J.). See also *Lee Kuan Yew v. Chin Vui Khen* [1991] 3 M.L.J. 494 (H.C.) *per* Siti Norma Yaakob J., later C.J. of Malaya where a defence plea of Art. 10(1)(a) of the *Malaysian Constitution* was rejected.

109 *New Straits Times Press* (*M*) *Bhd v. Airasia Bhd* [1987] 1 M.L.J. 36 (S.C.); *Anwar bin Ibrahim v. Abdul Khalid @ Khalid Jafri bin Bakar Shah* [1998] 6 M.L.J. 365 (H.C.).

110 *Liew Yew Tiam v. Cheah Cheng Hoc* [2001] 2 Current Law Journal 385 at 395 (C.A.) *per* Gopal Sri Ram J.C.A., now F.C.J.

related to voting that were relied on in *Lange*.[111] However, as a matter of principle, this would appear to be a difficult argument in each of its two key stages. First, it would have to be established that a constitution, which includes express protection for speech, also includes an implied protection for political speech. Second, the implied protection would need to be stronger in its effects on laws such as defamation than the express constitutional provision has yet been shown to be.

B. *Malaysian Law and the* Reynolds *Privilege*

Neither of the above arguments appears worth pursuing in detail, especially when the avenue offered by *Reynolds* is also available. We suggest that *Reynolds* is clearly available within the Malaysian common law of defamation, given its origins in English common law and its suitability for "a modern pluralistic democracy"[112] like Malaysia. One possible obstacle would be an interpretation that saw *Reynolds* as being based solely on European human rights standards in the *European Convention on Human Rights*[113] and the *Human Rights Act*.[114] That would leave the legal argument in a similar position to the one discussed above in relation to applying the *Lange* privilege within Malaysia: in what way do the particular quasi-constitutional standards derived from the *European Convention on Human Rights* arise in the Malaysian context?

Some statements in the House of Lords do suggest the European influence on *Reynolds*. Lord Steyn, for example, noted that the "starting point" for analysis in areas of law such as defamation "is now the right of freedom of expression", which has become "the rule" while "regulation of speech is the exception requiring justification".[115] However, Lord Steyn also substantially equated Article 10 of the *European Convention on Human Rights* and English law in this regard—he emphasised the longstanding protection for free speech in English common law, which he termed part of the "constitutional" protection of rights under the common law.[116] It is worth noting that here the use of the term constitutional is not a reference to the effect of

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111 See *e.g.*, s. 24 of the *Australian Constitution* (1900) reads, in part, "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth". In Art. 119 of the *Malaysian Constitution* it is provided that: "(1) Every citizen who (a) has attained the age of twenty-one years on the qualifying date; and (b) is resident in a constituency on such qualifying date… is entitled to vote in that constituency in any election to the House of Representatives or the Legislative Assembly unless he is disqualified under Clause (3) or under any law relating to offences committed in connection with elections".

112 *Anwar v. NSTP*, *supra* note 87 at para. 60.

113 *Supra* note 13.

114 *Supra* note 12. See *e.g.*, *Review Publishing Co Ltd v. Lee Hsien Loong* [2010] 1 S.L.R. 52 at para. 216 (C.A.) [*Review Publishing*]. Overall, the Singapore Court of Appeal judgment appears to subscribe to this view, although the court also notes that the English change was not "a purely common law development": at para. 264.

115 *Reynolds*, *supra* note 4 at 208. This statement may now need to be qualified, so that no overriding priority is given to speech, in light of decisions such as *Guardian News and Media v. Ahmed* [2010] 2 All E.R. 799 (S.C.) which recognise that Article 8, which protects private life, can also be engaged in matters of reputation; see also *Re S* (*A Child*) (*Identification*: *Restriction on Publication*) [2005] 1 A.C. 593 (H.L.) [*Re S* (*A Child*)] and *Terry v. Persons Unknown* [2010] E.M.L.R. 16 (Q.B.D.).

116 See text accompanying note 115.

the *Human Rights Act* and the *European Convention on Human Rights*. It is about the common law's protection for speech.

In *Reynolds*, the Law Lords noted the significance of the *Human Rights Act* and its incorporation of European principles, but said the European provisions did not introduce fundamental differences for qualified privilege. That is, the decision drew on established qualified privilege principles influenced by the right to freedom of expression as applied through the common law. For example, as noted above, Lord Steyn largely equated Article 10 of the *European Convention on Human Rights* and English law. Two reasons were given:

> First, there is the principle of liberty. Whatever is not specifically forbidden by law individuals and their enterprises are free to do… By contrast the executive and judicial branches of government may only do what the law specifically permits. Secondly, there is a constitutional right to freedom of expression in England… By categorising this basic and fundamental right as a constitutional right its higher normative force is emphasised. These are perhaps some of the considerations which enabled Lord Goff in 1988 and Lord Keith in 1993 to hold that [A]rticle 10 of the [*European Convention of Human Rights*] and the English law on the point are in material respects the same.[117]

The constitutional right referred to above is the right as recognised by a traditionally unwritten constitution, and its reflection in the common law. It is not merely the idea of a constitutional right derived through the *Human Rights Act*. Thus the traditions of the common law have been an important source for *Reynolds*.

It is also worth noting that Article 10 of the *European Convention on Human Rights* was used most directly within *Reynolds* to reject an alternative form of privilege. The defendant newspaper had agued for a new category of qualified privilege based on the subject matter of the publication alone; namely, "political information".[118] The argument was that, for political material, the duty-interest qualified privilege would arise and could only be defeated by malice. The wider circumstances of the publication's investigation, content and style would not have been relevant to whether the publication occurred on an occasion of privilege.[119] In rejecting this approach, Lord Nicholls referred to three European cases—*Fressoz v. France*,[120] *Bladet Tromsø and Stensaas v. Norway*[121] and *Thorgeirson v. Iceland*[122]—to underline that in European

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[117] *Reynolds*, *supra* note 4 at 207. The 1988 and 1993 judgments mentioned in the quote involved Lord Goff, who observed in 1988 in *Attorney-General v. Guardian Newspapers* (*No 2*) [1990] 1 A.C. 109 (H.L.) at 283-284 that there was in principle no difference between Art. 10 of the *European Convention on Human Rights*, *supra* note 13, and English law of confidence, which was indorsed by Lord Keith, speaking for a unanimous House of Lords, in *Derbyshire County Council v. Times Newspapers* [1993] A.C. 534 at 551 (H.L.).

[118] *Reynolds*, *supra* note 4 at 200.

[119] The defence would have been equivalent to the common law qualified privilege that existed in Australia between 1994 and 1997, under the rules set out in *Theophanous v. Herald and Weekly Times* (1994) 182 C.L.R. 104 (H.C.A.). That defence was abrogated by *Lange*, *supra* note 17: see *e.g.*, Butler & Rodrick, *supra* note 58 at 77-82; Kenyon, *supra* note 58 at 212-213.

[120] (21 January 1999), No. 29183/95, (2001) 31 E.H.R.R. 2.

[121] (20 May 1999), No. 21980/93, (2000) 29 E.H.R.R. 125.

[122] (1992) 14 E.H.R.R. 843.

case law no categorical distinction is drawn "between political discussion and discussion of other matters of public concern".[123] Instead, the *Reynolds* defence extends to matters of public interest, and the publication's investigation, content and style are relevant to whether an occasion of qualified privilege arises.

Rather than suggesting that *Reynolds* is merely a product of Article 10, the common law sources which were drawn on deserve recognition. This can be seen in the approach of Lord Nicholls, with whom Lords Cooke and Hobhouse agreed.[124] Lord Nicholls reviewed the established common law approach to defamatory facts that cannot be proven true. The law requires that some duty or interest exists between the publisher and the recipient in order to find a qualified privilege in the communication. Through this defence, defamation law recognises the need, in the public interest, for recipients to receive frank and uninhibited communication made on certain occasions. Established categories of qualified privilege have developed in relation to these occasions. The list of categories is not closed and there is basis for courts to recognise, in the public interest, that another category of occasion should be protected.

In considering the approach that should be taken to publications made to a wide audience, Lord Nicholls examined established authorities in English common law,[125] and summarised the question to be asked as "whether the public was entitled to know the particular information".[126] In answering this question, Lord Nicholls set out ten illustrative and non-exhaustive factors,[127] emphasising the flexibility of the common law. Thus, within Lord Nicholls' approach to the *Reynolds* privilege, there was not explicit reliance on European case law. European references were made to affirm the correctness of the English common law.[128] As Lord Hobhouse stated: "I agree with Lord Nicholls that the circumstances of publication have to be taken into account in determining whether any particular publication was privileged. This… is an established part of English law".[129] In light of the above analysis, it is useful to consider a decision such as *Blackshaw v. Lord*,[130] which is often cited for the proposition that before cases such as *Reynolds*, the media could not rely on any general common law qualified privilege.[131] The concerns that were prominent in *Blackshaw v. Lord* relate to matters that were also of importance in *Reynolds*, such as the investigation underlying the publication. Understanding this helps to explain how

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123 *Reynolds*, *supra* note 4 at 204. Lord Steyn also used European case law to reject a generic test for political information.

124 *Ibid.* at 204, 217, 237.

125 *Ibid.* at 195-197.

126 *Ibid.* at 197.

127 *Ibid.* at 205.

128 *Ibid.* at 204. Lord Nicholls referred to *Fressoz v. France*, *supra* note 120, *Bladet Tromsø and Stensaas v. Norway*, *supra* note 121 and *Thorgeirson v. Iceland*, *supra* note 122 to show there may be circumstances where publishers need not prove allegations of fact. For instance, in *Thorgeirson v. Iceland*, *ibid.*, the court took into account that the report of widespread rumours of brutality by Icelandic police in Reykjavik had some substantiation in fact (an officer had been convicted), the purpose of the report (to promote an independent investigation), the nature of the report (a matter of serious public concern) and the difficulty of proof (it was unreasonable to require the writer to prove that unspecified members of the police had committed acts of serious assault resulting in disablement).

129 *Reynolds*, *supra* note 4 at 240.

130 [1984] 1 Q.B. 1 (C.A.).

131 It is also notable that *Blackshaw v. Lord*, *ibid.*, appears to have remained particularly important in Singapore; see *e.g.*, *Review Publishing*, *supra* note 114 at paras. 180-181.

Reynolds, while clearly a change from *Blackshaw v. Lord*, is within the incremental tradition of the common law. *Blackshaw v. Lord* concerned a newspaper report, written by Lord and published in the *Daily Telegraph*, about a £52 million loss that arose through incompetence in a government department. The report said multiple civil servants had been reprimanded, identified Blackshaw as the person in charge of the relevant office at the time and said that he had resigned.

One of the defences was common law duty-interest qualified privilege. It succeeded at first instance, with the judge holding that the defendants "had a legitimate duty or interest to publish the words complained of and the readers of the 'Daily Telegraph' had a corresponding or common interest therein".[132] The duty or interest was found to arise because of the subject matter of the publication, which involved alleged governmental maladministration of such large sums of money. The subject matter was said to be "so important… that it would be the duty of the press to bring it to the attention of the public, and any right-thinking person who wanted good administration… and who was interested in the running of the country, would want to know those facts".[133]

The Court of Appeal disagreed; there was no privilege on the facts of the case.[134] Stephenson L.J. stated that qualified privilege did not attach "to a statement on a matter of public interest believed by the publisher to be true in relation to which [the publisher] has exercised reasonable care".[135] However, it is important to recognise that the approach of all the appellate judges confirmed that it was possible for publications to wide audiences to be privileged. They could be privileged if, in the circumstances of the publication at issue, a duty and interest arose. For example, Fox L.J. approved the statement of Buckley L.J. in *Adam v. Ward* that:[136]

> [I]f the matter is [a] matter of public interest and the party who publishes it owes a duty to communicate it to the public, the publication is privileged, and in this sense duty means not a duty as matter of law, but… 'a duty recognised by English people of ordinary intelligence and moral principle but at the same time not a duty enforceable by legal proceedings'.[137]

Whether such a duty or interest arose would depend on the circumstances. Dunn L.J. stated that, except where the publication occurs on an already recognised category of privilege, "the court must look at the circumstances of the case before it in order to ascertain whether the occasion of the publication was privileged".[138] Corresponding duties or interests must be found, a determination "which depends also on the status of the information".[139] Stephenson L.J. identified the additional factors more clearly:

> The subject matter must be of public interest; its publication must be in the public interest. That nature of the matter published and its source and the position or status of the publisher distributing the information must be such as to create the

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[132] *Blackshaw v. Lord, ibid.* at 23.
[133] *Ibid.* at 25.
[134] *Ibid.*
[135] *Ibid.* at 26.
[136] *Ibid.* at 41.
[137] *Adam v. Ward* (1915) 31 T.L.R. 299 at 304 (C.A.) quoting *Stuart v. Bell*, *supra* note 47 at 350 (Lindley L.J.).
[138] *Blackshaw v. Lord*, *supra* note 130 at 35.
[139] *Ibid.*

> duty to publish the information to the intended recipients, in this case the readers of the "Daily Telegraph". Where damaging facts have been ascertained to be true, or been made the subject of a report, there may be a duty to report them… provided the public interest is wide enough… But where damaging allegations or charges have been made and are still under investigation… or have been authoritatively refuted… there can be no duty to report them to the public.[140]

It is also noteworthy that the plaintiff's counsel conceded the general subject matter of the publication could be protected by duty-interest qualified privilege. Stephenson L.J. did not distance himself from this assessment, stating:

> [The journalist] may have been under a duty to inform the public of the £52 m loss, but not to attribute blame to the plaintiff or to communicate information about his resignation, even if it was of public interest. The general topic of the waste of taxpayers' money was, [counsel for the plaintiff] concedes, a matter in which the public, including the readers of the "Daily Telegraph"… had a legitimate interest and which the press were under a duty to publish; but they had no legitimate interest in [the journalist's] particular inferences and guesses…[141]

With the attention paid in the judgments to the circumstances that underlay the publication, one can see the subsequent principles in *Reynolds* as involving the same sorts of concern with publications; investigation, content and style. *Reynolds* is a development, clearly. But traces of the ten illustrative factors set out by Lord Nicholls in *Reynolds* can be seen even in *Blackshaw v. Lord*. The factors are not so foreign to the common law, even if they have been incorporated in a different way in *Reynolds*. Among the factors identified by Stephenson L.J. in *Blackshaw v. Lord*, which later featured in Lord Nicholls' ten factors in *Reynolds*, are the subject matter of the publication, the source of the information, the status of the information and the urgency of the matter. The failure of Lord to include Blackshaw's side of the story—which was that he resigned for personal reasons—and the failure to provide Blackshaw with an opportunity to comment prior to publication were also damaging factors.

That *Reynolds* is a common law development receives support from English judges themselves. This can be seen, for example, in the judgments of Lord Bingham and Lord Scott in *Jameel*. Lord Bingham observed that *Reynolds* was "built on the traditional foundations of qualified privilege but carried the law forward in a way which gave much greater weight than the earlier law had done to the value of informed public debate of significant public issues".[142] Lord Scott stated that *Reynolds* was a "reinvesting" of qualified privilege with the flexibility that the common law laid down and envisaged in earlier cases in light of the role of the media in reporting on matters of public importance.[143] Lord Scott also noted with approval the dicta of Lord Cooke in a House of Lords judgment that was delivered soon after *Reynolds*. In *McCartan Turkington Breen v. Times Newspapers*, Lord Cooke remarked that "until *Reynolds* it would seem that the legal profession in England may not have been fully alive to the possibility of a particular rather than a generic qualified privilege for newspaper

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[140] *Ibid*. at 26.
[141] *Ibid.*
[142] *Jameel*, *supra* note 15 at para. 28.
[143] *Ibid.* at para. 133.

reports where the circumstances warranted a finding of sufficient general public interest".[144] To Lord Cooke, *Reynolds* was "less a breakthrough than a reminder of the width of the basic common law principles as to privilege".[145] As Eady J. has also observed, "the long established common law principles are adaptable to a great variety of circumstances. What is more, it is clear from *Reynolds* itself and from *McCartan Turkington Breen v. Times Newspapers*… that the courts are encouraged to invoke those principles more generously than in the past".[146]

The Law Lords in *Reynolds*—or at least some of them—may well have been influenced by Article 10 of the *European Convention on Human Rights*, but their decisions can still be seen as anchored in English common law. As Gavin Phillipson has observed of English judicial reasoning under the *Human Rights Act* more generally, this is an instance in which "the essentially flexible and pragmatic nature of the common law" has been preserved under the legislation.[147]

Similarly in Malaysia, while judges may be influenced by the recent English developments, ultimately any decisions must be anchored in Malaysian law. In this regard, there are sufficient bases for the *Reynolds* privilege to arise under Malaysian common law. The defence of privilege is grounded on the public interest in certain occasions of publication being protected from defamation claims. The defence is available to publications to the world at large if it can be shown that the publisher has a duty to publish the information, or does so to protect an interest, and the public has a corresponding duty or interest to receive the information. *Reynolds* has set out how such a duty and interest may arise, and it has been correctly applied as part of common law defamation in Malaysia.

C. Reynolds *and Jurisprudential Creatures*

Another line of analysis could be taken in relation to the *Reynolds* privilege, and is worth outlining briefly. It concerns a matter that is yet to be resolved in English case law; namely, whether or not the *Reynolds* privilege is a "new jurisprudential creature".[148] Judges continue to differ on the applicability of this label to the defence. However, it is not at all clear that either approach to the issue undercuts the argument made here. That is, the *Reynolds* defence is clearly based on concepts of duty and interest within the common law, which have been applied to cover a new occasion of publication identified by the shorthand of "responsible journalism". As Baroness Hale observed, even when identifying the defence as a different jurisprudential creature, it "is a natural development" of the law of privilege.[149] And those Law Lords

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144 *McCartan Turkington Breen* (*a firm*) *v. Times Newspapers* [2001] 2 A.C. 277 at 301 (H.L.) (Lord Cooke).

145 *Ibid.*

146 *Armstrong v. Times Newspapers* [2004] EWHC 2928 (QB) at para. 106. The Court of Appeal did not overrule or negate the remark of Eady J.: [2005] E.M.L.R. 33 at para. 68 (C.A.).

147 Gavin Phillipson, "Clarity Postponed: Horizontal Effect after *Campbell* and *Re S*" in Helen Fenwick, Gavin Phillipson & Roger Masterman, eds., *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007) 143 at 146.

148 See *e.g.*, *Loutchansky v. Times Newspapers* (*No. 2*) [2002] 2 W.L.R. 640 at para. 35 (C.A.) (Lord Phillips M.R.); *Jameel*, *supra* note 15 at para. 46, *per* Lord Hoffman; and at para. 146, *per* Baroness Hale.

149 *Jameel*, *ibid.* at para. 146.

who have not used the "jurisprudential creature" label emphasise the very same point: *Reynolds* is a development of the longstanding common law concepts of duty and interest.[150]

The issue gained prominence through the Court of Appeal decision in *Loutchansky v. Times Newspapers Ltd and other (No. 2)*,[151] delivered by Lord Phillips M.R. He identified two distinctions from traditional qualified privilege:

> Whereas previously it could truly be said of qualified privilege that it attaches to the occasion of the publication rather than the publication, *Reynolds* privilege attaches, if at all, to the publication itself: it is impossible to conceive of circumstances in which the occasion of publication could be privileged but the article itself not so. Similarly, once *Reynolds* privilege attaches, little scope remains for any subsequent finding of malice… [T]he publisher's conduct in both regards must inevitably be explored when considering Lord Nicholls' ten factors, [that is] in deciding whether the publication is covered by qualified privilege in the first place.[152]

These observations led to the statement that *Reynolds* privilege should be recognised, "as a different jurisprudential creature from the traditional form of privilege from which it sprang", with its own form of duty and interest.[153]

The distinctions noted by Lord Phillips, however, do not mean that the defence cannot be seen as part of the common law. It is clearly still a form of duty-interest privilege. What is different is that the circumstances of publication determine whether an occasion of privilege arises, and the range of factors considered are more extensive and varied than is usual under other categories of privilege. In addition, the consideration of these factors at the stage of determining if an occasion of privilege arises means that there is little opportunity, as a factual issue, for malice to defeat an occasion of the *Reynolds* privilege. A similar concern with the position of malice can be seen in the comments of Lord Hoffman in *Jameel*—who agreed with the label "different jurisprudential creature"—that "the propriety of the conduct of the defendant is built into the conditions under which the material is privileged".[154]

The defence *is* different in that an occasion on which public interest material is published and responsible journalism is practised is now an occasion of qualified privilege. The defence focuses on the material at issue and the underlying circumstances, in determining whether an occasion of privilege exists, more than earlier forms of the defence. But it does not appear that this necessarily leads to a categorical difference in terms of the common law's influence on, and role within, the *Reynolds* defence.

It is also worth noting that aspects of English defamation law may develop further, beyond their common law basis, through the ongoing influence of the *European Convention on Human Rights* if reputation (or some aspects of it) continues to be seen as falling within Article 8 of the *European Convention on Human Rights* and

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150 See *e.g.*, *ibid.* at para. 30 (Lord Bingham); at para. 107 (Lord Hope); and at para. 135 (Lord Scott).
151 *Supra* note 148.
152 *Ibid.* at para. 33.
153 *Ibid*. at para. 35.
154 *Supra* note 15 at para. 46.

its protection for private life.[155] However, such further developments in English law would appear to remain separate from the common law underpinnings that can be seen in the form of the *Reynolds* privilege as it was set out in decisions such as *Reynolds* and *Jameel*.

V. Conclusion

The developments in qualified privilege in Malaysian law, just as in other common law jurisdictions, can be linked to wider trends of increasing freedom for public speech. News gathering and dissemination in Malaysia are shifting from traditional print and broadcast media, with links to governing interests, to encompass more diverse media forms including a variety of internet-based publications.[156] In addition, the 2008 Malaysian general election results[157] suggest a move away from what has been called a semi- or quasi-democratic model[158] towards increased public speech and engagement.[159] These factors also suggest the value that case law such as *Fernandez* has within Malaysia in terms of supporting a role for the media beyond acting as a mouthpiece for government interests.[160] Equally, the above legal analysis

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155 See *e.g.*, *Guardian News and Media v. Ahmed*, *supra* note 115; *Re S* (*A Child*), *supra* note 115; and comments of Sir David Eady (speaking extra-judicially at the launch of a research centre for law, justice and journalism at City University, London, 11 March 2010), online: <http://www.judiciary.gov.uk/docs/speeches/eady-j-city-university-10032010.pdf>. Arguments might be made, for example, in relation to truth providing a complete defence in defamation without considering the value of privacy interests affected by a publication, or in relation to the comparatively high hurdle for gaining a pre-publication injunction in defamation under the rule in *Bonnard v. Perryman* [1891] 2 Ch. 269 (C.A.).

156 See *e.g.*, Janet Steele, "Professionalism Online: How *Malaysiakini* Challenges Authoritarianism" (2009) 14 International Journal of Press/Politics 91.

157 In the 2008 general election, a coalition of three opposition parties gained more than one third of the federal seats, a marked reduction for the ruling Barisan Nasional coalition; see *e.g.*, Abdul Rashid Moten, "2008 General Elections in Malaysia: Democracy at Work" (2009) 10 Japanese Journal of Political Science 21.

158 Commentators have labelled Malaysia by terms such as semi-democratic, quasi-democratic, semi-authoritarian and soft-authoritarian; see *e.g.*, Harold Couch, "Malaysia: Neither Authoritarian nor Democratic" in Kevin Hewison, Richard Robison & Garry Rodan, eds., *Southeast Asia in the 1990s*: *Authoritarianism*, *Democracy and Capitalism* (St. Leonards, N.S.W.: Allen & Unwin, 1993) 133; Zakaria Haji Ahmad, "Malaysia: Quasi Democracy in a Divided Society" in Larry Diamond, Juan J. Linz & Seymour Martin Lipset, eds., *Democracy in Developing Countries* (Boulder, Colorado: Lynne Rienner, 1989) 347; William Case, "Testing Malaysia's Pseudo-Democracy" in Edmund Terence Gomez, ed., *The State of Malaysia*: *Ethnicity*, *Equity and Reform* (London: RoutledgeCurzon, 2004) 29; William Case, "Semi-Democracy and Minimalist Federalism in Malaysia" in Baogang He, Brian Galligan & Takashi Inoguchi, eds., *Federalism in Asia* (Cheltenham: Edward Elgar, 2007) 124.

159 This appears to be the situation, even though Malaysia has a wide range of laws restrictive of speech; see *e.g.*, *Printing Presses and Publications Act 1984*, *supra* note 82, *Communications and Multimedia Act 1998* (Act 588) (Malaysia), *Sedition Act 1948* (Act 15) (Malaysia), *Internal Security Act 1960* (Act 82) (Malaysia), *Societies Act 1966*, *supra* note 82; Kevin YL Tan & Thio Li-ann, eds., *Constitutional Law in Malaysia and Singapore*, 2nd ed. (Singapore: Butterworths Asia, 1997) at 788-832; Graham Brown, "The Rough and Rosy Road: Sites of Contestation in Malaysia's Shackled Media Industry" (2005) 78 Pacific Affairs 39; Shad Saleem Faruqui & Sankaran Ramanathan, *Mass Media Laws and Regulations in Malaysia* (Singapore: Asian Media Information and Communication Centre, 1999).

160 The well-known internet publication, *Malaysiakini*, does appear to be achieving this sort of independence in its journalism: see *e.g.*, Andrew T. Kenyon, "Investigating Chilling Effects: News Media and Public Speech in Malaysia, Singapore and Australia" (2010) 4 International Journal of Communication 440.

suggests how Malaysian case law can continue to apply the *Reynolds* defence and how doing this is more plausible than applying the Australian *Lange* privilege. As was suggested as long ago as 1999 in relation to Malaysia, the *Reynolds* defence is an incremental extension of common law qualified privilege, warranted to protect general publications on matters of public interest.[161]

We have argued that *Reynolds* privilege should be applied within Malaysia, and have sought to show how this is easily possible in doctrinal terms. As noted in the only recent Malaysian decision that did not apply *Reynolds*,[162] the *Reynolds* defence is preferable to *Lange* on policy grounds because it offers a more suitable strength and scope of protection for contemporary plural democracies. As we have outlined, it also appears far more plausible legally for the *Reynolds* defence to arise as part of Malaysian common law. Courts can apply *Reynolds* and *Jameel* within the Malaysian common law. Simply dismissing the developments as a product of European human rights protection is to misread the common law. Instead, the developments in England and in many jurisdictions sharing its legal heritage suggest that any society seeking to be democratic in substance, and following the common law tradition, should apply a defence at least as strong as *Reynolds* in its defamation law. Malaysian courts should continue to recognise this need, as has occurred in many other jurisdictions.[163] As well as broadly comparable developments in Australia,[164] Canada,[165] India,[166] Ireland,[167] New Zealand[168] and South Africa,[169] *Reynolds* itself has been

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[161] Farid Sufian Shuaib, "General Publication, Public Interest and Common Law Qualified Privilege: Where is the Law Heading?" [1999] 2 Malayan Law Journal Articles 163.

[162] *Anwar v. NSTP*, see text accompanying notes 88-102.

[163] The only notable exception is Singapore, which has not adopted this trend within the common law; see *Review Publishing*, *supra* note 114. While doctrinal arguments similar to those set out in this article about *Reynolds* and *Lange* could be mounted against the legal analysis taken in Singapore, there is a more important factor that may militate against the development of a broader privilege defence in Singapore; namely, the political, social and cultural factors that remain in the country. While the Court of Appeal does not put it in such terms, Singapore is strongly critiqued in many scholarly analyses for the hegemonic tendencies of its political order. The literature is extensive, across varied disciplines, see *e.g.*, Terence Lee, "Gestural Politics: Mediating the 'New' Singapore" in Krishna Sen & Terence Lee, eds., *Political Regimes and the Media in Asia* (London: Routledge, 2008) 170; Garry Rodan, "State-Society Relations and Political Opposition in Singapore" in Garry Rodan, ed., *Political Oppositions in Industrialising Asia* (London: Routledge 1996) 95. This means that Singapore law sees the media as having no investigative role. As stated in *Review Publishing*, "there is no room in our political context for the media to engage in investigative journalism which carries with it a political agenda" (at para. 272). That cannot be said of other common law jurisdictions, and it cannot be said of Malaysia which has far more developed political opposition and civil society: see *e.g.*, Cherian George, "The Internet's Political Impact and the Penetration/Participation Paradox in Malaysia and Singapore" (2005) 27 Media, Culture & Society 903; Garry Rodan, *Transparency and Authoritarian Rule in Southeast Asia*: *Singapore and Malaysia* (London: Routledge Curzon, 2004); Janet Steele, *supra* note 156; Jun-E Tan & Zawawi Ibrahim, *Blogging and Democratization in Malaysia*: *A New Civil Society in the Making* (Petaling Jaya: Strategic Information and Research Development Centre, 2008).

[164] *Lange*, *supra* note 17.

[165] *Grant v. Torstar*, *supra* note 3.

[166] *Rajagopal v. State of Tamil Nadu*, *supra* note 3.

[167] *Hunter v. Duckworth*, *supra* note 3.

[168] *Lange v. Atkinson*, *supra* note 18.

[169] *National Media v. Bogoshi*, *supra* note 3.

applied, for example, in the commonwealth Caribbean,[170] Hong Kong[171] and Brunei.[172]

It should be recognised, however, that the defence places a substantial role in the hands of judges to decide whether the circumstances of publication amount to an occasion of privilege. Such a decision may well be influenced by wider attitudes to public speech, political opposition and civil society. Those attitudes may be changing among judicial officers, just as they can be seen to be developing across Malaysian society more broadly. But the way in which *Reynolds* is an evolution in the law—unlike the comparatively revolutionary effect of the US reformulation of defamation since *New York Times v. Sullivan*[173]—means that it can be expected to have only an incremental effect within Malaysian defamation law and the space it gives to public speech. Even though matters of communications technology and, especially, the presence and vitality of civil society and political opposition appear to be of great importance to public speech within countries like Malaysia,[174] the *Reynolds* privilege is, in principle, a development that should over time support those changes.

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170 See *e.g.*, *Bonnick v. Morris* [2003] 1 A.C. 300 (P.C.).

171 *Abdul Razzak Yaqoob v. Asia Times Online* [2008] 3 Hong Kong Cases 589 (H.C.).

172 *Rifli bin Asli v. New Straits Times Press* (*Malaysia*) *Berhad*, *Rifli bin Asli v. Ahmad Khawari Isa and Berita Harian Sdn Bhd* [2001] Brunei Law Reports 251 (H.C.); *Rifli bin Asli v. New Straits Times Press* (*Malaysia*) *Berhad*, *Rifli bin Asli v. Ahmad Khawari Isa and Berita Harian Sdn Bhd* [2002] Brunei Law Reports 300 (C.A.). In *Review Publishing*, *supra* note 113 at para. 214 the Singapore Court of Appeal states that *Reynolds* has also been considered and applied in Samoa. However, the cited case, *Alesana v. Samoa Observer Company* [1998] Western Samoa Supreme Court 6, deals with the *Lange* judgments in Australia (*supra* note 17) and New Zealand (*supra* note 57).

173 The most significant decisions are *New York Times v. Sullivan*, 376 U.S. 254 (1964) (S.C.); *Gertz v. Robert Welch*, 418 U.S. 323 (1974) (S.C.); and *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) (S.C.).

174 See *e.g.*, Rodan, *Transparency and Authoritarian Rule in Southeast Asia*: *Singapore and Malaysia*, *supra* note 163; Kenyon, *supra* note 160.