COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2017/PUB/con/0024; 2017/PUB/con/FP/00003

BETWEEN:

OMAR ARCHER SR.

Plaintiff

And

(1) COMMISSIONER OF POLICE

And

(2) THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Defendants

Before: The Honourable Mr. Justice Loren Klein

Appearances: Mr. Fred Smith, QC, Dawson Malone, Akeira Martin for the Plaintiff
Mr. Basil Cumberbatch for the Defendants

Hearing date(s): 3 April 2018 (Before the Hon. Mr. Justice Stephen Isaacs); 29 January 2020

JUDGMENT

KLEIN, J:

INTRODUCTION

[1] The issues referred to this Court for resolution pursuant to article 28(3) of the Constitution have their origin in what has been described by counsel for one of the parties as a "little Facebook spat".

[2] According to the allegations—for at this stage they are no more than that—over the course of several days in April 2015 the plaintiff became embroiled in an acrimonious exchange on Facebook (FB) with a female, who for the purposes of this Ruling will be referred to only as the virtual complainant. The virtual complainant called the plaintiff, among other things,

a "pathetic turd", said that a "cockroach could beat you in an election", and that his mother may have tried to induce an abortion which made him "retarded instead". The plaintiff shot back personal and offensive allegations, the most stinging of which were that she had "had a baby in a bucket in a Rasta camp and left it to die" and that she had HIV/AIDs and was spreading it. She complained to the Police, and the plaintiff was subsequently arrested, charged with intentional libel and summarily tried before a magistrate. Midstream that trial, he asserted that the law under which he was charged was unconstitutional, triggering this reference to the Supreme Court.

[3] Arising, however, out of this now commonplace episode of human conflict on social media is an important question of constitutional law, namely: whether and in what circumstances can the State, consistent with the Constitution, apply the sanction of the criminal law to defamatory expression, as opposed to leaving parties to pursue their civil remedies. It is a question of high constitutional importance and one that is by no means easy to resolve. Respected Commonwealth courts on both sides of the Atlantic, among them our apex court (the Privy Council), have produced different answers to these questions, and in respect of laws which share a common historical origin and bear a high degree of similarity.

[4] It is also at once a very old and, in the context of this case, modern problem. Old because criminal libel traces its origins to a 1275 English statute creating an offence known as "*scandalum magnatum*" (slander of magnates or great men). New because the communications medium is the internet-based social networking and digital communications platform invented in 2004 known as Facebook ('FB'). Its ability to facilitate instantaneous transmission of texts, photos and multimedia to FB 'friends' and billions of users could scarcely have been conceived when the earliest criminal libel laws were being fashioned in medieval England.

[5] Significantly, this is also the first time that an attack is being made in this jurisdiction to the constitutionality of criminal libel. It is an offence that is considered anachronistic in many western democracies, including a handful of Caribbean countries, and there is a vociferous international campaign for the repeal of such laws by national parliaments, or for courts to strike them down.

[6] But as will be seen, any opportunity for reform through the courts comes up firmly against a barrier of the Constitution's own making—the 'savings law clause', which paradoxically preserve laws which pre-date the Constitution even if repugnant to constitutional guarantees. In this way, the hand of the past is kept firmly on the tiller of the future, and the ship carrying the promise of modern constitutionalism under a new and "supreme law" remains entombed in a Sargossian sea of ancient laws.

PRELIMINARY ISSUES

[7] Before launching into a discussion of the substantive issues, it is important to memorialize the unusual and sad circumstances in which this constitutional reference came before me. It also explains the delay between the initial hearing of this matter and the delivery of the ruling.

[8] As recorded in the masthead, the matter was heard before Senior Justice Stephen Isaacs (as he then was) on the 3 April 2018. Sadly, Senior Justice Isaacs, who had by then been appointed Chief Justice, died on 24 August 2018, before he could render a decision. The matter was transferred to another Judge, who made a case management direction dated 30 November 2018 to hear the matter *de novo*. However, before that hearing could take place, the plaintiff's legal team requested that the matter be heard on the written submissions and the transcript of the proceedings, as lead counsel for the plaintiff had sustained very serious injuries in a para-gliding accident and was not available for a rehearing. Counsel for the Crown agreed to this mode of disposition. The matter was transferred to me in early 2020.

Jurisdiction of another judge to hear matter

[9] Because of the peripatetic way in which this matter devolved on me, there arises a minor, though not insignificant, point of jurisdiction. I therefore summoned counsel for the parties on the 29 January 2020 and requested brief written submissions on my jurisdiction to hear the reference. In their submissions, counsel for the parties were agreed that I had jurisdiction. Mr. Cumberbatch for the defendants premised his submissions on the line of cases mentioned in a passage in *Halsbury's Laws of England,* "Courts and Tribunals" (Vol. 24A (2019))—("Death of Judge")—dealing with the jurisdiction of another judge to hear proceedings when a judge dies after the hearing, but before judgment has been delivered.

[10] Ms. Martin relied primarily on the Court's case management power at *R.S.C.* Order 31A, rule 18(o) to "instead of holding an oral hearing, deal with a matter on written representations submitted by the parties." While this rule clearly gives the court power to decide a matter on written submissions only, it does not specifically address the antecedent jurisdictional question raised by the death of the judge originally seized of the matter.

[11] I am satisfied, however, based on the principles enunciated in the case law, that in circumstances where a judge dies after hearing an application but before writing a judgment in an action where the evidence is by affidavit only, and in particular where the parties consent, there is no impediment to a different judge considering the matter on the written submissions and the record of the hearing: see *Re British Reinforced Concrete Engineering Co. Limited* (1929) 45 T.L.R. 186; and *Chua Chee Chor v Chua Kim Yong* [1963] 1 All ER 102.

[12] The interposition of a second judge created yet another jurisdictional wrinkle. At the hearing on the 29 January 2020, Ms. Martin drew my attention to the short decision of the Court of Appeal in *Smith's Point Limited*

et. al. v The Comptroller of H.M. Customs (SCCivApp. No. 64 of 2012), where the Court held that a judge lacked jurisdiction to hear an application for leave to bring judicial review proceedings (which she refused), as the matter had already been heard by another judge, although he had not delivered a ruling. The Court's reasoning in *Smith's Point* was: "As Longley J. was seized of this action, having heard it up to the point of rendering a judgment, Gray Evans J. did not have jurisdiction to render the decision she delivered on the 1st March 2012". This was because there was nothing to show that it was not "practical or convenient" (s.6, Supreme Court Act) for the first judge not to have disposed of the matter.

[13] I do not read the Court of Appeal's decision as laying down a procrustean rule that once a matter was assigned to a judge it had to be completed by that judge. Indeed, the language of section 6—"practical or convenient"—admits of subjective, discretionary factors, which seem intended to establish a rule of guidance and not black-letter law. Further, I am of the view that the facts of that case are distinguishable from the instant matter. There, the application for leave had been fully heard by the judge and, for whatever reason, was transferred to another judge. As the hearing in this matter did not commence anew before the second Judge, the evidential maxim *omnia praesumuntur rite esse acta* (presumption of regularity) must apply with respect to the decision to transfer it (see further, on this point, the decision of Adderley, J. (as he then was) in *St. George and others v. Hayward and others* [2006/CLE/Gen/FP/223A&B).

[14] Very strong judicial endorsement of this transfer jurisdiction is derived from the Court of Appeal's decision in *Maycock et. al. v. The Attorney General et. al.* (conjoined appeals Nos. 152, 170, 172, 173, 174, 179 and 180 of 2008). That appeal arose from the Supreme Court's decision on a constitutional reference, where counsel for several of the appellants had argued as one of his grounds that there had been an unlawful decision to transfer the magistrate's reference from one Judge to another Judge without hearing his clients.

[15] The Court of Appeal disposed of the argument as follows:

> "The point raised by Mr. Roberts on behalf of his clients that the decision to transfer the learned magistrate's reference from one Justice of the Supreme Court to another Justice of the Supreme Court was wrong in law since his clients were not heard before the transfer took place is, in my judgment, misconceived since the learned judges of the Supreme Court have equal jurisdiction, and the Chief Justice, as Head of the Judiciary is charged with the administration of that Court as well as all magistrates' courts. Where a matter is re-assigned to a different Justice from the Justice from whom it was originally assigned either because the latter may have been unable to complete it or because that Justice is assigned to other duties or has taken ill, it is a decision for the Chief Justice, in his administrative capacity, to ensure that it is assigned to a Justice who is able to complete it. There is no merit in that ground of appeal as a person, in a democracy like The Bahamas, has no legal or constitutional right to choose his judge."

[16] In any event, to the extent that there may be a conflict between the *Smith's Point* and *Maycock* decisions, I would prefer the latter.

FACTUAL BACKGROUND

[17] The basic facts out of which this constitutional reference arises have been sketched in the lead-in, not for their salaciousness but to provide some immediate context. It is important to reiterate that the trial is incomplete and the "facts" remain unproven at this point. Whether the *mens rea* and *actus reus* of the offence have been established and whether or not any defences are available to the plaintiff may at the end of the day remain issues for the determination of the magistrate. This court must therefore remain aloof to those adjudicative facts.

The Protagonists

[18] The plaintiff filed an Originating Notice of Motion for Constitutional Relief (the Constitutional Motion) on 12 April 2017. An affidavit in support was filed on 20 February 2018. In it, he describes himself as a political activist and "an advocate for freedom of expression". He indicates that he maintains a Facebook page on which he publishes videos, posts and live stream, and asserts that he has "many followers". His online advocacy is said to include "…me passing comments (sometimes negatively) about the corrupt practices of some political elite in The Bahamas". His lead counsel Mr. Smith QC described him in oral submissions as "a well-known figure, a publicly outspoken figure" and of having a "big political profile".

[19] The plaintiff also alleges in his affidavit that his prosecution was politically motivated. Inexplicably, and notwithstanding the very serious allegations levied against the State as to the *bona fides* of the prosecution, the defendants did not file any affidavit evidence challenging these assertions. They did file a document, on 14 March 2018, which purported to be an "Affidavit in Response" by a Corporal Moses Curry. But that was a curious, shape-shifting document, drafted in the form of a pleading (e.g., "paragraph 1 is admitted") and the referenced paragraphs were not to the Archer affidavit, but to the plaintiff's skeleton submissions! More will be said of this later. However, Mr. Smith in his oral submissions indicated that he was not taking any objection to the form of the affidavit.

[20] The virtual complainant is a newspaper reporter. She is also alleged by the plaintiff to be a "ghost writer" for a tabloid, and it is her alleged contributions to that publication which seem to have been the original bone of contention between the parties. But nothing turns on that, since it is the exchange on FB which led to the charge before the magistrate. They were FB 'friends', as that term is used—at least up until the unfortunate exchange, when he 'unfriended' her—but they are not socially acquainted.

[21] According to the charge sheet, the exchange on FB took place between 16-23 of April 2015. It appears that things were set in motion when the plaintiff posted comments critical of writings in the tabloid allegedly attributed to the virtual complainant, which seemed intended to "bait" her (his words) and which did elicit a response.

The FB messages

[22] The flashpoint appeared to be the 16 April 2015, when the virtual complainant apparently privately in-boxed the plaintiff with the following comments, as appears from his public posting of the exchange [emphasis appears in the original]:

> "HERE IS WHAT [*the virtual complainant*] wrote a few hours ago, the truth hurts:
>
> 'You are a pathetic turd. I don't know you. But you presume to know me. I don't live in a matchbox like you. And all of the things in your "file" are lies. So the big dummy has opened himself up to a lawsuit. Too bad [y]our house looks like a tool shed. I think your mother tried to induce an abortion and it made you retarded instead. Small wonder you haven't accomplished anything in life. Your followers on FB consider you the idiot and a cockroach could beat you in an election.' "

[23] That post was immediately followed with this riposte [emphasis in the original]:

> "GO SUCK YOUR MOTHER YOU AIDS RIDDEN B*TCH!!!!
> YOU GOT AIDS AND YOU SPREADING IT…!!"

[24] What followed over the next few days was a desultory string of posts in which the Plaintiff unleashed a litany of offensive allegations, a sample of which follow (not quoted elliptically):

> "She got the boomerang [slang for HIV/AIDs]. And she is spreading it daily."
> "Plus you sick. I will tell everybody who gave you the boomerang. Try me."
> "Is it not true that [*the virtual complainant*] had a baby in a bucket in a Rasta camp and left it to die?"
> "I will tell you all exactly when she had that baby and where she dumped it. It was even in the newspapers when the fetus was discovered."

[25] The plaintiff also posted a photograph of the virtual complainant on his FB page. So, there was no mistake about the identity of the person to whom his comments were directed.

Procedural history

[26] The virtual complainant became aware of these postings on or about the 16 April 2015, and on the 19 April 2015 made screen shots of them and sent copies to her lawyer. She made a complaint to the police that same day. A complaint was also made to FB, and it is understood that the company took down the most offensive of the posts.

[27] The plaintiff was arrested on the 18 September 2015 and charged with intentional libel contrary to section 316 of the Penal Code, Chapter 84, particulars of which were that "you between 16th and 23rd April 2015 did intentionally and unlawfully publish defamatory material that [*the virtual complainant*] has the Human Immunodeficiency Virus (HIV) or commonly called AIDS on your Facebook page via the world wide web with intent to defame [the virtual complainant]". He was simultaneously charged with another offence (threatening harm to a senior Police Officer), but that is not directly relevant to this application.

[28] On 21 September 2015, he was arraigned and remanded to custody (bail being denied) until a fixtures/bail hearing, which was set for 28 September 2015. Bail was actually not granted until the 2 October 2015. The matter was transferred among several magistrates' courts, and he was re-arraigned on 21 November 2016 (when he pleaded not guilty) and the trial adjourned to 28 November 2016. The matter resumed on 28 November 2016, and following the close of the prosecution's case, it was again adjourned to the 5 December and subsequently to the 13 December 2016. At the continuation of the hearing on the 13 December, the learned magistrate rejected the no-case submission by the plaintiff and found that there was a *prima facie* case to answer. The matter was further adjourned to the 21 December 2016, 29 December and 30 December. After the plaintiff failed to appear on the last two dates, a bench warrant was issued for his arrest.

[29] However, he appeared with counsel before the Magistrate on the 4 April 2017, who cancelled the warrant and remanded him to custody until the 11 April 2017. When the matter resumed on that day, the new legal team representing the plaintiff, led by Mr. Fred Smith QC, raised the constitutionality of the criminal libel law, and requested a reference of the matter to the Supreme Court. As indicated, the legal issues referred to the Supreme Court were reduced to an Originating Notice of Motion filed 12 April 2017.

[30] The plaintiff was granted bail on the 18 April 2017 in the amount of $9,000.00 with two sureties, subject to reporting and other conditions, which included the surrendering of his passport. The bail conditions remain in place and the trial has been stayed pending the determination of this reference.

THE ORIGINATING NOTICE OF MOTION

[31] The Originating Notice of Motion framing the reference sought the following relief:

> "1. A Declaration that the laying of the charge, prosecution, trial and liability of Omar Archer Sr. to conviction and sentence to a fine and or imprisonment thereby for up to 2 years for the offence of Intentional Libel contrary to Section 315(2) of the Penal Code Cap 84 ("the Criminal Libel Proceedings") are void, illegal and of no effect, in that they are a breach of Omar Archer Sr.'s Constitutional Right to Freedom of Expression guaranteed by Article 23(1) of the Constitution; and consequentially,
>
> 2. An Order that Magistrate [*name omitted*] dismiss the Criminal Libel Proceedings and or the charge laid against Omar Archer Sr. by the COP in respect thereof; and or,
>
> 3. An Order of Certiorari to quash the Criminal Libel Proceedings as being unconstitutional, void, illegal and of no effect; and
>
> 4. A Declaration that Section 315(2) of the Penal Code which provides for the offence of Criminal Intentional Libel is unconstitutional; and or
>
> 5. That the COP pay damages to Omar Archer for having unconstitutionally subjected him to the Criminal Libel Proceedings; and,
>
> 6. All such further orders, writs, reliefs and or directions as the Court may consider appropriate for the purpose of securing the enforcement of the fundamental rights and freedoms to which Omar Archer Sr. is entitled to under the Constitution."

[32] I note that this matter arises under the special constitutional jurisdiction given to the Supreme Court under article 28(2)(b) to hear any "question arising" concerning the contravention of any of the fundamental rights provisions (16-27), which by 28(3) are required to be submitted when such issues arise in an inferior court. Thus, the filing of an originating notice of motion is somewhat of a procedural irregularity.

[33] However, as this issue has already received the judicial scrutiny of no less than a former Chief Justice (Sir Burton Hall), I do no more than echo his words in *Wells v Attorney General of the Commonwealth of The Bahamas* (No. 1791/1991) [6,7]:

> "6. Before I proceed further, I would deal with the procedure as to a Constitutional reference under Article 28(3). In the present case, upon counsel having been invited to state the particulars of the ground upon which he requested the magistrate to refer the case, it was thought that the applicant—now the Plaintiff—need himself have filed an action in the Supreme Court which counsel then did by way of originating summons supported by an affidavit sworn by the Plaintiff.
>
> 7. Of course, there is no prohibition against approaching the Supreme Court in this manner for Constitutional relief and it is, therefore, permissible: (Jaundoo v Att-Gen of Guyana [1971] AC 972); however,

magistrates should note that Article 28(3) of the Constitution is its own originating procedure and the applicant need not initiate separate action in the Supreme Court. When a "question arises" magistrates should make inquiries of the defendant or counsel as the case may be so that it is clear what the Supreme Court is being required to pass upon. The Supreme Court action begins upon such reference without the person having to take any further steps to move the Supreme Court."

THE LEGAL FRAMEWORK

The Constitution

[34] I now turn to look at the constitutional and statutory provisions against which the issues are to be decided. (Italicized portions of the legislative provisions are supplied for emphasis.)

[35] The touchstone against which any law or action must be tested for constitutionality is article 2 of the 1973 Constitution (the Constitution), often called the 'supreme law clause', which proclaims:

> "2. This Constitution is the supreme law of the Commonwealth of The Bahamas, and subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law, to the extent of the inconsistency, be void."

[36] Next would be the article which secures the right(s) which it is alleged is/are being violated. Article 23 of the Constitution protects the rights to freedom of expression in the following terms:

> "*Protection of freedom of expression*
>
> 23.—(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this Article the said freedom includes freedom to hold opinions, to receive and impart ideas and information without interference, and freedom from interference with his correspondence.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision—
> (a) *which is reasonably required*—
> (i) in the interests of defence, public safety, public order, public morality or public health; or
> (ii) *for the purpose of protecting the rights, reputations and freedoms of other persons,* preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television, public exhibitions or public entertainment; or
> (b) which imposes restrictions upon persons holding office under the Crown or upon members of a disciplined force,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

The 'savings law clause'

[37] Article 30 contains what is known as the 'savings law clause', which purports to shield pre-Constitutional written laws ("existing laws") from constitutional scrutiny. It provides as follows:

"*Saving of existing law.*

30.—(1) *Subject to paragraph (3) of this Article, nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provisions of Article 16 to 27 (inclusive) of this Constitution* to the extent that the law in question—

(a) Is a law (in this Article referred to as "an existing law") that was enacted or made before 10th July 1973 and has continued to be a part of the law of The Bahamas at all times since that day;
(b) repeals and re-enacts an existing law without alteration; or
(c) alters an existing law and does not thereby render that law inconsistent with any provision of the said Article 16 to 27 (inclusive) in a manner in which, or to an extent to which, it was not previously so inconsistent.

(2) […]

(3) *This Article does not apply to any regulation or other instrument having legislative effect made or to any executive act done, after 9th July 1973 under the authority of any such law as is mentioned in paragraph (1) of this Article.*

[38] It is important to flag at this point that sub-paragraph (3) of article 30 draws a distinction between the saved law itself and any executive action taken pursuant to such law after 9 July 1973. The former is saved as of right; the latter is only saved to the extent that it passes constitutional muster. This distinction is of some importance for the resolution of the issues herein. But the matter is not as facile as this brief explanation might suggest, and I shall return to this discussion later.

The 'modification clause'

[39] Another provision of the Constitution that is relevant to the issues under determination is what has been referred to as the 'modification clause', which is to be found not in the Constitution itself but in the Order in Council bringing it into force. As contained in paragraph 4 of The Bahamas Independence Order 1923, this provides as follows:

"*Existing laws.*

4.-(1) Subject to the provisions of this section, the existing laws shall be construed with such modifications, adaptations, qualifications and

exceptions as may be necessary to bring them into conformity with the Bahamas Independence Act 1973(b) and this Order."

[40] This, and similar provisions in like Constitutions, seems at first blush to afford the Court wide powers to modify existing laws to bring them into conformity with the constitution—and earlier Privy Council cases had indeed held so (see, for example, *Roodal v Trinidad and Tobago* [2005] A.C. 328, although subsequently overruled by the trilogy of death-penalty cases from Barbados, Trinidad and Tobago: *Boyce (Lennox Ricardo) v The Queen* [2005] 1 A.C. 400; *Matthew v Trinidad and Tobago* [2005] 1 A.C. 433; and *Watson (Lambert) v The Queen* [2005] 1 A.C. 472). It is now clear, based on these latest Privy Council authorities, that where there is sharp dissonance between fundamental rights provisions and existing law, there is little if any room for the application of the Court's modifying power in the face of the savings law clause.

Enforcement of fundamental rights provision

[41] As stated, the reference was made under article 28(3), which requires constitutional questions arising in any court other than the Supreme Court or the appellate courts to be referred to the Supreme Court for determination. But it is useful to set out the preceding sub-articles of art. 28 to properly frame the constitutional jurisdiction of the Court.

> "*Enforcement of fundamental rights*
>
> 28.—(1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress
>
> (2) The Supreme Court shall have original jurisdiction—
>
> (a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article; and
>
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article,
>
> and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive), to which the person concerned in entitled:
>
> Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.
>
> (3) *If, in any proceedings in any court established for The Bahamas other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the provisions of the said Articles 16 to 17 (inclusive), the court in which the question arises shall refer the question to the Supreme Court."*

<u>The Penal Code</u>

The 'criminal libel' offences

[42] The law relating to 'criminal libel' is set out in *Title xxi* of the Penal Code (Ch. 84) (the Code), ss. 315-322. Section 315 provides as follows:

> "315. (1) Whoever is convicted of negligent libel shall be liable to imprisonment for six months.
> (2) *Whoever is convicted of intentional libel shall be liable to imprisonment for two years*."

[43] Sections 316 to 322 of the Code set out in a detailed manner the relevant definitions of libel, defamatory matter, publication and the circumstances which provide for matter published to be either absolutely or conditionally privileged, and therefore not unlawful. It is only necessary to alight briefly on several of the material provisions.

[44] Section 316 provides:

> "*A person is guilty of libel who by print, writing, painting, effigy or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another person, either negligently or with intent to defame that other person*."

[45] Section 317 defines defamatory matters this way:

> "317(1) Matter is defamatory which imputes to a person any crime or misconduct in any public office, or which is likely to injure him in his occupation, calling or office or expose him to general hatred, contempt or ridicule.
>
> (2) In this section, "crime" includes any act, wheresoever committed, which if committed by a person within the jurisdiction would be punishable on indictment under any law."

[46] Section 318 defines publication:

> "318(1): A person publishes a libel if he causes the print, writing, painting effigy or other means by which the defamatory matter is conveyed, to be so dealt with, either by exhibition, reading, recitation, description, delivery or otherwise as that the *defamatory meaning thereof becomes known or is likely to become known to either the person defamed or any other person*.
>
> (2) It is not necessary for libel that a defamatory meaning should be directly or completely expressed; and it suffices if such meaning and its application to the person alleged to be defamed, can be collected from the alleged libel itself or from any extrinsic circumstances or partly by the one and partly by the other means."

[47] Section 319 provides that publication of a defamatory matter concerning a person is unlawful, unless it is "privileged" on any of the grounds mentioned in the sections following (320 and 321).

[48] Section 320(1) sets out the "absolutely privileged" grounds ("a-h") in respect of which "no person shall under any circumstances be liable to punishment" under the Code for publication of any defamatory matter. These include where matter is published in official circumstances, such as by Parliament, in judicial proceedings, if published under a legal duty and "(h) *if the matter is true, and if it is found by the jury that it was for the public benefit that it should be published*." Incidentally, that section also provides that where matter is absolutely privileged, it matters not whether it is true or false, or that it is not published in good faith.

[49] Section 321 sets out 10 circumstances in which publication of defamatory matter is "conditionally privileged", provided that it was done in good faith. These cover situations extending to fair reporting of matters in a civil or criminal case, reproduction of matter previously published which is privileged, or published by a person acting as a legal advocate in proceedings, or where the matter is "an expression of opinion in good faith". The latter category include an expression of opinion relating to the conduct of a person in a judicial or other public capacity, or in relation to their conduct in any public question or matter, or their conduct in any public legal proceedings as disclosed by evidence, and for expressions of opinions in books and other artistic materials.

[50] Section 322 explains "good faith". The presumption of good faith is displaced in respect of publication of defamatory matter by a person where it is made to appear: (a) that the matter was untrue, and was not believed to be true; (b) where the matter was untrue and it was published without reasonable care to ascertain its truth or falsity; and (c) that the publication was made with intent to injure the person in a substantially greater degree than necessary for the interest of the public. If a matter is published under any of the exceptions in 321 that would attract qualified privilege if published in good faith, the publication is presumed to have been made in good faith unless "the contrary is made to appear, either from the libel itself or from the evidence given…".

Relevant provisions of the Criminal Procedure Code

[51] There are also several provisions of the Criminal Procedure Code (the Code) that are relevant to a prosecution under section 315, and which need only be mentioned in passing. Pursuant to section 214 of the Code, section 315 is a Third Schedule Offence, which means it is an indictable offence triable summarily. Thus, an accused has a right to elect a trial before the Supreme Court with jury, or a summary trial before a magistrate.

[52] Section 12 sets out the law with respect to the establishment of intent generally for offences under the Code. What is apparent from that provision is

that the law applies an objective test to intent, and a person is generally presumed to have intended the natural consequences of his conduct.

Relevant international human rights instruments

[53] Counsel for the plaintiff submitted that I should also be guided by the international human rights jurisprudence in my approach to the issues under consideration. The most relevant of these are the European Convention on Human Rights (the ECHR), as interpreted by the European Court of Human Rights (ECtHR) (the Strasbourg court), and the UN International Covenant on Civil and Political Rights (ICCPR). The Government of The Bahamas ratified the ICCPR in 2008. It should be pointed out, however, that the ICCPR's status as a binding treaty does not constitute it a direct source of rights in domestic law. The Bahamas is a dualist state which requires transformation of international obligations by statute before they can become justiciable in domestic courts.

[54] I accept that these international principles are persuasive authorities for the following reasons. Firstly, there is a presumption that Parliament does not intend to legislate contrary to its international obligations, and recourse may be had to the international jurisprudence to aid in the resolution of ambiguities in domestic statutes (*Salomon v Customs and Excise Commissioners* [1967] 2 QB 116 at 143.) Secondly, the ECHR is the acknowledged antecedent of the Bill of Rights in most of the Westminster models (*Matthew v Trinidad*, pg. 455A), and the jurisprudence that has developed around both the ECHR and the ICCPR has frequently been cited by many courts (including the Privy Council) in construing constitutional rights. (See, in this regard: *Minister of Home Affairs v Fisher* [1980] AC 319, where the Privy Council referred to the ECHR, the ICCPR, and the Universal Declaration of Human Rights in coming to the conclusion that "child" in a constitutional context included children other than legitimate children; *Bowe and another v The Queen* [2006] 1 WLR 1623, where the Board undertook an expansive analysis of comparative and international jurisprudence in coming to the conclusion that the mandatory death penalty was almost universally unlawful before 1973 and therefore only a discretionary penalty was received under the 1973 Constitution; and *Neville Lewis v R* [2001] 2 AC 50, where the Board held that an unimplemented treaty (the American Convention on Human Rights) was capable of creating procedural rights in domestic law.)

The European Convention on Human Rights

[55] Freedom of expression is dealt with under article 10 of the ECHR (1950), which provides as follows:

> '*Article 10.*
> 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 interest 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.' [Emphasis supplied.]

International Covenant on Civil and Political Rights

[56] Article 19 of the ICCPR, adopted in 1966, reads as follows:

'*Article 19.*

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form or art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. *It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals." [Emphasis supplied.]

THE HISTORY OF CRIMINAL LIBEL

[57] Criminal libel has a long and somewhat ignominious history. The earliest positive expressions trace back to the 1275 Statute of Westminster (3 Edward, c.34) creating the offence known as *De Scandalis Magnatum*, which proclaimed that:

> 'from henceforth none be so hardy to tell or publish any false news of tales whereby discord or occasion of discord or slander may grow between the King and his people, or the Great Men of the Realm; he that doeth so shall be taken and kept in prison until he hath brought him into the court which was the first author of the tale'.

[58] What is commonly referred to as 'criminal libel' actually encompasses four sub-offences—defamatory libel, seditious libel, blasphemous libel and obscene libel. We are only concerned here with the first of these. Historically, these offences have often been used as instruments of state repression and in more modern times to suppress political criticism.

[59] The tendency for abuse was exemplified by the superintendence of the Court of Star Chamber over the *scandalum magnatum* offence during its early beginnings, a body which became infamous for jurisdictional excesses (see, for example, *De Libellis Famosis*, 1605, 5 Co. Rep. 125, where the defendant was prosecuted for defaming the deceased Archbishop of Canterbury, the court notoriously holding that truth was no defence). The rationale for holding that truth was not a defence to criminal libel was rooted in the view that the offences existed to prevent breaches of the public peace and duels when reputations were attacked. Such disorder did not depend on the truth or falsity of the accusations, and there developed the saying (often attributed to Lord Mansfield) that "the greater the truth, the greater the libel".

[60] The demise of the Star Chamber in 1641 led to the criminal libel jurisdiction and jurisprudence formerly vested in that body being exercised and developed by the common law courts, until later modified by statute, the most notable of the early statutes being the Libel Act 1792 ("Fox's Libel Act"), c. 60 and the Libel Act 1843, c. 96 ("Lord Campbell's Act"). While the historical justification of defamatory libel may have been to prevent public disorder and vilification of public figures, as the offence developed in the 19th century it became clear that a prosecution for libel need not contain any public interest element, nor need the victims be public figures (*Gleaves v. Dawkins* [1980] A.C. 477, at 486 (H.L.)).

[61] However, the role of the truth continues to be an important distinction between civil and criminal defamation. In civil defamation actions, truth is a complete defence; in criminal libel, truth *per se* is not a defence, unless the defendant can also establish to the satisfaction of a jury that in addition to being true, the publication was also in the public interest (see s. 320(1)(h) of the Code; *Dorsett v Attorney-General of the Commonwealth of The Bahamas* (No. 347 of 1988, [1989] BHS J. No. 100, per Sawyer, J.).

[62] Modified versions of the criminal libel offences as they existed under the English statutes and the common law were enacted in The Bahamas, as in many of the former United Kingdom colonies. The current criminal libel law appears to have been incorporated into Bahamian law as part of the Penal Code when it came into force on 1 January 1927 (s. 497(1)), and it seems to have been amended only once in 1964 (43 of 1964). The amendment was simply to delete the references to "General Assembly" appearing at paragraphs (a) (b) and (f) of what was then s. 364(1) [now s. 341] and substitute therefor "House of Assembly". Criminal libel does not appear to have been used in this jurisdiction since 1986. That was when a newspaper editor, Mr. Lionel Dorsett, was charged on indictment for intentional libel of the-then Prime Minister, Sir Lynden O. Pindling, for publishing in a political journal called "The Torch" the words "Is the Chief still a thief?" He was acquitted 11-1 by a jury during a trial in 1988.

[63] It is, however, a criminal offence on the wane worldwide, and it has been abolished in several western countries, including the United Kingdom, which

abolished the offence in 2009. Similar laws have been repealed in three Caribbean countries (Antigua and Barbuda, Jamaica and significantly Grenada) and partially repealed in Trinidad and Tobago. But at least 11 of the other English-speaking Caribbean countries retain criminal libel laws, and several retain seditious and other libel laws.

SUMMARY OF THE PARTIES' ARGUMENTS

The Plaintiff's

[64] Counsel for the plaintiff deployed a multiplicity of arguments in support of the constitutional reference/notice of motion, which are summarized below. They are not necessarily treated with in this ruling in the order in which they are listed.

i) Section 315(2) of the Penal Code ('Criminal Libel Law') is unconstitutional, as it constitutes a *prima facie* infringement of the right to freedom of expression in article 23(1), and even if it is a law reasonably required, it is disproportionate and not justifiable for the protection of reputation in a democratic society, as there are adequate civil remedies.
ii) If not unconstitutional, and/or if saved by article 30 as an existing law, the executive act of charging and prosecuting the Plaintiff is unconstitutional, as it is not reasonably required to protect private reputations nor for any of the public policy interests set out in sub-paragraph (2) of article 23, and neither is it justifiable in a democratic society.
iii) The magistrate court, as a court without judicial tenure, lacked the jurisdiction to hear the criminal libel charge, which *ex facie* raised constitutional issues.
iv) Alternatively, section 315(2) was unconstitutional prior to the advent of the 1973 Constitution, and therefore under the wide modification powers which existed under the 1969 Constitution in the absence of a savings clause, it would have been modified for constitutional conformity and must now be construed as having been so modified when imported into the 1973 Constitutional order.
v) The laying of the charges against the Plaintiff was actuated by political reasons, and was therefore improper.

[65] I pause here to note that while the challenge of the plaintiff is to s. 315(2), which makes a person liable to imprisonment for up to two years if convicted of intentional libel, the plaintiff was actually charged under section 316, which defines the offence of intentional (and for that matter negligent) libel. Whether anything turns on this is not a matter for this Court, and as the point is not taken here, I say no more on it.

The Defendants'

[66] The position of the defendants was straightforward. They relied heavily on the recent Privy Council jurisprudence construing similar provisions in Grenada to justify the constitutionality of *Title xxi* (*Worme and another v. Commissioner of Police of Grenada* [2004] UKPC 8). Further, they relied on the savings clause to immunize the law and the executive action from constitutional challenge. With respect to the challenge to executive action, the defendants contended (rather perplexingly) *in limine* that the act of prosecuting or laying the charge was a "judicial" as opposed to "executive" act, and therefore as such was not exposed to the constitutional scrutiny attached to post-independence executive acts. But they also argued that the act of charging the plaintiff was in any event saved under art. 30(1).

THE APPROACH TO INTERPRETING THE FUNDAMENTAL RIGHTS PROVISIONS

[67] Before delving into a discussion of the issues and arguments, it is useful to rehearse the principles that should guide the Court in its approach to the adjudication of fundamental rights in a constitution with a Bill of Rights such as that of The Bahamas. These are the entrenched rights found in Constitutions based on what is often called the Westminster model. But we are reminded by Lord Diplock in *Hinds v R* [1977] A.C. 195 (212) that they took their cues from the common law of England, and by Professor Ralph Carnegie that 'Westminster' is but a rhetorical device for constitutions that in fact significantly depart from the Westminster prototype ("*Floreat the Westminster Model*", Caribbean Law Review, Vol. 6, June 1996). I will therefore generically refer to them as the Westminster common law models.

[68] I attempt to state some guiding principles for two main reasons. Firstly, even though there has been no lack of constitutional challenges in this jurisdiction, not very many cases have approached the application of the interpretive criteria in a systematic way. Secondly, while constitutional claims always involve a balancing exercise, the case law has not adopted proportionality as a formal adjudicative construct, and the parties are agreed that the matter essentially turns on a proportionality analysis. Although the authorities are far from consistent in applying the principles, the governing approach is generally familiar, and I would venture to distil the following summary of the principles, steps and sequences.

Summary of interpretative approach

(i) The presumption of constitutionality

[68.1] First, it is said that the court starts from the 'presumption of constitutionality'. This means: (i) that "legislation should so far as possible be 'read down' so as to comply with constitutional requirements" (*Observer Publications Ltd. v Matthews* (2001) 58 WIR 188, para. 49); and (ii) that the "constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional" (*Public Service Board v Omar Maraj* [2010] UKPC 29). In *Attorney General of*

the Gambia v Momodou Jobe [1984] A.C. 968, Lord Diplock helpfully explained that the presumption was "but a particular application of the canon of construction …which is an aid to the resolution of any ambiguities in the actual words used". But many of the earlier cases (and indeed some of more recent vintage) tended to overstate the presumption, perfunctorily proclaiming that the presumption imposed a "heavy burden" upon a person seeking to challenge the constitutionality of legislation (*Mooto v AG of Trinidad & Tobago* [1979] 1 WLR 1334; *Surrat and others v Attorney General of Trinidad and Tobago* [2007] UKPC 55 [45], *Grant v The Queen* [2006] 68 WIR 354. In *Arorogangi Timberland Ltd. and others v Minister of the Cook Islands National Superannuation Fund* [2017] 1 WLR 99—a case in which the Privy Council specifically found that the Court of Appeal of the Cook Islands "had placed too much weight on the presumption of constitutionality" [27]—their Lordships clarified and it might be said circumscribed the doctrine. They explained that when the issue of constitutionality turns on proportionality (as is invariably the case when construing the majority of fundamental rights), "the presumption adds nothing to the ingredients of the proportionality exercise." In any event, despite the trite homage paid to it, the presumption is ill-at-ease in the structure of the Westminster common law models, where the savings law clause continues to protect laws that would otherwise be clearly unconstitutional.

(ii) Whether there is a prima facie interference with the constitutional right.

[68.2] Second, the court considers, based on a textual analysis whether the impugned law or provision constitutes a *prima facie* interference with the content of the expressed right, in this case article 23(1). The jurisprudential approach most often followed in Caribbean constitutions where fundamental rights are bifurcated constructs—i.e., statements of general rights followed by limitations—is to construe the law against the literal meaning of the constitutional provision, without regard to any of the permitted limitations or justificatory criteria which are normally stated in the subsequent sub-paragraphs or sections (*Francis v Commissioner of Police* (1973) 20 WIR 550; *Worme*). This exercise requires a constitutional document to be accorded "a large and liberal construction", not to be diminished by a "narrow and technical construction' (*Edwards v Attorney-General for Canada* [1930] AC 124 [136], per Lord Sankey LC), and to be given a "generous interpretation avoiding…the 'austerity of tabulated legalism' suitable to give individuals the full measures of the fundamental rights…" (*Minister of Home Affairs v. Fisher* [1980] AC 319, 328-329). In other words, the court is required to adopt a construction that is pro-rights. If there is one interpretive approach that has been elevated to canonical status in the adjudication of rights in the Westminster-common law model, it is this.

(iii) *Whether the law is 'reasonably required' for protection of any private rights or in the public interest*

[68.3] Third, if the court finds that the right is *prima facie* infringed, it then considers whether the law is "reasonably required" for the protection of any of the private rights or public policy objects set out in the article (in this case art. 23(2)). Firstly, the permitted invasion must be authorized by a law, and although this seems a self-evident proposition, a law may be too vague or uncertain to qualify as a law for this purpose (*Sunday Times v The United Kingdom*, No. 6538/74 (1979), ECtHR). "Reasonably required" admits of no clean definition, and it depends on a balancing exercise in the context of the permitted exceptions and the measures to accomplish this. It will be noted that there is a shift from "necessary" in the ECHR to "reasonably required" in the Westminster common law models, which might seem to suggest a test importing far greater flexibility. In *Handyside v United Kingdom* (1976) 1 EHRR 737, in examining the article 10(2) restrictions on expression, the ECtHR said that "necessary" in a democratic society was not synonymous with "indispensable", but also noted that it did not have the flexibility of expressions such as "reasonable", as used in other articles in the ECHR [48]. However, in *Newbold v Commissioner of Police* [2014] UKPC 12, the Privy Council criticized the Court of Appeal for thinking that this difference in terminology imported a different test. In *R v Oakes* 1986 CanLII 46 (SCC) [70] it was said that this required the court to examine whether the law or measure is rationally connected to the legislative objective. The onus/burden is on the state to show that it is reasonably required, but it is clear that this is not an *onus probandi* in any strict sense. The test of reasonableness is an objective exercise, and in many cases the Privy Council has been content to assume or discern it from the text of the statute (*Attorney General v Antigua Times* [1976] A.C. 16, *Grape Bay v A.G. of Bermuda* (2000) WLR 574, *Cable and Wireless (Dominica) Ltd. v Marpin Telecoms Ltd.* (PC) [2001] WLR 1123). There are, however, cases where evidence might admittedly have to be led to establish reasonableness (see *Cable and Wireless*).

(iv) *Whether the law or anything done under it is reasonably justified in a democratic society*

[68.4] Fourth, even if it is established that the law is reasonably required, it is still subject to the final constitutional criterion of whether the provision or anything done under it is reasonably justifiable in a democratic society. This is the test of proportionality, even though that term is not specifically used in the Constitution. The phraseology of the proviso is actually expressed in the negative—to the extent that the law or thing done under it is shown "not to be reasonably justifiable in a democratic society". The significance of this negative formulation is that it shifts the burden to the plaintiff/applicant (*DeFreitas v Permanent Secretary of Ministry of Agriculture, Lands and Housing* [1999] 1 AC 69), in

contrast to the position where the formulation is positively expressed and remains on the state (e.g., Canadian charter, ECHR). In the *Arorogangi Timberland* case, Lord Sumption, JSC, applying the test adopted by the United Kingdom Supreme Court (UKSC) in *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 93, explained that proportionality:

> "depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interest of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

The fourth element is layered on to the elements of the proportionality test initially stated by their Lordships in the *DeFreitas* case (*supra*). In *Bank Mellat*, the UKSC specifically referred to the "classic formulation" of the test in *DeFrietas*, and explained that while that decision had been a "milestone in the development of the law," it is "now more important for the way in which it has been adapted and applied in the subsequent case law" (see, for example, *Huang v Secretary of State for the Home Department* [2007] 2 A.C. 167, per Lord Bingham of Cornhill, at para. 19, where the four-part analysis was adopted). In *R v Oakes*, the leading case under the Canadian Charter, Chief Justice Dickson said [70]: "Although the nature of the proportionality test will vary depending on the circumstances, in each case the courts will be required to balance the interest of society with those of individuals and groups." In *Christian Institute Ors., Re Judicial Review* [2007] NIQB (11 September 2007), Weatherup J. said [para 79]: "*R v Oakes* is acknowledged as the parentage of the ingredients of proportionality in Canada, South Africa, Zimbabwe, the Privy Council and the House of Lords and it would appear that the different formulations are intended to convey the same concept."

(v) The effect of the savings clause

[68.5] The role played by the savings clause provisions in the Constitution creates unique interpretive issues and approaches to construing fundamental rights. Article 30(1) saves and protects from constitutional scrutiny for inconsistency with rights anything "contained in or done under" a law existing when the Constitution came into force. Yet, somewhat paradoxically, subparagraph (3) does not preclude executive acts done under such a saved law from being challenged. Thus, notwithstanding that the court may be required to accept at face value the "constitutionality" of the law or provision, the Court may still be

required to embark on the interpretive analysis set out at (ii) (iii) and (iv) in respect of executive acts taken or subsidiary legislation made under such laws (see *Newbold and Ors. v The Commissioner of Police and ors.* [2014] UKPC 12, *Armbrister v Commissioner of Police* [177-78] 1 LRB 549 (although dis-approved in part by the Privy Council).

(vi) The burden/standard of proof

[68.6] One of the unique features of the Westminster common law models is that they apportion the burden of proof of constitutionality between the complainant and the State. In *Observer Publications v Matthew* [2001] UKPC 11, their Lordships said [25]: "The onus upon those supporting the restriction is to show that it is so reasonably required. If the onus is discharged, the burden shifts to the complainant to show that the provision or thing done is not reasonably justifiable in a democratic society." However, it is to be clearly inferred from the approach of the Privy Council that the burden is not the strict legal burden of proof normally placed on a party to establish an assertion made by him in a civil claim on a preponderance of evidence. In fact, their Lordships have been willing to presume in many cases based on a "mere perusal of an Act whether or not it was reasonably required" and were prepared to "presume until the contrary appears or is shown" that all Acts passed by a legislature were reasonably required (see *Attorney General v. Antigua Times*). They did admit that there would be exceptional cases where evidence would be required (see *Cable and Wireless*, where the matter was sent back for a factual inquiry). Further, as noted by Margaret Demerieux ("*Fundamental Rights in Commonwealth Caribbean Constitutions*", Faculty of Law Library, UWI, 1992) [pg.83]: "It may well be that in the context of the formulation of West Indian Bills of Rights clauses, there are in fact few instances in which proof of facts is crucial to the determination of the constitutionality of a rule of law or a piece of legislation." As to the elements of the proportionality test, questions "1" and "2" basically overlap with the "reasonably required" criteria (the state's burden); and "4" requires a balancing exercise to be conducted by the Court. Only "3" (the minimal impairment test) has to be satisfied by the complainant. This anomalous admixture of evidential burdens is the result of superimposing the test of proportionality under the Canadian Charter upon the Westminster common law models, the Charter's guarantee of rights being "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". It should also be noted that in *Bank Mellat* the proportionality test is said to depend on an "exacting analysis of the factual case advanced in *defence* of the measure" (emphasis supplied). This is somewhat misleading, as while the adjudication of Convention/human rights in the UK (as in the Canadian example) does place the burden all along on the State to justify the restrictions, there is a division of the burden under the Westminster common law models.

[69] In summary, the approach to constitutional adjudication under the rights set out in the Bahamian constitution (and constitutions which are similarly patterned) is as follows:

(1) The starting point is the rebuttable presumption of constitutionality, but this is primarily a rule of statutory construction that requires legislation so far as possible to be construed harmoniously with the Constitution; it is not a significant factor when the right being adjudicated depends on a proportionality analysis.

(2) Second, whether the law or action *prima facie* interferes with the expressed right based on a textual analysis of the right and applying a liberal and generous construction to the Constitution to give effect to the rights.

(3) Third, whether the law or action, even if it constitutes an interference, may be justified as being "reasonably required" for the protection of any of the stated private rights or public policy objectives, which requires that the law is rationally connected to that objective and is not arbitrary, unfair or based on irrational considerations. This is required to be established by the State.

(4) Fourth, whether the law or measure, even if reasonably required, can be established as being not justifiable in a democratic society. This requires an application of the proportionality test, and an examination of: whether the legislative objective justifies limiting a fundamental right, whether the measures are designed to meet that objective, whether the approach guaranteed to cause minimal impairment to the right is used, and whether in all the circumstances a fair balance has been struck between the rights of the individual and rights of the community. The onus is officially on the complainant/plaintiff to establish this "negative", although it is clear that parts of the test are objective and overlap with the test at paragraph (3) above (which is part of the State's burden).

(5) Fifth, if it is a law which predates the Constitution (an 'existing law') but executive action taken or subsidiary legislation made under it are being challenged, the court must still conduct the analysis at paras. (2)-(4).

DISCUSSION AND ANALYSIS

Whether Title xxi is unconstitutional

[70] As indicated, the plaintiff's first line of attack is to the constitutionality of *Title xxi*. The defendants contend that it is not unconstitutional, and rely in particular on the Privy Council's ruling in *Worme,* where the Board found that the provisions of the Penal Code of Grenada dealing with defamatory libel, which are basically indistinguishable from *Title xxi,* were justifiable in a democratic society and not unconstitutional. In light of this authority, Mr. Smith conceded in his oral arguments that it would be an "uphill battle" to try

to persuade the court that the legislation was unconstitutional on its face. More potently, the defendants throw up the shield of the savings clause, and assert that "the offence of intentional libel cannot be the subject of direct challenge under section 23 of the 1973 Constitution" because it is protected by the savings clause at art. 30(1).

[71] Logic might suggest that I should deal first with the savings argument, because its effect, according to conventional wisdom, is to render the impugned law unassailable and any discussion as to its constitutionality academic. But there are several reasons why I think it is nevertheless important to embark on an interpretive analysis of the constitutionality of the challenged provisions of *Title xxi*. Firstly, the structure of the savings law clause at article 30 provides the plaintiff with two bites at the constitutionality cherry: to the law itself and then to any executive action taken under such law. So even a finding by the Court that the law is saved does not obviate the need to look at the proportionality of any action authorized under it. Secondly, and notwithstanding the doctrine of constitutional restraint, in my view a court called upon to review the constitutionality of legislation would be shortchanging it citizens by putting down its pen at the very mention of the savings clause.

The presumption of constitutionality

[72] I am required by sheer weight of precedent to presume that *Title xxi* is a valid law under the Constitution, unless and until it can be shown otherwise. But where (as here) the issue of constitutionality turns principally on the proportionality of the law or measure, the presumption of constitutionality is simply subsumed under the proportionality analysis (*Arorongi*). Apart from this, there are other cogent reasons why the presumption has limited practical significance for this case. The law in question is nearly a hundred years old, and like very many of the laws which come into collision with constitutional precepts, it pre-dates the constitutional order (or orders, in countries such as the Bahamas where there have been successive constitutions—1963, 1969 and 1973). It is therefore somewhat of a legal fiction, if not a fallacy, to assign a presumption of constitutionality to a law enacted in a constitutional vacuum. Moreover, it is facile to speak of a presumption of constitutionality when laws may be demonstrably unconstitutional but nonetheless saved from being so by their status as 'existing' laws (see, for example, *Prince Pinder v The Queen* [2003] 1 AC 620).

Step 1: Whether criminal libel is an interference with freedom of expression

[73] I can deal shortly with this first step, as it is common ground between the parties that criminal libel constitutes a *prima facie* interference with freedom of expression, as appears from this submission by the plaintiff (para. 8 of written submissions), with which the defendants concurred (para. 3 of their affidavit/submissions):

> "It is plain that the right to freedom of expression is interfered with by the offence of intentional libel. It is however equally plain that the law pursues a legitimate aim, in particular protecting the rights, reputations and freedoms of others (and possibly in some cases also preservation of public order). The question, as in many cases in this field, is whether the interference is proportionate—whether it is necessary and proportionate to have the means to criminally punish people for publishing intentionally libelous material."

[74] It is perhaps not surprising that the defendants would make this concession in light of the centrality of the *Worme* decision to their case. Their Lordships readily concluded in that case that it was "common ground that the crime of criminal libel constitutes a hindrance to citizens' enjoyment of their freedom of expression under section 10(1) of the Constitution [of Grenada]…" (para. 41). (Section 10(1) is virtually indistinguishable from article 23(1) of the Bahamian constitution.) But even if it were not common ground between the parties that criminal libel was a *prima facie* interference with the right of free speech, I would be prepared to hold so.

[75] There has been universal acceptance that freedom of speech is a *sine qua non* in a democratic society, and this principle has been consistently affirmed by many superior courts around the free world. While it is not necessary to multiply citations of the many cases which have given pride of place to freedom of expression, a conspectus of the views of some of these courts follows: (i) In *Handyside v United Kingdom* (1976) 1 ERHH 737, the European Court of Justice said that "Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man"; (ii) In *Palko v Connecticut* (5) (1939) 302 US 319 at 326-327, the US Supreme Court said of freedom of speech, as contained in the First Amendment to the US Constitution, "…it is 'the matrix, the indispensable condition of nearly every other freedom' "; (iii) in *Subramanian Swamy et. al. v Union of India* [No. 184 of 2014] [para. 107] the Supreme Court said "The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succour and protection to all other liberties."; (iv) in *Mandela v Falati* (1994) (4) BCLR 1(W) 8, the South African High Court commented that freedom of expression "…is the freedom upon which all others depend; it is the freedom without which the others would not long endure"; and (v) in *Jagan v Burham* (4) (1973) 20 WIR 96 at 137-138, Crane J.A. said that the facets of "freedom of expression" were 'cherished rights' and that the article of the Guyanese constitution protecting freedom of expression "seeks to preserve what is vital in a free society wherein the right to speak, to propagate and to circulate ideas belong to everyone and will be protected for everyone subject only to the qualifications under the very article itself".

[76] As may be clearly discerned from this survey, the chief commodity of freedom of expression lies in its role in fostering free political discussion and holding government accountable in a democratic polity. This was also the context in which the Privy Council was considering the issue in *Worme*, which

involved critical comments directed at a politician (in that case the Prime Minister). But it is also clear that expression which arguably does not contribute to the public weal can conceptually come within the class of free expression that is notionally protected by the ambit of freedom of expression.

[77] In *Worme* the Privy Council accepted at face value that potentially libelous speech was an interference with the right to freedom of expression. In *R v Lucas* [1998] 1 S.C.R. 439, affirming *Irwin Toy Ltd. v Quebec (Attorney General)* [1989] 1 S.C.R. 927, the Supreme Court of Canada rejected a submission on behalf of the Attorney-General that "defamatory libel is not worthy of constitutional protection". It said of the argument: "It runs contrary to the long line of decisions, beginning with *Irwin Toy*…which have held that freedom of expression should be given a broad and purposive interpretation. The court has consistently held that all expression is protected, regardless of its content, unless the form in which the expression is manifested is such that it excludes protection (as, for example, a violent act)." That freedom of speech admits of the wholesome and specious has also been recognized in the Strasbourg jurisprudence. In *Handyside (supra),* considering an article 10 challenge by the applicant who had been convicted for obscenity, the ECJ said [49]:

> "Subject to paragraph 2 of Article 10, [freedom of expression] …is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."

[78] Sedley J. famously observed in *Redmond-Bates v Director of Public Prosecutions* [2000] HLRR 249 [20], one of the cases cited by the plaintiff, that: "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome, and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having."

[79] It is also important to note that there does not need to be an actual prosecution or imposition of a sentence to constitute a possible interference with the right. In the context of the European jurisprudence, the courts have developed the concept that defamation laws, civil and especially criminal, can have a "chilling effect" on freedom of expression and the free flow of ideas, and this is so even where there may be no sentence, or a suspended sentence, or even no prosecution (*Altug Taner Atkcam v Turkey*, No. 27520/07, 25 October 2001). In this regard, the plaintiff alleges as part of his complaint that "…generally his liability to be convicted and sentenced to a fine or imprisonment for the criminal offence of libel, is unconstitutional…". This allegation finds loam in the Constitution, whose enforcement provision

expressly grants the right to bring a claim where a person alleges that his constitutional rights are "likely" to be infringed. In fact, the constitutional reference procedure itself is an exemplification of this *qui timet* invoking of constitutional protection.

[80] However, very little turns on finding an interference with the right based on the first stage of the examination. There are numerous cases in both the international jurisprudence and the domestic case law (as in *Worme*) where the courts have found a *prima facie* infringement and gone on nevertheless to find that the law was proportionate and constitutional.

Step 2: Whether it is a law reasonably required in the public interest—art. 23(2)

[81] Again, there is no major dispute here, as the plaintiff accepts that the law pursues a legitimate aim in protecting the reputation of others, and possibly to preserve public order (para. 73, *supra*). No doubt this concession is in deference to the trite observation that freedom of expression, as is the case with most of the fundamental rights and freedoms of the individual granted in Chapter III of the Constitution, is not an untrammeled right. Article 15, which sets forth a preambular statement of the fundamental rights subject to their enforceability under the enumerated provisions, contains the caveat that:

> "…the subsequent provisions of this Chapter shall have effect for the purpose of affording protection of the aforesaid rights and freedoms *subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest*." [Emphasis supplied].

[82] Sub-paragraph 2 of that article then provides for a list of private rights and public interest matters contained in any law or done pursuant to such law to constitute permissible limitations to the right expressed in 23(1), to the extent that they are "reasonably required" for the stated purposes. The exceptions include the traditional public policy categories such as defence, public safety, public order, public morality or public health (sometimes called the police powers), and other matters for the protection of the rights of others. The most relevant for this discussion is 23(1)(a)(ii), which permits laws for the "purpose of protecting the rights, reputations and freedoms of other persons…".

[83] Counsel for the plaintiff argued, however, that "in the modern era, it [criminal libel] should be reserved for the most serious cases", of which the instant case was said not be an example, and that "a civil injunction or order to pay damages would be sufficient." (Incidentally, the plaintiff's assertion that criminal libel should be reserved for the most serious cases, is itself a slight concession that the offence *per se* might not be unconstitutional, depending on the seriousness of the libel, a notion which will be examined further.)

[84] While I agree that the civil remedy ought properly to be the first port of call to redress defamation, this does not necessarily mean that the criminal law has no role to play in defamation. In some cases, a civil claim may not be feasible and may not punish, as the defendant may be a person of straw and unable to pay damages, or the defamer might be very wealthy and take the calculated risk of paying damages. Conversely, the claimant may be impecunious and unable to institute a claim. Further, the claimant may not wish to pursue a public civil trial, for reasons of negative publicity. As pointed out, unlike in civil claims where truth is a defence, truth alone is not a defence in a criminal prosecution, and thereby the victim might have some redress *via* the criminal law that would otherwise not be available. It is also worth observing that although the choice is often pitched as between pursuing a civil or criminal remedy, in fact the remedies are not mutually exclusive. They co-exist, and while there may be procedural issues in play as to whether they should be pursued concurrently, a criminal prosecution does not preclude recourse to civil remedies. In fact, a civil action had been brought in *Worme*, but was stayed pending the criminal trial.

[85] That the law on criminal defamation is only rarely removed from the prosecutor's tool kit also does not mean that it has no role to play either as an alternative to or adjunct to a civil action for damages. There is no doctrine of desuetude with respect to the law. In *Uren v John Fairfax & Sons Pty. Ltd.* [1966) 40 A.L.J.R. 124, in the High Court of Australia, Windeyer J. famously said that "…the law has often used its old weapons instead of forging new ones." Indeed, with the advent of the internet and social media platforms and the inherent difficulty in regulating such mediums, and the increase in offensive and hate speech being posted on electronic communications platforms, some jurisdictions are reassessing the utility of criminal defamation laws. Thus, the reports of the demise of criminal libel might be somewhat exaggerated. I would therefore hold that *Title xxi* is a law reasonably required to protect the reputations of others.

Step 3: Whether the law is (shown not to be) reasonably justified in a democratic society

<u>The proportionality test</u>

A democratic society

[86] The proportionality analysis takes place in the milieu of a democratic society. In *Oakes,* examining the concept of a democratic society under the Canadian Charter, Chief Justice Dickson said:

> *The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural group and identity, and faith in social and political institutions*

> *which enhance the participation of individuals and groups in society.* ”
> [Emphasis supplied.]

[87] In *The State v Khoyratty (Mauritius)* [2007] 1 AC 80, the Privy Council considered macro-features of a “democracy” to involve free elections, the protection of fundamental rights by an independent and impartial judiciary, and the separation of powers between the legislature, executive and judiciary. The Board recognized, however, that the task fell to the courts at any point in time to fill in the interstices of the content of this phrase in a given society. Delivering the judgment of the Board Lord Steyn said [29]:

> “*Giving content to the term “democratic state: in section 1 is part of the tasks of judges who are called upon to interpret the Constitution.* […] Having regard, in particular, to the specially entrenched status of section 1, in my view it would be wrong to say that the concept of the democratic states to be found there means nothing more than the sum of the provisions in the Constitution, whatever they may be at any given moment. Rather, section 1 contains a separate, substantial, guarantee. […] That said, the Constitution is not to be interpreted in a vacuum, without any regard to the thinking in other countries sharing similar values. Equally, the experience in Mauritius is likely to prove of value to courts elsewhere.”

[88] Article 1 of the Constitution proclaims that The Bahamas shall be a sovereign “democratic state”. I am therefore able to take judicial notice of the fact that The Bahamas, in addition to possessing the formal legal attributes of a democratic state outlined in *Khoyratty,* is a state which respects and cherishes the right and freedoms of the individual in a democratic society. That its citizens value freedom of speech, especially when it concerns matters of public interest, is indicated by the jury verdict in the *Lionel Dorsett* case. The state’s signing on to several rights treaties in addition to the enshrined rights in its Constitution also signals an international commitment to upholding the fundamental rights and freedoms of the individual. But these rights are counterbalanced with the right to protect private reputations, a position adumbrated by both the Constitution and the international instruments binding on the state.

Question “i”: Whether legislative objective sufficiently important to justify limiting freedom of speech

[89] Putting to one side its historical affinity with preventing breaches of the peace, it is now accepted that criminal libel laws were implemented to prevent and deter attacks on reputations. In fact the importance of reputation is borne out from antiquity: see, for example, *de Libellis Famosis* (1605), where it is said that “libelling…*robbeth a man of his good name*, which ought to be more precious than his life”, perhaps echoing Iago’s “He who steals my purse” speech in Shakespeare’s *Othello*, believed to have been written a few years earlier (1603); and *Gleaves*, where there is a reference to the debate in the House of Lords on what became Lord Campbell’s Act (Select Committee (1843),vol. 20, p.177), where Lord Campbell said that criminal libel existed

"…*with a view of vindicating the character of the party injured*, or of having revenge upon the libeller, and not in the remotest degree with any view of the protection of the public peace" (pg. 490). [Emphasis supplied.]

[90] There is also textual evidence in the Code itself that the dominant legislative purpose of criminal libel was to protect reputation (a point also noted in *Lucas*, where the Canadian Code, like the Bahamian Code, was derived in part from the 1843 Libel Act, the long title of which declared it be an Act "For the better Protection of private Character"). For example, criminal libel is included in Book III of the Code under the rubric "Offences against the Person and *Reputation*." This may be contrasted, for example, with the offences of "blasphemous or obscene libel" (s. 489 of the Code) and "publishing false news" (s. 492) which are "Criminal Public Nuisances". It has already been mentioned that Article 23(2) specifically recognizes as a permissible limit on freedom of expression the need to protect the "reputations or rights of others", and art. 17 of the ICCPR sets out the right to protection of the law against attacks on a person's honour and reputation. The OAS human rights system, in which the Bahamas participates, protects similar values.

[91] The importance of the right to reputation as part of the panoply of individual human rights in a democratic system comes out clearly in the oft-quoted speech of Lord Nichols of Birkenhead in *Reynolds v Times Newspaper Ltd.* [2001] 2 AC 127 [201]:

> "Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognize that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputation of others."

[92] In *Worme*, the Privy Council specifically adverted to the fact that criminal libel laws, in one form or another, are still retained by very many democratic societies as support for the proposition that such laws are not undemocratic and promote an important social and legislative goal (a point also remarked by the Canadian Supreme Court in *R v Lucas* [1998] 1 SCR 439). In fact, we are reminded in *State v Khoratty* by Lord Steyn that regard is to be had to what pertains in "other countries sharing similar values" when

interpreting the Constitution. Of course, the inherent fissure in this argument is that the comparison becomes less valid whenever these countries reform their laws to abolish criminal libel and similar crimes. A poignant example is provided by *Worme* itself, decided in 2005, in which the Privy Council declared that criminal libel still existed in the United Kingdom, only to abolish such laws in 2009. In fact, Grenada abolished criminal libel in 2012 (*Criminal Code (Amendment) Act* of 2012).

Comparative analysis of cases

[93] The courts in the common law world have taken different approaches to the disposition of challenges involving criminal libel, or similar laws. Several have upheld the constitutionality of such laws (*Worme* (PC), on appeal from Grenada, *Subramanian Swamy v Union of India* (Indian Supreme Court); some have upheld the constitutionality with excisions and or modifications to the law to make it compliant (*Lucas* (Supreme Court of Canada); *Richardson v Raynor* [2011] 78 WIR 159 (Supreme Court, Bermuda); and others have completely struck down such laws as unconstitutional (*Jaqueline Okuto & Anor. v. AG and 2 others* [2017] eKLR (Supreme Court, Kenya); *Chimakure v. The Attorney-General of Zimbabwe* (SC 14/2013 (Constitutional Court of Zimbabwe); *Sullivan v The Attorney General (Court of Appeal) Sechelles* (SCXA 25 of 2012). Unsurprisingly, *Worme* and *Subramanian* were cited and relied on by the defendants, while the plaintiff relied on *Jaqueline Okuto*. The others were uncovered in the Court's research on this matter, and are referenced only for comparative purposes.

[94] As the defendants were content to rely almost wholly on the Privy Council's decision in *Worme* for their argument that s. 315(2) is constitutional, I set out the relevant conclusions (distilled mainly in para. 42) of the judgment in some detail:

> "The protection of good reputation is conducive to the public good. It is also in the public interest that the reputation of public figures should not be debased falsely. Their Lordships are therefore satisfied that the objective of an offence that catches those who attack a person's reputation by accusing him falsely, of crime or misconduct in public office is sufficiently important to justify limiting the right to freedom of expression. Moreover, the offence is rationally connected to that objective and is limited to situation where the publication was not for the public benefit. Of course, the tort of libel provides a civil remedy for damages against those who make such attacks, but this no more shows that a crime of intentional libel is unnecessary than the existence of the tort of conversion shows that the crime of theft is unnecessary. Similarly, the fact that the law of criminal libel has not been invoked in recent years does not show that it is not needed. After all, prosecutions are in one sense a sign not of the success of a criminal law, but of its failure to prevent the conduct in question. In *R v Lucas* [1998] 1 SCR 439, 466 Cory J, for the Supreme Court of Canada, rejected a similar argument against the constitutionality of the crime of defamatory libel in the Canadian Criminal Code:

> "55. The appellants argued that the provisions cannot be an effective way of achieving the objective. They contended that this was apparent from the fact that criminal prosecutions for defamation are rare in comparison to civil suits. However, it has been held that "The paucity of prosecutions does not necessarily reflect on the seriousness of the problem', rather 'it might be affected by a number of factors such as the priority which is given to enforcement by the police and the Crown' (*R v Laba*) [1994] 3 SCR 965, 1007 (emphasis added). There are numerous provisions in the Code which are rarely invoked, such as theft from oyster beds provided for in section 323 or high treason in section 46. Yet the infrequency of prosecutions under these provisions does not render them unconstitutional or ineffective. I agree that the small number of prosecutions under section 300 may well be due to its effectiveness in deterring the publication of defamatory libel…
> "56. In my view section 300 is rationally connected to the legislative objective of protecting the reputation of individuals."

> For much the same reasons as the Supreme Court, their Lordships reject this particular argument for saying that the crime of intentional libel is not reasonably required in Grenada. Looking at the position overall, they are satisfied that it is indeed reasonably required to protect people's reputations and does not go further than is necessary to accomplish that objective."

[95] In *Subramanian*, a discursive judgment running to 268 pages, a two-judge bench of the Indian Supreme Court upheld the constitutionality of the criminal offence of defamation under ss. 499 and 500 of the Indian Penal Code, on the ground that criminal defamation is not a disproportionate restriction on free speech. The court reasoned that protection of reputation is a human right as well as a fundamental right (derived from Article 21, as an element of the right to life and liberty) (para. 186). In *Okuta*, the High Court of Kenya declared the offence of criminal defamation under s. 194 of the Kenyan Penal Code to be unconstitutional, and found that the use of the criminal law to protect reputation was "clearly excessive and patently disproportionate" and that there was an alternative civil remedy for defamation (paras. 39-40). That case also concerned a publication on Facebook and the Court applied the *Oakes* proportionality test and referred to the international jurisprudence. Counsel for the Defendants sought to distinguish this case on the basis that the 1963 Constitution of Kenya, which was basically in the same form as the 1973 Constitution of the Bahamas, was replaced with a new constitution in 2010. I accept that the 2010 Constitution is radically different from the independence constitution, but I do not necessarily accept that these changes by themselves render the ruling irrelevant, since the rationale was based on the application of the proportionality test. Of more significance is that the court there did not have to contend with a savings clause, as even the original 1963 Kenyan Constitution lacked the savings clause to be found in the Bahamian constitution, and the new constitution certainly has none.

[96] Of the cases looked at by the court and not cited by counsel, it is appropriate to make mention of the Bermudian Supreme Court case of *Richardson v Raynor*, which involved a challenge very similar to that in the present proceedings. In that case, Kawaley J. held that s. 214(1) of the Bermuda Criminal Code (criminal defamation) was invalid on its face for contravening the right to freedom of expression set out in s. 9 of the Bermuda Constitution, but relied on the modification clause to read down the section to make it conform with the Constitution. The brief facts were that a criminal defense lawyer was prosecuted for the summary offence of unlawful defamation pursuant to s. 214(1) of the Criminal Code of Bermuda for a posting on Facebook which suggested that a police inspector, who had prosecuted him for a minor drugs offence (for which he had been discharged by a magistrate) was racist. He also launched a constitutional challenge to the criminal libel charge and requested that the senior magistrate hearing the charge refer the matter to the Supreme Court for the determination of the question as to whether the prosecution contravened his rights of freedom of expression under s. 9(1) of the Constitution [the equivalent of 23(1)].

[97] Section 214(1) of the Bermuda Criminal Code provided as follows:

> "Any person who unlawfully publishes any defamatory matter concerning another person is guilty of a summary offence, and is liable to imprisonment for twelve months."

Kawaley J. found that as parsed that section criminalized "non-intentional" defamation and encompassed statements not intended to injure and/or not known to be false, and therefore went beyond what was reasonably required to protect reputational damage to individual citizens and/or public officials. He therefore utilized the modification power under s. 5(1) of the Bermuda Constitution Order to modify the section to read as follows (additions in italics):

> "Any person who unlawfully publishes any defamatory matter concerning another person *knowing the defamatory matter to be false* is guilty of *an* offence, and is liable to imprisonment for twelve months upon *summary conviction and* on conviction on indictment to imprisonment for two years,
> *Provided that no charge shall be laid under this section without the consent expressed in writing of the Director of Public Prosecutions*."

[98] Thus, the first modification was based on the finding that the first limb of section 214 did not properly prescribe a mental element for the offence, and was simply intended to import into the Bermudan Code the requisite intent which is already specified in the corresponding Bahamian provision. The added proviso raises other considerations, however, which are germane to the issues in the present case, and which will be discussed later. Notwithstanding the stature of Kawaley J., this might be thought an overly liberal use of the modification powers, although it may be explained by the lack of a savings

clause in the Constitution of Bermuda. Therefore, there was no impediment to the court using the corrective power to save, rather than strike down the law.

[99] On the analysis of the first element of the proportionality test, I find that the provision which penalizes defamation and hence limits the right to free speech with the objective of protecting reputation, both of public figures and private persons, is a sufficiently laudable goal in a democratic society to warrant limiting freedom of expression in appropriate cases. This condition is satisfied not only because of the inherent value and dignity attached to personal reputation, and its recognition as a carve-out in the rights provision, but also because the core substance of the right to freedom of expression is not necessarily impaired by such restrictions, subject to the requirement that recourse to penal provisions is had only in the most serious of cases.

Question "ii": Whether the measure is rationally connected to legislative objective

[100] This element obviously overlaps with the "reasonably required" test. As explained in *R v Oakes* [70]: "[T]he measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective." In *RJR-MacDonald Inc. v Canada (Attorney-General)* [1995] 3 S.C.R. 199 [pg. 352], Iacobucci J. observed that "[r]ational connection is to be established upon a civil standard, through reason, logic or simply common sense."

[101] In *Worme* the Privy Council found that s. 252(2) of the Grenada Penal Code penalizing the offence of criminal libel, which as has been pointed out is virtually indistinguishable from s. 315(2), was rationally connected to the objective of protecting reputation, and sufficiently limited in its scope as to meet the requirements of reasonableness. I am bound by that. But I am also satisfied that s. 315(2) independently meets the requirement of rational connection as set out in the *Oakes* test. First of all, although not without deficiencies, the law creating criminal libel is conscientiously and deliberately crafted, occupying its own Title in the Code. It sets out the mental elements of the offence, what constitutes publication, what constitutes defamatory matter, and a laundry list of grounds on which a defendant might rely to establish that the publication was privileged (either absolutely or qualified) and therefore not unlawful.

[102] The plaintiff accepts that the offence is narrowly drawn and circumscribed, as appears from the written submissions at paras. 14, and 15:

> "14. In order to be convicted of intentional libel, it will need to be demonstrated that a defendant published defamatory material intending for it to impute to a person a crime or misconduct in public office, or to injure (or be likely to injure) his occupation or calling, or to expose him to general hatred, contempt or ridicule. Where the defendant is an individual acting on his own behalf the publication will not be defamatory if it

> appears from all the circumstances that it was made in good faith in one or more protected circumstances, for example, literary opinion or fair comment on the conduct of persons in public office.
>
> 15. *It is clear from the foregoing considerations of the Code that it significantly constrains the breadth of criminal liability for intentional libel by including a number of built-in limitations and defences*." [Emphasis supplied.]

[103] It is also tolerably clear that the prosecution must prove that the publication was "unlawful" and that there was intent to defame. For example, a person is only guilty of libel if they "*unlawfully*" publish defamatory material either with intent to defame (315)(2) or negligently (315)(1). Unlawfully is defined to mean publication of defamatory material unless it is privileged on any of the grounds mentioned in *Title xxi*. Thus, the burden to establish that a publication is unlawful and hence not within any of the grounds of privilege (or to negative any defence) is on the prosecution. In *Worme* the Privy Council rejected a contention by the claimant that the onus of proof of the defences under ss. 257 and 258 of the Grenadian Code (which are basically indistinguishable from 320 and 321, set out above), was thrust on the defendant, and thus a reason for holding the law unconstitutional. After a meticulous examination of the provisions, Lord Rodger of Earlsferry writing for the Board said [24]:

> "[T]he language of the relevant provisions of the Code is not designed to place the burden of proof of absolute privilege on the defendant. So this is not a case where the statute introduces an exception to the general principle [i.e., that the burden of proof remains on the prosecution—*Woolmington v Director of Public Prosecutions* [1935] AC 462]. The general principle must therefore apply."

[104] Parliament has thought that certain intentional attacks on reputation ought to be visited with the sanction of the criminal law, and created provisions which specifically address that mischief. Though we may now question the utility or even constitutionality of such a law with the passage of time and the evolution of thinking about fundamental rights, it cannot be disputed that such a law is directly connected to the objective of protecting reputations, even if the instrument used to accomplish it is the blunt force of the criminal law. As said by the authors of *Clerk & Lindsell on Torts* (22 Ed., Sweet & Maxwell), pointing out the relationship between tort and crime: "*Perhaps the most important feature of this relationship of tort and crime is that both serve to impose obligations of universal application designed to protect the good order of society*." In my judgment, to the extent that the criminal law, by imposing punishment, may play a role in deterring unwarranted attacks on personal reputation, it is a measure which is rationally connected to the legislative objective of protecting reputation, and the offence is sufficiently circumscribed so as to be within that remit. So I would hold that section 315(2) passes the test of being rationally connected to the objective.

Question "iii": Whether the means used to impair the right or freedom are no more than is necessary to accomplish that objective

[105] Even if s. 315(2) passes muster of being a sufficiently important legislative goal and being rationally connected to that objective, is the criminal solution too draconian a means to achieve the ends of reputation protection? It is this component of the proportionality test that is bound to be the most problematic. Mr. Smith argues that to use the criminal law in this situation is like "cracking a nut with a sledgehammer." He states that "It was plainly open to the State to protect the reputation of the alleged defamed person by lesser means (and in particular, in this case, by the enforcement of his civil rights as opposed to using the criminal law)."

[106] It cannot be gainsaid that the sanction of the criminal law is the most serious sanction that can be imposed by the state on an individual. In his collection of constitutional essays ("*Fundamental Rights and Democratic Governance: Essays in Caribbean Jurisprudence*," Caribbean Law Publishing Co.) the late Professor Simeon MacIntosh, in an Essay on "*Freedom of Speech and the Press, Public Discourse and Democratic Governance*" described the state's penal power as follows [pg. 123]:

> "The enforcing of criminal statutes is the most intrusive and coercive exercise of domestic power by a state. … In other words, punishment entails an act of force against an autonomous individual that morality would forbid were the citizen not a criminal. … [G]iven the great potential for doing grave injustice in the act of criminalizing and punishing conduct, the power of the state embodied in the criminal justice system ought never to be exercised in the absence of a complete and compelling moral justification. This argument is underscored when account is taken of the indignities of an arrest for the alleged commission of a crime, the expenses which must necessarily be incurred in mounting a defence against a criminal prosecution, the harsh consequences of incarceration and other encumbrances of a criminal conviction."

[107] I accept that criminal libel, to the extent that it can be accommodated in the constitutional framework, should be reserved for the most serious cases. In *Goldsmiths v Sperrings* [1977] 1 WLR 478 (485) Lord Denning explained that: "A criminal libel is so serious that the offender should be punished for it by the State itself…Whereas a civil libel does not come up to that degree of enormity." A few years later, in D*eakin*, the House of Lords underscored the requirement for there to be sufficient gravity of the libel to warrant prosecution. This comes out best in the speech of Lord Scarman, which is worth setting out at some length [pg. 14].

> "While, therefore, it was almost invariably said that the criminality of libel arose from the tendency to disturb the public peace, evidence was not necessary to establish the existence of the tendency: the gravity of the libel was the best evidence. The logic of the law was finally exposed by du Parcq J. in *Rex v Wicks* [1936] 1 All ER 384. In giving the judgment of the court, he said, at p. 386, that a prosecution ought not to be instituted

> "when the libel complained of is of so trivial a character to be unlikely either to disturb the peace the community or serious to affect the reputation of the person defamed." It is plain from the passage in the judgment where these words appear that the learned judge was emphasizing that it is the gravity of the libel which matters. The libel must be more than of a trivial character: it must be such as to provoke anger or cause resentment. The emphasis of the passage, as Wien J. recognised in *Goldsmith's* case, at p. 87F, is upon the character of the language used. *In my judgment, the references in the case law to reputation, outrage, cruelty or tendency to disturb the peace are no more than illustrations of the various factors which either alone or in combination contribute to the gravity of the libel. The essential features of a criminal libel remain—as in the past—the publication of a grave, not trivial, libel.*" [Emphasis supplied.]

[108] Mr. Smith argues further (para. 49 of written submission) that: "Mr. Archer's comment, in the context in which it was made, was not in reality likely to have caused significant or serious harm and it was unnecessary and disproportionate for the state to intervene and lay a criminal charge as opposed to simply allowing the aggrieved party to seek redress under the civil law." I agree that context is important in assessing the gravity of the alleged libel and the proportionality of any response. The cases clearly show that public figures such as politicians or persons operating in a public context, which includes journalists, are exposed to public scrutiny and must have a higher tolerance for critical comment: see, for example, *Morar v Romania*, App. No. 25217/06, 7 July 2015, where the ECtHR expanded the concept of public figures to include [55]: "anyone who is part of the public sphere, either because of their action or by their position. In other words, one must distinguish between private individuals and individuals acting in a public context."

[109] Although the virtual complaint is a journalist by profession, the alleged defamatory exchange did not involve any discussion of any public issue or idea, and so the greater margin of appreciation that might be allowed in respect of persons operating in the public sphere does not come into play. True it is that the remarks were made in the context of what the plaintiff's counsel described in his written submissions as the parties being engaged in "some sort of slanging match—exchanging insults on line", and it is important to bear this in mind. But while one cannot turn a blind eye to the fact that the virtual complainant was not totally on the receiving end, there are some important distinctions to be borne in mind. Firstly, her comments were messaged privately, while those of the Plaintiff were broadcast to the world. Secondly, while scathing, they were for the most part opinions, what might be considered "scurrilous abuse" as that term is used in civil defamation, as opposed to purported factual assertions.

[110] But content is also important. Were the plaintiff's words to be found libelous, in my view they could quite possibly meet the "gravity" test based on the character of the words, as set out in the passage by Lord Scarman in *Deakin* (*supra*), to attract a prosecution. I therefore cannot agree with Mr. Smith's assertion that the plaintiff's comments were not likely to have caused

harm or significant harm, or that they do not rise to such a level as to warrant a criminal charge—assuming this can be done harmoniously within the constitutional framework. The statement made by the plaintiff had the potential to cause significant and or serious harm not only to the plaintiff, but possibly to others. Firstly, as a matter posted on Facebook, it had the potential to instantaneously reach millions of people, in fact the entire world. This is not to suggest that libel committed in the digital world is to be treated differently from libel committed via the non-electronic media. But it is a simple recognition that the internet has the capacity to instantly reach a global audience, and exponentially compound the reputational damage to the person.

[111] In *Editorial Board of Pravoye Delo & Shtekel v. Ukraine*, App. No. 33014/05 [para. 63], the ECtHR held that "The risk of harm posed by content and communication on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press." In the Australian case of *Dabrowski v Greeuw* [2014] WADC 175, the Court found that the publication of the material on the internet made its effect almost permanent and was capable of causing harm to the plaintiff's reputation well into the future. The court concluded that: "…when defamatory publications are made on social media it is common knowledge that they spread. They are spread easily by the simple manipulation of mobile phones and computers. Their evil lies in the grapevine effect that stems from the use of this type of communication."

[112] It will be recalled that the Plaintiff himself states that he has a "large" following on Facebook, and in fact several of his followers did comment on the post. One said "*She should be locked up for spreading the disease*"; another said "*omar you is a beast!! you gone all out on this roach*"; and another said "*whew…too much information and picture, how am I suppose to react if I ever see this woman in church or food store after this?* "

[113] Secondly, and I can take judicial notice of this, the Plaintiff imputed not one, but several serious crimes to the virtual complainant. The first was that she might have been guilty of concealing the body of a child, contrary to s. 298 of the Code, which is punishable with two year's imprisonment. The second was that she may also have committed infanticide, a crime for which a person could be found guilty of either manslaughter or murder depending on the facts under s. 298 of the Code, with the corresponding punishments. It is also an offence under s. 8(2) of the Sexual Offences Act to have sexual relations with other persons if a person knows he or she is infected with the HIV virus/AIDs, and a person so guilty is liable to detention for five years.

[114] Thirdly, it is not inconceivable in today's world, where there have been many examples of information or material published in cyberspace motivating actual violence, for an affected person to have responded either by way of retaliation or self-harm, irrespective of the truth or falsity of it. In this regard, I think it appropriate to state, again subject to the important caveat that the facts before the magistrate are still unproved, that the virtual complainant provided

medical evidence before the trial court which contradicted the Plaintiff's statement as to her HIV status. In fact, it appears that the police prosecutors were under the impression (erroneously) that they needed evidence that the allegation was in fact not true before commencing the prosecution.

[115] Thus, I reject any suggestion that the Plaintiff's statements were not capable of causing significant harm, either to the virtual complainant or others. Calling someone a pathetic turd or saying that a cockroach could beat them in an election, or that they might be mentally retarded because of a botched abortion (obviously not an allegation based in fact) is admittedly not nice behavior. But at most, it is abusive. The election jab might even be thought amusing. To assert, however, before an unlimited audience in cyber space, accompanied by a photograph, that a person committed infanticide and is infected with the HIV/AIDS and spreading it to others, is no laughing matter. Unfortunately, the virtual reality and anonymity of the internet has the tendency to sometimes blur the lines between cyberspace and the real flesh and blood users with lives and reputations in the real world.

[116] Thus, subject to what I say below, if a prosecution for criminal libel could be constitutionally undertaken, a criminal response might not be an unnecessary and disproportionate response in light of the content of the alleged defamatory statements in this case.

Question "iv": Whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interest of the community.

[117] By virtue of this fourth element of proportionality, the court is now required to step back and conduct a final balancing or fine-tuning exercise, having regard in particular to the potential consequences to the defamer. In *Huaung v Secretary of State for the Home Department* [2007] UKHL 11, the House of Lords said that the overarching approach of the proportionality test is "…the need to balance the interest of society with those of individuals or groups. This is indeed an aspect which should never be overlooked or discounted."

[118] It has already been shown that the right to reputation is part of innate human dignity, and that there is a societal interest in protecting such reputations. True it is that criminal libel may no longer be needed to prevent duels, but is the criminal law needed to protect an individual's reputation? In fact, a question that is frequently interrogated in many of the cases dealing with criminal libel is whether the public interest exceptions encompass the application of the criminal law to protect private interests. In *Okuta*, one of the reasons for the court holding that criminal libel was unconstitutional was that "criminal defamation aims to protect individual interest while the limitation under Article 24 seek to protect public interest as opposed to…individual interests…" [p. 6]. By contrast, article 23 of the Bahamas' Constitution specifically authorizes the protection of the reputations of others.

[119] While the Strasbourg jurisprudence stops short of outlawing criminal libel, it takes a very dim view of criminal sanctions for such offences. The court has held that the "nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10" (see *Cumpana and Mazare v. Romania* [CG] no. 33348/96 (para.115). In many of its decisions the court has stressed that the imposition of a prison sentence will only be compatible with Article 10 rights in serious cases, such as with hate speech or incitement to violence. In the *Cumpana* case, the 7-month prison sentences which were imposed on two journalists were never served as the journalist were pardoned by the Romanian President, but the Court said:

> "Such a sanction, by its very nature, will inevitably have a chilling effect, and the fact that the applicants did not serve their prison sentences does not alter that conclusion, seeing that the individual pardons they received are measures subject to the discretionary power of the President of Romania; furthermore, while such an act of clemency dispenses convicted persons from having to serve their sentence, it does not expunge their conviction." [para. 116].

[120] The European Court has emphasized the professional and other consequences that a conviction due to defamation might have on a person, such as the loss of a position (as in *Ceylan v Turkey*, [1999] ECHR 44, where the defendant lost his position as president of a worker's union because of his conviction) as well as civil and other political rights (such as in *Murat Vural v Turkey* (App. No. 9540/07, 21 October 2014), where the applicant was sentenced to 13 years' imprisonment and unable to vote for 11 years as a result). In small societies, these social consequences are heightened, and a criminal trial and conviction, even one resulting from a matter most often dealt with by the civil law, carries a stigma and record of criminality which are not easily escaped or erased.

[121] Intentional libel under the Code carries with it a potential jail sentence of two years. Admittedly, two years is the upper level and the magistrate has a discretion. This is a far cry and several centuries removed from the pillorying and loss of ears or slitting of nostrils that were part of the medieval punishments for libel, and some of which were issued by the Star Chamber. It also pales in comparison to sentences as long as 20 years' imprisonment meted out in some jurisdictions for criminal defamation or cognate offences (see *Chimakure v. Attorney-General*, publishing false news). But it is not an insignificant thing to be deprived of one's freedom for simple expression, no matter how offensive, and to suffer the indignities of any penal process leading up to that—arrest, pre-trial incarceration, bail, etc.—unless it falls into the category of those where significant public interests are engaged (e.g., hate speech or inciting violence).

[122] Many democracies recognize and accept that some forms of speech should be criminalized, and deserve condign punishment. In fact, even those

countries which have abolished the specific offence of criminal libel, retain laws that criminalize messages or communications which are grossly offensive, or of an indecent, obscene or menacing character. And these laws have been extended to social media platforms. For example, in the UK, under s. 127(1)(a) of the Communications Act 2003, a person is guilty of an offence is he or she sends "*a message or other matter that is grossly offensive or an indecent, obscene or menacing character*" by means of a public electronic communications network. Added to this is the Malicious Communications Act 2003, which provides that "*any person who sends to another person a letter, electronic communications or article of any description which conveys…a threat…is guilty of an offence if his purpose in sending it is that it should…cause distress or anxiety to the recipient or to any other person to whom he intends that it or its content or nature should be communicated*."

[123] To take a more basic example, no one would doubt that the person who maliciously shouts "fire, fire" in a crowded theatre should be subject to some form of criminal sanction. In the Code this comes under the generic offence of causing public terror (s. 204), and as indicated in the illustrations provided by the Code, this offence can be committed where "A. wilfully raises a false alarm in a theatre and a panic ensues in which a person is injured". It is punishable by three months' imprisonment. In other words, a person who maliciously shouts "fire, fire" in a crowded theatre where people might be seriously physically injured is only subject to three months' imprisonment, while a person who may defame another in a non-violent way is subject to two-years' imprisonment.

[124] Therefore, in the circumstances of the instant case, a classic case of alleged defamation of a private person—and especially where the Plaintiff does not deny that he could be subject to a civil action—I would have been prepared to conclude that the possible sanctions to which the Plaintiff has been exposed and the penal actions which he has endured as part of the criminal trial process are disproportionate and therefore unconstitutional. They fail to strike the proper balance between the Plaintiff's rights to freedom of expression and the societal need to protect the reputation of others. The latter could adequately (and perhaps more effectively) be done by recourse to the civil law. However, as explained above, I consider myself bound by the Privy Council's ruling in *Worme*, which found what is almost a replica of *Title xii* in the Grenada context to be a proportionate sanction and therefore not unconstitutional. I am therefore constrained to find that the challenged provision of *Title xxi* are not unconstitutional on the grounds of proportionality.

The savings law clause: Part I

[125] In advancing this argument, the Defendants invoke the statement of Acting Chief Justice Potter in the Bahamian case of *Armbrister and Others v Commissioner of Police*, Supreme Court, Appeal Side (No. 40/1977) at page 554, where he said that "If it were necessary to decide that the Penal Code is today an existing law in its entirety I would so decide." They also make

reference to the more recent Privy Council case of *Newbold v COP (supra)* where the Board held that the Listening Devices Act (LDA) was not unconstitutional as a law saved by article 30(1), although their Lordships did not come to this conclusion without some equivocation and qualification.

[126] The Plaintiff concedes that the s. 315 of the Code is an existing law and naturally anticipated the argument on the savings clause, as indicated at para. 21 of their written submissions: "*The relevant provisions of the Penal Code existed in the same or materially similar terms prior to 1973. The offence of intentional libel is therefore an 'existing law'*. Doubtless, the Defendants will argue that the crime of intentional libel cannot be the subject of direct challenge under section 23 of the 1973 Constitution."

[127] What then is the effect of *Title xxi* being a saved law? Many first-instance courts in the Commonwealth Caribbean have long grappled with savings law clauses, and in the main have found themselves inhibited to give effect to fundamental rights. Others, Houdini like, have found ingenious and creative ways to escape this straitjacket. But, as discussed below, these first instance approaches have only had currency so long as they aligned with the shifting sands jurisprudential approach taken by the Privy Council, the final court of appeal for many of these courts.

[128] *Armbrister* represents the traditional view, perhaps taken a bit too far (as pointed out by the Privy Council in *Newbold*). In that case, Potter, Actg. CJ, was considering an appeal by several persons who had been convicted of taking part in a procession "without the prior permission of the Commissioner of Police" contrary to section 230(33) of the Penal Code and of obstructing police officers in the execution of their duty. The procession was in fact a public protest against the planned execution of a convicted murderer and capital punishment in general, for which the Commissioner of Police had refused his permission. One of the grounds of appeal was that s. 230(33) was inconsistent with several constitutional provisions, mainly art. 22 (freedom of movement), art. 23 (freedom of expression), art. 24 (freedom of assembly and association), art. 25 (freedom of movement) and art. 26 (protection from discrimination). Acting CJ Potter decided the matter primarily based on the impact of the impugned section on article 25.

[129] Having found that s. 230(33) was a saved law which had not been amended since 1973 (in fact that virtually the entire Code was a saved law) he held that the effect of the savings law clause was to preserve the law, as well as the executive act of the Commissioner of Police in refusing permission, from being held unconstitutional. He reasoned as follows:

> "The effect of art 30 on art 25 in this case is that the content of s. 230 (33) of the Code cannot be rendered void by arts 2 and 25, but that any 'executive act' on the part of the Commissioner of Police since 9 July 1973 done under the authority of s 230(33) of the Code must fall within the exceptions provided in para (2) of art 25.

> The same conclusion may be expressed another way by saying that the relevant section of the Code is only statutory authority for the executive acts of the Commissioner of Police (since 9 July 1973) in so far as those acts comply with the Constitution.'
>
> Where a provision of the existing law is such that no executive act which is constitutionally valid can be performed under its authority, the preservation of that existing law is of no consequence.
>
> It is where the provision of the existing law could be used as the authority for constitutional or unconstitutional executive acts, and that provision is not severable, that art. 30 comes into play. It preserves the law despite the Constitution, but only permits its use for constitutional purposes."

[130] The approach in *Armbrister,* which was one of the first local cases to put under the microscope the dichotomous position of articles 30(1) and (3), may be contrasted with that of Hall, CJ, in *Gladstone McEwan v Bethel*, (Civil (Const) No. 881 of 2002. There, the Chief Justice attempted to circumvent the effect of the savings clause by locating the right being challenged (right to vote in secret ballot) in article 1 of the Constitution proclaiming The Bahamas to a democratic State, and therefore nominally outside the reach of the application of the savings clause (which applies to articles 16-27). Hall CJ had also found that in any event, so far as the claim engaged any article 23 rights, article 30 did not save executive acts. The Privy Council in *Newbold* commented that [51]:

> "Hall CJ's reasoning cannot, in the Board's opinion, stand so far as it rested on articles 23 and 30. Section 59(1)(b) was a provision in an existing law, which laid an unequivocal and unavoidable duty on the returning officer, giving him no power or discretion to do anything but mark the voter's number and number (*sic*) on the counterfoil relation. The performance of such a duty must fall within article 30(1), not article 30(3). Otherwise, article 30(1) becomes meaningless."

The treatment of the savings clause in the Privy Council

[131] There is hardly any legal issue which has seen as many judicial meanderings, toing and froing, advances and retreats and volt-faces than the savings clause provisions in West Indian constitutions. The approach has oscillated historically between rigid upholding of the savings clause (see the earlier death penalty cases), to a liberal approach of using the modification clause to achieve constitutional conformity (see *Reyes v The Queen* [2002] 2 AC 235, *R v Hughes* [2002] 2 AC 284, *Roodal*). Apparently concerned that they may have tipped the scales too far in the direction of judicial law-making in those cases, their Lordships empanelled a Board consisting of nine Law Lords to hear the trilogy of death penalty cases from Barbados, Trinidad and Jamaica cited *supra* (*Boyce, Matthew, Watson*). The outcome was that the Board, by a slim majority (5-4) in *Boyce* (applied in *Matthew)* retreated to the safety of the more literal approach, giving primacy to the savings clause at 30(1) over the modification clause. (A different result obtained in *Watson*,

because Jamaica had amended its relevant laws in 1992, and the offending provision, unlike the case in Barbados and Trinidad, was therefore not saved.)

[132] It is useful to set out in some detail several passages from *Boyce* (which may be applied *mutatis mutandis* to the Bahamian constitution), where Lord Hoffman, speaking for the majority said:

> "31. If one reads section 26 [art. 30] together with section 1 [art.2], it discloses a clear constitutional policy. Section 1, which applies to all laws past or future, states the general proposition that the Constitution is the supreme law and, in consequence, that any law inconsistent is to that extent to be void. Section 26 declares an exception to this general proposition. No existing written law is to be held inconsistent with sections 12 to 23 [16-27]. Existing laws are to be immunized from constitutional challenge on that ground. If they cannot be held void, it follows that they must be accepted as valid.
>
> 32. The wisdom of casting a blanket immunity from constitutional challenge over the whole corpus of existing laws might be debatable. Not all of the former British colonies in the Caribbean thought it necessary to do so. The framers of the Constitution of Barbados (and other constitutions containing similar provisions) may have adopted them because, as Lord Devlin suggested in *Director of Prosecutions v Nasralla* [1967] 2 AC 238-248, they thought that the existing laws already embodied the most perfect statement of fundamental rights and that no inconsistency with sections 12 to 23 was possible. (See also Lord Diplock in *de Frietas v Benny* [1976] 39, 244). Against this explanation, however, it could be said that if the framers were fully persuaded on the point, they would not have thought section 26 necessary. A more likely explanation is, as Lord Hope of Craighead says of a similar provision in the Jamaican constitution in the judgment of the Board in *Watson v The Queen (Attorney General for Jamaica intervening)* [2004] 3 WLR 841, para. 46:
>
> "It was a reasonable working assumption, in the interest of legal certainty and to secure an orderly transfer of legislative authority from the colonial power to the newly independent democracy."
>
> 33. It is however unnecessary to devote too much time to speculating about the thought-process of the framers of the Constitution because, whatever may have been their reasons, they made themselves perfectly clear. Existing laws were not to be held void for inconsistency with the Constitution. Nor does the Constitution itself contain any textual warrant for the existence of a power of modification falling short of the power to hold an offending provision void."
>
> […]
>
> 55. […] The protected laws and the extent of their immunity from challenge are stated in the most concrete terms. It is in any case difficult to address an argument that the law should be updated and not left trapped in a time-warp when the plain and obvious purpose of section 26 is that the existing laws should *not* be judicially updated by reference to sections 12 to 23 [the enumerated rights]." [Emphasis in original text.]

[133] In fact, the trilogy of cases is perhaps best known for the trenchant dissent of the minority, and in particular the remarks of Lord Nicolls of Birkenhead in his separate speech where he said:

> "69. I do not believe the framers of the constitutions ever intended the existing laws savings provisions should operate to deprive the country's citizens of the protection afforded by rising standards set by human rights values. The savings clause were intended to smooth the transition, not to freeze standards forever. The constitutions of these countries should be interpreted accordingly, by giving proper effect to their spirit and not being mesmerized by the letter. […]
>
> 70. Self-evidently, an interpretation of the Constitution which produces this outcome is unacceptable. A supreme court of a country which adopts such a literal approach is failing in its responsibilities to the citizens of the country. A constitution should be interpreted as an evolving statement of a country's supreme law."

[134] The advent of the Caribbean Court of Justice (CCJ) as the apex court for several of the Caribbean states has provided the legal space in which to throw off the bit which many national courts have been chomping on for decades in trying to reconcile the savings clause with fundamental rights. In conjoined appeals from the Court of Appeal of Barbados in *Nervais and Severin v The Queen* [2018] CCJ 19, the CCJ signaled a fundamental break with the Privy Council jurisprudence on the point and stated a pro-rights approach as follows [68]:

> "We are satisfied that the correct approach to interpreting the general savings clause is to give it a restrictive interpretation which would give the individual the full measure of the fundamental rights and freedoms enshrined in the Constitution. This interpretation should be guided by the lofty aspirations by which the people have declared themselves to be bound. A literal interpretation of the savings clause has deprived Caribbean persons of fundamental rights and freedoms even as appreciation of their scope have expanded over the years. Where there is a conflict between an existing law and the Constitution, the Constitution must prevail, and the courts must apply the existing laws as mandated by the Independence Order with such modifications as may be necessary to bring them into conformity with the Constitution. In our view, the Court has a duty to construe such provisions, with a view to harmonizing them, where possible, through interpretation, and under its inherent jurisdiction, by fashioning a remedy that protects from breaches and vindicates those rights guaranteed by the Bill of Rights."

[135] In the subsequent case of *Quincy McEwan et. al. v. the Attorney General of Guyana* [2018] CCJ 30, heard shortly after *Nervais and Severin*, the Court again had occasion to consider the savings clause and laid down four guiding principles to "ameliorate the harsh consequences of the application of the savings law clause." These are as follows: (i) the savings clause must be construed restrictively; (ii) only challenges to the stipulated or enumerated human rights provisions are barred (or conversely protected by the savings clause); (iii) the courts should so far as possible avoid an interpretation that places a State in breach of its international obligations; and (iv) the court should

attempt to modify the law under the modification clause before applying the savings law clause. It should be noted that Hall, CJ had actually applied the methodology at "ii" 16 years earlier in *Gladstone McEwan!*

[136] Although I am greatly attracted to the cogent reasons given by the minority of the Board in the trilogy of cases, and the enlightened approach to interpretation of the savings clause in the recent jurisprudence from the CCJ, I am nevertheless bound by the majority view in *Boyce* and the decision in *Newbold*. Therefore, even if I had found the impugned provision of *Title xii* to be inconsistent with and in contravention of article 23, it is clearly a saved law under article 30(1), and therefore cannot be impeached. The weight of judicial precedent sitting on the shoulders of first instance courts cannot be dislodged by a casual judicial shrug, much as there is the temptation to do so.

The savings clause: Part II— the dichotomy between arts. 30(1) and 30(3)

[137] But that is not the end of the line for the plaintiff. His second line of attack is that even if *Title xxi* itself is constitutional or saved, the exercise of the prosecutorial discretion to charge him is an executive act which "must be exercised in a way that is compatible with fundamental rights under the Constitution", and he alleges that this has not been achieved in this case.

[138] Curiously, the defendants sought to argue *in limine* that the act of charging the Plaintiff was a "judicial" act as opposed to an "executive" act, based on s. 58 (3) of the Code. That provides in part that a complaint may be made to a magistrate "orally or in writing, but if made orally shall be reduced to writing by the magistrate, and in either case shall be signed by the complainant and the magistrate." This, it was contended, amounted to the magistrate preferring the charges, and thereby a judicial act. This is not a seriously arguable proposition, as a magistrate would clearly be performing a ministerial as opposed to judicial functions in reducing a complaint to writing. But more importantly, it is clear on the facts of this case that the charge was laid by the Police. The proviso to 58(3) provides that "where proceedings are instituted by a peace officer or other public officer acting in the course of his duty, a formal charge duly signed by such officer may be presented to the magistrate and shall for the purposes of this Code be deemed to be a complaint." I therefore find the Defendants argument to be seriously misconceived in this regard.

[139] In advancing his case on the challenge to the executive act, Mr. Smith relies on the interpretation given by their Lordships in *Newbold* of the *Armbrister* principle, encapsulated in the following statement:

> "49. […] If an existing law cannot be performed without breaching the Constitution, that appears to the Board a situation in which something "done under the authority of any [existing] law" would be preserved from challenge under article 30(1) of the Constitutional. Otherwise, the existing law would itself in effect be void."

> 53. "[…] As already stated, that would make the saving of existing law clauses meaningless. Just as a duty imposed by an existing law must be capable of performance, so in the Board's view section 30(1) must enable the performance of an existing law which cannot otherwise be performed without contravening the current Constitution. The *Armbrister* principle only applies when there are true alternative means of performance, at least one of which complies with the Constitution and must then be adopted."

[140] The explanation of their Lordships in *Newbold* was directed to clarifying the part of the reasoning by Potter Actg. CJ, where he had held that:

> "Where a provision of the existing law is such that no executive act which is constitutionally valid can be performed under its authority, the preservation of that existing law is of no consequence".

The Board departed from the reasoning of Potter to the extent that it suggested that "no executive act can be immune from constitutional scrutiny even if it is directly authorized by an existing law" [53].

[141] Thus, according to the Plaintiff's postulate, the question as to the constitutionality of the executive act of prosecuting the Plaintiff (since the power is contained in and done under an existing law) must turn on whether the prosecution could give effect to *Title xxi* in a way other than what is currently provided for, which the Plaintiff alleges is disproportionate and unconstitutional. He argues that there are alternative means of performance. It would be different, he says, if the provision of the Penal Code being challenged said something along the lines that "…the DPP must prosecute all persons who have published matters about people, which he thinks are untrue…". But he states further:

> "In the instant case the state plainly has options. The state must decide whether to prosecute the offence or not. As in the example of the restaurant above, it would be better to decide that, on these facts, the public interest would be better served by allowing the person allegedly defamed to rely on his civil rights. A person considering themselves to be defamed has significant and powerful civil law rights to claim damages and secure injunctions and so on. In many cases, these are the only remedies available to people."
> […]
> "In the instant case, there is no fixed and absolute statutory duty to apply the Intentional Libel law to every set of facts conceivably coming within its scope."

[142] The example given by the Plaintiff is that of someone failing to pay for their dinner at a restaurant; the police are said to have a discretion whether to use the State's resources to seek to prosecute for theft, or whether to require the restaurateur to sue under the civil law to recover the bill.

[143] I do not consider, however, that this is a matter that comes within the remit of the *Armbrister* principle, as clarified by the Privy Council in *Newbold*.

Though Mr. Smith's argument is superficially attractive, it is based on the fallacy of a false choice. True it is that a prosecutor may be required to exercise some discretion in deciding whether to prosecute. But the choice of whether to prosecute or leave the parties to their civil remedy is not a choice of alternative means of performing s. 315(2). The only way to give effect to s. 315(2) is to lay a criminal charge against such a person and let the law take its course. Parliament has thought (whether one agrees or not) that intentional libel should be a crime *per se*, and it does not require a prosecutor to weigh the suitability of a criminal charge against the efficacy of the civil law if on the alleged facts a criminal charge is made out. If the prosecution were to refuse to prosecute any action under *Title xxi* because a civil action was thought to be a constitutionally preferred option, it would effectively negate the constitutional savings clause. It should also be borne in mind, that whether or not to pursue a civil action is a matter for the complainant, who (for some of the reasons set out *supra*) might not be inclined to pursue that remedy.

[144] There are a number of cases which show that the availability of a civil remedy for defamation is not a legitimate consideration when considering a charge of criminal libel. For example, in In *Deakin*, Viscount Dilhorne said [pg. 486]: "I cannot regard it as the law that examining justices, be they lay or stipendiary, are required to consider, if a charge of criminal libel comes before them, whether or not the civil remedies for libel should suffice for the person libeled." In *Edgar, ex parte* (1913) 77 JP) 283, a writ of prohibition was refused against a magistrate preventing him inquiring into whether the defendant had published a subsequent criminal libel, notwithstanding that the plaintiff had chosen his civil remedy and had obtained an injunction against the defendant.

[145] The ambit of the prosecutorial discretion was neatly put by Laws L.J. in *Reg. v D.P.P., Ex p. Kebiline* [2000] 2 A.C. 326 (pg. 351 D-F). In that case, there was a challenge to the DPP giving his consent to prosecutions, on the basis the prosecutor's discretion should be guided in advance by the 1998 Human Rights Act, the main provisions of which were yet to come into force, but which would have made the prosecutions incompatible with art. 6(2) of the ECHR. He said:

> "[I]t is the Director's duty generally to enforce the criminal law. If he is to decide not to enforce some particular statutory provision, in my judgment he will be required on a judicial review to point to a particular context which he is entitled to regard as giving rise to an objective public interest justifying the decision. Obviously, he may not so decide merely because he entertains the subjective view that Parliament should not have criminalized the kind of acts in question. No doubt, he would never do so. Nor could he so decide merely because he concluded that prosecutions under a particular provision were too expensive or otherwise wasteful of scarce resources, at least if the reach of his decision was that he would *never* consent to such a prosecution. In this latter case, he might be entitled to entertain a policy decision which put, as it were, a particular class of prosecutions on the back burner, but he would not be entitled to refuse to consider a prosecution within the class whatever the individual circumstances. So long as an offence is on the statute book, it will be

> ordinarily presumed that it is to be made good by actions against offenders; and this is so notwithstanding the Director's wide discretion whether or not to prosecute in any individual case."

[146] I also think that there is much to commend the view vigorously advanced by the Plaintiff that matters of defamation in the ordinary course should be left to the civil law. But that is a determination to be made by Parliament; it is not a matter left to the discretion of prosecuting authorities. As long as criminal libel remains on the books as an existing law the prosecutor cannot be faulted for using it in the face of a legitimate complaint, notwithstanding that many persons, including judges, might think it is not now compatible with fundamental rights. I therefore reject the contention that the option for the complainant to pursue civil remedies was an alternative way of performing the provisions of *Title xxi*, and consequently do not find that the act of prosecuting the Plaintiff is unconstitutional.

[147] Before leaving this matter, however, I must remark that the relationship between art. 30(1) and 30(3), notwithstanding the observations of the Board in *Newbold,* remains in a most unsatisfactory state. Their Lordships were very right to describe it as a "conundrum".

[148] A different way of reading art. 30(3) vis-à-vis art. 30(1) might be that the former was only intended to apply to executive acts which were *not* previously lawful or authorized under the existing law, e.g., new actions. In fact, it would appear that some of the earlier jurisprudence from the Privy Council on the savings clause tended towards this view. Delivering the judgment of the Privy Council in *Maharaj v Attorney General* (No. 2) [1979] AC 885, pg. 395-396, dealing with the Constitution of Trinidad and Tobago, Lord Diplock said:

> "In view of the breath of language used in s. 1 to describe the fundamental rights and freedoms, detailed examination of all the laws in force in Trinidad and Tobago at the time the Constitution came into effect (including the common law so far at it had not been superseded by written law) might have revealed provisions which it could plausibly be argued contravene one or other of the rights or freedoms recognized and declared by s. 1. Section 3 eliminates the possibility of any argument on these lines. As was said by the Judicial Committee in *de Freitas v Benny* [1976] AC 239, 244:
>
>> 'Section 3 debars the individual from asserting that anything done to him if that is authorized by a law in force immediately before 31 August 1962 abrogates, abridges or infringes any of the rights or freedoms recognized and declared in s. 1 or particularized in s. 2'.
>
> <u>But s. 3 does not legitimize for the purposes of s. 1 conduct which infringes any of the rights or freedoms there described and was *not* lawful under the fore-existing law</u>." [Underlining supplied; italics in the original.]

[149] Article 30(3) must also be read subject to the *noscitur et sociis* principle of statutory construction. It is to be noted that article 30(3) makes it possible to challenge under a saved law not only executive acts, but any regulation or

other instrument having legislative effect made "*after* 9th July 1973" under the authority of any other law—in other words, new regulations or instruments. Therefore, it only seems logical that the framers, having already made provisions for existing laws and *anything done* under such laws under art. (30(1)), could only be looking to the future in drafting 30(3), and contemplating executive acts and subsidiary legislation post-independence which were not already protected under existing laws.

ADDITIONAL ARGUMENTS

[150] The direct constitutional challenge to criminal libel and the challenge to executive action under 30(3) did not, however, empty the plaintiff's quiver. Counsel launched two further rearguard attacks on its constitutionality. The first is a variant of the argument deployed in *Forrester-Bowe*, which contends that the criminal libel laws were unconstitutional prior to 1973 and that therefore what was imported under the 1969 constitution (which contained no savings clause) could only have been a modified version that was constitutionally compliant. The second is an offshoot of the *Hinds/Skip Patrick Davis (infra)* argument as to the subject matter jurisdictional limits between a magistrate's court and the Supreme Court.

The Forrestor-Bowe variant

[151] This argument, modelled on the syllogistic argument deployed in *Forrestor-Bowe*, proceeds as follows (paras. 23, and 26):

> "The 1973 Constitution was…preceded by The Bahamas Islands (Constitution) Order 1969 (SI 1986/590), which contained and brought into force the 1969 Constitution. The 1969 Constitution, unlike the 1973 Constitution, did not contain a general savings clause. Sections 2 and 3 of the Constitution required provisions inconsistent with the Constitution to be read with such modifications as may be necessary to bring them into conformity with the Constitution. It would be only this modified version of the law that would be saved under the 1973 Constitution as an 'existing law'.
>
> The 1969 Constitution contained protections for the freedom of expression in terms broadly similar to Article 23 of the 1973 Constitution. It is therefore possible to challenge the offence of intentional libel on the basis that it was unconstitutional during or before 1972 and required modification. Only the modified version of the law would be saved under the existing laws provisions in the 1973 Constitution."

[152] This argument must summarily fail for the following reasons. Whether one agrees or disagrees with the jurisprudential approach of the Privy Council in *Forrester-Bowe* —and the recourse to a carbon-dating method of testing constitutionality to my mind remains a judicial *dues ex machina* to circumvent the knotty problem of the savings clause in the death penalty cases—all of the premises on which the Board came to its conclusion in *Bowe* were satisfied in that case. Particularly relevant for present purposes was that the Board

concluded that the mandatory death penalty was unconstitutional prior to 1973 after conducting an exacting comparative analysis of the jurisprudence on the mandatory death penalty, which enabled it to conclude [35]:

> "The Board is unaware of any jurisdiction in which, by 1973, the mandatory death penalty was retained, and it was considered just to execute all who were convicted: by one means or another, the harshness of the old common law rule was mitigated."

[153] The Plaintiff has provided no evidence or historical account to show that criminal libel was considered unlawful by 1973, or at any point before then. On the contrary, as recently as *Worme* (2005), the Privy Council could declare that the law of criminal libel existed in many liberal democratic countries, as did the Canadian Supreme Court in *Lucas.* Even the current European jurisprudence does not support the view that criminal libel is unconstitutional *per se* or inconsistent with national constitutions. Some countries have repealed criminal libel legislation, but the vast majority of countries still maintain such laws in one form or another.

[154] Secondly, the Plaintiff has not suggested in what way or ways the criminal libel laws should be modified to achieve constitutional compliance. In *Forrester-Bowe*, the issue was simply the mandatory versus a discretionary death penalty, and the death penalty itself could be retained subject to reading it as discretionary rather than mandatory. On the contrary, where the very purpose of the law is said to be unconstitutional (as here), modification under the Independence Order cannot be attempted without usurping the legislative function.

[155] In any event, it is doubtful that the exceptional judicial technique and reasoning employed in *Forrester-Bowe* have any application outside of the unique circumstances and issues with which their Lordships were confronted in that case. It would mean that many other statutes could similarly be challenged on the basis that they ought not to have been considered good law prior to 1973 and, if a court had been asked to declared them unconstitutional then, it would have been bound to do so. This could only lead to uncertainty in the law.

[156] Before leaving this point, however, I think it fitting to pay tribute to the remarkable prescience of a former Acting CJ of the Bahamas, Gonsalves Sabola, who from as early as 1990 recognized the problem in a slightly different form in the *Steve Bethel Case* (No. 14 of 1990), a case in which Mr. F. Smith, incidentally, also appeared as counsel. That was a challenge on a constitutional reference to whether a Family Island "Commissioner" sitting as a magistrate under s. 2 of the Magistrate's Act could qualify as an "independent and impartial court established by law". Counsel for the defendant had argued (in what seems to have been a forerunner of the argument later developed before the Board in *Bowe)* that even if s. 2 of the Magistrate's Act was a saved law, it was void for inconsistency with "section 6(1) of the 1963 Constitution,

so that its continued publication after the revocation of that Constitution could not restore its validity" (pg. 4).

[157] The Acting Chief Justice's response was as follows (pg. 5):

> "It is to be noted that the 1963 Constitution did not proclaim itself to be the supreme law of the land nor did it ordain that any existing law inconsistent with its provisions should be void to the extent of the inconsistency. This omission was not made good until the promulgation of the 1973 Constitution. Even assuming that the consequences of inconsistency was a liability of the existing law to be declared void, if in fact there has been no such declaration by the court and the existing law remains in the Statute Book, it cannot, in my opinion, if challenged after the commencement of the current Constitution be tested by a previously revoked Constitution. I do not apprehend that the court is required to travel back into history, exhume a revoked constitution, revivify it, then use it as a touchstone to test the validity of the laws currently in the Statute Book. The present Constitution makes provisions for dealing with existing laws and it is therefore by its provisions that such laws would be held either valid or void or saved. I hold this to be the intention of the framers of Article (1)(a)."

[158] I agree. While the holding of the Privy Council in *Bowe* as to the discretionary nature of the death penalty is binding, there is no precedent in legal methodology. I therefore reject the notion that the constitutionality of criminal libel ought to be assessed at a point prior to 1973. But even if I am wrong on that, in any event the plaintiff has not provided any evidence to suggest that there was at that point or any time before then any emerging norm of customary international law or comparative domestic law to the effect that criminal libel was unconstitutional. There still is none.

The lack of jurisdiction in the magistrate

[159] The argument that the magistrate was without jurisdiction *ab initio* to hear the criminal libel charge was put this way in Mr. Smith's reply skeleton argument [41-42]:

> "The Plaintiff will also argue that he will not have been receiving a fair hearing in breach of Article 20 as a magistrate does not enjoy security of tenure, particularly when it comes to criminal offences as potentially pernicious in their abuse by the state of Freedom of Expression as protected by Article 23 of the Constitution (see *COP v Steve Bethel* 14 of 1990 and *Skip Patrick Davis* cases. . …
>
> The Plaintiff will also submit, based on the principles in *Davis*, that an untenured magistrate cannot conduct a trial of a matter that concerns and affects the Plaintiff's constitutional right to freedom of expression. The determination of Constitutional Rights are constitutionally reserved to the Supreme Court and upper courts. The offences of intentional and negligent criminal libel are *prima facie* a breach of a person's Freedom of Expression. The determination of whether a person may be guilty of an

such (*sic*) offence (if it can indeed continue to exist as a lawful constitutional charge) must necessarily involve consideration of the Constitution and the proportionality test set out above. This can only be conducted by a Supreme Court not a magistrate who

a. Is constitutionally infirm because he or she has no security of tenure; and
b. the determination of constitutional matters are for the Supreme Court and not Magistrates."

[160] This point was not, however, developed in oral arguments much beyond the written submissions. It is obviously correct to the extent that it states the general principle that questions of infringement of the Constitution or fundamental rights are reserved for the Supreme Court (*Hinds* (1975) 24 WIR at pages, 338, 339, per Lord Diplock), or perhaps appellate courts when the issue arises *de novo* before them (*Forrester Bowe*). In fact, art. 28(3) is itself a built-in constitutional safeguard against a magistrate trespassing on the constitutional province of the Supreme Court, and the magistrate is cast under a mandatory duty to refer a matter to the Supreme Court the instant a constitutional issue is raised (see *COP v Bethel, supra).*

[161] While it is true that criminal defamation laws (as does civil defamation laws) inevitably place restrictions on freedom of speech, it is not correct to say that s. 315(2) *prima facie* engages issues of violations of constitutional rights. In fact, the enforcement of very many criminal laws notionally impinge on rights. Yet many of these matters are triable as summary offences, or triable either way, and it cannot be right to contend that a magistrate is estopped from hearing them simply because these offences potentially impact on rights.

[162] For example, every time the Police set up a roadblock and stop vehicles for possible traffic violations, it might potentially raise issues of freedom of movement (*Smith v COP*), or privacy issues (as argued in *Neil Wells,* in respect of the prohibition against non-transparent window tints). In the *Armbrister* case, the law which criminalizes taking part in a procession without the prior sanction of the Commissioner of Police and which is cognizable by a magistrate summarily was said to infringe a number of fundamental rights. There is no need to multiply examples.

[163] Also, the lack security of tenure in magistrates as holders of "public offices" rather than as holders of judicial office under the Constitution does not debar them from hearing matters within their bailiwick, as made clear by the Privy Council in *Commissioner of Police v Davis* (1993) 43 WIR 1. There, the Board confirmed that the magistrate's courts were courts of law entitled to exercise the jurisdiction of inferior courts (pg. 17 of judgment).

[164] Further, the nature and facts of this case are far removed from the scenario in the *Davis* case, which applied the principle (stated authoritatively in *Hinds v R*) that an inferior court cannot trespass on the jurisdiction or sentencing powers reserved to the Supreme Court. As pointed out, section

315(2) specifies punishment for an offence which by section 214 is triable summarily or on information. If the accused elects to be tried summarily, there is no constitutional impediment to the magistrate hearing the charge. The maximum imprisonment is two years, well within the sentencing powers of a stipendiary and circuit magistrate, the statutory maximum of which is five years (s.9(2) of the Code).

[165] In *Davis,* Hall J. had found at first instance that the sentencing power of magistrates should be curtailed at the outer limit of five years. The Court of Appeal had disagreed that 5 years should be the cap of the magisterial sentencing powers, and accepted that a possible 7-year sentence (available in the case of a second or subsequent conviction) was permissible, although they were not prepared to establish an outer limit. The Privy Council did not disturb this finding, although it seems that Hall J's 5-year standard informed the statutory maximum adopted in 1994.

[166] I therefore reject the submission that the magistrate lacked jurisdiction *ab initio* to hear the matter, especially having regard to my previous finding (and which is also common ground between the parties) that *Title xxi* is an existing law within the meaning of article 30(1). In this regard, the plaintiff's reliance on *COP v Bethel*, far from supporting his argument, is dead against him, since the Court found that the constitutional status of the *ex officio* magistrate to constitute an impartial tribunal was preserved by s. of the Magistrate's Act, which was a saved law. Lastly, s. 4 of the Code clearly provides for a magistrate's court "to try any offence in respect of which jurisdiction is expressly conferred upon such court, or upon such court when presided over by a particular grade of magistrate, by the Magistrate's act or any other law for the time being in force."

OTHER CONSIDERATIONS

The issue of bad faith

[167] The plaintiff alleges in his affidavit (in fact much of his affidavit is consumed with these allegations) that the current charge of criminal libel is one of several charges which have been proffered against him out of political malice and spite. He contends that the virtual complainant was only galvanized into acting because of prodding from the Police (although the facts as alleged bears out that she made a complaint within days of the posts becoming known to her).

[168] I only refer to a few paragraphs of the affidavit to provide the tenor of the allegations contained therein, as for reasons which are briefly stated below, I do not consider it necessary (or indeed appropriate) to decide this issue on this reference. I therefore do not express any views on them one way or the other.

> "11. I am a well-known political enthusiast. In fact, I ran independently in the 2007 general election. I have since become an avid supporter of the Free National Movement ("the FNM). I was particularly vocal during the period leading up to the 2017 election. My vocalization of the "corrupt" nature of some Members of the Progressive Liberal Party ("the PLP") garnered much public support and attention from the electorate.
>
> "12. There are times when my passion has resulted in me being victimized, arrested, convicted and otherwise very badly treated by members of the executive including the Royal Bahamas Police Force ("RBPF"). Because of this, I believe that the substratum of these proceedings is merely another example of such oppression."

[169] He refers to events in 2013, when he was charged with making death threats (later dropped) against a former Minister of State, and then in 2015 with a charge of a threat of unlawful harm (again made on Facebook) in respect of a senior police, for which he was convicted. This was appealed to the Supreme Court, which struck out the appeal for want of appearance by the plaintiff. The matter was further appealed to the Court of Appeal for restoration of the Appeal. The COA remitted the matter to the Supreme Court to decide whether the appeal should be restored (*Omar Archer v Commissioner of Police* (MCCrApp. No. 140 of 2017), and it is understood that the appeal awaits hearing. Mr. Archer then sets out the timeline leading to the current prosecution, which he alleges indicates *mala fides* in his prosecution:

> "34. Much is to be made of the timeline of the proceedings against me—a particularly the following:
>
> a. April 2015—the Facebook posts about [the virtual complainant] were made;
> b. 19th September, 2015 – the Facebook post about [a senior police officer] were made;
> c. 18th September, 2015 – I was arrested and charged in respect of both the threat of unlawful harm charge and the criminal libel charge; and
> d. 21st September, 2015—arraigned in respect of both matters."
>
> "39. The timing of these events appeared to me to be as a result of [the virtual complainant], [senior police officer] and the other PLP associates' attempts to silence me for speaking out against their vicious, calculated attempts to silence and by extension injure me, a clear denial of my right to freely express myself."

[170] The fact that a discretion or even a duty under a statute may have been misused or exercised in bad faith does not make the law or the action unconstitutional, although such abuses would clearly be remediable in administrative law: see the leading Canadian case of *Roncarrelli v Duplessis* (1959) CanLII 50 (SCC). As was said by Frankfurter J. in the US Supreme Court in *Kovaks v Cooper* (1949) 336 U.S. 77 (quoted by the Privy Council in *Francis v COP*):

> "It is not unconstitutional for a State to vest in a public official the determination of what is in effect a nuisance merely because such authority may be outrageously misused by trying to stifle the expression

> of some undesired opinion under the meretricious cloak of a nuisance. Judicial remedies are available for such abuse of authority, and courts, including this Court, exist to enforce such remedies."

[171] A local example is provided by *Tannis v AG* (No. 31/1970), a decision of the Court of Appeal. There, the appellant had been convicted by the magistrate after pleading guilty to a charge of indecent assault, and was sentenced to 21 months' imprisonment. Unable to appeal on the guilty plea, he appealed against the sentence, which was dismissed. Months later, he applied for constitutional redress under then article 14 of the 1969 Constitution, on the grounds that there had been a denial of his fundamental rights and that in fact he had pleaded not guilty but that the magistrate had nevertheless sentenced him saying "I know you, you are guilty". The Court dismissed the application under the proviso that he had adequate means of address available to him (i.e., by *certiorari*). On appeal to the Court of Appeal, that court affirmed the Supreme Court's decision, on the grounds that if the allegations were substantiated, *certiorari* would lie to quash a conviction entered "in denial of elementary natural justice", and thus the constitutional application was not appropriate.

[172] However, this is not an application where the court is exercising its supervisory jurisdiction over inferior tribunals to prevent procedural abuses, and neither is this a ground raised in the plaintiff's constitutional motion. The court here is concerned with a reference on the constitutionality of the law and/or executive action under challenge. Notwithstanding the plenitude of power vested in the Supreme Court to grant constitutional relief, my jurisdiction is limited to those constitutional questions arising on the reference.

The one-sided affidavit evidence

[173] I cannot let this matter pass, however, without commenting on the fact that there was no substantive attempt by the defendants to refute the plaintiff's allegations, except for a generic denial at paragraph 2 that "Save as hereinafter stated, no admissions are made regarding the assertions contained in the Affidavit of the Applicant". In this regard, it is significant to note that the parties were afforded several opportunities to file evidence (both Isaacs Snr. J. and the second Judge gave directions for the filing of affidavits in relation to the hearing). It is disturbing that such grave and troubling allegations would be levied against the state's use of its criminal powers in prosecutions which are extremely rare (one has not been held in over 30 years!) and go unanswered.

[174] Not surprisingly, counsel for the plaintiff urged the court to find that, as the plaintiff's affidavit was "uncontroverted", the facts should be taken as being admitted (relying on the case of *Louis Bacon v Sherman Brown*, No. 503 of 2012). In this regard, I reiterate that much of the affidavit of the Plaintiff was concerned with alleging that his prosecution was motivated by ulterior and ultimately political reasons. Were this matter an application for judicial review, a Court might very well take an unfavorable view of the exercise of the

prosecutorial discretion, in the face of the silence of the Defendants. But as I have indicated, I do not have to decide this issue for the disposition of the reference.

[175] I also accept that the defendants have not put forth the "exacting factual" defence of the measures referred to in *Arorogani*, though as explained, that requirement is not totally apposite constitutional adjudication under the Westminster common law models. In fact, Mr. Smith contended (para. 55 of his reply submissions) that "it is still for the Crown to establish that prosecution is a proportionate response, necessary for the preservation of public order." While it seems to make eminent sense that the burden should be on the State throughout to defend a legislative measure or any action taken under it, as discussed at para. 68.6 (*supra*) the burden of establishing that a measure is disproportionate (i.e., not reasonably justified in a democratic society) rests mainly on the complainant.

[176] Whether a law is reasonably required is also a matter of impression for the court, and I am satisfied that there was sufficient material before me, whether based on a review of the challenged legal provision itself and the cited case law, to find that the law was reasonably required, which as indicated can never be a strict question of fact. I would have found that the penal sanction was constitutionally disproportionate, but this is academic because of the holding based on the authority of *Worme* and the savings law clause.

DISPOSITION

[177] This case has caused me very anxious consideration. Not only did it arrive under exceptional circumstances, but it raised a myriad of novel and difficult constitutional questions, to which there were no easy (or short) answers. The fact that it was not argued orally before me also turned out to be rather inconvenient. Consideration of the myriad issues required the court to look further afield, but at the end of its day its disposition was based on an interpretive analysis of the Constitution itself, binding authority from the Privy Council on the point (*Worme*) and the savings law clause.

[178] It has not been an easy exercise to attempt to retro-fit an offence deeply mired in antiquity and social control into the dwelling of a modern constitution. But the walls were already framed. Counsel for the plaintiff tried valiantly, like the army amassed against the walls of Jericho, to bring the walls down through ingenious attacks, but in this case the walls did not fall.

[179] After careful analysis, and for the reasons given, the Court is nonetheless driven to the conclusion that section 315(2), though admittedly a *prima facie* interference with article 23(1) rights, cannot be held to be unconstitutional, being a saved law within the meaning of article 30(1), and neither is the executive act of prosecuting the plaintiff unconstitutional under 30(3).

[180] In light of the above, I therefore refuse the declaration sought at paragraph 1 of the Constitutional Motion that the laying of the charge, prosecution, trial and liability of the Plaintiff to conviction and imprisonment are void, illegal and of no effect as constituting a breach of the Plaintiff's right to freedom of expression. I also refuse the orders sought at paragraphs 2 and 3, respectively, that the magistrate dismiss the criminal libel proceedings and/or grant certiorari quashing the criminal proceedings as being unconstitutional. Further, I refuse the declaration sought at paragraph 4 that s. 315(2) of the Penal Code is unconstitutional, and consequently the order that the Commissioner of Police pay damages to the Plaintiff for subjecting him to criminal libel proceedings.

[181] The parties are to lodge written submissions as to costs within 14 days of this Ruling. I also direct that the Registrar is to convey a copy of this Ruling to the learned magistrate from whom the constitutional reference arose.

Postcript

[182] Notwithstanding my *de jure* findings as to the constitutionality of the challenged provision of *Title xxi*, and consequently that the prosecution of the defendant was not therefore invalid, I cannot leave this matter without observing that the offence of criminal libel does not sit happily in the edifice of a modern Constitution.

Deficiencies in law

[183] There are serious deficiencies in the law which have caused me tremendous angst. Many of these were pointed out in the UK Law Commission Working Paper No. 84 (Criminal Libel, 1982), and illustrated in several of the cited cases (*Richardson v Raynor, Lucas)*, where the Court used its constitutional scalpel to make reforms. To my mind, the most troubling aspect is the lack of a procedural mechanism or safeguard for deciding when a libel rises to the level of seriousness to warrant the weight of the criminal law. This leaves the question of prosecution solely at the discretion of the prosecutor, with all of the inherent dangers in an offence that has traditionally been used as an instrument of social and political control. Some of the anomalous features of the law also result from its historical origin, and the ways in which it has diverged from civil defamation. Take the following examples: (i) criminal libel charges can be brought even if the publication is only to the person defamed and not to any third party (s. 318(1)), which is antithetical to the protection of reputation; (ii) the defence at s. 320(1)(h) seems to shift the burden of proof to the Defendant (although in *Worme* the PC held that the regular presumption of the burden of proof being on the prosecution must be implied); (iii) the lesser offence of "negligent libel" creates a criminal offence which does not seem to require *mens rea*, contrary to the general presumption of law that *mens rea* is required before a person can be found guilty of a criminal offence; and (iv) there are also other anomalies and inconsistencies in

Title xxi, an example of which is the explanation of good faith at s. 322(1) (c), which must necessarily fail the test of legal certainty.

[184] In many jurisdictions where the offence exists, there are either statutory guidelines for the prosecution to follow in deciding whether to lay a charge, and/or a requirement to seek the leave of the court, which then applies discretionary principles to the grant of leave. The most important factor to be considered in such cases is naturally whether the intervention of the criminal law is called for, meaning whether the defamation is so serious as to require punishment of the offender in the public interest, as opposed to just the private interest of the individual (*Goldsmith v. Pressdram Ltd.*[1977] 1 QB 83 at 88; *Golsdsmith v. Speerings Ltd. (supra)* at 485). In fact, in *Deakin* the recommendation of all of the Law Lords was that criminal prosecution for defamatory libel should only be possible either with the consent of the Attorney General having regard to the factors in 10.2 of the ECHR (per Lord Diplock) or by the order of "a judge in chambers" (Lord Edmund-Davies). I have already pointed out the example of *Richardson v Raynor*, where Kawaley J. read in a provision to require the consent of the Director of Public Prosecution before any charge for criminal libel could be brought.

[185] Perhaps the time has also come for Parliament to give serious consideration as to whether such an offence remains viable, or whether there should be a move to the more modern catalogue of alternatives to criminal libel (see the UK legislation referred to earlier), or other legislation specifically applicable to internet based platforms of communication.

[186] I should also state, for completeness, that since the plaintiff was charged, there has been a significant evolution with respect to the exercise of the prosecutorial power, which is now largely reposed in a constitutionally appointed independent Director of Public Prosecution (DPP), and which would now create some insulation against any allegation of possibly politically motivated prosecutions.

[187] I cannot but feel, however, that the court, in paying obedience to the savings clause—as it must—is abdicating its responsibility as guardian of the constitution and a bulwark against unconstitutional treatment of citizens. In this connection, one cannot turn a blind eye to the fact that since the institution of the criminal proceedings, the plaintiff has been forced to live under the spectre of the penal process, and remains subject to bail and reporting conditions, in light of a significant delay for which no blame can be attributed to him. This in itself is a matter of serious concern, which may have other legal implications.

[188] The Privy Council acknowledged the incongruity of the savings clause in rights adjudication in *Newbold*, but suggested that it was a matter for Parliament [58]:

> "It seems likely therefore that the provision of the saving of existing laws has to date proved of little if any significance in Bahamian law. The Board understands the view taken by Bahamian first instance judges that such a saving strikes a curious note in a modern constitutional state like The Bahamas. It may be that the legislature would wish to reconsider whether it remains appropriate in the modern era."

[189] Unfortunately, the savings clause is as equally entrenched as the rights provisions and recent experience in attempted constitutional reform has taught us that cutting this Gordian knot is not so easily accomplished as suggested by the Board. It may well be that the Alexandrian sword is best wielded by the apex court.

[190] Finally, I end this judgment by paying tribute to the life and legacy of the late Chief Justice Stephen Isaacs. This case was one of the final matters that he heard.

Dated the 29 June 2020.

Klein, J.
Justice