

INTRODUCTION

It is alarming that at a time when there is a worldwide trend to remove criminal libel from the law books that there could be, in Jamaica, any suggestion of taking the retrograde step of further codifying criminal libel, albeit in a different legal vehicle. One does not have to look very far to see evidence of this trend. In France, the Court of Cassation abolished its criminal libel law in January 2009, following domestic and international outcries at the arrest in December 2008 of an investigative journalist. Mexico abolished criminal libel in 2006. In September 2010, the Ugandan Constitutional Court abolished sedition and criminal libel. While in the United States, criminal libel is no longer a federal crime although it still exists on the statute books of a few states. (*Reform of Jamaican Libel Law Briefing prepared for the Joint Select Legislative Committee of the House of Parliament by Mark Stephens- September 2010*)

As a direct corollary of this thrust, the International Press Institute, in 2012, embarked on a campaign to have criminal libel removed from the law books in the Caribbean. A team visited Jamaica and was well received by our political heads and the appropriate reassurances given. Indeed, in Jamaica the thrust to remove criminal libel from the books was given a “kick-start” when the Hugh Small led Committee empanelled by then Prime Minister, Hon Bruce Golding, recommended that criminal libel, a relic of feudal times, be removed from the law books.

Through successive administrations and committees, the one recommendation to revise the libel laws of Jamaica that all have united around has been the recommendation to remove criminal libel from the law books. In its Report to the Houses of Parliament in December 2011, the Joint Select Committee in accepting the recommendation of the Small Committee that criminal libel be abolished, noted at page 9 of their report, that both the Media Association of Jamaica and Mr. Stephens supported this recommendation and that the latter had stated in his address to Parliament that no one should be locked up for what they say. The partisan committee then unanimously voted in favour of the abolition of this offence.

1 Mark Stephens Q.C. is of course, an eminent English jurist who had been invited by then Attorney-General and Minister of Justice, Dorothy Lightbourne, to address the joint select libel committee reviewing the Small Report, a committee which she headed.

2 See page 3 of the Report of the Honourable Senate on the Joint Select Committee's Report.

THE CONTEXT

To codify cyber defamation in the **Cybercrimes Act** (the Act) will criminalize the act of defamation on the internet. We believe that the original framers of the legislation deliberately did not include defamation as an offence in the legislation because there were already existing laws, in the form of the **Libel and Slander Act**, **Defamation Act** and common law which provided remedies for defaming someone whether it be on the internet, in print, or by means of broadcast.

The internet provides a more ready forum for the average Joe or Jane to express him or herself and parliament must be careful to resist any attempt to introduce any change to the Act which could expose a large percentage of poor Jamaicans to the risk of being classified as and treated as "criminals" without sufficient cause. It must be borne in mind that defamation on the internet is commonly done via websites, blogs, forums, emails, instant messaging, chat rooms and now in the social networking sphere, all avenues of the "average citizen."

The case of Shaheen Dhada provides a useful example of how the average citizen could unwittingly find himself running afoul of the criminal law if special provision is made for defamation in the Act. In November 2012, 21-year-old Shaheen Dhada was arrested for her facebook post questioning the shutdown of Mumbai for the funeral of a powerful politician. The post read "Every day thousands of people die. But still the world moves on... Just due to one politician dead. A natural death. Every one goes crazy... Respect is earned not given out, definitely not forced. Today Mumbai shuts down due to fear not due to respect." She was

charged under the Indian IT Act, “sending false and offensive messages through communication services.” (<http://www.bbc.co.uk/news/world-asia-india-20490823>). Amending the Act to include “defamation” could result in similar atrocities in Jamaica.

The average citizen aside, the media, the most frequent defendant in libel cases, would now become susceptible to being sued not only for their publications in print and otherwise, but also to being criminally indicted for the same publication, because it was also published on the internet. Additionally, many media houses provide a forum for the citizens of this country to post their views. In a situation such as this, because of the unique nature of defamation, the media house, which is seen as the “publisher” of the information, would remain liable to be heavily taxed in a civil court but now would also become liable to be criminally indicted along with the citizen who wrote the offending piece. One publication, therefore, could result not only in staggering damages being awarded but also in a multiplicity of criminal convictions. These potential ramifications would be patently unjust and undesirable in a country which celebrates its developed democracy.

Sufficiency of existing legislation

We must also bear in mind that at 51% (internetworldstats.com) penetration, internet reach is far less than print and electronic media combined in Jamaica. If, therefore, we have all but accepted that the removal of criminal libel from the laws books is the way to go in the non-cyberspace world, it must be counter-intuitive and circuitous to now be talking about introducing criminal libel in another format. “Out through one door, in through another.”

The MAJ does not take lightly the importance of reputation and believes that there is need for strong laws on our law books to protect reputation and to provide remedies where the right to freedom of expression, is exercised irresponsibly. These laws and remedies already exist, however, and are slanted so heavily in favour of protection of reputation that they are often criticized as not having the necessary balance between protection of reputation and protection of free speech. In fact, the existing legislation and common law have been relied on successfully in many cyber-defamation cases in recent times including the well know case of Gordon Butch Stewart who successfully instituted civil proceedings against the maker of certain defamatory statements made of and concerning him on the internet.

In IPI’s White Paper, entitled “ Our Stand on Criminal Defamation.” it was noted that “International organisations and rights groups have long viewed civil defamation laws as legitimate avenues for the resolution of libel allegations, as long as the fines foreseen by such laws as punishment for defamation are not aimed at silencing journalists or news organisations, but solely at redressing the damage caused.” In a report to the UN Human Rights Council in 2010, the UN Special Rapporteur for Freedom of Expression asserted, “any attempt to criminalise freedom of expression as a means of limiting or censoring that freedom must be

resisted”, and the rapporteur recommended that states “make civil liability proceedings the sole form of redress for complaints of damage to reputation.”

CONCLUSION In a modern democratic society, citizens should be able to speak their minds freely without fear of criminal punishment. The right to freedom of expression is enshrined in the Constitution of Jamaica and has been given even greater prominence by the Charter of Rights which is now in force. The MAJ advocates for the abolition of criminal libel from our legislation and strongly oppose any legislation which would implement such.

It would be draconian and imprudent to introduce criminal remedies for expressing oneself on the internet at a time when we are uniting around the need to remove, from our law books, criminal penalties for expressing oneself in all other forms of media.

The Lower House of this parliament has expressed its unanimous support for the abolition of criminal libel, The Upper House has likewise also expressed its support for the abolition of criminal libel. We urge our parliamentarians to remain steadfast and unrelenting in their stance to ensure the preservation of the civil liberties of the citizens by Jamaica by saying no to including defamation in the Cybercrimes Act.

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