

***The following is an address given by Mr. Christopher Barnes on Freedom of Expression and Changing the Libel Laws in Jamaica at the Rotary Club of St. Andrew on May 10, 2011:***

Ladies and Gentlemen, first I wish to thank you for your invitation to speak at this lunch; I admire the work that the Rotary Club does and how its members give freely of themselves for the betterment of society under the motto **Service above Self**. We in the news media business share this vision, and it is upon this basis which most of us endure the day to day challenges in this often thankless job.

Today I am here to talk about one of our fundamental rights, Freedom of Expression, and the recent developments in the local laws both protecting and restricting it in the last couple of years. It is important to speak on this topic as it is often mistakenly thought that libel laws and changes thereto are only beneficial to the media owners pursuing them. This couldn't be further from the truth as it is this very right upon which our democracy hinges. Ladies and gentlemen, today and every day, our democracy is under threat as long as our libel laws remain outdated.

Freedom of Expression is enshrined in section 22 of the Constitution of Jamaica (an excerpt of which I quote):

***“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression.....”***

This includes the freedom to hold opinions, to receive and impart ideas and information by correspondence, and other means of communication, without interference.

The freedom is however fettered by several constraints contained in the same section of the constitution, including the following:

“Nothing contained in, or done under the authority of any law shall be held to be inconsistent

with or in contravention of this section to the extent that the law in question makes provision **for the purpose of protecting the reputations, rights and freedoms of other persons...**".

Therefore, while the constitution enshrines the right to freedom of expression, there are many caveats to this right. The argument then that has been advanced over time, is that there needs to be a greater balance of the two.

The balance in the Jamaican context - and wider commonwealth, generally - has been decidedly lopsided and in favour of protection of freedom of reputation rather than protection of free speech. Restrictive and archaic libel laws have been particularly helpful in this regard.

**Why is freedom of expression necessary?** Freedom of expression is the linchpin to all other freedoms as it is the means by which the citizenry can demand it's right to all other freedoms, good governance and accountability. It is, therefore, correctly regarded as the right above all other rights, **the cornerstone of any democracy.**

In October 2007, the Prime Minister named a committee headed by Hugh Small Q.C. (dubbed "the Small committee") to review the libel laws of Jamaica with the mandate of ensuring that any proposal for revision would:

1. support the principle of freedom of the press;
2. provide reasonable protection against false and damaging publication;
3. prevent the suppression of information to which the public is reasonably entitled;
4. impose appropriate burdens of accountability on public officials holding positions of trust;

The Small committee made, to the Prime Minister, several recommendations which were forwarded to parliament for consideration. After two years, parliament finally accepted several of the recommendations made, the more pivotal of which were:

1. **Limitation period reduced from six to two years** – the actual recommendation of the Small committee was a limitation period of one year. The rationale behind the proposed

reduction was that persons who rightly felt that there was damage to their reputation should naturally seek to clear their names as quickly as possible and not to wait for years before stepping forward.

**2. The publication of an apology should not be construed as an admission of liability –**

Often times the publisher, who publishes an apology in an attempt to amicably resolve an allegation of defamation, is later subjected to the claim that the apology was proof of admission of guilt.

**3. The role of the jury to be limited only to the determination of guilt** - under the current libel laws, the jury determines both the issue of guilt and the quantum due to the person defamed. This practice is potentially detrimental to the defendant, as libel cases are very complex with technical terminologies. With this change, it is the judge who determines the quantum due to the person defamed as he or she is best suited (given the complexity) to determine what adequate compensation would amount to. Libel is one of the only remaining areas of civil law where a jury still plays an active role. It is often that awards handed down by jury are done on the basis that “they are a big company”, they can pay for it” rather than on the facts of the damage caused.

**4. Criminal libel is to be abolished**- This means that no longer would it be possible for a person (that includes me and my editor) to be imprisoned for exercising his or her right to freedom of expression. The rationale for this is clear; we are long past the days when persons should be deprived of their freedom for exercising their constitutional right to free speech.

Good progress was made, however, the parliamentary committee stopped short of materially affecting the status quo when it refused to: a) put on cap on damages awarded; and b) set a different standard of proof for public officials.

***Cap on damages:***

The combination of jury assessment and the absence of cap on general damages have, over the years, resulted in awards which were totally out of sync with awards in other areas of civil law.

The Small committee proposed that personal injury awards be used as a proxy in determining

the quantum of damages due and payable. Additionally, similar to the approach adopted in Australia, the committee was of the view that there should be a cap on

**general damages**

(that is damages for intangible items such as ‘inconvenience,’ ‘embarrassment,’ ‘being shunned by civil society’ etc). In Australia the cap is \$250,000.00. ‘

**Special damages**

(that is real loss eg. loss of job etc)’ would remain uncapped once proven.

A cap on damages gives some reprieve to new and emerging (and arguably the established) media which are very susceptible to even modest awards of damages, and is absolutely desirable in a democracy to encourage the existence of an independent and diverse press.

***Setting a different standard for Public Officials:***

The media has pressed, in recent years, for the adoption of different standards for public officials versus regular citizens, in presiding over libel cases. The American approach of New York Times v Sullivan is the model most often raised by media practitioners.

Under the Sullivan model:

- a. Damages cannot be awarded to a public official for defamation relating to his official conduct in the absence of proof of actual malice.
- b. The case shifts the burden of proving actual malice to the public official before the article is determined to be defamatory.
- c. Public officials who are agents of the people should be freely criticized by citizens to whom they are accountable. They must tolerate a greater degree of criticism.

In the absence of the freedom to openly criticize government bodies and officials, what is left is a breeding ground for corruption and abrogation of other Constitutional Rights.

Politicians often misinterpret the Sullivan approach to mean the media and the public are free to defame public officials. **This is not so.** The rationale behind the proposal is that “debate on public issues should be uninhibited and robust, and may well include fervent, caustic and sometimes unpleasantly sharp attacks on government and public officials.”

One advantage of the Sullivan Approach is that it removes the fear of defamation suits being initiated indiscriminately against media houses by public officials, thereby strengthening the media, the watch dog of our democracy.

It is interesting to note here that Senator K.D. Knight Q.C has recently indicated his support for this distinction between the public official and the average citizen and suggested that the discourse on this area be resumed.

### ***Media House Responsibility***

In their unrelenting pursuit of the aforementioned changes, the media houses however, are not without the need for greater responsibility. With increased freedoms for expression, media houses must ensure that greater internal controls exist to guide journalists in their quests for, and dissemination of, information. Proper familiarization of Journalists with the Libel and Defamation Laws and established journalism Code of Conducts is necessary. The PAJ has recently announced their new Code of Practice which it seeks to have all media houses adopt as a minimum standard, and incorporated into each journalist's job description.

In fact, much of the code espouses elements of your very own **four way test**:

Of the things we think, say or do

1. Is it the **TRUTH**?
2. Is it **FAIR** to all concerned?
3. Will it build **GOODWILL** and BETTER FRIENDSHIPS?
4. Will it be **BENEFICIAL** to all concerned?

Adoption of elements of the code is a necessary step in the pursuit of fair and accurate reporting. This is endorsed by media houses, several of which already have similar codes in force. **Self regulation is the only answer.**

One of the popular complaints to me about media is that we lack real investigative reporting. There are, in my opinion, as a representative of media owners, two reasons for this:

1) **The current libel laws:** Investigative reporting on corrupt practices is inherently risky for both journalist and witness/source. From the media house perspective, we would like to protect both so that the next good story will be written and will have sources. The current libel and defamation laws are structured in such a way that any allegation of libel would result in the exposure of the source once it goes to court, and could likely expose one or one's family to intimidation or physical harm. A change to the Sullivan principle as described earlier could help to remedy this, where it places the burden of proof on the alleged corrupt official.

2) **The heavy demand on resources, both in time and money:** It takes a lot of both to develop relationships with trustworthy and credible sources in the process of investigating and seeking out facts. Financially, news media houses depend heavily on advertising dollars to pay the bills. We can all imagine that with the proliferation of media houses and with a shift of marketing dollars away from news media to other non-traditional forms or events, some news media houses are increasingly strapped for resources.

This is where corporate Jamaica and its citizenry come in. Please do not lose sight of the fact that, while we are well known to provide the most efficient ways to get a marketer's message across to its clients through the ads we display, news media are more importantly, **your most important allies for strengthening our democracy**

News Media, in this regard, needs your support in order to continue its efforts.

Robust and critical debate is a right of every citizen of a democratic society and not the sole purview of the media. **The fight, therefore, for strengthening of the right to freedom of expression, is not a media fight. It is a fight for every citizen of this country.**

For those of you who I didn't lose to sleep after this hearty lunch, it is hoped that you have a better appreciation of the importance of what we the media have been fighting for on your behalf. **Yes folks, we are working for you.**

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