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THE *REYNOLDS* PRIVILEGE IN A NEO-CONFUCIANIST COMMUNITARIAN DEMOCRACY: REINVIGORATING FREEDOM OF POLITICAL COMMUNICATION IN SINGAPORE

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This article explores how defamation jurisprudence in Singapore has elevated the political public figure to an exalted position, virtually according the reputation of these honourable men, or *junzi*, heightened protection over the constitutional guarantee of freedom of speech. It takes the position that there are sufficient bases for the *Reynolds v. Times Newspapers Ltd.* privilege (the *Reynolds* privilege) to be adopted under Singapore common law, independent of any reliance on art. 10 of the European Convention on Human Rights. It further argues that courts in Singapore ought to draw on relevant English and Australian jurisprudence, and consider a broader qualified privilege defence in defamation suits involving political public figures. The author concludes that the common law of qualified privilege in Singapore should be reviewed to take into account a multi-factorial approach when examining whether greater leeway may be accorded to citizen comments on public officials and public policy that are relevant to good government and good governance.

I. INTRODUCTION

Defamation actions by politicians in Singapore have always attracted much international attention. This article agrees with numerous observations made by Andrew Kenyon and Ang Hean Leng in their analysis of the developments in qualified privilege in Malaysian law,[1] and their suggestion that "*Reynolds*[2] 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"'.[3] It continues where Kenyon and Ang have left off, exploring how defamation jurisprudence in

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1 Andrew Kenyon & Hean Leng Ang, "*Reynolds* Privilege, Common Law Defamation and Malaysia" [2010] Sing. J.L.S. 256.

2 *Reynolds v. Times Newspapers Ltd.* [2001] 2 A.C. 127 (H.L.) [*Reynolds*].

3 Kenyon & Ang, *supra* note 1 at 272. In 2007, Tee Ah Sing J. in the High Court applied the *Reynolds* privilege and examined the ten factors as laid out by Lord Nicholls: see *Irene Fernandez v. Utusan Melayu (M) Sdn. Bhd.* [2008] 2 Current Law Journal 814. See also Kenyon & Ang at 266-270. However, it should also be noted that "Malaysian law has reached the awkward position of the Federal Court having endorsed both the English *Reynolds* defence and the Australian *Lange* defence": see Kenyon & Ang at 263.

Singapore has elevated the political public figure to an exalted position, virtually according the reputation of these honourable men, or *junzi*, heightened protection over the constitutional guarantee of freedom of speech. It also takes the position that there are sufficient bases for the *Reynolds* privilege to be adopted under Singapore common law, independent of any reliance on art. 10 of the *European Convention on Human Rights*.[4]

The classification of any individual as a 'public figure' in the United States automatically imports the *New York Times Co. v. Sullivan*[5] actual malice standard into virtually any civil suit from defamation to invasion of privacy—an onerous requirement that few public figure plaintiffs can ever satisfy—in contrast to the more nuanced approaches to defamation of political public figures adopted by English and Australian jurisdictions. Part II evaluates how a neo-Confucianist ethos and a pragmatic approach to good government have influenced judicial interpretation of art. 14 of the *Constitution of the Republic of Singapore*,[6] and have resulted in an inversion of a classical understanding of the political public figure. Part III argues that the rationales behind the *Lange v. Australian Broadcasting Corp.*[7] and *Reynolds* privileges are relevant to the Singapore experience, and that courts in Singapore ought to consider a broader qualified privilege defence that takes into account the *Reynolds* factors in defamation suits involving political public figures. Part IV concludes that the common law of qualified privilege in Singapore should be reviewed to take into account a multi-factorial approach in examining whether greater leeway may be accorded to citizen comments on public officials and public policy that are relevant to good government and good governance.

II. The Political Public Figure in Singapore

A. *Rationale for Heightened Protection of the Political Public Figure*

In Singapore, the constitutional guarantee of freedom of speech, which applies only to the *citizens* of Singapore, is found in art. 14 of the *Singapore Constitution*, which states:[8]

> 14 – (1) Subject to clauses (2) and (3)—
> (a) every citizen of Singapore has the right to freedom of speech and expression;
> …
> (2) Parliament may by law impose—
> (a) on the rights conferred by clause (1) (*a*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;
> …

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4 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 [*ECHR*].

5 376 U.S. 254 (1964) [*New York Times*].

6 *Constitution of the Republic of Singapore* (1999 Rev. Ed.) [*Singapore Constitution*].

7 (1997) 189 C.L.R. 520 (H.C.A.) [*Lange*].

8 *Singapore Constitution*, *supra* note 6, art. 14.

The eight grounds upon which freedom of speech may be restricted have been "construed expansively, in both ministerial pronouncements and judicial interpretation".[9] Despite the presence of the supremacy clause,[10] in a consistent line of cases since the 1990s, the Singapore Court of Appeal, the highest appellate court, has interpreted art. 14 with deference to the "government's assessment of the needs of public order without requiring that the restrictions be informed by substantive standards of reasonableness, proportionality, or necessity within a democratic society".[11]

This judicial deference stands in stark contrast to the First Amendment[12] jurisprudence in the US,[13] but it resonates with the communitarian ideology or neo-Confucian ethos of the Singapore system, which emphasises the community's interest in social cohesion and stability above individual rights and liberties.[14] This pragmatic political ideology centred on economic progress, effective governance and a harmonious multiracial and multicultural society, has been articulated in an official document

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9 Li-ann Thio, "Singapore: Regulating Political Speech and the Commitment "to Build a Democratic Society"" (2003) 1 International Journal of Constitutional Law 516 at 516.

10 *Singapore Constitution*, *supra* note 6, art. 4 which states: "This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void".

11 Thio, "Singapore: Regulating Political Speech and the Commitment "to Build a Democratic Society"", *supra* note 9 at 516. See also Li-ann Thio, "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 29:

> [T]he desire to limit judicial review is evident in deliberately excluding 'reasonable' before the word 'restrictions' … in relation to permissible legislative restrictions … This reflects the logic of parliamentary supremacy in trusting legislators to conclusively determine reasonable and appropriate balances between liberties and competing interests.

See, generally, *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 1 S.L.R.(R.) 791 (C.A.) [*Jeyaretnam*]; *Tang Liang Hong v. Lee Kuan Yew* [1997] 3 S.L.R.(R.) 576 (C.A.) [*Tang Liang Hong*]; *Goh Chok Tong v. Jeyaretnam Joshua Benjamin* [1998] 2 S.L.R.(R.) 971 (C.A.) [*Goh Chok Tong*]; *Review Publishing Co. Ltd. v. Lee Hsien Loong* [2010] 1 S.L.R. 52 (C.A.) [*Review Publishing*].

12 U.S. Const. amend. I.

13 The vertical application of the First Amendment—*e.g.* content/viewpoint discrimination, time-place-manner restrictions and public forum doctrine—is beyond the scope of this article. However, in terms of its horizontal effect in common law defamation, the Supreme Court has imposed the actual malice standard with respect to public figure plaintiffs. See *New York Times*, *supra* note 5 at 280; *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974) at 344-345 [*Gertz*]. Under the *New York Times*/*Gertz* rules, the public official who is defamed in the US today has little ability to correct a falsehood published about him or her in the media. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749 (1985) at 769, Justice White issued a trenchant warning about the diabolical effects of the actual malice standard. Nevertheless, the US Supreme Court has steadfastly refused to establish judicial standards of conduct to promote responsible journalism: *e.g.*, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1966) at 164-165; *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) at 247-258. For criticisms of the actual malice standard, see, *e.g.*, Benjamin Barron, "A Proposal to Rescue *New York Times v. Sullivan* by Promoting a Responsible Press" (2007) 57 Am. U. L. Rev. 73.

14 This has been well-chronicled in a number of publications: *e.g.*, Li-ann Thio, "An "i" for an "I": Singapore's Communitarian Model of Constitutional Adjudication" (1997) 27 Hong Kong L.J. 152; Kishore Mahbubani, "The Dangers of Decadence: What the Rest Can Teach the West" (1993) 72(4) Foreign Affairs 10; Bilahari Kausikan, "Asia's Different Standard" (1993) 92 Foreign Policy 24; Melanie Chew, "Human Rights in Singapore: Perceptions and Problems" (1994) 34(11) Asian Survey 933. *Contra* Aryeh Neier, "Asia's Unacceptable Standard" (1993) 92 Foreign Policy 42; Tommy Koh, *The Quest for World Order: Perspectives of a Pragmatic Idealist* (Singapore: Times Academic Press for Institute of Policy Studies, 1998) at 352-366.

released by the Singapore government.[15] Much of this climate of speech regulation stems from the concern that the fragile ethnic and religious harmony in Singapore must be preserved to prevent the recurrence of the race riots that the country experienced in the 1960s.[16] For example, political commentator Melanie Chew explains this "ideology of survival"[17] as the "siege mentality"[18] where the political leadership of Singapore "perceives Singapore as being small, vulnerable, and fragile" resulting in all human rights considerations being "subordinate to the task of ensuring the economic and physical survival of the nation and the community".[19] As a result, the Singapore courts have rejected the American 'public figure' doctrine,[20] as well as the broader limits of acceptable criticism regarding politicians as recognised in European Court of Human Rights jurisprudence,[21] the responsible journalism test enunciated by the House of Lords,[22] and the special protection accorded to information on political and government matters by the High Court of Australia.[23] The Singapore Court of Appeal's approach has led to laments that it could have instead undertaken a "more searching analysis of the essence and confines of the fundamental right of free speech under the Constitution"[24] rather than adopting a "semantic approach"[25] and "exhibiting a highly literalist approach towards constitutional interpretation".[26] It is important to note here that the Court of Appeal in *Review Publishing* did not reject the responsible journalism test—or a broader qualified privilege with respect to matters of public interest—as being inapplicable to *Singapore citizens* in the future; the Court in fact suggested how the issues relating to the adoption of the *Reynolds* privilege may be argued in future cases involving defendants who are Singapore citizens.[27]

The Singapore government's espousal of "Asian values"—a form of cultural relativism and economic particularism—repudiates the liberal Western notion of distrust of government that informs much of First Amendment jurisprudence,[28] and instead embraces respect for honourable trustworthy gentleman-governors, or *junzi*, derived

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15 Sing., "Shared Values White Paper", Cmd. 1 of 1991 [*Shared Values*]. The Shared Values identified are: Nation before community and society above self, upholding the family as the basic building block of society, resolving major issues through consensus rather than contention, and stressing racial and religious harmony.

16 See Thio, "Singapore: Regulating Political Speech and the Commitment "to Build a Democratic Society"", *supra* note 9 at 519.

17 Chew, *supra* note 14 at 945.

18 *Ibid*.

19 *Ibid.* See also Lee Kuan Yew, *From Third World to First: The Singapore Story: 1965-2000* (New York: HarperCollins Publishers, 2000) at 760-763.

20 *E.g.*, *Jeyaretnam*, *supra* note 11 at 809-815.

21 *Ibid.* at 813-818.

22 *E.g.*, *Review Publishing*, *supra* note 11 at 164-171.

23 *E.g.*, *Lee Hsien Loong v. Singapore Democratic Party* [2007] 1 S.L.R.(R.) 675 at 708-710 (H.C.).

24 Tsun Hang Tey, "Singapore's Jurisprudence of Political Defamation and its Triple-Whammy Impact on Political Speech" [2008] P.L. 452 at 456.

25 *Ibid*.

26 *Ibid*. More hyperbolic commentary have argued that this "judicial acceptance of executive policy… that reflects the statist nature of Singapore's courts" can have "a pejorative impact of perceptions of the nature of Singapore's common law": see Cameron Sim, "The Singapore Chill: Political Defamation and the Normalization of a Statist Rule of Law" (2011) 20 Pac. Rim L. & Pol'y J. 319 at 328, 348.

27 *Review Publishing*, *supra* note 11 at 175-188.

28 See, Eric Barendt, *Freedom of Speech*, 2nd ed. (Oxford: Oxford University Press, 2005) at 21-23; Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) at 85-86.

from the Confucian tradition.[29] Although drawn from Confucian ideals, it was explained that these values are "secular"[30] in nature, "common to all the major groups in Singapore"[31] and are "shared by all communities".[32] More recently, former Prime Minister and founding father of Singapore Lee Kuan Yew, reiterated the "Confucianist belief that society works best where every man aims to be a gentleman"[33] and that this *junzi* adheres to the Five Relationships, or *Wu-Lun*.[34] Since the elected politician is a gentleman-governor and is therefore a *junzi* deserving of respect in a Confucian social order of hierarchical relations, substantial public harm can result where criticism deters such candidates from seeking public office. In the landmark case of *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*,[35] the Court of Appeal commented that an extensive free speech privilege "would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility"[36] and "that the public at large have an equal interest in the maintenance of public character, without which public affairs could never be conducted with a view to the welfare and the best interests of our country".[37] The Court held that:[38]

> Persons holding public office or politicians (we call them 'public men') are equally entitled to have their reputations protected as those of any other persons. Such persons, in the discharge of their official duties, are laying themselves open to public scrutiny both in respect of their deeds and words. In that respect, criticisms in relation to their official conduct may be 'robust' and 'wide-open' and may include 'vehement, caustic and sometimes unpleasantly sharp attacks'.

The Court's underlying concern that an "absolute or unrestricted right of free speech would result in persons recklessly maligning others with impunity"[39] is also shared by courts in other jurisdictions like the United States, the United Kingdom and Australia, but it is evident that Singapore courts permit far greater restraints to be placed on speech than in any of these jurisdictions.

B. *Consequences for Defamation of Political Public Figure*

Significant damages have been paid out by defendants who have been found liable in defaming politicians in Singapore, but damages awarded to the Prime Minister

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29 See *e.g.*, *Shared Values*, *supra* note 15 at para. 41; Thio, "The Virtual and the Real: Article 14, Political Speech and the Calibrated Management of Deliberative Democracy in Singapore", *supra* note 11 at 33; Yash Ghai, "Human Rights and Governance: The Asia Debate" (1994) 15 Australian Yearbook of International Law 1 at 11-12.

30 *Shared Values*, *ibid.* at para. 46.

31 *Ibid.* at para. 9.

32 *Ibid.* at para. 40.

33 Tom Plate, *Conversations with Lee Kuan Yew—Citizen Singapore: How to Build a Nation* (New York: Marshall Cavendish Editions, 2010) at 177.

34 *Ibid*.

35 *Supra* note 11 at 819.

36 *Ibid.* The court was citing Philips Lewis, J. E. Previte, R. W. Ground, *Gatley on Libel and Slander*, 8th ed. (London: Sweet & Maxwell, 1981) at 206.

37 *Supra* note 11 at 818. The court was citing Cockburn C.J. in *Campbell v. Spottiswoode* (1863) 32 L.J. Q.B. 185 at 200.

38 *Ibid.*

39 *Ibid.*

and other Ministers who have been defamed have, to date, not exceeded S$500,000 in a single suit. Nonetheless these "crippling damages"[40] have been said to have a "chilling effect"[41] on freedom of speech in Singapore, particularly on speech critical of politicians or public officials.[42] From 1988 to 2005, damages in defamation suits by political leaders—individually and collectively—have ranged from S$200,000 to S$8 million.[43] Generally, according to the Court of Appeal, defaming a political leader is "a serious matter in Singapore because it damages the moral authority of such a person to lead the people and the country".[44]

Indeed, the Singapore judiciary places a greater emphasis on the official political positions occupied by government leaders in defamation actions; non-governing politicians receive significantly less in damages.[45] The Court of Appeal explained thus:[46]

> Singapore courts have consistently awarded higher damages to public leaders than other personalities for similar types of defamation because of the greater damage done not only to them personally, but also to the reputation of the institution of which they are members. The expression 'public leaders' in this context would be a reference to political and non-political leaders in the Government and public sector and private sector leaders who devote their careers and lives to serving the State and the public.

The highest court in Singapore justified the quantum of damages assessed for defaming a politician, especially a Prime Minister or a Cabinet Minister, as follows:[47]

> Public leaders are generally entitled to higher damages also because of their standing in Singapore society and devotion to public service. Any libel or slander of their character with respect to their public service damages not only their personal reputation, but also the reputation of Singapore as a State whose leaders have acquired a worldwide reputation for honesty and integrity in office and dedication to service of the people.

In sum, this exaltation of the political public figure to a reverential status has led legal commentator Tsun Hang Tey to remark that the "Singapore judiciary has

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40 Tey, *supra* note 24 at 458.

41 *Ibid.*

42 *Ibid*. Academic commentator Andrew Kenyon explains that the "concept of a chilling effect seeks to capture the idea that some socially valuable speech is not made because speakers feel threatened by the risks of legal liability": Andrew T. Kenyon, "Investigating Chilling Effects: News Media and Public Speech in Malaysia, Singapore, and Australia" (2010) 4 International Journal of Communication 440 at 442.

43 *E.g.*, *Lee Kuan Yew v. Seow Khee Leng* [1988] 2 S.L.R.(R.) 252 (H.C.); *Jeyaretnam*, *supra* note 11; *Lee Kuan Yew v. Vinocur John and others* [1996] 1 S.L.R.(R.) 840 (H.C.); *Tang Liang Hong*, *supra* note 11; *Lee Kuan Yew v. Chee Soon Juan* [2005] 1 S.L.R.(R.) 552 (H.C.); *Lee Hsien Loong v. Singapore Democratic Party*, *supra* note 23.

44 *Lim Eng Hock Peter v. Lin Jian Wei* [2010] 4 S.L.R. 357 at para. 13 (C.A.) [*Lim Eng Hock*]. See also David Tan, "Defaming a Political Leader is a Serious Matter in Singapore" (2011) 16 Media & Arts Law Review 39 at 45-46.

45 *E.g.*, *Chiam See Tong v. Ling How Doong and others* [1996] 3 S.L.R.(R.) 942 (H.C.); *A Balakrishnan and others v. Nirumalan K Pillay and others* [1999] 2 S.L.R.(R.) 462 (C.A.).

46 *Lim Eng Hock*, *supra* note 44 at para. 12.

47 *Ibid.*

managed to turn the public figure doctrine on its head";[48] the Singapore public figure is "twice blessed—once, in enjoying the same protection as [other individuals] when it comes to defamation liability, and twice, in the conferment of much higher damages".[49]

III. The Political Public Figure in a System of Representative Democracy and Responsible Government

A. *Basis for the Australian Implied Freedom of Political Communication*

The landmark judicial recognition in 1992 of an implied constitutional freedom of political communication,[50] based on its indispensability to the efficacious working of the system of representative democracy and responsible government provided by the Australian Constitution, suggests that political communication may have a broad ambit that can embrace the discussion of all matters of public affairs[51] and the "free flow of information and ideas bearing on Commonwealth, State and Territory government, government arrangements and institutions".[52] However, a subsequent unanimous High Court decision in *Lange* anchored the doctrine to the necessary implications from the text and structure of the Australian Constitution,[53] and framed the freedom more narrowly as "freedom of communication between the people concerning political and government matters which enables the people to exercise a free and informed choice as electors".[54] Furthermore, the High Court of Australia has been "reticent about using the language of rights to describe [this] freedom".[55] The Court has emphasised that this Australian implication is negative in character, being a restriction on the exercise of legislative and executive power rather than a source of positive rights.[56]

Under the *Lange* test established by the High Court, a law will be invalid if it "effectively burden[s] freedom of communication about government or political matters" and is not "reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed

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48 Tey, *supra* note 24 at 461.

49 *Ibid*.

50 *Nationwide News Pty. Ltd. v. Wills* (1992) 177 C.L.R. 1 (H.C.A.) [*Nationwide News*]; *Australian Capital Television Pty. Ltd. v. Commonwealth* (1992) 177 C.L.R. 106 (H.C.A.) [*ACTV*]. See also Dan Meagher, "What is Political Communication: The Rationale of the Implied Freedom of Political Communication" (2004) 28 Melbourne U.L. Rev. 438; Adrienne Stone, "Freedom of Political Communication, the Constitution and the Common Law" (1998) 26 Federal Law Review 219.

51 *E.g.*, *ACTV*, *ibid.* at 142; *Theophanous v. Herald & Weekly Times Ltd.* (1994) 182 C.L.R. 104 at 121-123 (H.C.A.) [*Theophanous*].

52 *ACTV*, *ibid.* at 217.

53 *Lange*, *supra* note 7 at 559, 560, 566.

54 *Ibid.* at 560. It is, however, not confined to election periods. See *ibid.* at 561-562. See also *Levy v. Victoria* (1997) 189 C.L.R. 579 at 606 (H.C.A.) [*Levy*].

55 Adrienne Stone, "Australia's Constitutional Rights and the Problem of Interpretive Disagreement" (2005) 27 Sydney L. Rev. 29 at 33. See also *Lange*, *supra* note 7 at 560: "These sections do not confer personal rights on individuals"; *Cunliffe v. Commonwealth* (1994) 182 C.L.R. 272 at 327 (H.C.A.).

56 *E.g.*, *Theophanous*, *supra* note 51 at 125-126; *Lange, supra* note 7 at 560, 567, 575; *Levy*, *supra* note 54 at 622.

system of representative and responsible government".[57] Akin to European jurisprudence, this proportionality test examines a vertical application of this constitutional freedom as a check on the exercise of state powers to restrict communication that contribute to democratic debate and discussion of governmental matters,[58] but the High Court of Australia was not prepared to expand this freedom to the extent of the First Amendment.[59]

In addition, the High Court noted that the "protection of the reputations of those who take part in the government and political life of this country from false and defamatory statements is conducive to the public good".[60] This is a view also echoed by the Singapore judiciary.[61] While eschewing any notion of a positive right to freedom of speech being granted by this implied freedom of political communication, the unanimous decision in *Lange* nevertheless adopts an "extended defence of qualified privilege"[62] where the defendant has to meet the standard of 'reasonableness' which is defined by a number of factors akin to the *Reynolds* list. It has also been observed that the High Court has borrowed much from Strasbourg jurisprudence on the *ECHR*.[63] As a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable "unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue".[64] Furthermore, the defendant is expected to have "sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond".[65] In the context of the implied freedom, the High Court in *Lange* unanimously held that "the common law must conform with the Constitution";[66] while the Court appears unwilling to create any constitutional defences, it has interpreted the common law defence of qualified privilege in a manner that is in harmony with the Australian Constitution.[67] Although this modified qualified privilege in theory has a broad scope in its coverage of political communication, its effect on freedom of speech is far more muted. The *Lange* privilege in fact "imposes fairly onerous conditions upon

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57 *Coleman v. Power* (2004) 220 C.L.R. 1 at 50 (H.C.A.) [*Coleman*] (restating the *Lange* test). See also *Hogan v. Hinch* (2011) 275 A.L.R. 408 at paras. 47, 92 (H.C.A.) [*Hinch*].

58 David Tan & Thomas McCarthy, "Australia—Protecting goodwill and reputation" in Thomas McCarthy, *The Rights of Publicity and Privacy*, 2d ed. (Australia: Clark Boardman Callaghan, 2000) at para. 6:159.

59 The High Court has considered the generous protection accorded to speech under the US Constitution and distinguished First Amendment rights-based jurisprudence as being inapplicable to Australia: *e.g.*, *Lange*, *supra* note 7 at 563-564, 567; *Levy*, *supra* note 54 at 622, 637-638, 644. *Contra* William G. Buss, "Alexander Meiklejohn, American Constitutional Law, and Australia's Implied Freedom of Political Communication" (2006) 34 Federal Law Review 421 at 439-442.

60 *Lange*, *supra* note 7 at 568.

61 See *supra* note 37.

62 *Lange*, *supra* note 7 at 571.

63 Peter Amponsah, *Libel Law, Political Criticism, and Defamation of Public Figures: The United States, Europe and Australia* (New York: LFB Scholarly Publishing, 2004) at 77-78.

64 *Lange*, *supra* note 7 at 575.

65 *Ibid*. See also *Stephens v. West Australian Newspapers Ltd.* (1994) 182 C.L.R. 211 at 252-253 (H.C.A.).

66 *Lange*, *supra* note 7 at 566. See also the discussion of this conformity in Buss, *supra* note 59 at 429-439.

67 *Lange*, *ibid.* at 564-566. See also an examination of the use of common law methodology in cases dealing with freedom of political communication post-*Lange* in Buss, *ibid*. at 435, 450-457.

the defendant and should ensure that the extended defence of qualified privilege is not easily invoked".[68] Like in *Reynolds*, the *Lange* privilege has established a high standard of responsible journalism for the media.

The relevance for Singapore law lies in how the High Court of Australia has viewed the ambit of political communication as necessary in a system of representative government. In *Lange*, the unanimous court held it encompasses relevant information concerning the functioning of government and about the policies of political parties and candidates; communications between electors and the elected representatives, between electors and candidates for election, between the electors themselves; communications concerning the conduct of executive branch officials, including ministers, the public service, statutory authorities and utilities.[69] While one can distinguish the constitutional framework of Singapore from Australia, it is important to note that it is the "national democratic elections [that] provide the basis for the implication"[70] and as such, Singapore does share significant similarities with Australia in this regard. Moreover, the *Singapore Constitution* provides an express grant of a positive right to freedom of speech for the citizens of Singapore, which presents a stronger case for a more robust protection of such communications relevant to a system of representative government under art. 14.

B. *Broader Basis for the Reynolds Privilege*

The House of Lords in *Reynolds*, in explaining the defence of qualified privilege, held that the press had a duty to inform the public about matters of public interest and that the public had a corresponding interest to receive such information. The Law Lords also unanimously rejected 'political speech' as a new subject matter category of qualified privilege. Thus, in English law today, qualified privilege would not attach to the publication of a defamatory article simply because the article concerned political speech. The House of Lords held that a media article would be protected by qualified privilege where the information is "of sufficient value to the public that, in the public interest, it should be protected".[71] Qualified privilege therefore is interpreted more broadly in *Reynolds* than in the traditional qualified privilege defence which pertains to information of public interest that the press had a duty to publish and the public had a corresponding right to know of.[72] It suffices to note here there is significant

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68 Andrew Lynch, "Unanimity in a Time of Uncertainty: The High Court settles its differences in *Lange v. Australian Broadcasting Corporation*" (1997) 6 Griffith L.R. 211 at 217.

69 *Lange*, *supra* note 7 at 560-561. This concept of political communication was also referred to in *Reynolds*. See *Reynolds*, *supra* note 2 at 200. In *Hinch*, *supra* note 57 at para. 49, French C.J. was of the view that "[t]he range of matters that may be characterised as "governmental and political matters" for the purpose of the implied freedom is broad. They are not limited to matters concerning the current functioning of government. They arguably include social and economic features of Australian society".

70 Buss, *supra* note 59 at 427.

71 *Reynolds*, *supra* note 2 at 195.

72 The traditional qualified privilege defence is also known as the duty-interest privilege. See *Adam v. Ward* [1917] A.C. 309 at 334 (H.L.). In *Jameel v. Wall Street Journal Europe Sprl.* [2007] 1 A.C. 359 at paras. 50, 146 (H.L.) [*Jameel*], Lord Hoffmann and Baroness Hale respectively, viewed the *Reynolds* qualified privilege as being of a "different jurisprudential creature" which evolved from the traditional qualified privilege. See also *Loutchansky v. Times Newspapers Ltd.* [2002] Q.B. 783 at para. 35 (C.A.) [*Loutchansky*].

disagreement amongst judges and commentators regarding the precise conceptual basis of the *Reynolds* privilege.[73]

The *Reynolds* privilege in seeking to protect defamatory material of public importance that the defendants have published *responsibly*, regardless of the material's truth or falsity, attaches to publications to the world at large.[74] Thus it can be seen as "conceptually a different species of qualified privilege [from the traditional duty-interest defence]",[75] or as a substantial expansion of the circumstances in which the defence can be satisfied.[76] Even in the absence of art. 10 of the *ECHR*,[77] it is possible to derive a broader qualified privilege defence from the notion of accountability of elected politicians and public officials within a system of representative democracy. In the Privy Council's judgment in *Hector v. Attorney General of Antigua and Barbuda*,[78] the court suggested that:[79]

> In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.

Lord Bridge also thought that the stifling of public criticisms of government officials hindered the citizenry's capacity to make informed electoral choices[80]—a view that is reflected in the *Lange* decision of the High Court of Australia.

Academic commentators Kenyon and Ang have made compelling arguments that the *Reynolds* privilege "is clearly still a form of duty-interest privilege",[81] and that "[w]hat 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".[82] Lord Nicholls, who wrote the leading judgment in *Reynolds*, took as the starting point the need for the common law to assist electors in making informed choices about who should govern their country, and whether the elected were governing well:[83]

> [F]reedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in

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73 For a summary, see Jason Bosland, "Republication of Defamation under the Doctrine of Reportage—The Evolution of Common Law Qualified Privilege in England and Wales" (2011) 31 Oxford J. Legal Stud. 89 at 89-91.

74 Andrew Kenyon, *Defamation: Comparative Law and Practice* (Oxford: University of Cambridge London Press, 2006) at 196.

75 David Price & Korieh Duodu, *Defamation: Law, Procedure and Practice*, 3rd ed. (London: Sweet & Maxwell, 2004) at para. 13.01.

76 *Jameel v. Wall Street Journal Europe Sprl. (No 2)* [2004] E.M.L.R. 11 (C.A.); Kenyon, *Defamation: Comparative Law and Practice*, *supra* note 74 at 202-211.

77 *ECHR*, *supra* note 4, art. 10, states, *inter alia*, that: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".

78 [1990] 2 All E.R. 103 (P.C.).

79 *Ibid*. at 106.

80 *Ibid.*

81 Kenyon & Ang, *supra* note 1 at 278.

82 *Ibid.*

83 *Reynolds*, *supra* note 2 at 200.

> this country. This freedom enables those who elect representatives to Parliament to make an informed choice.

But his Lordship cautioned about placing too much emphasis on freedom of the press, and explained the need for a balanced approach to giving effect to art. 10:[84]

> [I]n the absence of any additional safeguard for reputation, a newspaper, anxious to be first with a "scoop", would in practice be free to publish seriously defamatory misstatements of fact based on the slenderest of materials. Unless the paper chose later to withdraw the allegations, the politician thus defamed would have no means of clearing his name, and the public would have no means of knowing where the truth lay. Some further protection for reputation is needed if this can be achieved without a disproportionate incursion into freedom of expression.

Hence Lord Nicholls set out a list of ten non-exhaustive factors intended to "recalibrate the legal balance between reputation and free speech through altering the scope and strength of defamation law's defences".[85] The ten factors are:[86]

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

Overall, the *Reynolds* privilege appears to be broad as it is not limited to 'political speech', but in effect, it can have a narrower application in that it protects only 'matters of public concern' that is relevant to democratic debate and to electors making an informed choice in a system of parliamentary democracy. Thus it has much in common with the Australian free speech jurisprudence. Finally, despite the potential of the *Reynolds* privilege to develop wider protection for publishing allegations that are made by others,[87] it has been more regularly employed by the English courts to hold the media to a higher standard of responsible reporting.[88] In fact, the media so rarely succeeds in invoking the privilege that it was commented

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84 *Ibid*. at 201.

85 Kenyon, *Defamation: Comparative Law and Practice*, *supra* note 74 at 203.

86 *Reynolds*, *supra* note 2 at 205.

87 See Russell Weaver *et al.*, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Durham: Carolina Academic Press, 2006) at 99-111.

88 See *infra* notes 170-181 and text accompanying.

"[t]here is a danger that this defence is only theoretically available and then only in a perfect world".[89]

C. *Relevance to Interpretation of Art. 14 of the Singapore Constitution*

1. *Review Publishing Co. Ltd. v. Lee Hsien Loong*

The Court of Appeal left many tantalising hints in *Review Publishing* regarding the possible application of *Reynolds* in defamation cases involving a Singapore citizen-defendant.

If accepting as a starting point, the Court's observation that "constitutional free speech in Singapore is conferred on *Singapore citizens* only",[90] then at least textually there are significant similarities in terms of a guarantee of a positive right between art. 14(1)(a) of the *Singapore Constitution* ("every citizen of Singapore has the right to freedom of speech and expression") and art. 10 of the *ECHR* ("Everyone has the right to freedom of expression"). If the development of common law qualified privilege in the United Kingdom may be shaped by art. 10 of the *ECHR*, then it is not tenuous to argue that qualified privilege as it applies to Singapore citizens could also be bolstered by art. 14(1)(a) of the *Singapore Constitution*[91] and guided by English decisions in this area. Although the *Reynolds* privilege is not currently part of Singapore's common law,[92] this article postulates that "a *contemporary* consideration of what the common convenience and welfare of [Singapore] society require"[93] makes a persuasive case for its adoption as a qualified privilege available to Singapore citizens.

It should also be noted that Chief Justice Chan Sek Keong has mooted that the *Reynolds* factors may be taken into account in the award of damages. In particular, Chan C.J. emphasised:[94]

> The *Reynolds* rationale can equally be given effect by holding the defendant liable for defamation but adjusting the quantum of damages payable, with the exact amount to be paid in each case being calibrated by the court in proportion to the degree of care which the defendant has taken (or failed to take) to ensure that what he publishes is "accurate and fit for publication".

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89 Siobhain Butterworth, "Times libel ruling shows Reynolds privilege is of little practical use" *Afua Hirsch's Law Blog, The Guardian* (21 July 2010), online: The Guardian <http://www.guardian.co.uk/law/2010/jul/21/times-libel-ruling-reynolds-defence> (last accessed 5 November 2011).

90 *Review Publishing*, *supra* note 11 at 170 [emphasis in original], referring to the *Singapore Constitution*, art. 14(1)(a).

91 Chan Sek Keong, "Opening Address: Singapore Academy of Law Conference 2011—Developments in Singapore Law 2006-2010" (Opening Address delivered at the Singapore Academy of Law Conference 2011, 24 February 2011), online: Supreme Court of Singapore <http://app.supremecourt.gov.sg/data/doc/ManagePage/3704/Opening%20Address%20by%20Chief%20Justice%20Chan%20at%20the%20SAL%20Conference%202011.pdf> (last accessed 5 November 2011) at para. 14: "freedom of speech in Singapore is also a higher legal order right because it is a constitutional right under [a]rt. 14 of the Constitution".

92 *Review Publishing*, *supra* note 11 at 171.

93 *Ibid.* at 166.

94 *Ibid.* at 187-188. See also Chan, *supra* note 91 at para. 15: "The Court of Appeal in that judgment also suggested that if the *Reynolds* privilege is not accepted as a defence to liability, it can still be accepted as a mitigating factor in damages. I would have thought that any academic commentator would seize on that suggestion and make a meal of it".

With respect, it is an entirely a different matter finding a Singapore citizen not liable for defamation in successfully pleading the *Reynolds* privilege compared to holding a Singapore citizen liable for defamation but lowering the quantum of damages because certain *Reynolds* factors were favourable to the defendant. In any award of damages, courts would naturally examine the mitigating factors. If a Singapore citizen were to publish a matter of public interest relating to allegations of corruption and the suitability of a political public figure for office, had taken comprehensive steps to verify the information, presented the information in a dispassionate and objective manner, and had given the plaintiff an opportunity to comment, such factual circumstances can present a strong case for a successful pleading of the *Reynolds* qualified privilege. To hold the individual liable for defamation and then adjust the quantum of damages, because of the numerous mitigating measures the defendant had taken, does not adequately give effect to "freedom of speech in Singapore… [as] a higher legal order right".[95] On the contrary, such an approach may have the unintended consequence of chilling speech relating to matters of public interest that contributes to a representative democracy.

2. *Democracy vs. Good Government*

Former Prime Minister Lee Kuan Yew explained that if Singapore as a small nation "embarked on any of these romantic ideas, to revive a mythical past of greatness and culture"[96] rather than to avoid "racial conflict, linguistic strife, religious conflict",[97] Singapore would be a failed state.[98] Referring to a "pragmatist"[99] approach to government where Singapore is constantly "fighting for survival"[100] in contrast to a "classical, Western, liberal approach",[101] he revealed that Singapore's extraordinary success is dependent on economic and political alliances based on the nation's "security, stability and predictability".[102] Although Lee maintains that his ideology-free pragmatic approach to running a country is the key to success, he had on occasions subscribed to the virtues of a representative democracy[103] and was instrumental in the adoption of the Singapore National Pledge by the government. The fact that

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95 Chan, *supra* note 91.

96 Interview of Lee Kuan Yew by Leonard Apcar (29 August 2007) in "Excerpts from an Interview with Lee Kuan Yew", online: The New York Times <http://www.nytimes.com/2007/08/29/world/asia/29iht-lee-excerpts.html?ref=asia> (last accessed 5 November 2011).

97 *Ibid.*

98 *Ibid.* Lee Kuan Yew stepped down as Prime Minister in 1990 and was appointed Senior Minister and then reappointed Minister Mentor from 2004-2011. Lee has stepped down from the Cabinet after the 2011 General Elections.

99 *Ibid.* See also Koh, *supra* note 14 at 356-366.

100 *Ibid.*

101 *Ibid.*

102 *Ibid*.

103 Minimally, Lee believed in a government of elected parliamentarians who would be accountable to the electorate, and that a Western-style Westminster system of parliamentary democracy will have to be adjusted to fit the needs and requirements of Asian societies with an emphasis on good government. See *e.g.*, Alex Josey, *Lee Kuan Yew: The Crucial Years* (Singapore: Times Books International, 1968) at 65-71; Lee, *supra* note 19 at 547-549; Lee Kuan Yew, "What People Want is Good Government" (Keynote address delivered at the Create 21 Asahi Forum, 20 November 1992) in Han Fook Kwang, Warren Fernandez & Sumiko Tan, *Lee Kuan Yew: The Man and His Ideas* (Singapore: Times Editions, 1998) at 381. However, a pragmatic ideology nonetheless pervades government decision-making. See

Singapore is a representative democracy—in the sense that politicians are elected by the people who represent them in parliament—have been echoed by other members of the Singapore Cabinet.[104] Academic commentator Thio Li-ann has noted that the "free discussion of political matters is integral to a representative democracy, which is how the Singapore government describes the current system".[105] However she does not elaborate whether such a system of representative democracy entails certain constitutional implications for a more limited freedom of political discussion as opposed to a broader notion of freedom of speech in terms of a horizontal application.[106]

At its most basic level, a democracy entails a choice of rulers by the people, where each citizen is entitled to a say in the choice of rulers, and the rulers are in turn accountable to the people.[107] The Singapore National Pledge, recited at numerous public events and school assemblies, is an oath of allegiance to Singapore and the ideals that it embodies. It was written by one of Singapore's founding fathers, Sinnathamby Rajaratnam, in 1966, after Singapore's independence and was revised by the then-Prime Minister Lee Kuan Yew and subsequently approved by the Cabinet:[108]

> We, the citizens of Singapore,
> pledge ourselves as one united people,
> regardless of race, language or religion,
> *to build a democratic society*
> based on justice and equality
> *so as to achieve happiness, prosperity and*
> *progress for our nation.*

The national commitment to "build a democratic society" as a means to achieving the articulated ends as enshrined in the Singapore National Pledge is a significant

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Beng-Huat Chua, *Communitarian Ideology and Democracy in Singapore* (New York: Routledge, 1995) at 57-78.

104 See *e.g.*, Sing., *Parliamentary Debates*, vol. 73, col. 1720 at 1726 (16 May 2001). See also *Shared Values, supra* note 15 at paras. 29, 47, 48, 51.

105 Thio, "Singapore: Regulating Political Speech and the Commitment "to Build a Democratic Society"", *supra* note 9 at 522.

106 Nonetheless it is likely that Thio would support the interpretation of art. 14 "in a manner which recognises the higher normative force [that] a constitutional liberty possesses": Thio, "The Virtual and the Real: Article 14, Political Speech and the Calibrated Management of Deliberative Democracy in Singapore", *supra* note 11 at 30. But it is perhaps subject to a qualifier that "a distinction must be drawn between political speech which promotes democratic debate and truth, and political speech which undermines these objectives by proffering falsehood, malicious aspersions and misinformation": *supra* note 11 at 41.

107 See Christine Sypnowich, "Ruling or Overruled? The People, Rights and Democracy" (2007) 27 Oxford J. Legal Stud. 757 at 765. Other more sophisticated and developed democracies—or idealised democracies—may require adherence to principles of liberty, egalitarianism and reciprocity. *E.g.*, Ronald Dworkin, *A Bill of Rights for Britain* (London: Chatto & Windus, 1990) at 35; Wil Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (New York: Cambridge University Press, 2007) at 106-109; Amy Guttman & Dennis Thompson, *Democracy and Disagreement* (Harvard: Harvard University Press, 1996) at 93. For a description of different forms of democracy, including the meaning of a "pragmatic democracy", see Amponsah, *supra* note 63 at 9-17.

108 National Heritage Board, "The National Pledge", online: <http://mystory.sg/content/1567> (last accessed 5 November 2011).

indication that the establishment of a "democratic society" in Singapore is quintessential to the achievement of "happiness, prosperity and progress" for the nation. One of the five stars on the Singapore flag also symbolises democracy.[109] Although such declarations are non-legal in nature, the widespread public recital of the Pledge, and its unequivocal endorsement by the Singapore government, at a plethora of national events and occasions demonstrates the unique consensual nature of the Pledge that arguably has attained the status of a social compact: that the citizens of Singapore, including the government, are committed to *build a democratic society*. This democratic society envisaged is by no means identical to a Western liberal democratic model, but is shaped by "Asian values" and the priority to ensure a system of "good government".[110] At the bare minimum, one should accept that,

> [a]t a pragmatic level, freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy…This freedom enables those who elect representatives to Parliament to make an informed choice, regarding individuals as well as policies, and those elected to make informed decisions.[111]

The need to maintain "good government" and "good governance" has been consistently emphasised by the political leaders and senior public officials of Singapore.[112] Lee Kuan Yew himself thought that this represented a government which was "honest, effective and efficient in protecting its people, and allowing opportunities for all to advance themselves in a stable and orderly society".[113] Ambassador-at-Large Tommy Koh argued that indicators of good government included "wise and honest political leaders; a competent and clean bureaucracy [and] social policies in such fields as housing, education and health care that make every citizen feel a stakeholder".[114]

If a good government "accepts the obligation to face the electorate",[115] then this accountability that is quintessential to good governance leads inevitably to the electorate being able to communicate matters relating to good government and governance amongst themselves and with the political leaders. The citizens' desire for a shift to a more participatory democracy is perceptible. The recent Singapore parliamentary elections, in which the People's Action Party (PAP) lost a historic 6 seats, clearly illustrated the demand of the electorate for greater accountability and more

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[109] See *Shared Values, supra* note 15 at para. 51. The other four stars represent equality, peace, progress and justice.

[110] See Han Fook Kwang, Warren Fernandez & Sumiko Tan, *Lee Kuan Yew: The Man and His Ideas* (Singapore: Singapore Press Holdings, 1998) at 87-101, 380-383. It has also been emphasised on numerous occasions by Lee Kuan Yew that Singapore is built on a system of good government by *good* men.

[111] *Reynolds*, *supra* note 2 at 200. See also text accompanying note 83.

[112] It was also proposed by academic commentator Jon Quah that national value of "honest government", as well as "compassion for the less fortunate", be included to supplement the four Shared Values. See Jon Quah, "Searching for Singapore's National Values" in Jon Quah, ed., *In Search of Singapore's National Values* (Singapore: Institute of Policy Studies, 1990) 91 at 98-101.

[113] Lee, "What People Want is Good Government", *supra* note 103 at 380.

[114] Koh, *supra* note 14 at 208, 365 (explaining the elements of "good governance").

[115] *Ibid.*

active involvement in government.[116] Academic commentator Alan Chong noted that "the people are sending a strong message to the PAP: Listen to us".[117] In his post-election press conference, Prime Minister Lee Hsien Loong conceded that this election "marks a distinctive shift in our political landscape",[118] and that "many [Singaporeans] wish for the Government to adopt a different style and approach to government, in keeping with a new generation and a new era which we're living in".[119] PM Lee later promised that the ruling party would evolve to accommodate more views and citizen participation, and said "[n]ever forget we're the servants of the people, not their masters… Never lord it over the people we're looking after and serving".[120] The promised transformation of the PAP is an unequivocal signal that "the balance struck on 16 September 1963 between constitutional free speech and protection of reputation"[121] is unlikely to remain the same today in the light of the events after the May 2011 elections. Perhaps this is the "evidence of a change in our political, social and cultural values"[122] that would satisfy the Court of Appeal "that change [to the defence of qualified privilege] is necessary so as to provide greater protection against the existing law of defamation for defendants where the publication of matters of public interest is concerned".[123]

3. *Neo-Confucianism and Good Government*

There is no real need to argue for freedom of speech from a liberal democratic philosophy. Even from a neo-Confucianist perspective, one must understand that the five Confucian paradigms of human relationships are premised on respect being shown according to specific norms of behaviour called "rites" (*li*) which exist as a social constitution that is preferable to governmental enforcement of laws (*fa*). In the Confucian view, especially as expounded by his follower Mencius, the cultivation of personal virtue (*ren*), expressed through voluntary adherence to *li* should be sufficient to order social activity without the interference of *fa*.[124] Confucianism does not support a highly interventionist state; on the contrary, communitarian goals are to be promoted through the cultivation of personal virtue and the practice of rites within what Mencius describes as a "cooperative community".[125] If one wants to make a coherent and intellectual connection between Confucianism with communitarian Asian values, then we will have to accept a statist conception of society with

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[116] See *e.g.*, Zuraidah Ibrahim, "81-6: Workers' Party wins Aljunied GRC; PAP vote share dips to 60.1%" *The Sunday Times* (8 May 2011) 1, 4.

[117] "PAP's share of vote declines again" *The Sunday Times* (8 May 2011) 13.

[118] "Pledge to serve responsibly and humbly" *The Sunday Times* (8 May 2011) 3.

[119] *Ibid.*

[120] "3Ps behind PAP's image problem" *The Straits Times* (27 May 2011) A28.

[121] *Review Publishing*, *supra* note 11 at 178.

[122] *Ibid.*

[123] *Ibid.*

[124] See William Theodore De Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective* (Cambridge: Harvard University Press, 1998) at 17-40. See generally, Mencius, *The Works of Mencius*, trans. by James Legge (New York: Dover Publications, 1970).

[125] De Bary, *supra* note 124 at 33. See also Jeremy Paltiel, "Cultural and Political Determinants of the Chinese Approach to Human Rights" in Errol Mendes & Anne-Marie Traeholt, eds., *Human Rights: Chinese and Canadian Perspectives* (Ottawa: Ottawa University Press, 1997) at 25.

an emphasis on participatory community. It would be a misunderstanding of Confucianism to insist on the right of the state to act on behalf of the people as a whole (*gong*), often at the expense of the individual (*si*), purporting to find its mandate in the enforcement of rites (*li*). The development of the community compact in a later neo-Confucian tradition tended to misappropriate *li* and calcify them in *fa*, which is characteristic of a more authoritarian and bureaucratic state.

Indeed neither Confucius nor Mencius explicitly advocated freedom of expression, but it has been pointed out that "a Confucian perspective would have a reason, albeit an *instrumental* one, to endorse freedom of expression".[126] They both saw the value of public criticism of the ruler and those holding public office as conducive to prevent those in power from indulging in wrongdoing and to the pursuit of *ren*.[127] The traditional Confucian preference of rites over laws, the glaring weakness in its approach to government insofar as it relied on the inherent goodness of the *junzi* and on the moral restraints of ritual and benevolence to curb the excesses of autocratic power has resulted in a neo-Confucianist movement that attempts to adapt Confucianism to the realities of political life. In the late 19^{th} century, Liang Qichao's journal *Renewing the People (Xinmin Congbao)* interpreted Confucian political doctrine to emphasise that the people as a 'new citizenry' possessed rights (*quanli*) both individually and collectively, with a consciousness of its own identity and actively participating in the determination of its own destiny in a world of many contending peoples. This form of Confucian constitutionalism emphasises accountability and the value of public discussion of governmental matters (*gongyi*) and the discussion of learning (*jiangxue*).[128] Minimally, the model of good government and good governance adopted by the Singapore government—reinforced in part by a commitment to build a democratic society, and in part by notions of Confucian communitarian ideology—necessitates *minimally* a recognition and protection of the freedom of speech that relates to communications pertaining to the conduct of the elected *junzi* and *gongyi*.

The Australian free speech jurisprudence is therefore instructive. Even in the absence of an express free speech provision like art. 10 of the *ECHR* or art. 14 of the *Singapore Constitution*, the High Court of Australia held that it was necessary to find an implied constitutional freedom of communication in respect of government and political matters which accords an analogous but much narrower right to the press to report matters of public interest.[129] In fact, the High Court of Australia has stated that unlike the *Constitution of the United States*, the *Constitution of Australia* does not create rights of communication; the freedom protected is not freedom to communicate, but "a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters

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[126] Joseph Chan, "A Confucian Perspective on Human Rights for Contemporary China" in Joanne Bauer and Daniel Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999) 212 at 228 [emphasis added].

[127] *Ibid.* at 229.

[128] De Bary, *supra* note 124 at 109-116.

[129] In *ABC v. Lenah Game Meats Pty. Ltd.* (2001) 208 C.L.R. 199 at 283, 285 (H.C.A.), Kirby J. also pointed out that the US First Amendment "has no counterpart in the Australian Constitution" and that analogous First Amendment principles have been rejected by both the High Court and the House of Lords; the public interest in free speech will not always trump individual interests.

relevant to the system of representative and responsible government".[130] The High Court in a unanimous and joint opinion framed the implied freedom narrowly, saying that "each member of the Australian community has an *interest* in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia".[131]

Framed in this manner, with the basis of freedom of speech fundamentally originating from its necessity in a system of representative democracy and responsible government, free speech may be properly circumscribed by other competing community interests and *yet* be given adequate breathing space to robust political debate and the communication of information about political and government matters consistent with democratic values.

In Singapore, the "dominant community interest is invariably identified with assuring respect for the reputations of politicians and public institutions",[132] but this does not mean that one has to abandon the community interest in robust political debate and political communication which are implicit in the wording "*to build a democratic society*" as enshrined in the National Pledge. In fact, the Pledge strengthens the argument that art. 14(2) of the *Singapore Constitution* ought to be interpreted in the context of this national commitment to democracy. Koh concedes that despite a Singaporean "culture favouring consensus-building", the nation nonetheless subscribes to "a form of participatory democracy".[133] Moreover, as McHugh J. points out in *Stephens v. West Australian Newspapers Ltd.*:[134]

> In the last decade of the twentieth century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials.

These observations are equally pertinent to Singapore, especially where voting is compulsory for citizens under the *Parliamentary Elections Act*.[135] Furthermore, as Anne-Marie Slaughter persuasively argues, there is an underlying "simple desire [amongst the highest appellate courts of any jurisdiction] to look around the world

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[130] *Levy*, *supra* note 54 at 622 (McHugh J.). See also *Levy*, *supra* note 54 at 594 (Brennan C.J.) and 641 (Kirby J.).

[131] *Lange*, *supra* note 7 at 571.

[132] Thio, "Singapore: Regulating Political Speech and the Commitment "to Build a Democratic Society"", *supra* note 9 at 523.

[133] Koh, *supra* note 14 at 208.

[134] (1994) 182 C.L.R. 211 at 264 (H.C.A.).

[135] *Parliamentary Elections Act* (Cap. 218, Rev. Ed. Sing. 2011) [*PEA*], s. 43. See also the *Singapore Constitution*, *supra* note 6, art. 39(1)(a): "Parliament shall consist of—such number of elected Members as is required to be returned at a *general election by the constituencies* prescribed by or under any law made by the Legislature" [emphasis added].

for good ideas"[136] and this reflects "a spirit of genuine transjudicial deliberation within a newly self-conscious transnational community".[137] Slaughter thought that when a "core judicial function… to protect individuals against abuses of state power"[138] is engaged, courts may well "feel a particular common bond with one another"[139] as they have to determine "the appropriate level of protection in light of a complex matrix of historical, cultural, and political needs and expectations";[140] however, "[a]ctual decisions must be highly individualized".[141] Hence, "constitutional cross-fertilization"[142] is a perfectly legitimate process in an era of globilisation that allows courts to import ideas from other jurisdictions and benefiting from "comparative deliberation"[143] when adapting them to the particular circumstances of their jurisdictions.

D. *Implications for Defamation Laws in Singapore*

1. *Interpreting the Common Law to Give Effect to Art. 14(1)*

The author does not suggest that Singapore ought to embrace either the *Reynolds* privilege or the *Lange* privilege in its entirety. Indeed the historical, geographical, political, social and cultural circumstances of Singapore are markedly different from England or Australia. However, they do share a common commitment to a system of representative democracy and responsible government, insofar as citizens requiring information relating to matters of public interest and government matters so as to be able to competently exercise their votes. The *Lange* privilege contains elements present in the *Reynolds* list of ten non-exhaustive factors, and will not be examined separately here.[144] But Singapore Law Minister Kasiviswanathan Shanmugam's recent unequivocal rejection of both privileges makes the incorrect assumption that more robust democratic debate is the only goal that the *Reynolds* or *Lange*-type privileges seek to attain.[145] On the contrary, such privileges improve the

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136 Anne-Marie Slaughter, *A New World Order* (New Jersey: Princeton University Press, 2004) at 78.

137 *Ibid.*

138 *Ibid.* at 79-80.

139 *Ibid.*

140 *Ibid.*

141 *Ibid.*

142 *Ibid.* at 69-79. See also Christopher McCrudden, "A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights" (2000) 20 Oxford J. Legal Stud. 499; Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74 Ind. L.J. 819.

143 *Supra* note 136 at 75. See also Frederick Schauer, "The Politics and Incentives of Legal Transplantation" in Joseph Nye & John Donahue, eds., *Governance in a Globalizing World* (Virginia: R. R. Donnelly and Sons, 2000) 253 at 256-258.

144 *Lange*, *supra* note 7 at 571-575.

145 Kasiviswanathan Shanmugam, "The Role of the Media: Singapore's Perspective" (Speech at Inaugural "A Free Press for a Global Society" Forum, 4 November 2010), online: Ministry of Law, Singapore <http://app2.mlaw.gov.sg/News/tabid/204/Default.aspx?ItemId=515> (last accessed 5 November 2011); Question and Answer Session with Kasiviswanathan Shanmugam, Minister for Home Affairs and Minister for Law and Moderator Frederick Schauer, Distinguished Professor of Law, University of Virginia Law School (4 November 2010) at Inaugural "A Free Press for a Global Society" Forum, online: Ministry of Law, Singapore <http://app2.mlaw.gov.sg/LinkClick.aspx?fileticket=AR3FeMrxRJc%3d&tabid=204> (last accessed 5 November 2011).

essential flow of communication on matters of public interest and government matters to voters.

This article proposes that the Singapore Court of Appeal consider adopting or adapting the *Reynolds* privilege to give effect to art. 14(1)(a) of the *Singapore Constitution* by extending it to any Singaporean—whether an ordinary citizen and journalist—when articulating one's views on matters of public interest relating to government and governance. As legal commentator William Buss observes, at some point, the common law might fall short of what the Constitution requires.[146] The court should then interpret the common law to fit the requirements of the Constitution.[147]

Chief Justice Chan Sek Keong indicated in a recent extra-judicial address that the judiciary is the "lynchpin of a democratic society and the rule of law".[148] Hence, even under the narrowest literal construction of art. 14 of the *Singapore Constitution*, in the absence of the Singapore Parliament passing a law that circumscribes the defence of qualified privilege, it is open to the Court of Appeal to develop the defence of qualified privilege under the common law in the direction of the *Reynolds* privilege *and* still accord greater weight to reputation in recognition of Singapore's purportedly neo-Confucianist culture. While the Court in *Review Publishing* conceded that "the *rationale* behind the *Reynolds* privilege… is equally relevant to our citizens because of art. 14(1)(a) of the Singapore Constitution",[149] it stopped short of declaring that the adoption of the *Reynolds* factors—or a combination thereof—would be appropriate to ensure that the citizens of Singapore are enable to exercise their constitutional right to express views on matters of public interest relating to government and governance.

Despite a general disavowal of any adherence to an ideology by the political leaders of Singapore, the public commitment to "build a democratic society" as evidenced in the Singapore National Pledge presents good grounds to accord greater protection to speech relating to government and governance. The Court of Appeal has conceded that:[150]

> We should, however, clarify that this does not mean that public leaders may not be criticised at all. They certainly should be strongly—and perhaps even mercilessly—criticised for incompetence, insensitivity, ignorance, and any number of other human frailties where the critique does not go to the extent of besmirching their integrity, honesty, honour, and such other qualities that make up the reputation of a person.

Undoubtedly *more* weight can be given to the reputation of honourable men whose vocation of serving the public is their "whole life",[151] but the current judicial

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146 Buss, *supra* note 59 at 435.

147 See *ibid.* at 434-435; Stone, "Freedom of Political Communication, the Constitution and the Common Law", *supra* note 50 at 227-245; Adrienne Stone, "The Australian Free Speech Experiment and Scepticism about UK Human Rights Act" in Tom Campbell, Keith Ewing & Adam Tomkins, eds., *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 391 at 395-399.

148 Chan Sek Keong, "Securing and Maintaining the Independence of the Court in Judicial Proceedings" (2010) 22 Sing. Ac. L.J. 229 at 230, citing Lydia Tiede, "Judicial Independence: Often Cited, Rarely Understood" (2006) 15 J. Contemp. Legal Issues 129 at 129.

149 *Review Publishing*, *supra* note 11 at 175.

150 *Lim Eng Hock*, *supra* note 44 at para. 13.

151 *Ibid*., citing *Crampton v. Nugawela* (1996) 41 N.S.W.L.R. 176 at 193 (N.S.W.C.A.).

approach to criticisms of elected public figures in defamation claims does not give sufficient weight to a constitutional norm that guarantees the freedom of speech. Presently, s. 12 of the *Defamation Act*[152] sets out particular circumstances where qualified privilege shall not apply; it does not however define the defence of qualified privilege, thus leaving it to the courts to interpret qualified privilege in the common law.[153] Section 12(4) states that "Nothing in this section shall be construed as limiting or abridging any privilege subsisting… immediately before the commencement of this Act".[154]

Since the defence of qualified privilege has existed in the common law before the commencement of the *Defamation Act*, it is part of the common law in Singapore.[155] One should not ask the question whether the *Reynolds* qualified privilege is a natural development of the common law, or a different jurisprudential creature that grew out of art. 10 of the *ECHR*.[156] This is an incorrect inquiry. One should reason from first principles whether the common law of qualified privilege adequately gives effect to art. 14(1) of the *Singapore Constitution*, and in the light of developments over the last 45 years since Singapore declared its independence, *and* Singapore's commitment to building a democratic society based on a system of representative government, whether a multi-factorial approach to the common law defence of qualified privilege is applicable today. As observed by the *Lange* court,

> [t]he issue raised by the Constitution in relation to an action for defamation is whether the immunity conferred by the common law, as it has been traditionally perceived, or, where there is statute law on the subject the immunity conferred by statute, conforms with the freedom required by the Constitution.[157]

The *Lange* court also observed that the common law has

> to be developed in response to changing conditions… [such as] the increase in literacy, the growth of modern political structures… and the modern development in mass communications, especially the electronic media, now demand the striking of a different balance from that which was struck at [the time of federation].[158]

In the same manner in which the Court of Appeal has developed the common law in areas like negligence, in rejecting past authorities and articulating a universal test

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152 *Defamation Act* (Cap. 75, 1985 Rev. Ed. Sing.), s. 12.

153 One should also note other legislative limitations on the application of qualified privilege pertaining to publication in respect of any such report or matter as stipulated in Part II of the Schedule (*Ibid.*, s. 12(2)) and to statements in elections (*Ibid.*, s. 14).

154 *Supra* note 152.

155 See *Application of English Law Act* (Cap. 7A, 1994 Rev. Ed. Sing.), s. 3. See also *Pang Koi Fa v. Lim Djoe Phing* [1993] 2 S.L.R.(R.) 366 at para. 22 (C.A.):

> The courts in Singapore are not strictly bound by decisions of the English courts in the sense that the courts in England are not part of the hierarchy of courts in Singapore, this being especially true since legislative amendments have limited appeals to the Judicial Committee of the Privy Council; nonetheless, in respect of decisions in common law, particularly in the area of tort in general and negligence in particular, decisions of the highest court in England should be highly persuasive if not practically binding.

156 *Review Publishing*, *supra* note 11 at 173-176.

157 *Lange*, *supra* note 7 at 565.

158 *Ibid.*

that applies to all factual scenarios,[159] the defence of qualified privilege ought to be reconsidered in a similar fashion. This has been alluded to by the Court of Appeal in *Review Publishing* when it opined that

> there is nothing in [a]rt. 14(2)(a) of the Singapore Constitution and the Defamation Act (1985 Rev Ed) which precludes our courts from developing the common law of defamation for 'the common convenience and welfare of society' in keeping with Singapore's prevailing political, social and cultural values.[160]

2. *Adapting the Reynolds Factors with an Emphasis on Responsible Journalism*

To apply or not to apply *Reynolds* is the wrong question; its answer will inevitably lead to cultural relativist arguments that it is inappropriate due to Singapore's "unique" circumstances. A more meaningful examination is whether the factors articulated in *Reynolds* are relevant to a common law defence of qualified privilege in Singapore in the context of an express positive right granted to citizens under art. 14(1) of the *Singapore Constitution* and in the absence of a test in the *Defamation Act* prescribed by the Singapore Parliament.

The *Reynolds* privilege contains a number of factors to which the Singapore courts can accord different weight or emphasis.[161] The *Reynolds* responsible journalism standard is not as broad as the Court of Appeal in *Review Publishing* made it out to be; it is focused on ensuring that journalists take reasonable steps to check on the accuracy of any allegations that they report.[162] According to the Privy Council, this defence was also capable of applying to "publications made by *any person* who published material of public interest in any medium, so long as the conditions framed by Lord Nicholls as being applicable to 'responsible journalism' are satisfied".[163] This focus is in line with the judicial emphasis on responsible reporting and comment in Singapore. In *Jameel*, Lord Bingham explained that:[164]

> The rationale of [the responsible journalism] test is… that there is no duty to publish and the public have no interest to read material which the publisher *has not taken reasonable steps to verify*… [T]he publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.

As Kenyon and Ang have also pointed out, the *Reynolds* privilege is only different from the traditional duty-interest privilege

> 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 [more closely] on the material at issue and the underlying circumstances,

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159 *E.g.*, *Spandeck Engineering (S) Pte. Ltd. v. Defence Science & Technology Agency* [2007] 4 S.L.R.(R.) 100 at 130 (C.A.).

160 *Review Publishing*, *supra* note 11 at 176.

161 *Reynolds*, *supra* note 2 at 205.

162 *E.g.*, *Flood v. Times Newspapers Ltd.* [2010] EWCA Civ 804 [*Flood*].

163 *Seaga v. Harper* [2009] 1 A.C. 1 at 9 (P.C.).

164 *Jameel*, *supra* note 72 at 377 [emphasis added].

> in determining whether an occasion of privilege exists, more than earlier forms of the defence.[165]

One should also be cognisant that the *Reynolds* privilege does *not* necessarily result in greater freedom for the media or any individual to publish baseless allegations or scandalous falsehoods. All the circumstances surrounding the verification of sources, gathering of information, manner and tone of its reporting and opportunity to reply for the person against whom an allegation has been made are material to the privilege being successfully argued.[166] In fact, the *Reynolds* privilege skews the emphasis towards the protection of reputation, places an onerous burden on the publisher to prove that he or she has behaved responsibly and discourages publication of information that is likely to be false. Moreover, as observed by academic commentator Ian Loveland, the right to reply component, especially critical to the success of the *Lange* privilege, "enhances the flow of pertinent information to the electorate".[167]

Importantly, as demonstrated in *Reynolds*, the failure of the *Sunday Times* to publish Reynolds' side of the story when making serious allegations of political misconduct will not avail the defendant of the qualified privilege. In *Grobbelaar v. News Group Newspapers*,[168] the defence failed because of the publications' sensational style of reporting, despite the bribery allegations being of great public interest.[169] The *Reynolds* privilege also failed in *James Gilbert Ltd. v. MGN Ltd.*,[170] because the media used unreliable sources, did not ask the claimants about the charge that was made in the publication, faced no real urgency in publishing the material and presented the matters as fact rather than supported allegations. Other cases where the media failed to meet the standards of responsible journalism include *Armstrong v. Times Newspapers Ltd.*[171] and *Galloway v. Telegraph Group*.[172]

Despite the House of Lords' clarification in *Jameel* that the *Reynolds* factors do not represent individual hurdles to be cleared by the media defendant,[173] the lower courts still insist that the media demonstrates high standards in terms of ethics and responsibility before the *Reynolds* privilege would be permitted to stand. Post-*Jameel*, the media lost again in *Flood*,[174] for failing to substantiate allegations that a public servant had abused his position as a police officer by accepting bribes from

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165 Kenyon & Ang, *supra* note 1 at 278.

166 The issues involving trial by jury as highlighted by the English courts and academic commentators will be of limited relevance in a Singapore context of trial by judge. *E.g.*, *Loutchansky*, *supra* note 72; *Gregson v. Channel Four Television* [2002] EWCA Civ 941; Kenyon, *Defamation: Comparative Law and Practice*, *supra* note 74 at 209-211; Paul Mitchell, *The Making of the Modern English Law of Defamation* (Oregon: Hart Publishing, 2000) at 117.

167 Ian Loveland, *Political Libels: A Comparative Study* (Oregon: Hart Publishing, 2000) at 183. See also John Hayes, "The Right to Reply: A Conflict of Fundamental Rights" (2004) 37 Colum. J.L. & Soc. Probs. 551 at 576, 582-583; Jerome Barron, "The Right of Reply to the Media in the United States—Resistance and Resurgence" (1993) 15 Hastings Comm. & Ent. L.J. 1 at 11.

168 [2001] 2 All E.R. 437 at 445-450, 465, 483-485 (H.L.).

169 See also Paul Robertshaw, "The Review Roles of the Court of Appeal: *Grobbelaar v News International*" (2001) 64 Mod. L. Rev. 923.

170 [2000] E.M.L.R. 680 (H.L.).

171 [2004] EWHC 2928.

172 [2006] EWCA Civ 17 (failing to ask a potential claimant about the serious charges).

173 *Jameel*, *supra* note 72 at 377, 384.

174 *Supra* note 162. See also *Charman v. Orion Publishing Group Ltd.* [2007] All E.R. 622 (Q.B.D.); *Malik v. Newspost Ltd.* [2008] Q.B. 502; *Radu v. Houston* [2009] E.M.L.R. 13 (C.A.).

some of Russia's most wanted suspected criminals in return for selling to them highly confidential Home Office and police intelligence. The English Court of Appeal was unanimous in emphasising the importance of verifying information, especially in regard to accusing a public official of misconduct. In particular, Moore-Bick L.J. was of the view that:[175]

> [R]esponsible journalism requires a recognition of the importance of ensuring that persons against whom serious allegations of crime or professional misconduct are made are not forced to respond to them before an investigation has been properly carried out and charges have been made. It is very easy for allegations of impropriety or criminal conduct to be made, to the police, professional bodies and others who may have a duty to investigate their truth, out of malice, an excess of zeal or simple misunderstanding. If the details of such allegations are made public, they are capable of causing a great deal of harm to the individual concerned, since many people are inclined to assume that there is 'no smoke without fire'.

The English Court of Appeal has been cautious about "tipping the scales too far in favour of the media"[176] and the courts, including the House of Lords, have observed that:[177]

> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever.

When serious allegations are made about a fairly senior public servant, like in *Flood* regarding a Detective Sergeant in the Extradition Unit of the Metropolitan Police, the court is likely to apply the *Reynolds* factors with a view that "the more serious the charge, the more the public is misinformed and the individual harmed".[178] In *Flood*, the court found that little was done by the journalists in respect of "steps taken to verify the information"[179] and the published allegations were "no more than unsubstantiated unchecked accusations, from an unknown source, coupled with speculation".[180] The court concluded that a qualified privilege defence which results in a "trial by press without proper safeguards… is clearly not in the public interest".[181]

In a similar vein, if accusations were made against senior members of the Singapore government, the subject matter would no doubt be a matter of public

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[175] *Flood*, *supra* note 162 at para. 104.

[176] *Ibid.* at para. 63. Legal commentator Andrew Kenyon in his comprehensive analysis of English cases and interviews with practitioners observes that "media defendants have failed on *Reynolds* privilege in almost all the cases [but] the reasoning in the decisions does not suggest that *Reynolds* privilege is narrow in its scope, nor necessarily weak in its strength". See Andrew Kenyon, *Defamation: Comparative Law and Practice*, *supra* note 74 at 209.

[177] *Reynolds*, *supra* note 2 at 201; *Flood*, *supra* note 162 at para. 43.

[178] *Flood*, *ibid.* at para. 68, quoting *Reynolds*, *ibid.* at 205.

[179] *Flood*, *ibid.* at para. 73.

[180] *Ibid*.

[181] *Ibid.* at para. 104.

interest. Lord Nicholls opined that:[182]

> The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion.

But a broad classification of what is in the public interest does *not* mean the media can publish negligently or recklessly; the media still has to meet the standard of responsible journalism as determined by an evaluation of the *Reynolds* factors. The application of the *Reynolds* factors in an examination of the qualified privilege defence obviates the need for an artificial analysis of the duty-interest criteria, and instead subjects the behaviour of the journalist or publisher to judicial scrutiny. In short, the *Reynolds* privilege does not merely protect responsible journalism; it also *ensures* responsible journalism and comment.

Even if the *Reynolds* factors were applied to three key defamation cases in Singapore that spanned two decades from 1990 to 2010, the defendants would most likely still have been found liable. In a communitarian democracy like Singapore, where a high premium is placed on the reputations of elected political figures, any allegation of impropriety or corruption would be a serious matter.[183] This means that weighing against the other *Reynolds* factors like steps taken to verify the information and whether comment is sought from the plaintiff, the Singapore courts may be justified in requiring more to be done by the defendant compared to a similar situation in the UK.

In *Lee Kuan Yew v. Joshua Benjamin Jeyaretnam*,[184] it was a serious slander in the suggestion by a Singapore citizen, who was also a politician, that the Prime Minister of Singapore had "encouraged or countenanced the suicide for the improper purpose of covering up what, in a full trial, would have been a scandal most embarrassing to the Government and the PAP".[185] While this questioning of the honesty of the PAP Government and the suicide of a government minister following allegations against him of corruption was a "matter of outstanding public interest",[186] the defendant's timing of his utterance at an election rally,[187] his tone when delivering such statements[188] and his failure to include the gist of plaintiff's side of story[189] weighed against the assertion of a qualified privilege. The allegation had also been the subject

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182 *Reynolds*, *supra* note 2 at 205.

183 Tan, *supra* note 44 at 39, 46; *Lim Eng Hock*, *supra* note 44 at paras. 12-13.

184 [1990] 1 S.L.R.(R.) 709 (H.C.).

185 *Ibid.* at para. 34. See also paras. 31, 33, 39, 53, 57.

186 *Ibid.* at para. 36. See also para. 6.

187 *Ibid.* at para. 60: "the defendant chose to wait one-and-a-half years to raise the matter again and uttered the slander".

188 *Ibid.*: "He was up to no good when he built up the aspersions in the speech and then said that Mr Teh Cheang Wan had written to the plaintiff the day before the suicide saying: 'I will do as you advise.' He then paused for the effect on the audience. I totally reject his claim that he was merely asking questions on matters of public importance and exercising his freedom of speech".

189 *Ibid.* at para. 36: "… the public interest required that the plaintiff should say whether he responded at all, and if he did, what his response was, to a letter from the deceased written to the plaintiff on the day before his death and received by the plaintiff the same day in which the deceased said he was willing to accept full responsibility and that he 'would accept any decision which you (the plaintiff) may want to make"'.

of an official investigation which concluded that "there was no complicity and no aiding and abetting by any official of the Ministry or any other Permanent Secretary or Minister or Parliamentary Secretary".[190] Moreover, the circumstances and timing of the slander—in the course of an electioneering speech before a crowd of "about 7,000 who were at a very busy bus interchange and a food centre"[191]—ensured that the imputations made "would in the ordinary way spread and would "snowball" by word of mouth".[192]

In *Goh Chok Tong v. Chee Soon Juan*,[193] it was also a serious allegation by a Singapore citizen at an election rally that the Prime Minister "conceal[ed] from Parliament and the public, information on a $17bn loan made to Indonesia and [continued] to evade disclosure of the loan because he had something to hide".[194] Such an accusation of impropriety was clearly a matter of public interest. Perhaps one may even argue that the defendant made an attempt to seek the plaintiff's comments at the walkabout, albeit a feeble one.[195] However, the defendant had taken no steps at all to verify the information. On the contrary, the defendant later admitted that he "had no basis for making these allegations, and that they were false and untrue".[196] The circumstances and timing of the publication was also calculated to generate wide media coverage of the allegation.[197]

Finally, in *Review Publishing*, the defendant was not a 'citizen of Singapore' and could not avail itself of the constitutional protection of art. 14(1)(a). The defendant would not be entitled to argue the *Reynolds* qualified privilege as proposed in this article. But if the journalist were a Singapore citizen, the *Reynolds* privilege should be available to the individual. In that case, even though the Court of Appeal rejected the application of *Reynolds*, it nevertheless demonstrated that the Appellants were "unlikely to [have been] able to successfully invoke the *Reynolds* privilege as a defence because it [did] not seem that they would [have] satisf[ied] the "responsible journalism" test".[198] Chan Sek Keong C.J. pointed out that "the allegations of (*inter alia*) corruption and abuse of power made against the Respondents in the Article were extremely serious (see the first *Reynolds* factor)",[199] there was "no urgency to publish the Article (see the sixth *Reynolds* factor)",[200] and "the Appellants did not seek the Respondents' comments on the NKF Saga, which formed the fulcrum of

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190 *Ibid.* at para. 14.

191 *Ibid.* at para. 57.

192 *Ibid*.

193 [2005] 1 S.L.R.(R.) 573 (H.C.).

194 *Ibid.* at para. 39.

195 *Ibid.* at para. 7: "When we met Goh Chok Tong this morning during our walkabout, he was there just about 3 or 4 feet away, I asked him, 'Mr Goh, what happened to our money? What happened to this $17 billion?' He wouldn't answer. He just waved us on".

196 *Ibid.* at para. 13. See also paras. 51, 70.

197 *Ibid.* at para. 43: "The statements were made in the presence of members of the public and members of the news media. The defendant must have expected his words to be republished, and had expressly requested that they be covered in the news".

198 *Review Publishing*, *supra* note 11 at para. 258.

199 *Ibid.*

200 *Ibid.* See also para. 171: "The NKF Saga (which featured prominently in the Article) was not new. Furthermore, the Appellants had more than sufficient time to check the accuracy of the allegations contained in the Article before publishing it in FEER, which is a monthly journal".

the Article, before publishing the Article and, naturally, the Article… did not contain the gist of the Respondents' side of the story *vis-à-vis* that issue (see the seventh and eighth *Reynolds* factors)".[201] While Chan C.J. did not elaborate on the other factors, it was clear that the source of numerous other alleged statements of facts was Far Eastern Economic Review (FEER) themselves rather than quotes from an interview,[202] and tone of the FEER article which gave "especial prominence"[203] to the defamatory rhetorical question strongly suggested that FEER was aware of the serious imputations of those words.[204]

IV. Conclusions

This article has argued that the common law of qualified privilege in Singapore should be reviewed to take into account a multi-factorial approach that draws on the *Reynolds* factors. The *Reynolds* privilege offers a better balance between the protection of the reputation of honourable men in politics and freedom of speech in relation to the conduct of these honourable men when holding office. The *Reynolds* privilege should not be construed to supplant the duty/interest test for situations to which that touchstone was intended to apply;[205] it should be seen to supplement that touchstone in order to provide the protection of qualified privilege to statements published to the Singaporean electorate at large on matters of public interest relating to good government and governance. That is, it is simply an extension to the circumstances in which the traditional qualified privilege applies. This extended qualified privilege should also be available to any citizen of Singapore who seeks to comment or publish *responsibly* on such matters. It does not need the crutch of art. 10 of the *ECHR* and can securely stand on its own two feet. Furthermore, it should be noted that the "Law Lords in *Reynolds*—or at least some of them—may well have been influenced by [art. 10], but their decisions can still be seen as anchored in English common law".[206] According to Lord Cooke, *Reynolds* was "less a breakthrough than a reminder of the width of the basic common law principles as to privilege".[207]

It is important to revisit the judgment of Lord Nicholls in *Reynolds*. The basis for adopting the responsible journalism standard in *Reynolds* can be reasoned from what is necessary in a democratic society, even in the absence of art. 10 of the *ECHR*. His Lordship observed that:[208]

> It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any

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[201] *Ibid.* at para. 258.
[202] *Ibid.* at paras. 160, 162, 165.
[203] *Ibid.* at paras. 88, 165.
[204] *Ibid.*
[205] *Contra ibid.* at 136.
[206] Kenyon & Ang, *supra* note 1 at 277.
[207] *McCartan Turkington Breen (a firm) v. Times Newspapers* [2001] 2 A.C. 277 at 301 (H.L.). See also Kenyon & Ang, *ibid.*
[208] *Reynolds*, *supra* note 2 at 200.

> curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment.

With Singapore's commitment "to build a democratic society",[209] albeit a neo-Confucianist communitarian democracy, and bolstered by the free speech guarantee in art. 14(1), the common law of defamation may be more expansively interpreted to include a multi-factorial approach to the qualified privilege defence that draws on the *Reynolds* factors. Even if, as the Singapore Court of Appeal commented, "the balance in Singapore between constitutional free speech and protection of reputation has remained unchanged",[210] this does not preclude a sensible consideration of the *Reynolds* factors while giving due weight to the reputation of honourable men in Singapore.

Indeed there is an "Asian version of a social contract between the people and the state".[211] This social contract, even if argued to be communitarian in nature, nonetheless requires the leaders of the state to be accountable to the people. Good government depends on "good institutions virtuously administered".[212] Even in the Shared Values White Paper released by the Singapore Parliament to explain its governing ideology, it was stated that "[t]he electorate must uphold the democratic process… Elected politicians and career civil servants who are entrusted with authority over their fellow citizens must exercise power responsibly, as trustees of the people".[213]

It is a compelling argument that in the Singapore context of an Asian system of government of "good men",[214] the behaviour of these men should still be subject to appropriate scrutiny by the citizens of Singapore to ensure that they remain "good". Robust debate and rigorous scrutiny should not be confined only to the hallowed chambers of Parliament House. The name of the label we attach to a consideration of the factors articulated in *Reynolds* in relation to a defence in a defamation suit by politicians or unelected public officials is an issue of limited importance. What is important is that Singapore courts now take the opportunity to reflect more carefully on the purposes that the common law ought to serve in a society whose democratic culture has evolved significantly over the last forty-five years.

Lord Nicholls has explained that:[215]

> The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case [and

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209 See text accompanying note 108.

210 *Review Publishing*, *supra* note 11 at 177.

211 Koh, *supra* note 14 at 350.

212 Peter Berkowitz, *Virtue and the Making of Modern Liberalism* (New Jersey: Princeton University Press, 1999) at 163. It is important to note that liberalism is not a monolithic ideology that places the rights of the individual over the cultivation of virtue. Berkowitz, for example, argues that "stability in democracies depends on citizens who can discipline the democratic inclination to do as one pleases so as to defer immediate gratification in the interest of long-term benefits" (at 177), and that in "a liberal polity… it will be necessary for its citizens, both those who do and those who do not occupy political office, exercise virtue" (at 191).

213 *Shared Values*, *supra* note 15 at para. 48. See also Gerald Caiden, "The Problem of Ensuring the Public Accountability of Public Officials" in Joseph Jabbra & O. P. Dwivedi, eds., *Public Service Accountability: A Comparative Perspective* (Connecticut: Kumarian Press, 1988) at 17.

214 *E.g.*, Sing., *Parliamentary Debates*, vol. 63, col. 752 at 815 (1 November 1994) (Lee Kuan Yew), quoted in Han, Warren & Tan, *supra* note 110 at 89.

215 *Reynolds*, *supra* note 2 at 204.

> this] elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression… on all matters of public concern.

At present, nothing in the *Singapore Constitution* or in the *Defamation Act* prevents the Singapore Court of Appeal from broadening the qualified privilege as it applies to publications of matters of public interest regarding issues of good government and good governance. In fact, the Court of Appeal in *Review Publishing* has opened a window of opportunity:[216]

> If our courts answer the key question in the affirmative (*ie*, if they rule in favour of applying the *Reynolds* rationale to the publication of matters of public interest such that greater latitude is given to constitutional free speech at the expense of protection of reputation in this specific context), they will have to go on to consider how the new balance between these two competing interests should be struck. In this regard, it would, in our view, be helpful for our courts to bear in mind the different approaches which other common law jurisdictions have taken in order to give freedom of speech precedence over protection of reputation.

One must also appreciate the Court of Appeal's concern that "it will generally be easier for a defendant who publishes defamatory material of public interest to satisfy the 'responsible journalism' test than to successfully establish a defence of justification and/or fair comment",[217] and that this may "spawn more cases of *irresponsible* journalism being passed off as responsible journalism in the *Reynolds (HL)* sense".[218] But safeguards can easily be put in place to assuage the fear of the slippery slope. It is submitted that since the relative weight placed on reputation of political public figures in Singapore vis-à-vis freedom of speech is clearly different from that in the UK, Singapore courts can therefore accord different emphasis to each of the *Reynolds* factors—for example, an allegation of corruption against a senior public official, which is a very serious charge, must be counterbalanced by, inter alia, thorough steps taken to verify the information, a clear distinction of facts from comments and a publication of the plaintiff's side of the story.

Finally, a consideration of the *Reynolds* factors in Singapore's defamation laws is not incompatible with the Singapore government's view that

> [i]f you make a personal attack of fact against a person's reputation, for example by alleging that he is corrupt, or that he is a liar, or that he embezzled State funds, then you should be prepared to prove it in court. We do not believe that public discourse should degenerate to a base level, by allowing untrue personal attacks. We would like to keep political debate focused on issues. You can attack government policies fiercely. That will not be defamatory. And let the people choose the candidates based on alternative policies.[219]

If the citizens of Singapore are to elect the "honourable men" who are to constitute the "good government" of Singapore, they will need timely and accurate information pertaining to government policies or the conduct of these men to enable them to make

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[216] *Review Publishing*, *supra* note 11 at 183.
[217] *Ibid.* at 187.
[218] *Ibid.*
[219] Shanmugam, "The Role of the Media: Singapore's Perspective", *supra* note 145 at paras. 64, 65.

an informed choice.[220] In effect, the *Reynolds* factors can better enable a flow of information that is published in a *responsible* manner to reach the electorate than the present duty-interest privilege.

Should one embrace the romantic ideology of freedom of speech at all costs regardless of the consequences? The short answer is no. First Amendment jurisprudence with its hyperindividualist and political overtures is unique when compared to the more balanced approaches adopted by other liberal democracies in the European Union and Australia. Even for those who cherish individual liberty, it has been argued that "it is the logic of liberalism which ensures that the care for the necessary *virtues* in liberal democracies must be a delicate balancing act".[221] The general failure in the marketplace of ideas—especially evident in an age where terrorism threats and hate speech, presumably "bad" ideas, loom large and real—militates against a cacophonous culture of expansive speech liberties that devalues communitarian objectives. As Chew points out, "[t]he "Singapore school" can build a new Singaporean individual, characterized by a sense of social and political involvement, initiative, confidence, freedom from fear and love of country".[222] The consideration of the *Reynolds* factors in a qualified privilege defence raised by the citizens of Singapore is compatible with both the *Singapore Constitution* and Singapore's neo-Confucianist communitarian democratic system that emphasises good government and good governance. In October 2010, former Prime Minister Goh Chok Tong explained that:[223]

> In politics, the government encourages feedback and participation. We want to engage you. Singaporeans have become better educated and have higher expectations. This is natural, as is the growing desire of Singaporeans to want more say over matters which affect their lives and future. This is a healthy development.

The balance in Singapore between constitutional free speech and protection of reputation may not have changed significantly,[224] but Singapore's prevailing political, social and cultural values are certainly evolving.[225] No doubt, there is still space for a little bit more speech in this "Garden of Political Istana".[226] By according greater leeway for citizen comments on public officials and public policy, all Singapore citizens can better participate in living in this Neo-Utopia.[227]

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220 *E.g.*, *Reynolds*, *supra* note 2 at 200.

221 Berkowitz, *supra* note 212 at 192.

222 Chew, *supra* note 14 at 948.

223 Goh Chok Tong, (Speech at the NTU Students' Union Ministerial Forum, 29 October 2010), online: Singapore Press Centre <http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/micacsd/speech/S-20101029-1> (last accessed 5 November 2011) at para. 26.

224 *Cf. Review Publishing*, *supra* note 11 at 177.

225 *Ibid.* at 176.

226 Plate, *supra* note 33 at 209.

227 *Ibid.* at 211. Plate describes Singapore as "this era's Neo-Utopia, a living example of getting a place into as utopian a shape as is humanly possible".