KIRIBATI POLITICS AND DEFAMATION:

THE CASE OF *TEATAO TEANNAKI V TEBURORO TITO,*

1994 to 2000

By: David R. James[*]

PROLOGUE

The Republic of Kiribati, a central Pacific Ocean state, is a world of much ocean, about 35 atolls in three far flung archipelagoes (the Gilbert, Line and Phoenix Groups), and 90,000 people. The economy is primarily subsistence fishing and agriculture, the first of which is abundant, the second hard won in sandy droughty ground. The major employer is the Government. The village social structure, with the autochthonous language and culture, is largely intact, and a matter of closely punctuated celebration.

In its Parliament, the *Maneaba ni Maungatabu*, the President or *te Beretitenti*, leads the Government. Since Independence from British Colonial Administration on 12 July 1979, there have been three Presidents of the Republic. Under the written *Constitution* the *Beretitenti* is Head of State and chairman of cabinet. He succeeds to office by way of a second and separate national vote in competition among three or four persons nominated in the *Maneaba* from among its members; the Presidential elections being held immediately after the national vote for members. Government and Opposition are factional groupings, identified into political parties or coalitions, none of which usually project doctrinaire personalities.

A national election takes place every 4 years, but sooner if there is, in the *Maneaba*, a vote of 'no confidence'. There have been two such no confidence dissolutions of the *Maneaba* since Independence. This article considers some of the circumstances surrounding the no confidence dissolution on 24 May 1994 and the defamation actions born of the dissolution issue.

The legal proceedings arising out of the alleged defamation are involved. This article will detail the background to the situation, before turning to the various legal proceedings that occurred in the wake of the alleged defamation. The legal issues that these proceedings raised and a commentary on the law of defamation in Kiribati will follow.

BACKGROUND

The no confidence vote

Teburoro Tito was leader of the Opposition in the *Maneaba* that dissolved in May 1994. He is now the President, having been elected in September 1994 and re elected in November 1998. Prior to politics he was an educator. Teatao Teannaki has been a national elected representative since the beginning of representative government in 1976. Before that he was an inspector of cooperatives. He continues to represent the island of Abaiang in the *Maneaba*. Teannaki was the *Beretitenti* from July 1991 until the May 1994 dissolution.

In 1993 Tito commenced an investigation of travel expense claims submitted to the Ministry of Finance by or on behalf of the *Beretitenti* and his Ministers in relation to the entitlements defined as 'on official visits to his island constituency' in the *Salaries and Allowances of Members of the Maneaba ni Maungatabu Act* [Cap 92A]. On 16 December of 1993 Tito said in the *Maneaba*[1] that a number of Ministers have *kimoa* public monies and he complained of the perverse interpretation of the *Salaries and Allowances ... Act* being countenanced by the *Beretitenti*. Beniamina Tinga, later to become *Kauoman ni Beretitenti* (Vice-President) and Minister of Finance and Economic Planning, also denounced the Executive,[2] but Tito was the Opposition's most forceful spokesman.

The following session of the fourth sovereign Parliament convened in mid May 1994. The Opposition demanded that a select Parliamentary committee be established to inquire into the integrity of the impugned official-visit-to-island-constituency claims. The Government proposed that a Commission of Inquiry be established, and a no confidence certificate was notified to the Speaker on the resolution. The vote was held on 24 May 1994. The Government failed to carry the vote and the Speaker perforce dissolved the *Maneaba*.

The *Constitution* requires an election to be held within three months of dissolution. Upon dissolution a date was fixed for the formal nomination of candidates and for the election itself, under the *Election Ordinance* [Cap 29B].[3]

The meaning of kimoa

The I-Kiribati word *kimoa*, and a similarly critical term, *iraea*, may or may not, depending on context and perhaps on the predilections of the interpreter, be translated as stealing or thieving, dishonestly taking or retaining and wrongly taking or retaining. However in the pre European community in which these words first had currency there was no criminal versus civil wrong distinction.

It would appear that the nounal use of *kimoa* (synonym, 'rat'), perhaps the equivalent of the English word 'thief', is understood to have a pejorative imputation, particularly when it is alleged in connection with the taking of another's property from within the same island community. There was no political unity within the Gilbert Group until the advent of colonial administration the late 1800's (the Line and Phoenix Groups being unsettled until modern times) so Government owned property is not invested by the taboo of a family, a clan or an island asset. Public assets have a less respected standing in the moral intelligence, predisposed by traditional linguistic culture. It may be grammatical and a personal criticism to say that X. has *kimoa* a public asset; but it may be merely ranting and a misuse of the term to say that X. is [a] *kimoa* for padding her or his claims for public expenses.

The alleged defamation

Tito's statement in the *Maneaba* could not, of itself, ignite the legal actions started in the following year because debate in the *Maneaba ni Maungatabu* attracts the legal protection of an absolute privilege against lawsuit. Instead similar comments made during election campaigning, outside of the *Maneaba*, provided the alleged defamation:

It is 30 May 1994. Upon the dissolution the combined opposition have scheduled a series of public meetings to seek to justify the early return to election mode. One of these is fixed for a community *maneaba* in Bairiki, a main administrative islet of South Tarawa. A video tape run by an entrepreneur is rolling in the presence of a crowd of future electors and a number of opposition supporters. Tito and a few other opposition party functionaries are present. There are no furnishings. Everyone except the person speaking sits on the floor. There is little formality. It is not a traditional village meeting where social position, age and gender have formal precedence, yet the speakers and the near spectators are all middle aged and older men. The oratory is slightly florid, metaphoric, sometimes Biblical. Any humour is likely

to be a touch sardonic, like this from a pro government questioner (in paraphrase from the vernacular):

we thank the member for his hard work and his helpful explanations; ... we know he is only thinking of the people when he worries about this money he says was taken in a way not according to law, in feigned ignorance; ... but we do not see any prosecution of these persons, so, does he have courage in his belly to speak the words here, that he said when shielded behind the privileged walls of the Maneaba, now, with a video tape watching, so the people can see, and will he say that the President and his Ministers are kimoa; and will he face up to the legal consequences of his words?

This culminates the first hour. Tito, more animate than before, now answers:

surely I can respond in this public place that the President and his Ministers took the money that should not be taken; I thrust deeper - they took the money that does not belong to them – they iraea the people's money; and closer to what you demand, I conclude from what I have seen that they have kimoa the money of the people of Kiribati ... this is not my usual way, I am sorry to have to say it, but it is what you wanted!

The combined opposition caused ten copies of the video tape recording this meeting to be made and distributed among supporters for showing at various island meetings.

LEGAL PROCEEDINGS

The first action - Magistrates' Court of Abiang

On 13 July 1994, in Abaiang, Teannaki attended a large meeting including Island Councillors and Elders, the latter being the traditional local leaders. A copy of the video was shown. The source for the copy that was played is uncertain. Shortly thereafter Teannaki commenced action against the local candidate in the Magistrates' Court of Abaiang[4] for damages for defamation up to the monetary limit of $3,000, and for an order preventing further publication. On the first day of hearing, 21 July 1994, Tito attended to support the named defendant and the plaintiff applied for and was granted an order adding Tito as an additional defendant. Both sides were represented by lawyers. At the end of the day the matter was unfinished, and the case was adjourned until after the election. The case was never reconvened, and that action can now be considered obsolete.

The second action – Magistrates' Court of Betio

A further action in the Magistrates' Court of Betio[5] commenced shortly thereafter and proceeded to hearing on 5 days in August 1994.

The undated judgment, delivered presumably within about one week of 24 August, was in favour of the defendant. The learned lay Magistrate found for the plaintiff only on the proof of publication. He perceived that the parties had disparate ideas of what the law affords a *Beretitenti* by way of expenses; he saw no evidence of malice; he found the circumstances to equate to an occasion of qualified privilege; and he found that the allegation of stealing was fair comment. As to the plaintiff's contention that because the Chief Accountant's Office in the Ministry of Finance and Economic Planning had accepted the accounts prepared by plaintiff's staff, it was therefore unreasonable for the defendant to suggest any level of wrongdoing by the plaintiff, the Magistrate responded:

notwithstanding these apparently disinterested approvals of the questioned claims, the Defendant should have 'the benefit of the doubt', that too much was paid out.

Commencement in the High Court

Before the Betio Magistrates' Court had delivered its judgment Teannaki commenced an action in defamation in the High Court. The plaintiff's writ of summons was filed in the High Court on 22 August 1994, and issued, over the signature of the Honourable Chief Justice, on 7 September 1994.[6] The plaintiff sought A$350,000 for general damages and an injunction from publication of the videos.[7]

On 1 October 1994 the defendant was elected *Beretitenti*, polling having taken place on 30 September 1994. His Government established a Commission of Inquiry on 3 November 1994. His application to stay the proceedings pending the outcome of the Inquiry was dismissed, as was the plaintiff's application to stay the conducting of the Inquiry pending the outcome of the action.

A number of other events occurred before this action was heard in court. We shall therefore consider these other events before returning to the hearing.

Statutory Judicial Review of the Betio Magistrates' Court decision

By early September the matter came to the attention of Chief Justice Faqir Mohammed, sole judge of the High Court of Kiribati. He determined on 14 September 1994, without due process, that the Betio Court's judgment should be set aside and that the matter be heard in the High Court 'together or apart from a similar matter now pending before it'.[8] Further the defendant was ordered to surrender all copies of the video tape in his possession or control. The 'similar matter' referred to by the Chief Justice may be the unresolved Abaiang proceeding, or it may be the High Court action in defamation commenced by writ of summons by Teannaki on 22 August 1994.

The power, on his own motion, engaged by His Honour was section 81 of the *Magistrates' Courts Ordinance* [Cap 52]. This provides that on application, or on its own motion, the High Court may review a Magistrate's decision not otherwise being appealed. The powers set out at sub section 80(3) are: to set aside a judgment and substitute another; to direct the lower court to take further evidence and stay the judgment in the meantime; to set aside the judgment and order a new trial in that, or another court below; or to make any other order 'as justice may require'. There is no specific power to direct the proceeding be heard afresh in the High Court; and the Chief Justice gives no reasons, in his four page judgment, why justice might require that the matter proceed in the High Court.

The reasons contend that what was said, in its least prick, *that the Beretitenti... was not entitled to the money*, to the more pointed accusation, *it was taken outside the law*, to the deepest thrust, *that the money was 'stolen'*, are all, if false, defamatory. The Chief Justice was able to show a number of inadequacies in the judgment under review. He also went on to say that there was 'not a shred of evidence that the plaintiff was guilty of theft.' The Chief Justice said this despite the evidence that a number of expense claims were paid to the plaintiff that was on the lower Court record, establishing thereby the likely receipt by the plaintiff of some money. One would think that this is a 'shred of evidence'.

At the date of the judgment, 14 September 1994, the presidential election was in the last two weeks before the date for polling. The Chief Justice's judgment was used by the promoters of the former government to exonerate Ministers of the allegation of pocketing excessive expense claims. However, as indicated above, this did not prevent Tito from winning the election and becoming the new *Beretitenti*.

The second High Court action

The party of the former Government has two shots left. On 28 October 1994 the plaintiff's former Vice President (the *Kauoman ni Beretitenti*) Taomati Iuta, commenced his own action[9] represented by the same local lawyer, based on the same allegations, for the same injunctive relief, but now for $100,000 in general damages, and for $400,000 in aggravated and/or exemplary damages. He opted to join three defendants being persons involved in the dissemination of the video contents. The Court eventually

directed, over the objection of Tito, that Iuta's action would be put on hold pending the outcome of Teannaki's defamation claim.

The election petition

Teannaki then filed a petition[10] under the *Elections Ordinance* [Cap 29B]. Filed in the High Court on 31 October 1994, the petition alleged that Tito, now the *Beretitenti*, engaged in six particulars of corrupt practice during the presidential election. The relief available under the statute, and prayed for, was that the election be declared void and that the respondent be disqualified from contesting a fresh election.

The election petition proceeded before a new Chief Justice, the Honourable Richard Lussick, in late 1995.[11] After 22 days of hearing and 36 witnesses, in his 77 page judgment His Honour found that 'the only grounds of any substance' was the allegation that between 30 August and 29 September 1994 the *Beretitenti* visited various town or village *maneaba* 'uninvited', and he provided free tobacco to those present, 'for the purpose of corruptly influencing those people to vote for him.' But upon his review of the evidence and upon his determination that there is a Kiribati custom of visitors making offerings or *mweaka* at their first formal attendance at a *maneaba*, the Chief Justice dismissed the allegations with costs.

Costs were eventually taxed and ordered against Teannaki in the amount of about $32,000, about one half of which was solicitor's costs, the balance being disbursements related to the transport and subsistence of witnesses from outer islands.

The Hearing of the Defamation Claim

The High Court defamation action proceeded to hearing on 29 September 2000. The delay of six years was caused by the usual and the not so usual exigencies of litigation. There were the inevitable attacks on the pleadings: failure to stipulate the various imputations that the plaintiff suggested are to be taken from the defamatory words; a striking out of the statement of claim; and reinstatement of the statement of claim by the Court of Appeal with leave to amend.[12]

The unusual factors involved the judiciary itself. There was an application by the plaintiff to have Chief Justice Lussick exclude himself on the basis of his having made an implicit finding against the credibility of Teannaki in the election petition judgment. His Honour reluctantly acquiesced to this application, with costs against the plaintiff. Chief Justice Lussick's contract for services ending also caused delays. He was replaced, as from January 2000, by Chief Justice Robin Millhouse QC. Chief Justice Millhouse resolved that he would hear neither defamation case because they involved the Head of State and, as he is the only Judge of the High Court, he will often be expected to rule on matters concerning the Government. The High Court searched for a Justice to be appointed to hear only Teannaki's defamation action and located the Honourable John Toohey AC QC, formerly of the High Court of Australia. He arrived in the country for the three week fixture on Thursday, 28 September 2000.

On the following day, the hearing for *Teatao Teannaki v Teburoro Tito*[13] commenced. It did not last as long as anticipated. After a brief opening statement, his counsel, an Auckland lawyer, called Teannaki to give his evidence in chief. With that lawyer was Mr Banuera Berina, the I-Kiribati practitioner who had conducted this and the related matters for the former *Beretitenti* and his Ministers from the outset. The evidence of the plaintiff was given in Gilbertese and translated. The direct examination lasted about one and a half hours. The Solicitor General of Kiribati, for the defendant, cross-examined for a day and a half. He is employed in the Attorney-General's Office, but his brief was a private retainer of that Office by the defendant, who paid fees to the Ministry of Finance and Economic Planning in order to do this.

The cross examiner attempted to remind the plaintiff through reference to excerpts from various debates in

the *Maneaba* from 1980, 1988, 1992 and 1993 that Members' and Ministers' proper expense entitlements were a matter of perennial concern in Parliament. Against the plaintiff's casuistic contention that any trip by a *Beretitenti* to his island constituency is *ipso facto* an official visit was put Teannaki's inconsistent answer in a 1992 debate. Against his averment that he cannot be expected to answer for claims made by his staff and accepted by the Chief Accountant's office was put the evidence that direct payment would have been paid to him of the daily subsistence allowance, which, on at least one occasion, at $45, is three and one half times greater than the $10 permitted in the statute; and at least one of the claim forms bears his signature. The witness could not sensibly tell the Court what the English parliamentary principle of Cabinet Responsibility means, beyond the guess that it signifies that Cabinet members should do their best. And he said that after the 16 December 1993 statement of the defendant in the *Maneaba* that some Ministers had *kimoa* public money, the plaintiff as *Beretitenti* made a desultory inquiry into the accounts that had been presented on his behalf, and was assured they were correct. But against that answer he was reminded that some time in 1995, proximate to the Commission of Inquiry hearings, he repaid $525 to the Ministry of Finance and Economic Planning; and this would indicate improper claims and a retaining and using of the money for an unreasonable period after notice.

Re examination of Teannaki by his counsel completed the last 15 minutes of day two. On the morning of day three, 2 October 2000, over six years after starting it, the plaintiff asked through counsel to withdraw his claim. The defendant's counsel urged that the plaintiff not be given leave simply to discontinue the action. Justice Toohey agreed with the defendant’s position. He dismissed the plaintiff's action and entered judgment in favour of the defendant, with costs.

THE LAW

In Kiribati the law on defamation is based on UK law. The *Laws of Kiribati Act* 1989, section 4, says that the *Constitution* is the supreme law; a redundant proposition as it is already a commandment in the *Constitution* itself.[14] Listed as subsidiary sources of law in the *Laws of Kiribati Act* are: Kiribati ordinances and statutes, customary law, Kiribati common law, and ‘every applied law’. Applied law includes, under section 7 of the Act, legislation of the Parliament of the United Kingdom in force (in the UK) on 1 January 1961. The *Defamation Act* 1952 (UK) falls into this category. [15]

The *Constitution* of Kiribati however, is the paramount law, and Acts will be invalid if they are inconsistent with the provisions of the *Constitution.* In respect of defamation the paramount law provides that:

12. (1)... no person shall be hindered in the enjoyment of his freedom of expression ... [which] includes ... the freedom to communicate ideas and information without interference ...

(2) Nothing contained in any ... law shall be held inconsistent with ... this section to the extent that the law... makes provision-

> (a) for the purpose of protecting the reputations, rights and freedoms of other persons ...
> (b) except so far as that [law] ... is shown not to be reasonably *justifiable in a democratic society*. (emphasis added).

The *Defamation Act* 1952 (UK) only applies to the extent that it declares the law without impairing a defendant's constitutional right of freedom of expression, therefore.

The opportunity was lost on this occasion to obtain a definitive ruling, but, on the pleadings, Tito might have advanced the following defences:

· Justification

· Fair Comment

· Qualified Privilege

· The Rule Against Trenching on the Privileges of Parliament

The manner in or extent to which these defences, and the provisions of the *Defamation Act* 1952 (UK), would apply in Kiribati is considered below.

Justification

The defendant carries a burden in a defence based on justification to prove that the pointed end of the statement is true. However, the defendant may range some distance from the date of the statement in gathering evidence in support of the proof of wrong doing. He or she can rely on after-acquired proofs to justify a charge he or she might have had difficulty sustaining at the date that it was made.[16] The investigative latitude found here can be contrasted with the rule that in advancing the defence of fair comment, the defendant is limited to what he could credibly conclude from the facts he knew at the time he made the impugned statement.[17]

It is uncertain whether such after-acquired proofs must relate only to the period up to the point of the alleged defamation, or whether the proofs can include some conduct of the plaintiff occurring after that point. In our cases this is not the situation, so this uncertainty is of little concern.

In common law, if several charges make up the defamation, the defendant has to prove the truth of each of those charges in order to succeed in the defence of justification.[18] Section 5 of the *Defamation Act* 1952 (UK) under the heading 'Justification', provides that the defence shall not fail where a defendant fails to prove the truth of every charge against a plaintiff, 'if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.' This widening of the common law defence should withstand constitutional scrutiny in Kiribati as it is an opening up of, and not a hindrance to, the citizen's constitutionally guaranteed freedom of expression.

The *Defamation Act* 1952 (UK), at s 6, allows that where the defendant's charges consist, 'partly of allegations of fact and partly of expression of opinion', it is not necessary to prove every allegation of fact so long as the opinion expressed is fair comment having regard to the facts proved. The rationale behind the defence is that the insulted party claims protection against a false opinion stated publicly which, unfairly, because falsely, will affect his reputation in the opinion of the community. The speaker of the words contends that if the material facts founding the opinion are largely true, where the plaintiff is in public life, and the opinion bears on public matters, the speaker has a right to speak and the other members of the relevant public have a right to hear.

On our facts it seems likely that all three variations of the defendant's stated attitude to the plaintiff's receipt of the public money would be viewed as expression of opinion. In each case the propositions that, (a) *the Beretitenti was not entitled to the money*, (b) *it was taken outside the law*, and, (c) *the money was 'stolen'*, are opinions based on the alleged facts. In order to the defence to succeed the facts to be demonstrated would be: that expense monies were claimed on one or more occasions; the documents in support do not show that the visit(s) to home constituency were 'official'; and the heads of claim are more than the amount, or outside the areas of claim, by statute, allowed for.

Fair comment, malice and freedom of speech

A comment is not fair if it is malicious. The law requires proof of actual or express malice. Actual malice will be found if the plaintiff can prove that the defendant did not honestly believe the veracity of the

statement at the time it was made. It will also be found if the defendant believed in the truth of what he or she was saying, but was motivated by spite.

An opinion is not usually either true, or false; but facts are only facts if they are true. An opinion may be carried on a vehicle of fact not strong enough for its weight. Unlike a 'fact' falsely posited or incorrectly assumed, which is not a fact at all, an opinion exists once expressed. But it may be spurious (not truly held) or tenuous (having only the remotest basis in fact) or specious (being initially plausible but on examination quite unsupportable). Spurious, tenuous and specious opinions are not afforded a defence in defamation.

This discussion washes individual rights to free speech up against democratic public interests. Often cited is the plausible but unprovable intuition of Cockburn C J, from *Campbell v Spottiswoode*[19]:

It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their very honour and character, and made without any foundation.[20]

Here it is implied that men of honour are born to duty; they are not acquisitive of power. Whilst this may be the case, the implication that ‘public men’ are always men of honour seems somewhat less tenable.

The approach to balancing this 'equal interest' between freedom of speech and protection to reputation is difficult. In the United States of America the First Amendment [freedom of speech and the press] to the *Constitution* protects false insulting speech, unless the tortfeasor be shown to have been driven by actual malice or reckless disregard for truth or falsity.[21]

Freedom of opinion is now explicitly protected in other human rights documents also. For example, article 10 of the *European Convention on Human Rights* provides:

1. 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

Quite what limits to free expression are ‘necessary in a democratic society’ is not clear.[22]

Qualified Privilege

[Communications] fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.[23]

An occasion is privileged according to the classic formulation, where the person who makes the

communication has an interest or a duty, legal, social or moral, including a duty arising from his own affairs, to make it, to the person to whom it is made, who has a corresponding interest or duty to receive it.[24] The utterance of a communication recorded for a national audience, on the questionable use of public funds for personal benefit by persons in national government elective office is an occasion of privilege.[25]

The speaker's legally protected human right to broadcast the denigratory opinion is a right *qualified* by the presence of actual or express malice (as discussed above). If intent to injure personally is shown to be a dominating passion behind the defendant's words, the defendant may lose the privilege to express the spurious opinion without paying judicially exacted damages.

Constitutional Freedom of Expression and the *Defamation Act* 1952 (UK), s. 10

Whilst Tito's statement would appear to attract qualified privilege, section 10 of the *Defamation Act* 1952 (UK) further limits privilege at elections. This section states:

A defamatory statement published by or on behalf of a candidate in any election to a local government authority or Parliament shall not be deemed to be published on a privileged occasion on the ground that it is material to a question in issue in the election, whether or not the person by whom it is published is qualified to vote at the election.

Section 10 of the Defamation Act 1952 (UK) is peculiarly dependent upon 'local political and social conditions' (to paraphrase the Privy Council in *Lange v Atkinson*[26]). It is difficult for an outsider to understand the conditions which caused Parliament at Westminster to provide, that, 'A defamatory statement published by or on behalf of a candidate in any election ... shall not be deemed to be published on a privileged occasion...' Perhaps there was too much ill will displayed or improper advantage taken of free political speech (to paraphrase s 19 of the *Defamation Act* 1992 (NZ)). It is suggested in *Reynolds v Times Newspapers* that the defence of comment on a matter of public interest survives for candidates, and the House of Lords queries whether section 10 can withstand scrutiny under the *Human Rights Act* 1998 (UK).[27] Such scrutiny might well have regard to equality under the law, as well as freedom of expression.

The curtailment of the freedom in the *Defamation Act* 1952 (UK) s 10 may not be justifiable in a democracy. To use the words of Kiribati's *Constitution*, 'justifiable in a democratic society' should mean that, without the curtailment, democracy would be impaired. For a hindrance to a constitutional freedom to be justifiable in a democratic society, the hindrance must advance a democratic purpose. The security of state secrets, which requires the effective deployment of the armed forces, is justifiable in the protection of the democratic state from external threat. The security of the data in an active police crime investigation is justifiable towards defending democracy from internal threat. Justification for a law that singles out candidates for a special hindrance to their freedom of expression must be found in the extent to which unleashing the freedom is shown to be harmful to the election process.

Apparently the United Kingdom lawmakers decided that the restrictions on freedom that are part of the qualified element in the common law of qualified privilege are not enough. The common law provides that a candidate will lose the defence of qualified privilege if he or she tells a damaging falsehood with malice, or reckless disregard for the truth, or without a reasonable effort to investigate the truth.[28] The *Defamation Act* 1952 (UK) s 10, provides that the candidate cannot, without risk of suit, publish a defamatory falsehood in any circumstances, including genuine belief on plausible but ultimately false grounds.

A qualified privilege for candidates is, however, more conducive to democratic values:

By protecting the free flow of information, ideas and debate, the Constitution better equips the elected to make decisions and the electors to make choices and thereby enhances the efficacy of representative government.[29]

On this line of authorities section 10 of the *Defamation Act* 1952 (UK), should be found to be inoperative in Kiribati because contrary to the *Constitution* section 12.

The plaintiff's position that section 10 should be held to be valid can be advanced by contending that protection to reputation is a public good, because:

it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family ... It is in the public interest that the reputation of public figures should not be debased falsely ... the electorate needs to be able to identify the good as well as the bad.[30]

To counter such a proposition we can look at the development of the defence of the constitutional right of political free speech that has developed in many common law jurisdictions.[31] This right to open discussion of government matters exists in law even where freedom of speech is not expressly enshrined; as in the Constitution of Australia.[32] The right is a fundamental common law freedom derived from the concept of 'the common convenience and welfare of society'. Cockburn, CJ's 'equal interest' between free expression on public matters and the good name of honourable men, is supplanted by an emphasis on freedom's utility for the democratic system: preservation of reputation is permitted only minimal interference with a constitutional freedom.

In *Theophanous*[33] a moderated *Sullivan*[34] approach is adopted: if false and damaging material is published, the defendant must show it was not aware it was false, the material was not published with reckless indifference as to the material's veracity, and it was published in circumstances where such limited investigations as the defendant may have performed were sufficient, having regard to the degree of importance of disseminating the information. This test approaches the amendment to the *International Covenant on Civil and Political Rights*, proposed by the London based NGO, Article XIX, which urges that only 'narrowly drawn restrictions' to freedom of expression be acceptable.[35] That Convention's present Article 19 provides that freedom of expression should only be subject to such restrictions, to protect the rights or reputations of others, 'as are provided by law and are necessary'.

In Canada the *Constitution Act* 1982, Pt I, being the Canadian Charter of Rights and Freedoms (hereinafter, 'the Charter'), provides in s 2(b) that expression is a 'fundamental freedom'. And in language reminiscent of the proviso in s 12 of the Kiribati *Constitution*, the Charter s 1 provides, that the freedom is 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'[36] The absence of the negative in this syntax more clearly places the onus of proving the constitutional propriety of the legal inroad, on the party seeking to justify the limitation. But the Charter has no direct purchase on the rights and duties between private litigants, because it is only applicable, under s 32, to government action.[37] Canada therefore applies its own common law valuation to defamation law, allowing the Charter to influence its interpretation.

The New Zealand *Bill of Rights Act* 1991, is applied in much the same way, but for the different reason that that it is an ordinary Act, without paramountcy, and with the stipulated objective of providing an interpretive overlay onto other statutes; albeit having application to the way in which the Courts are to apply the common law in non governmental litigation.[38]

In the United States the extension, by the Fourteenth Amendment to the *Constitution*, of the right of free expression to State action, also applies to private actions because:

It matters not that ... [the rule of state] law has been applied in a civil action and that it is common law only, though supplemented by statute ... The test is not the form in which state power has been applied but, whatever the form [i.e. through private action pursued in the court], whether such power has in fact been exercised, [the court being an engine of government].[39]

The analysis of these jurisdictions must, in some degree, be comparable to the approach to be taken in Kiribati. *Regina v Oakes*[40] authoritatively requires that, under the Charter, s 1, a justification for a limitation on stipulated rights must pass a two-fold test: firstly, that the measures are employed towards a pressing and substantial democratic objective; and secondly, that the means used are rationally designed, discrete and proportionate to the value of the competing objective.[41] The right to publish a political speech, in an appropriate context, to an appropriate range of listener, where that speech does not stray into private matters, and where the facts or opinions published are derived from reasonably reliable information, if further restricted, fails the second part of the two-fold *Oakes* test.

Reply to Attack

Should the defendant be deprived of the political free speech argument to invalidate section 10 of the *Defamation Act* 1952 (UK), there is another basis for advancing a qualified privilege to the occasion of the speech. The defendant was urged by his questioners to *have courage* and to repeat the critical allegations in a place where the defendant is not cosseted by an absolute privilege. In Kiribati it is shameful to leave unanswered a public challenge. Here was a virtual attack on the defendant's integrity and strength of character. A close community would naturally feel the insult intended by this public challenge. The plaintiff's complicity in the attack may have to be shown.

At the trial Teannaki denied his knowledge of the questioners' close connection to his party; though of the three questioners, one was a driver for his Vice President's (Iuta's) business, and the other two were brothers of a Minister in his cabinet.

This would have been a line of defence worth pursuing in trial because Teannaki's candour was perhaps compromised, the circumstances tended to show Tito was reactive, which would help to contradict the existence of actual malice on his part, and a speaker defending him or her self against personal attack can be an occasion of qualified privilege.[42]

The pragmatic relationship between counter attack, extended privilege, and malice is noted in *Adam v Ward*.[43] In that case the plaintiff made an insupportable statement in Parliament, which instigated an Army Council investigation, the report of which made reference to the plaintiff's own conduct. While the reference was more likely true than false the defendant's counsel conceded falsehood, in what was described as a 'startling' admission.[44] Even with this admission the case was decided against the plaintiff. As to the application of privilege it was found that there was no excess of privilege. There was also found to be an absence of malice. In his decision Lord Loreburn said (at 164):

But I agree that in ruling upon that subject [excess of privilege] a judge may well think that a man is justified in inculpating his accuser in order more effectively to exculpate himself, and also may well think that the defendant has not exceeded the privilege when he has expressed himself with some warmth under real provocation, though no one can be justified in using such an occasion beyond the reasonable limits of self-defence.

Lord Atkinson adopted the words of the Privy Council in *Laughton v Bishop of Sodor and Man*[45] :

To submit the language of privileged communications to a strict scrutiny and to hold excess beyond the absolute exigency of the occasion to be evidence of malice would, in effect, greatly limit, if not altogether

defeat the protection which the law throws over privileged communications.

In *Loveday v Sun Newspapers Ltd*[46] the dismissed plaintiff attacked his former employer, a municipal council, by letter to the editor, for 'victimization'. The town clerk, the second defendant caused the same newspaper to publish a response that touched on the personal qualities of the plaintiff as an employee.[47] Citing the 2nd edition (1929) of *Gatley on Libel and Slander*, the Court found that, a person attacked in the press is entitled to appeal to the same 'tribunal' for vindication; and, in the absence of malice, the defender may make relevant defamatory statements.[48]

The Rule Against Trenching on the Privileges of Parliament

The court will not allow parties to litigation to request it to rule on any question touching the truth, sincerity or motive behind any conduct in Parliament.[49] This privilege is absolute. Such questions are within the exclusive jurisdiction of the bodies within Parliament that are concerned with the privileges of the House. This rule has venerable origin in the *Bill of Rights Act* 1688, article 9, which provides that speeches in Parliament 'ought not to be impeached or questioned in any court or place out of Parlyament.' It has a common law source in the constitutional convention that the Courts and Parliament will not trench, the one on the other's business.[50] The *Constitution* of Kiribati in addition to confirming that the *Maneaba ni Maungatabu* may determine the privileges and immunities of members, also dictates that

76. (2) No civil or criminal proceedings may be instituted against any member...for words spoken before...the Maneaba, or *by reason of any matter or thing brought by him in the Maneaba*... (emphasis added).[51]

Our facts are that in December 1993 Tito said in the *Maneaba ni Maungatabu* that all the information he had given to the House was true in relation to certain Ministers having *iraea* or, if you will, 'stolen' public funds, and the President's responsibility for misapplying the expenses law. In his public statement outside the *Maneaba* on 30 May 1994, he was challenged to repeat and did finally say that the President and his Ministers had *kimoa* and *iraea* public funds. The matter within the speech was raised in the *Maneaba*, and it is a matter of public interest. It is suggested that the juristic nature of a statement made outside of the *Maneaba* may dissolve into that quality of absolute privilege that is given to matters brought in the *Maneaba*.

To support this position we can look to *Church of Scientology of California v Johnson-Smith*, approved in *Hamilton v Al Fayed*.[52] In *Church of Scientology*, Browne J said:

I accept the Attorney-General's [as *amicus curiae*] argument that the scope of Parliamentary privilege extends beyond excluding any cause of action in respect of what is said or done in the House itself. And I accept his proposition ... that what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House.[53]

In the *Scientology* case the action against the defendant, a Member of Parliament, alleged that the defamation occurred in a television interview where his words inferred that the plaintiff was a harmful organisation. The statement of defence contended that the words were in the Parliamentary record and were, thereby, absolutely privileged. A portion of the plaintiff's reply included, as particulars of malice, that the defendant had attacked the plaintiff in Parliament. Browne J determined that these particulars be struck out because, 'the motives or intentions of members of either House cannot be inquired into by criminal [court] proceedings'.[54]

In Hamilton v Al Fayed the plaintiff was the Member of Parliament. Findings of misconduct had been

made against him in Parliamentary Committees. Mr Al Fayed tendered emolument to Member Hamilton in consideration of his supporting legislation. Mr Al Fayed repeated his Parliamentary evidence of the payment in a television interview. The *Defamation Act* 1996, s 13 had been passed to allow an individual MP formally to waive the privilege of Parliament. The plaintiff waiving the privilege, the House of Lords determined that the case could proceed, but were it not for the waiver, a 'fair trial stay' would have been ordered to prevent the Parliamentary privilege from being infringed. To question the truth of what Mr Al Fayed said on television was to question the truth of what he deposed to the House of Commons Committee on Standards and Privileges.

The *Scientology* case supports the proposition that proof of malice cannot be adduced from the Parliamentary record. The proposition is demonstrated from a scenario where the alleged defamation occurred outside the House, but the plaintiff sought to prove express malice by conduct in the House.

Our alleged defamation occurred outside the *Maneaba*, but if malicious intent was sought to be shown in the May 1994 public speech, a similar ill will would be imputed to the defendant in the December 1993 *Maneaba* speech. Where the impugned statement and the Parliamentary speech are found to be materially similar in their imputation and the defendant is provoked by a personal attack into a deliberate repetition of the in-House comment to an out-of-House electorate, there is ground for suggesting that the alleged malice cannot be pursued. Such pursuit would necessarily imply that what the defendant said in the *Maneaba* was driven by a blameworthy motive. Where the words in substance are the same, the matters are fairly close in time, and the sting of the words as sharp, the inquiry into intention at the later occasion is tantamount to an inquiry into intention at the earlier, as in *Hamilton v Al Fayed.*

Summary

Whilst the proceedings detailed in this article did not result in a clear statement on the law of defamation in Kiribati, they raise a number of issues about the relationship between the law of defamation, as adopted from England, and the *Constitution* of Kiribati. These issues have been faced by a number of jurisdictions, as human rights standards have become more of an influence on domestic laws. Freedom of expression is an important value, both as an individual's human right, and for the functioning of a democratic society.

As Cockburn CJ says in *Wason v Walter*[55]*:*

The full liberty of public writers to comment on public men has only in very recent times been recognised. .... Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus *freely* brought to bear on the discharge of public duties? (emphasis added).

EPILOGUE

The dismissal of the former President's claim in defamation on 3 October 2000 left the former Vice President's claim standing. A new outside judge needed be located and a new three week fixture needed be set. The defendant, Teburoro Tito applied for security for costs against the remaining plaintiff, Taomati Iuta. Among the matters brought to the attention of the Court were that the *Beretitenti* was still owed about $20,000 by Teannaki on the election petition case, and that the *Beretitenti* had been caused to use family retirement entitlements to pay his own costs. He would have further costs to pay to the Ministry of Finance and Economic Planning - the Office of the Attorney-General having provided to him legal services.

On 10 November 2000, in written reasons the Chief Justice directed the plaintiff to pay into Court $10,000 as security for costs. In December 2000 the money not being paid in on the final extension granted, the

action against Teburoro Tito was struck out.

---

[*] David is from Winnipeg, Canada where he practised law and sometimes lectured for ten years. He is in practice in the Bay of Islands, New Zealand (david@pmlaw.co.nz ; jamesdavidr@xtra.co.nz); P O Box 576 Kerikeri). He is held together by Losaline Fulifu'atonga, the mother of his sons. A graduate of the University of Manitoba (1971, 1978), he was Solicitor General of the Republic of Kiribati for 2 ½ years until November 2001. David's previous papers may be found in the Manitoba Law Journal (1985), Health Law Canada (1986), and the Canadian Native Law Reporter (1987).

He owes much, personally and professionally, to many officers in the public service of Kiribati. He is bound to acknowledge the inestimable privilege of working with His Excellency Teburoro Tito; and of appearing before the Lord Cooke of Thornden, of many august judicial offices, also of the Kiribati Court of Appeal. David's friends at the Office of the Attorney-General afforded him the freedom to learn. Of special importance was the leadership of the Honourable Justice Michael Takabwebwe (as he now is), and the friendship and trust of the Honourable Titabu Tabane, now Attorney-General. Ms Anita Jowitt of the USP Law Faculty lent her skills in structuring and polish to it, but she is not to be blamed for the article's content.

[1] Kiribati, *Parliamentary Debate,* 16 December 1993, 494 – 496.

[2] Kiribati, *Parliamentary Debate,* 13 December 1994.

[3] Pre-Independence statutes are referred to as Ordinances, whilst post-Independence statutes are Acts.

[4] Court file reference AG 24/94.

[5] *Teannaki v Tito* (Unreported, Magistrates' Court of Betio, Kiribati, SM civ 12/94, August 1994).

[6] Court file reference HCCivC 2/1994.

[7] In Kiribati, the average wage for that minority of working age persons with steady remunerative employment, was in 1994 about A$2000, and the salary of the *Beretitenti* was about A$12,500. That situation is little changed today.

[8] *Teannaki v Tito* (Unreported, High Court of Kiribati, AG 24/94, 14 September 1994).

[9] Court file reference HCCivC 29/94.

[10] Court file reference HCCivC 30/94.

[11] *Teannaki v Tito (Election Petition)* (Unreported, High Court of Kiribati, HCCivC 30/94, 28 February 1996).

[12] The Court of Appeal is made up of a visiting panel of three Justices, who are usually eminent superior court Justices often retired from the Benches of Australia or New Zealand. It sits every 12 to 18 months. This infrequency means that, if a proceeding is delayed from one hearing date to the next, the delay will perforce be lengthy.

[13] Unreported, High Court of Kiribati, HCCivC 23/94, 2 Oct 2000.

[14] *Constitution* of Kiribati, section 2.

[15] It can be noted that none of the provisions of the *Defamation Act* 1952 (UK) discussed in this paper (sections 6, 7, and 10) have been repealed by the *Defamation Act* 1996 (UK). Even if they had, in Kiribati they would continue in force, because the date of reception of the applied law is fixed at 1 January 1961 (*c.f.* the Kingdom of Tonga where current UK law is applied in the absence of local law).

[16] P Lewis, *Gatley on Libel and Slander* (8th ed, 1981) para 1389, fn 35.

[17] P Lewis, above n 15, para 712.

[18] Michael A. Jones, *Textbook on Tort* (4th ed, 1993), 371.

[19] (1863), 3 B& S 769.

[20] Quoted by Brennan J, dissenting in part, from the majority judgment to which Toohey J adhered, in *Stephens v West Australia Newspapers Ltd* (1994) 68 ALR 765, 776; and see, *Globe & Mail Ltd. v Boland* (1960) 22 DLR (2nd) 277, 281, as cited by Brennan J at 776.

[21] See *New York Times v Sullivan* (1964) 376 US 254, cited without disapproval by three out seven members of the Court (including Toohey J) in the majority result in *Theophanous v The Herald and Weekly Times Limited* [1993-1994] 182 CLR 104, 130.

[22] Also see the discussion on qualified privilege and section 10 of the *Defamation Act* 1952 (UK) below.

[23] *Bradney v Virtue* (1909) 28 NZLR 828, 833 - 835, quoting *Stuart v Bell* [1891] 2 QB 346; but traced back to *Toogood v Spyring* (1834) [1824-34] All ER Rep 735,738; See *Reynolds v Times Newspapers* [1999] 4 All ER 609 (HL), 615.

[24] *Toogood v Spyring*, above n 23, 737-738; and see, *Adam v Ward* [1917] AC 309 (HL).

[25] *Theophanous v The Herald and Weekly Times Limited*, above n 21; *Stephens v West Australia Newspapers Ltd*, above n 20; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 521.

[26] [2000] 1 NZLR 257 (PC), an appeal from [1998] 3 NZLR 424 (CA); and see New Zealand Law Reform Commission, *Defaming Politicians, A Response to Lange v Atkinson*, Report No 64 (2000).

[27] *Reynolds v Times Newspapers,* above n 23, 618 para f to j.

[28] See *Theophanous v The Herald and Weekly Times Limited*, above n 21.

[29] *Theophanous v The Herald and Weekly Times Limited*, above n 21, 124 ALR 1, 12.

[30] *Reynolds v Times Newspapers*, above n 23, 622.

[31] An argument can also be advanced, on the facts of the case, that at the time of the alleged defamation Tito was not a candidate. The *Election Ordinance* requires an election to be formally called, after which candidates' nominations are to be accepted for registration. The plaintiff would not be able to show that this occurred between 24 and 30 May 1994. A prospective candidate is likely to be found to be something less than a candidate.

[32] See *Australian Capital Television Pty Ltd v The Commonwealth of Australia* (1992) 177 C R 106, where legislation is struck down, being found to infringe this implied freedom of communication; and see the pre Charter case, cited therein, of *Re Alberta Legislation* (1938) 2 DLR 81.

[33] Above n 21, 137.

[34] *New York Times v Sullivan*, above n 21.

[35] See Article 19 'Principles on Freedom of Expression and Protection of Reputation', (2000), 9 Commmonwealth Lawyer 37.

[36] Adopted by the *New Zealand Bill of Rights Act* 1991, s 5.

[37] See *Hill v Church of Scientology of Toronto*, (1995) 126 DLR (4th) 129.

[38] *Lange v Atkinson* [1998] 3 NZLR 424, 450-452, 465-467.

[39] *New York Times v Sullivan*, above 21, 265.

[40] (1986) 26 DLR (4th) 200.

[41] See Canada Law Book Inc, *Canadian Charter of Rights Annotated*, vol 2 1:6000.

[42] P.Lewis, above n 15, para 514.

[43] [1916-17] All ER Rep 157 (HL).

[44] per Lord Dunedin, at 166.

[45] (1872) 17 ER 534, in *Adam v* Ward, above n 43, 172.

[46] (1938) 59 CLR 502.

[47] *Loveday* is an example of a successful non suit, being the dismissal of an action without proceeding further into the merits. A defendants' refusing to apologise is not sufficient evidence of malice to leave with the jury. See a further example where malice was withdrawn from the jury in *Adam v Ward,* above n 43; and see, generally on the law of non suit in defamation: *Laufer v Bucklaschuk*, (1999)181 D L R (4th) 83 (Man CA).

[48] Above n 46, 514.

[49] *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC).

[50] Above n 49, 7.

[51] A more detailed provision may be found in the *Parliamentary Privileges Act* 1987 (Cwlth Aust), s 16 (3).

[52] [2000] 2 All ER 224 (HL) 231. Lord Cooke of Thornden, who has been President of the Kiribati Court of Appeal, agreed with the result though perhaps not in all the reasoning, at 236.

[53] [1972] 1 QB 522.

[54] Quoting from *Ex parte Wason* [1869] 4 QB 573, 577.

[55] [1861-73] All ER Rep 105, 113.