

## The Wasting Disease and a Cure: Freedom of the Press in Emerging Democracies

RICHARD N. WINFIELD

There is a connection among the law, a free press, and economic growth, particularly in emerging democracies. Laws that protect a free and independent press and laws that ensure transparency help the press to contribute to a nation's economic well-being. A free press protected and assisted by those laws can expose corruption in both the public and corporate sectors. Where corruption is eliminated and transparency is assured, equitable economic development has a chance to succeed.

A free press is an engine for economic growth. Corruption, at the governmental, judicial, and corporate levels, stands as a major obstacle to economic development. Corruption is a wasting disease that attacks not only the body politic, but also the central nervous system of the economy. Corruption is a kind of tax that kills foreign investment and squeezes and discourages local businesses from growing and prospering. But it is worse than a tax because the revenues do not contribute to the public welfare.

Corruption distorts the economy. Before Suharto fell from power in Indonesia, many insider firms had close connections to him and his family. When the news broke that Suharto's health and influence were waning, the stock market in Indonesia declined. It turned out that the shares of those insider firms connected with Suharto fell far more sharply than those of other firms. About a quarter of the value of those firms with political connections was attributable to those connections.

The most powerful antidote to corruption is full disclosure. "Sunshine is

said to be the best disinfectant," as one of our Supreme Court Justices captured the idea.<sup>1</sup> That is where the press comes in. A free and independent press should have the tools and the will to investigate and expose corrupt officials, government agencies, executives, and corporations. The most important tool for the press is the rule of law. The press needs laws and independent judges to protect investigations into corruption. Without this kind of protection, the disclosures that should get published will not. Without protection, reporters will be punished and killed, newspapers shut down, and television stations go off the air.

Is there a body of law that discourages and inhibits reporting on corruption? Yes. The laws of libel stand as major impediments to investigative reporting.

Let me offer you some examples from Armenia, Croatia, England, and the United States.

### Armenia: Insult to Injury

In Armenia, for instance, an editor recently reported accurately that the wife of a major political candidate was smuggling diamonds into the country with the help of some corrupt customs officials. The candidate, not the wife, brought a libel suit and recovered a sizable amount of money. The editor received a one-year suspended jail sentence. Two court officials came to the same editor's office to demand some editorial files. When the editor said, "get out of here, goats," the court also punished the editor for violating Armenia's insult law. The appeals court, applying the law on the books from the Soviet era, upheld the editor's conviction.

At a conference in Yerevan, Armenia, in December 2001, the appeals court judge stoutly defended his opinion that upheld the punishment of the editor. Before an audience of judges, journalists, and parliamentarians, we arranged an impromptu moot court argument. The Armenian judge defended his opinion. Then a law professor from Warsaw who

specializes in free expression law in the Council of Europe argued the case on behalf of the editor as if he were appearing before the European Court of Human Rights in Strasbourg. He argued that Armenian law and procedures violated Western European norms. I then argued the case on behalf of the editor as if I were appearing before the U.S. Supreme Court. I contended that the First Amendment barred the kind of laws and procedures that Armenia followed. The contrast between the laws of Armenia and the laws of Western Europe and America seemed stark.

### Croatia: Draconian Libel Laws

In Croatia, an irreverent magazine called the *Feral Tribune* regularly satirizes politicians and exposes corruption by the ruling party, especially when the regime of Franjo Tudjman was in power. About twenty politicians from Tudjman's party brought libel suits and won judgments and fines in tens of millions of kuna [8.34 kuna = US \$1] before complaisant judges from the ruling party. The draftsman of the draconian libel laws of Croatia announced that there was no conspiracy among the politicians who brought the suits. They were merely playing by the rules. He added that we should all remember that a majority of voters in Croatia had voted these politicians into office. I happened to be sitting next to him at a conference in Zagreb when he made that announcement. I responded that if a free press in a democracy protects anything, it protects the minority messenger with the unpopular message; the arithmetic of a majority vote does not count in applying equal protection of the laws. The libel laws, the draftsman, and the judges were holdovers from the days of Marshal Tito.

### England: The Ability to Punish

In England, the bias of libel laws and procedures decidedly favors the claimants and disfavors the press. How can you measure the investigative

*Richard N. Winfield retired last May from Clifford Chance Rogers & Wells LLP to teach at Columbia Law School and Fordham Law School. This article is based on a speech that he gave to Japanese news executives at the Foreign Correspondents Club in Tokyo in March.*

pieces about corruption that go unpublished for fear of the inevitable writ from a solicitor from a powerful company or executive in the city?

There is the cautionary tale about how a powerful Japanese securities company sued an American author and an English publisher in the English courts twelve years ago. The author's book was an unflattering look at the business practices and international legal problems of the securities company. Among the charges were that the company made payments to corporate blackmailers. The company issued a blunderbuss statement of claim in an effort to intimidate the author and publisher into killing the book. Some ancient features of English libel law helped the securities company:

- The company could and did exploit the presumption that the claimant had a good reputation.
- The company was not required to assert, much less prove, that anything said about it in the book was false.
- The defendants had to overcome the legal presumption that what they published was false.
- The law placed the burden on the author and publisher to prove the truth of everything charged in the complaint.
- English law permits very little discovery before trial.
- The scope of privilege in English law is very narrow.
- If they lost, the defendants would pay not only damages but also the legal costs of the securities company.

The company ultimately dropped the suit after almost two years of litigation. Although the company paid its own legal costs, it succeeded in requiring the author and the publisher to absorb their own heavy legal costs. A leading English solicitor who handled the defense wrote that the suit "brought into focus the question of whether it is proper to allow public companies an unfettered right to use their power and money to sue their critics for libel." He argues for reform that would "require a higher standard of proof and actual damage to the firm."

Although defamation law has improved for professional journalists in England in the past two years, little has changed to prevent a repetition of attempts by powerful companies to muzzle and intimidate their critics.

The famous McLibel case in

England makes the point. The fast food giant McDonald's sued a pair of environmental activists from London Greenpeace, who had the temerity to publish a six-page pamphlet criticizing McDonald's health, business, trade union, and environmental practices. All the usual legal presumptions favored McDonald's. None favored the two pamphleteers. Their combined weekly salary was about \$135. McDonald's bullying subjected the two pamphleteers to seven years of harassing litigation. The trial alone lasted 314 days, resulting in a judge's opinion of 762 pages. McDonald's scored a Pyrrhic victory. They could not collect damages or their estimated \$15 million legal costs against the impoverished defendants. Freedom of expression, however, suffered a defeat. The pamphleteers were denied a jury trial, were denied legal aid, and all the legal and procedural cards were stacked against them. The final insult was that a company like McDonald's could offset its legal costs against its taxes. Individuals like the pamphleteers must pay all their legal bills out of taxed income.

The story of Robert Maxwell is very instructive. This powerful media operator understood well just how lethal the libel suit could be. To Maxwell, the libel suit was an art form to keep the dogs at bay and to punish those who came too close. During his career, Maxwell or one of his puppet companies brought scores, perhaps hundreds, of libel suits and injunctions against the press in England and elsewhere around the globe. He sued mostly over disclosures about financial irregularities within his media empire. For thirty years, he succeeded in tying up the English press, requiring it to defend suit after suit, in the process spending millions of pounds in defense costs and settlements. He succeeded in creating a climate of heightened concern in newsrooms about reporting on Maxwell and his companies. When Maxwell's empire collapsed after his death, it turned out that Maxwell had stolen millions of pounds from employee pension funds. Ironically, he had sued the magazine *Private Eye* eight years earlier because they accused him of "classic asset stripping." *Private Eye* paid damages; legal and financial obstacles probably prevented the publication from proving whether its accusations were accurate.

### Even in America . . .

Even in the United States, with its doctrine of constitutional protection for the press, powerful companies use the law of libel as strategic weapons to punish and deter legitimate criticism. Dr. Jan Moor-Jankowski, a New York University professor of medicine and AIDS researcher, edited a small, scholarly scientific periodical called the *Journal of Medical Primatology*. He published a letter to the editor from a scientist and animal rights activist criticizing a multinational pharmaceutical company, Immuno AG. The letter argued that Immuno AG planned to conduct hepatitis research on chimpanzees in Sierra Leone and then release them into the wild, thereby endangering other chimpanzees. To muzzle this viewpoint, Immuno AG sued Dr. Moor-Jankowski, the periodical, and a number of other defendants both in the United States and abroad. Lawyers for the pharmaceutical giant grilled the doctor at depositions that lasted fourteen days. The company forced all the other defendants to settle to get out of the lawsuit. The insurance company for the scientist who wrote the letter settled by paying several hundred thousand dollars over his objection. Dr. Moor-Jankowski alone fought to uphold his right to publish scientific opinion. The process cost him two trips to the highest court in the State of New York and one trip to the U.S. Supreme Court. In the end he prevailed, and the law of opinion was enlarged—but at a cost of many years of his time and of hundreds of thousands of dollars from his personal assets after his own insurance ran out.

In another American case, the *Wall Street Journal* published a story critical of a Houston securities firm that traded in exotic securities products. The company said its revenues fell 52 percent within three weeks after the story ran and that it was forced to close. The company sued, claiming that the *Journal* got the facts wrong. Both parties engaged in the usual expensive American-style discovery. The *Journal* requested and received considerable information from the securities company. At trial, a jury punished the *Journal* for its apparently false reporting with an award of \$222.7 million, including \$200 million in punitive damages. While the *Journal's* appeal was pending, a former employee of the securities firm leaked some tape recordings of telephone con-

versations, demonstrating that the *Journal's* reporting was essentially accurate and that the securities firm had gotten its jury verdict through its own misconduct. The verdict was overturned, but the *Journal* had to pay its own considerable legal costs.

Large companies can and do use their lawyers and their treasuries to threaten, punish, and thus muzzle the press. They are assisted by the laws of libel that they can and do exploit with scant regard for cost. What can be done to produce some balance? You might consider the suggestion of the English solicitor who defended the book that criticized the Japanese securities giant: publicly traded companies should not have the unfettered right to sue for libel.

### **A Strong Case for Reform**

Libel is a blunt instrument. In the hands of a public company or powerful politician it can become a lethal weapon wielded to kill press coverage. The libel suit filed by a public company represents one of the most powerful and arbitrary regulators. A proposal to deregulate only this part of business and economic speech has the goal of encouraging more speech, investigation, and coverage.

One way to deregulate is to place some new procedural burdens on public companies. The company should be required to prove convincingly at the outset that the defendant published materially false statements. It must prove that the defendant was at fault in publishing the error. For instance, if the statement concerned a matter of real public importance, like the bribery of politicians, the company would have to prove that the defendant deliberately lied. Damages would be limited to the economic loss actually caused by the false statement. If the company wins, it should not be able to require the defendant to reimburse any of its legal costs. This kind of deregulation may help level the playing field.

If we accept the idea that libel suits or the threat of libel suits may punish and deter reporting about corruption by politicians and companies, we should consider other forms of deregulation. Let me suggest three reforms to reduce the chilling effect of libel.

*First, defamation should be decriminalized.* The libel suit should become exclusively a civil remedy to reconcile two competing values: an individual person's right to reputation and the right of a free

press to publish. The criminal justice system has no place in resolving these personal disputes. When the state prosecutes the press for criminal libel, it gives the lie to any of the government's pretensions to uphold the right of a free press.

Four years ago, my client, the Associated Press, published a story from Bucharest, Romania, about a disclosure from the newly opened archives of the secret police from the regime of Nicolae Ceausescu that a major Romanian politician, as had many of his countrymen, had collaborated under coercion with the secret police. The politician filed charges against AP for both criminal and civil libel in Romania. Local police interrogated the AP correspondent in Bucharest at the police station. The government prosecutor at the trial, assisted by the politician's civil lawyer, presented evidence for criminal libel. The trial hearings lasted, off and on, for two years. The trial judge awarded damages and costs to the politician, but reluctantly dismissed the criminal charges. Although the judge did not dispute that the AP story was accurate, he criticized AP for its negative story about the politician who had helped spark the overthrow of Nicolae Ceausescu in the early 1990s.

I wrote a brief for the court of appeals relying not on the First Amendment, but on the free press decisions of the European Court of Human Rights. We got the trial court decision overturned on appeal after four more years of effort and cost.

The specter of politics is never very far in any prosecution for criminal libel. When you decriminalize defamation, you also depoliticize libel.

*Second, no government or public authority should be able to sue for libel.* It is hard to imagine a civil libel suit by a government entity that is not motivated by political considerations. Unlike an individual, a government commands enormous power to rebut and attack its critics in the court of public opinion. Unlike an individual, it does not need the courts of law to rehabilitate its reputation. Permitting a suit by some agency or political subdivision exacts too high a price on the right of citizens to criticize their government.

*Third, public officials should not be permitted to sue for libel over criticism of public activities.* The public official is different from a private individual; the

public official must be held accountable; he owes his office in trust for the benefit of citizens; the press and the public have the natural right to criticize the public official for his stewardship of the duties the citizens gave him. The press needs legal protection from public officials who use libel suits to mask their misdeeds or to deter criticism. Do the libel laws provide sufficient protection for good faith criticism? How effective are the legal protections of the press against politicians who sue for political purposes?

The story of one American politician may make the point. During the Civil Rights Movement, the national press, based in the North, covered the upheaval in the American South in a way that was powerful and sympathetic to the demonstrators. Throughout the South, white politicians went to court and filed countless libel suits against the national press. Using the existing libel laws, they easily convinced white judges and all-white juries to impose heavy damages.

L.B. Sullivan, the police commissioner of Montgomery, Alabama, sued the *New York Times* over an advertisement that was signed by a group of black Christian ministers appealing for contributions to support the civil rights struggle. There were a few minor errors in the ad. Dr. Martin Luther King had been arrested not seven times, as the ad said, but only four times. The advertisement criticized the Montgomery police for using excessive force. Commissioner Sullivan was not named or even referred to in the advertisement.

The trial judge announced that there would be white man's justice in his courtroom. An all-white jury sided with Commissioner Sullivan and required the *Times* to pay damages of \$500,000, a lot of money in the 1960s. The jury also hit Dr. King and three other black ministers with \$500,000 damage awards that would easily destroy their civil rights organization. The highest court in Alabama upheld the jury; it was just following conventional libel law.

This scene was repeated all over the South. The white power structure was simply using the machinery of the libel suit to bankrupt the national press and discourage it from covering the protests. Libel laws were used to perpetuate a corrupt and racist regime. One high profile opponent of civil rights sued AP in sixteen different states.

The *Times* and the four ministers went to the U.S. Supreme Court and argued that the conventional laws of libel did nothing to protect them from good faith criticism of a public official like Commissioner Sullivan. The lawyer who argued for the ministers was my former boss, the late William P. Rogers, whose name remains on our letterhead. He had been attorney general under President Eisenhower and later was to become secretary of state under President Nixon. Commissioner Sullivan argued to maintain the status quo.

The Supreme Court overturned the jury verdicts. The Court announced a radical new rule that the First Amendment protects the press when it publishes libelous statements about public officials. The press inevitably makes mistakes in covering public issues and controversies. The law must protect good faith errors, even serious ones, to ensure that debate on public issues is uninhibited, robust, and transparent. The law must tolerate some false speech about public officials for fear of punishing and thereby cutting off accurate speech. Speech about public officials must have sufficient breathing space. In a word, the Court greatly deregulated libel in the marketplace of ideas.

Under the new rule, a public official like Commissioner Sullivan could win only if he proved convincingly that the *Times* and the ministers had acted in bad faith—that they deliberately lied or had entertained serious doubts about the truth. That rule, the Court announced, should provide the necessary protection for the press when it covers public officials. Generally speaking, the doctrine of *New York Times v. Sullivan* has fulfilled its promise. It represents one nation's efforts to redress the imbalance that conventional libel law had produced.

It took about eight years for the world to understand just how important that case was in exposing corruption. Two reporters for the *Washington Post* uncovered evidence of crimes by the president and his advisors in the White House: bribing the defendants in a burglary case to ensure their silence, lying under oath, using the organs of government to obstruct a criminal investigation—all the elements of corruption of power. Should

the *Post* publish the evidence they gathered? The *Post* understood that without the new constitutional protections of *New York Times v. Sullivan*, the Nixon White House could and would sue it and probably put the *Post* out of business. There were, of course, serious risks in deciding to publish. But there is no doubt that the protections of the *New York Times v. Sullivan* doctrine greatly reduced the risks to the *Post*. The line between Commissioner Sullivan and Watergate is a direct one.

From all the evidence, it is clear that the libel suit or threats of a libel suit can chill the press from doing its job in reporting about not only corruption but also business and the economy. The regulatory machinery of libel law should be dismantled and reformed to eliminate that chill. Let us leave the field of libel and return to the larger picture.

### **The Free Press Stands Against Corruption**

The World Bank recently issued a useful report that emphasizes the role that the media can play in improving the lives of people and the importance of law in helping the media perform that role. The report pointed out, for instance, how in September 2000 a local television station in Peru aired a videotape showing the national security chief, Vladimir Montesinos, bribing a legislator from the opposition party to get him to vote for the Fujimori government. The broadcast was quickly picked up by other media throughout Peru and led to his dismissal. Two months later, it led to the fall and departure of President Fujimori. The media exposed corruption and helped increase the transparency of government. It helped build a public consensus to fight corruption, creating the public disapproval that forces corrupt government officials to resign—and thereby raise the penalties for corruption. Laws that ensure that at least some independent television stations could hold broadcast licenses contributed to this outcome.

The World Bank report argues that the freer and more independent the press, the lower are the levels of perceived corruption regardless of a country's level of income. In other words, the freer the

press, the lower the corruption.

After studying the media in ninety-seven countries, the World Bank concluded that the media in countries with high levels of state ownership of the media are not only much less free, but they transmit far less economic and political information, and the countries tend to be poorer. High levels of state ownership of the media, the report stated, “translates into more corruption, less-developed financial markets, fewer political rights for citizens, and poorer social outcomes in education and health.” Mexico, for instance, privatized broadcasting in 1989. Soon there was an upsurge in TV coverage of government corruption scandals and other stories that the state-owned television had not covered.

The law should encourage the growth and protection of an independent media. The law should level the playing field between the independent media and media owned or controlled by the state or political parties. This would cover, for instance, tax laws, labor laws, access to capital, and access to newsprint.

The World Bank report was positive: “Across both developing and industrial countries, newspapers, broadcasts and new media such as the Internet have promoted competition in economic and political markets, and helped create incentives for public and private agents to become more accountable. And the media can empower people, including the poor, by giving them a platform for voicing diverse opinions, participating in governance, and engaging in markets.”

The good news is that there may be a cure for the wasting disease of corruption and the poverty and hopelessness it produces. It is a system of laws and independent judges protecting journalists who possess the courage and skills to attack and expose that wasting disease. 

### **Principal sources:**

WORLD DEVELOPMENT REPORT 2002.  
BUILDING INSTITUTIONS FOR MARKETS (2002).  
DAVID HOOPER, REPUTATIONS UNDER FIRE (2000).

### **Endnote**

1. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 67 (1933).