At events of such significance as this it is customary as a matter of protocol to say what a privilege and a pleasure it is for me to be here with you.

It is not in that vein that I would observe the protocol. I do not say what a privilege it is for me to lifted with such intellectual stalwarts as my colleague Joseph Archibald Q.C., or to follow in the footsteps of such legal luminaries as Professor Simeon McIntosh, Dr. Lloyd Barnett, Dr. Ralph Gonsalves and Dr. Kenny Anthony.

For me it is a real and personal pleasure to address you in memoriam of a man who influenced the fashioning of my legal career; who in my beginner’s practice impressed me so indelibly by the even-handedness with which he discharged his functions as a judge; the perspicacity with which he informed his decisions; the spirit of tolerance delimited by firmness with which he treated the vagaries of unbridled youth; his ever readiness to lend an ear to young counsel conflicted with doubt about what path she should follow; a man whose elegant ease and innate social grace lent dignity to the circumstances of the moment.

I recall that when I took silk I was confronted by a personal dilemma as to where I would put this badge of honour - I was unwilling to displace the letters behind my name which were the bench marks of my early positive and programmed endeavour by a honour conferred with the passage of years. There were no guiding precedents in my neck of the woods. All the Queen’s Counsels in our region were drawn straight from the Bar at the Inns of Court. I turned to Sir Archibald for guidance and with his instinct for compromise he told me, “Well, it is your newest; it is an honour conferred by Her Majesty, the Queen; so put it first and let your other letters follow.” And so I did.

Against the back-drop of the subject matter of this paper, it is fitting to recall that as early as the 1970’ Sir Archibald lit the torch of faithful application of the constitutional protection of individual liberty against state intransigence at a time when it was still fashionable among leading lawyers to think of human rights as being no more than the traditional Common Law rights expressed in Constitutional norms.

In or about 1972 I appeared before him holding a dock brief to represent one Delroy Davis on a Charge of Murder, an assignment which I received just a few weeks before the January Assizes. Following a Preliminary Examination Davis had been committed to
Stand trial upon the murder charge at the January Assizes and no other. There was a break-down in the administrative organisation of the legal department and the indictment was not signed because there was no DPP in place. Davis was made to appear at the January Assizes, but was returned to Her Majesty’s Hotel without having the case called on for plea. He had been in custody for some eighteen months and upon his instruction I made application to the court for the release of his body on the ground that his constitutional right of personal liberty had been unjustifiably infringed in that he was being held upon a defective warrant of committal, that not having been tried at the January Assizes and no other date having been fixed for him to be so tried, his retention in custody was arbitrary. On the first hearing of the Habeas Corpus application the Crown represented by an English Solicitor in the Attorney General’s Chambers appeared and made objection that it was unheard of for a person charged with murder to be granted bail. Having admonished him that he was premature the judge reminded him that I was not seeking bail but redress for an apparent breach of a constitutional right. To cut through the chase, Sir Archibald granted the order for Davis’s release.

It spun out into an interesting saga. But it is sufficient to underscore Sir Archibald Nedd’s ready grasp of the pre-eminence of the Constitution and the strength of his judicial character not to invoke any doctrine of necessity when holding in the scale the balance between the citizen’s right to liberty and the predicament of a collapsed administration in the legal department.

Now to the topic in hand.

**STRIKING A BALANCE BETWEEN FREEDOM OF EXPRESSION AND PROTECTION OF REPUTATION**.

And its sub-title

**Are Criminal Libel and Sedition laws Obsolete in a Modern Democratic Society?**

**STRIKING A BALANCE BETWEEN FREEDOM OF EXPRESSION AND PROTECTION OF REPUTATION**.

**The Quickening of Constitutional Democratic Governance**

The ideal of democracy as a mode of government which aims essentially to preserve and promote the dignity and fundamental rights of the individual, to achieve social justice, foster the economic and social development of the community, strengthen the cohesion of society and enhance national tranquillity has been domesticated in Grenada as in other regional nation states by the instrument of the Constitution which is Supreme.

As a consequence, we live under a constitutionalised form of democratic governance in which consciousness of the primacy of fundamental human rights and freedoms has been quickened by the plethora of international declarations, Covenants and protocols, the chief of which for present purposes, are:

i) The UNIVERSAL DECLARATION OF HUMAN RIGHTS;
ii) The INTERNATIONAL COVENANT on CIVIL and POLITICAL RIGHTS; and

iii) The UNIVERSAL DECLARATION ON DEMOCRACY adopted on the 16th September, 1997 at Cairo by 161st Session of the Council of the Inter-Parliamentary Union

The Universal Declaration on Democracy affirms extra-judicially the principles enunciated in a litany of judicial authoritative pronouncements by which Free Expression is framed as the centre-piece of the democratic way of life.

Further, the Declaration reminds us that democracy is both an ideal to be pursued and a mode of government to be applied according to the modalities which reflect the experiences and cultural particularities of the society without departing from internationally recognised principles, norms and standards. As such it is a constantly perfected and always perfectible state or condition whose progress will depend upon a variety of political, social, and economic factors.

Factual Background

For the purposes of this discussion, I propose to draw, in so far as I my limited competence permits, from the Grenada Constitutional experience.

Grenada is a member of the Commonwealth of Nations (formerly British Empire) with whom it shares the values of internationally recognised principles, norms and standards, subscribes to a form of Constitutional democracy and guarantees to the citizenry the fundamental rights and freedoms enshrined in its Constitution.

Chapter 1 Section 1 of the Grenada Constitution provides inter alia:-

“Whereas every person in Grenada is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:-

a) life, liberty, security of the person, equality before the law and the protection of the law;

b) freedom of conscience, of expression and assembly and association;

c) protection for the privacy of his home and other property and from deprivation of property without compensation;

d) the right to work

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in these provisions, being limitations designed to ensure that the
enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.”

Section 10 particularises the right to freedom of expression:

“(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.”

The Constitution of Grenada also provides recognition for the right to personal privacy. Section 7.

Freedom of conscience and of religion which is usually and conveniently mandated in the freedom of expression enjoys its separate guarantee and protection under section 9.

It is worthy of note that the right to privacy has its genesis in the culture of the Convention era of Human Rights. The case of Michael Douglas and Catherine Zeta Jones v Hello Ltd [2000] reminds us of the historical fact that until the era of Convention rights no right to privacy had emerged in English common law. What was protected under the English Common Law was REPUTATION.

Reputation is recognised by the Constitution as an interest of possible limitation upon freedom of expression in so far as such limitation is reasonably required in a democratic society.

Section 10 (2);

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings,… 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 Report of the Committee on Defamation (Cmmd 5909 (1975) presided over by Faulks J was predicated upon the premise:

“The law of defamation has two basic purposes: to enable the individual to protect his reputation, and to preserve the right of free speech. These two purposes necessarily conflict. The law of defamation is sound if it preserves a proper balance between them “
The process of balancing the right of freedom of expression and the interest in reputation involves a determination of their respective value bases which must be defined by reference to the social, political and economic environment in which the value determination is made.

Value and market climate are inextricably intertwined. A scale of values has to be established.

If we are to balance two commodities, some weights and measures must be ascribed to each. If their parity cannot be judged on a straight exchange one for one basis, then some further value system must be employed in order to achieve meaningful balance. If the market commodities which are to be put in the scale are yams and potatoes or potatoes and tomatoes, it cannot be that ten (10) lbs of potatoes will be off-set by ten (10) lbs of tomatoes. The fair trade balance must be struck by determining what is the value which each commodity will fetch in the market of their trade.

So too, if we are to strike a balance between Freedom of Expression and Reputation, if we are to determine how freedom of expression and reputation can be co-equally secured in our societies we must first determine their respective values to society.

The scale upon which those respective values are measured, is the social order characterised by its form of government, the social, economic and political factors and the norms which express the moral content of the society.

The values of Freedom of Expression and Reputation are to be determined by reference to the construct of the particular society.

It is the difficulty in fine-tuning the respective values of freedom of expression and of reputation to an acceptable universal consistency in social climates of such immense variables and diversity in governmental structure and historical experience that has lead to the divergences of the concept of “political speech” as have emerged out of the USA in Sullivan, the United Kingdom in Reynolds, Australia in Theophanous and New Zealand in Lange.

In balancing freedom of expression and reputation in the social context of a cohered society strengthened and informed by the free and open exchange of opinions and ideas, we must weigh the nature of the competing rights or interests and keep in view the environment in which the balancing process must occur.

**The Value Basis of Freedom of Expression**

**A. Value as deduced from the Form of Government**

1. **Democracy**
   There was a time when democracy was defined as the societal institution of government under which a homogeneous people were governed by an electoral process which was open and fair. It was wrapped in the catch phrase, “Government of the people, by the people and for the people.”
Democracy is no longer seen in such simplistic terms because experience has shown that, having gone through the process of the election of representatives to the seat of government, governments have gone on to administer the affairs of state as if democracy had given way to autocracy. It seeks to assure to an informed population on-going and meaningful participation in the affairs of the nation and in the decision-making process well beyond the casting of a vote on election day.

This is the age of universal declarations, and in keeping with the spirit of our times, the UNIVERSAL DECLARATION ON DEMOCRACY has affirmed the following principles:

1. Democracy is a universally recognised ideal as well as a goal, which is based on common values shared by peoples throughout the world community irrespective of cultural, political, social and economic differences. It is thus a basic right of citizenship to be exercised under conditions of freedom, equality, transparency and responsibility with due regard for the plurality of views, and in the interest of the polity.

2. As an ideal democracy aims essentially to preserve and promote the dignity and fundamental rights of the individual, to achieve social justice, foster the economic and social development of the community, strengthen the cohesion of society and enhance national tranquillity, as well as to create a climate that is favourable for international peace. As a form of government, democracy is the best way of achieving these objectives; it is also the only political system that has the capacity for self-correction.

3. Democracy is inseparable from the rights set forth in the international instruments. These rights must therefore be applied effectively and their proper exercise must be matched with individual and collective responsibilities.

The elements and Exercise of Democratic Government:

1. Democracy is based on the existence of well-structured and well-functioning institutions, as well as on a body of standards and rules and on the will of society as a whole, fully conversant with rights and responsibilities.

2. The key element in the exercise of democracy is the holding of free and fair elections at regular intervals enabling the people’s will to be expressed. These elections must be held on the basis of universal, equal and secret suffrage so that all voters can choose their representatives in conditions of equality, openness and transparency that stimulate political competition. To that end, civil and political rights are essential, and more particularly among them, the rights to vote and to be elected, the rights to freedom of expression and assembly, access to information and the right to organise political parties and carry out political activities.

3. Individual participation in democratic processes and public life at all levels must be regulated fairly and impartially and must avoid any discrimination, as well as the risk of intimidation by State and non-state actors.
4. Judicial institutions and independent, impartial and effective oversight mechanisms are the guarantors of the rule of law on which democracy is founded. In order for these institutions and mechanisms fully to ensure respect for the rules, improve fairness of the processes and redress injustices, there must be access by all to administrative and judicial remedies on the basis of equality as well as respect for administrative and judicial decisions both by the organs of the State representatives of public authority and by each member of society.

5. The state of democracy presupposes freedom of expression; this right implies freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

6. It is therefore necessary to develop conditions conducive to the genuine exercise of participatory rights, while also eliminating obstacles that prevent, hinder or inhibit this exercise.

7. The institutions and processes of democracy must accommodate the participation of all in homogeneous as well as heterogeneous societies in order to safeguard diversity, pluralism and the right to be different in a climate of tolerance.

That is the democratic society after which we strive.

2.. The Guarantees of the Fundamental Rights

Pivotal in the organisation of government and central to the exercise of state power are the fundamental rights and freedoms of the individual which are set out and guaranteed in the constitution. Those rights form the core value of society and, in the law-making exercise or in the policy frameworks, the state is allowed to limit those rights only in so far as the limitations are reasonably necessary for the public good. What is more even where curtailment of those rights may be reasonably required for the public good the law-makers and the policy framers can only make such incursions upon those rights to the extent that the attainment of the public purpose requires.

Freedom of expression, the prioritised core value of a democratic society, is a fundamental right which adheres to the individual at the moment of his birth. The right to be informed is a derivative and inherent facet of the right of free speech. The public needs sufficient information in order to choose wisely between competing policies and services, as well as to craft enhanced ideas for the consideration of the policy makers

B. Value as deduced from the Cases

1. In Re MUNHESEMO [1994] 1 LRC 284 four values have been ascribed to Freedom of Expression:

   (i) It helps an individual to obtain self-fulfilment;

   (ii) It assists in the discovery of the truth;

   (iii) It strengthens the capacity of an individual to participate in the decision-making processes of the affairs of the nation;
(iv) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

2. In *John Benjamin v AG of Anguilla et al* [2001 UKPC] the value of the fundamental right to freedom of expression was adopted from *Lingens v Austria*;

   “That freedom of expression as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2, it 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. Such are the bounds of that pluralism, tolerance and broad-mindedness, without which there is no democratic society.”

3. The *Commonwealth Statement on Freedom of Expression annexed to the Latimer House Guidelines for the Commonwealth* adopts the principle that:

   “Freedom of expression is the primary freedom, an essential precondition to the exercise of other freedoms. It is the foundation upon which other rights and freedoms arise.

4. In *GEORGE WORME* at para 19 Lord Rodger observed:

   “In considering in more detail the arguments advanced by counsel for both parties in their helpful submissions, their Lordships bear in mind the importance that is attached to the right of freedom of expression, particularly in relation to public and political matters, guaranteed by section 10 of the Constitution. The spirit of the statement of the European Court of Human Rights in *Lingens v Austria* (1986) 8 EHRR 407. 418-419. at para 42, that “freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention” has been reflected in decisions of courts throughout the world. In *Hector v Attorney General of Antigua* [1990] 2 AC 312, 318, for instance, Lord Bridge of Harwich said:

   “In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.”

C. The Information Age

Led by advances in telecommunications technology, the twenty-first century has dawned as the age of information in which knowledge has been harnessed as a tool of individual self-fulfilment, wealth creation and social engineering and restructuring. The exercise of the right of freedom of expression is an indispensable means of promotion and sharing of
ideas and experiences within a community so as to advance the frontiers of that society’s knowledge base.

Such is the value of the right of freedom of expression in the Convention on Human Rights era and within the setting of a Constitutional Democratic Society in which the primacy of freedom of expression as a value of society is enshrined.

That is not the traditional value of free speech and communication accorded under the common law in non-constitutional societies which were focused upon deploying innovations in industry and energy sources to create competitive material advantages for economic growth.

D. The Value of Free Speech at Common Law

Free speech was not always seen as a right. With the passage of time the right to speak gained recognition but was severely circumscribed.

i) The early struggle for free speech is reflected in the trial of Tom Paine and the observation of Thompson CJ in City of Chicago v Tribune Co (1923) 139 NE 86 at 90 observed:

“While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution. If the right to criticize the government is a privilege which cannot be restricted, then all civil as well as criminal actions are forbidden. A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecution

ii) The value of that early common law free speech has been insightfully analysed by Mason CJ of Australia in Theophanous v The Herald and Weekly Times Ltd. et al [1994] 3 LRC 369 In a climate of government where no fundamental rights have been domesticated, he sets out the scope and nature of the common law free speech, and having effected his historical survey he defines that common law right of free speech as an “implied freedom of communication”, necessary to give efficacy to a system of representative government. In its historical context he recognises that the interest or right in reputation emerged before the struggles for free speech had concretised it as a right.

He aptly poses the question: “Is the implied freedom a source of positive rights, an immunity or a restriction on legislative and executive power?” He does not attribute to the common law freedom the character of being a source of other rights.

At page 383 he asserts:

“The decisions in Nationwide News and Australian Capital Television establish that the implied freedom is a restriction on legislative and executive power. Whether the implied freedom could also conceivably constitute a source of positive rights was not a question which arose for decision in those cases and it is unnecessary to decide it in
this case. **For that reason we shall refer to the freedom of communication as an implication rather than as a guarantee of freedom, notwithstanding the use of the latter expression in some judgments in the two cases**

What Mason CJ postulates is that non-constitutional free speech which pre-dates Convention Rights had the narrow and well circumscribed value as a limitation upon the Legislative and Executive. Limited as it is in its purpose, the common law free speech is not an essential pre-condition to the development of other rights. It is confined to restraining government and is not referable to concepts of the fulfilment of the individual.

In a constitution where there was no Bill of Rights the efficacy of the workings of Government demanded the necessary implication of a right of free communication which was limited to the purpose of curbing the rise of despotic government and curbing the unrestrained power of the legislature and the executive branch of government.

At page 380, referring to *Nationwide News Pty Ltd* and *Australian Capital Television Pty Ltd v Commonwealth*, he postulates:

“In those cases, a majority of the court distilled from the provisions and structure of the Constitution, particularly from the concept of representative government which is enshrined in the Constitution, an implication of freedom of communication. That implication does not extend to freedom of expression generally (cf the First Amendment to the Constitution of the United States which reads: "Congress shall make no law ...abridging the freedom of speech, or of the press") The limited scope of the freedom was expressed in various ways by members of the court. It was described as “freedom of communication, at least in relation to public affairs and political discussion (Australian Capital Television), “Freedom to discuss governments and political matters “ (Nationwide News) of communication.”

At page 381 he asks the question; “**What is the content of the expression “political discussion”, bearing in mind that the underlying purpose of the freedom is to ensure the efficacious working of representative democracy.?**”

He draws a clear distinction between the common law free speech and the freedom of expression guaranteed in constitutional democracies. At page 383:

“It is necessary to treat with some caution Canadian and United States judicial decisions dealing with general guarantees of freedom of speech. Their constitutional provisions are not the same as ours. In our case, not all speech can claim the protection of the constitutional implication of freedom we have identified in order to ensure the efficacious working of representative democracy and government. The foregoing examination of the freedom implied by the Australian Constitution indicates that there is a significant difference between that freedom and unlimited freedom of expression and that the difference, though it does not lend itself to precise definition, is capable of being ascertained when the occasion to do so arises. In this respect, it is instructive to
contrast the limited concept of freedom of expression as implied earlier by the Supreme Court of Canada from the British North America Act 1867 (Imp) eg Re Alberta Legislation (1938) 2 DLR 81, Switzman v Elbling (1957) 7 DLR (2nd) 337, with the expanded concept of freedom of expression resulting from that court’s more recent interpretation of the Canadian Charter of Rights and Freedoms (see, eg. Retail Wholesale & Department Store Union v Dolphin Delivery Ltd (1986) 33 DLR (4th) 174, Ford v Quebec EG (1988) 53 DLR (4th) 577. The difference between the two reflects the difference between protection of freedom of expression generally as a fundamental human right and the protection of freedom of communication in matters of political discussion as an indispensable element in ensuring the efficacious working of representative democracy and government”

In Switzman v Elbling (1957) 7 DLR (2ND) 337 Rand J of the Supreme Court of Canada at 357 laid out the pre-Charter common law free speech as follows:

“Indicated by the opening words of the preamble in the Act of 1867, reciting the desire of the four Provinces to be united in a federal union with a Constitution “similar in Principle to that of the United Kingdom”, the political theory which the Act embodies is that of parliamentary Government, with all its social implications, and the provisions of the statute elaborate that principle in the institutional apparatus which they create or contemplate. Whatever the deficiencies in its workings, Canadian Government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated is undoubted.

But public opinion, in order to meet such responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary Government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that Government, the freedom of discussion in Canada, as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion’

The Court, dealing as it was with the reflection of the principles of government and the common law of free speech as transported from the United Kingdom, saw the freedom of communication as tied to the efficacious working of representative government. Not until Irwin Toy Ltd v A.G Que (1986) 32 DLR 4th 641, did the Canadian Courts come to accept that freedom of expression was multi-dimensional and that there was no basis on the face of the guarantee of s. 2(b) of the Canadian Charter for distinguishing between different kinds of expression, whether they be of a political, commercial, artistic, cultural or other nature.

In Ford v A.G Que the Supreme Court of Canada observed at 616:
“It is apparent to this court that the guarantee of freedom of expression in s. 2(b) of the Canadian Charter …cannot be confined to political expression, important as that form of expression is in a free and democratic society. The pre-Charter jurisprudence emphasised the importance of political expression because it was a challenge to that form of expression that most often arose under the divisions of powers and the “implied bill of rights”, where freedom of political expression could be related to the maintenance and operation of the institutions of democratic government. But political expression is only one form of the great range of expression that is deserving of constitutional protection because it serves individual and societal values in a free and democratic society”

Though we will find that in Reynolds that the Privy Council saw little or no difference between their freedom of speech and the guarantees of freedom of expression set out in Article 10 of the European Charter of Human Rights, it is clear from the authorities and the learning referred to that Free speech in England up to the time of Reynolds had as its value “a purpose of ensuring the efficacy of representative democracy” or as a ”restriction on legislative and executive power.”

In Derbyshire CC v Times Newspapers Ltd. [1993] 1 All ER 1011 the House of Lords held that under common law a local authority did not have the right to maintain an action for damages for defamation as it would be contrary to the public interest for the organs of government, whether central or local, to have that right. Not only was there no public interest favouring the right of government organs to sue for libel but it was of the highest public importance that a government body should be open to uninhibited public criticism, and a right to sue for defamation would place an undesirable fetter on freedom of speech.

It is clear that the value ascribed to freedom of speech in Derbyshire was restricted to the common law value of an implied right to limit the powers of the legislature and the executive. Commenting on Derbyshire Mason CJ observes that:

“Lord Keith of Kinkel referred with approval to the comment of Lord Goff of Chievely in A.G v Guardianship Newspaper Ltd (No.2) [1990] LRC (Const) 938 at 969 that, in the field of freedom of speech, there was no difference in principle between English law on the subject and art 10 of the European Convention on Human Rights…..However, whatever significance that statement might have otherwise had for the present case disappears when attention is given to the actual decision in Derbyshire.”

Indeed, Lord Nicholls expressly defined the prevailing value of common law free speech in his observations in Reynolds at 760:

“The high importance of freedom to impart and receive information and ideas has been stated so often and so eloquently that this point calls for no elaboration in
this case. At a pragmatic level, **freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country**........Freedom of expression will shortly be buttressed by statutory requirements. Under s. 12 of the 1998 Act, expected to come into force in October, 2000, the court is required in relevant cases, to have particular regard to the importance of the right to freedom of expression. The common law is to be developed and applied in a manner consistent with art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

In that context of the United Kingdom, the freedom of communication is to be seen as an implication, a privilege, not a guaranteed right of freedom of expression and consequently it is the narrow freedom of communication which has been made to balance evenly in the scale with reputation. The law of Defamation has crystallised on the basis of that common law value of free speech.

Like Article 10 of the European Convention on Human Rights, Section 10 of the Grenada Constitution guarantees the right of freedom of expression to the individual and therefore the right is personal. In *Theophanous* Brennan J observed at p 401:

> “If the Constitution (Australia) conferred a personal freedom, its scope would be likely to be far broader that the scope of a freedom consequent on an implied limitation on power.

> The freedom which flows from the implied limitation on power considered in Nationwide News and Australian Capital Television (I add *Switzman v Elbling of Canada 1957*) is not a personal freedom. ....the implication limits legislative and executive power.”

In Grenada the values to be ascribed to the fundamental right of freedom of expression as a source of positive rights are such as have been detailed in *Re Munhesemo* [1994] and the Latimer House Guidelines on Freedom of Expression which provide the source of the total development of the individual, functioning in a constitutional democratic society, and which aspires to the use of knowledge as a wealth creating tool. Freedom of expression encompasses political, commercial and artistic expression and the right to choice of language . Devine v AG Que [1982] 36 DLR 4th 321,, R v Big M Drug Mart Ltd

Further, the right in Grenada is personal. It is a right which empowers self-fulfilment. It is not a non-personal privilege limited to the purpose of circumscription of potential despotic governments.

**The Value Basis of Reputation**

Historically, Reputation in England has enjoyed a certain kind of sanctity. It is not surprising that in a social milieu characterised by a hierarchical structure of kingship, lords and nobles, serfs and villeins, the honour of reputation emerges as a social currency long before the common law privilege of free speech emerged as a curb upon the
legislative and executive power was crystallized. Reputation emerged before Runny Meade.

The first form of redress for dishonour to a name was the duel. “Meet me at dawn with your sword and seconds.”

The high value ascribed to reputation is immortalized in Shakespeare Othello III 3:

Good name in man and woman,
Is the immediate jewel of their souls;
Who steals my purse steals trash;
”Tis something, nothing;
Twas mine, ‘tis his, and has been slave to thousands.
But he that filches from me my good name
Robbs me of that which not enriches him.
And makes me poor indeed.”

Lord Nicholls of Birkenhead in Reynolds Times Newspaper Ltd. [2001] AC 127 at 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 for ever, 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 recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are required by law and are necessary in a democratic society for the protection of the reputations of others.”

iii) Lord Rodger of Earlsferry observed in GEORGE WORME at para 42 ascribes its value:

“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 situations where the publication was not for the public benefit.”

I put forward the view that when Reputation was being so highly sanctified both in Reynolds and George Womne, the free speech in play in that common law balancing process was free speech of a different nature and force than the freedom of expression in the Human Rights era and that which is enshrined and guaranteed in a constitutional democratic context.

The free speech there contemplated was of a lower value; the value being the implied and limited non-personal right of free communication implied as a necessary curb to despotic rule.

It is noted that neither the International Covenant on Civil and Political rights nor the Constitution of Grenada accords to Reputation the value of a fundamental right.

It is true that Ngulube C.J in Sata v Post Newspapers (No 2) [1995] 2 LRC 61 at 75 construes the Constitution of Zambia Art 20 which is in terms of Article 10 of the Convention as presenting a dilemma in “that our Constitution attaches equal importance to freedom of expression and the right to reputation.”

It is with respect and not audacity that I am constrained to disagree with the proposition that freedom of expression is given the same value as reputation.

True, Art. 10 of the Convention like Section 10 of the Grenada Constitution recognizes the individual’s interest in his reputation, but neither in the umbrella of section 1 of the Constitution or in the guarantee of section 10, nor in the provision of Article 10 of the Convention is it accorded the weight and rank of a personal fundamental right. If it were, and a member of state government were to impugn a citizen’s reputation then under the enshrining provisions of section 16 Constitutional redress would lie for violation of the purported fundamental right to reputation.

My mind has some difficulty in bending around that proposition.

The right to privacy and freedom of expression are fundamental personal rights attaching to the individual at birth. The concept of privacy affords recognition to the fact that the law must protect all individuals, public officials or private citizens, who find themselves subjected to an unwanted intrusion into their personal lives. Both rights are qualified.

Criminal Libel and Sedition protect reputation not the right to privacy.

As I have said on another occasion, REPUTATION is an intangible asset acquired by accretion, and as such it does not stand on the higher rungs in the ladder of human rights, albeit that it may be afforded protection in law. A child at birth is vested with the rights
of freedom of expression and of privacy, but is devoid of reputation. It is the passage of
time which creates or fails to create reputation. According to its creation, the
fundamental right to personal privacy may be enjoined to secure protection for what is an
ancillary but free-standing interest – The Reputation of the individual

In the constitutional democratic context, the interest of reputation is capable of being a
factor of limitation upon the exercise of the qualified right of freedom of expression.
Reputation is now a possible curb upon freedom of expression as the common law right
to free speech had emerged as a restraint upon the exercise of legislative and executive
power.

The difference in the fundamental right of free speech and the interest in reputation is
reflected in the approach to remedies.

1. RJ.R. MacDonald Inc v A>G of Canada [1995] 3 SCR 199 postulates that
upon applications for injunctions for the breach of a fundamental right, damages
are presumed to be an inadequate remedy.

2. Attacks upon Reputation invoke a focus on damages as the ready compensable redress.

The permissible degree of intrusion into the constitutionalised right of freedom of
expression should be evaluated in the balancing process with those inequalities between
the right and the interest in mind.

The Environment of The Balancing Process


Ours is part of the global environment which aspires to individual self-fulfilment and
social and economic advancement in the context of knowledge-based societies. Our
constitutional structures of government demand and permit pervasive governmental
intrusion into the lives, interests, activities and rights of the citizen. The development of
initiatives for promoting economic well-being and enhanced social services depend upon
government as a catalyzing agent for social change.

In such a climate laisser-faire has given way to Big Brother, and entrenched rights are
readily impacted by the public conduct of public officials. The frontiers upon which the
rights of the citizen collide with social policy are more diverse and varied and
correspondingly, the circumstances in which the citizen must scrutinize the conduct of
public officials have mushroomed. The tensions between freedom of speech and the
reputations of public officials have intensified.

2. The Effect of Parliamentary Privileges

The public officials in the guise of parliamentary representatives enjoy a constitutional
advantage which is not open to the private citizen, in the form of the privileges and
immunities of Parliament which they use to their full advantage. What is more, most of
the Constitutions in the region accord to the elected representatives an additional right of free speech to which the reputations of the citizenry are subordinated. Section 45 of the St. Christopher and Nevis Constitution is typical of the region’s instruments. It states

“Without prejudice to any provisions made by Parliament relating to the powers, privileges and immunities of the National Assembly and its committees, or the privileges and immunities of the members and officers of the Assembly and of other persons concerned in the business of the Assembly or its committees, no civil or criminal proceedings may be instituted against any member of the Assembly for words spoken before, or written in a report to, the Assembly or a committee thereof or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise.”

In a very real sense, that constitutional provision confers upon the parliamentarian an absolute privilege against liability for libel, civil or criminal

The scope of constitutional immunity for parliamentary political speech must be set in the context of live electronic broadcasting. No longer is he confined to the historical parameters of the immunity from suit for speech uttered within the walls of parliament. He is immune from suit for speech uttered to the world at large.

The efficacy of the business of government demands that kind of protection from suit at the instance of the citizen for political speech occasioned in Parliament.


We live in small communities in which the impact of governmental conduct is penetrative, swift and instantaneous; because we live so shoulder to shoulder the topicality of the interaction between the state and the citizen cannot be ignored as the central theme of social concern and public discussion.

Our population levels are reflected in the circulation levels of our news media which carry the torch of public discussion. Without the freedom to discuss what most concerns the public, the media will soon lose its readership. Reduction in circulation leads to closure.

In our democracies, we have no freedom of information laws and the public’s enjoyment of its right to know is dependent upon the existence of an independent and responsible news media. Without that vehicle of diffusion of information, the rights and privileges inherent in free speech would be lost.

The fear of liability, Civil or Criminal, will result in the avoidance of political discussion in the media, a loss of public interest in the publications and a closure of the principal means of exercising the right to Freedom of Expression.

For the last forty years the defamation cases litigated before our courts have been in the civil division and in the main have been brought by public officials. The interim
injunctive measures usually employed serve as a silencing mechanism for further discussion

Given that social landscape, the immunities and the inordinate power enjoyed by the public official, the constitutional world of Jennifer Gairy in which it is decreed that the state and the citizen stand on the same platform as equal juristic entities, the maintenance of a social balance between the state and its public officials on the one hand and the citizen on the other demands the recognition of a corresponding immunity for the protection of political speech

**In the interest of social justice, of securing transparency and accountability in government, of the promotion of the fundamental right to freedom of expression and the protection of reputation a new balancing exercise needs to be undertaken and the social fairness of criminal libel and sedition needs reappraisal.**

**The Balancing Exercise**

The Test to be applied in determining the validity of the law of Criminal Libel and Sedition.

The test laid down in *R. v Oakes [1986] 1 SCR 103* has become the universally accepted formula which is to be applied in the determination of the constitutional validity of legislative prescription or executive policy which impacts the fundamental rights and freedoms.

Once the complainant satisfies the Court that legislative prescription or executive activity impacts upon a fundamental right and limits its exercise, then the onus of justification on a preponderance of probability rests upon the state, the party seeking to uphold the restriction upon the right.

A mechanism for evaluating justification is employed. The Court asserts two central criteria:-

(i) The objective of the limit has to be of sufficient social importance to warrant over-riding a constitutionally protected right;

(ii) The scheme or mechanism adopted in the legislation has to satisfy a form of proportionality.

Proportionality has its own guidelines of evaluation. The limiting or restrictive measure will be proportionate where it satisfies the following further criteria:

a) The measure must be carefully crafted to achieve the over-riding social objective,

b) The effect of the measure must impair the fundamental rights as little as possible, and
c) There must be overall proportionality between the deleterious effects of the measure and the achievement of the objective of the legislative restriction

In balancing the social tensions between the dignity of man as particularized in the fundamental rights and freedoms, valid law must have a compelling and over-riding social need or purpose; the design and mechanism of the limiting law must be rationally connected to the social objective, it must harm the right as minimally as possible, and the degree of impairment of the right must be no more than that which is necessary to achieve the social objective.

The authorities show that the application of this golden thread of proportionality which runs throughout the balancing exercise is distilled in the admonition that the limiting law must not be over-broad. Over-breadth can be established by demonstrating that the social purpose was realizable by mechanisms which fell short of those adopted or that the objective is realizable by entirely different mechanisms which harm the rights more minimally than the measures actually adopted in the impugned legislation.

Proportionality imports the interlocking application of the principles of minimal impairment of the entrenched right and the over-breadth of the limiting restrictions

It is in the balancing exercise between the minimal impairment of the right and the over-breadth of the measure that the respective values between the constitutionalized fundamental right to freedom of expression and the common law right to reputation must be put in the scale.

Now for the sub-title.

Are Criminal Libel and Sedition laws Obsolete in a Modern Democratic Society?

The issue admits of Three Questions

1. Does the mechanism of self-correction inherent in the democratic processes admit the restraints of the criminal law which proscribe against the publication of allegations of possible criminal misconduct against a public officer?

2. Is the control of the reins of government to be secured by the preclusion of statements likely to cause disaffection in the context of a form of government which presupposes that freedom of opinion and expression is an instrument which “establishes a reasonable balance between stability and social change”?

3. Does the law of Criminal Libel in its broader scope constitute a justifiable restriction upon the fundamental right to freedom of expression as enshrined and guaranteed in the kind of democracy as perfected in your Constitution?

The answer depends upon the philosophical premises upon which the analysis is conducted.

In the common law tradition the sanctity of reputation was protected both by the civil tort of Defamation as well as by the offence of criminal libel.

The law in libel, civil or criminal, pre-dates the evolution of the concept of supremacy of a constitution and the distillation of principles aimed at promoting and preserving the dignity of man in a pluralistic society regardless of distinctions of class, race, disabilities, gender or political opinions.

Criminal libel and Sedition crystallised in a social environment where class distinction was almost the raison d’être of social homogeneity. The interest which those laws protected was the ordered structure of a feudal society in which noblesse oblige, the place on the upper rung of the social ladder and of power. Reputation emerged as a most valuable asset and constituted a kind of currency. Nobles got credit where villeins could not. It was a beautiful life.


Sedition Defined in Archbold

_"Sedition, whether by words spoken or written, or by conduct, is a misdemeanour indictable at common law, punishable by fine and imprisonment. It embraces, all those practices, whether by word, deed, or writing, which fall short of high treason, but directly tend or have for their object to excite discontent or dissatisfaction; to excite ill-will between different classes of the Sovereign’s subjects; to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the government, the laws or constitution of the realm, and generally all endeavours to promote public disorder."_ Per Du Parq in R. v Wicks

Such a criminal proscription inhibits speech and its enforcement is anathema to ‘social change’. As a norm regulating social behaviour it projects as its moral content a design to keep in place an adoring throng struck in awe as it gawks at and drops a knee before the procession of a waving monarch, lords and nobles.

The Law of Criminal Libel

_"A defamatory libel consists in the writing and publishing of defamatory words of any living person, words calculated or intended to provoke him to wrath or expose him to public hatred, contempt, or public ridicule, or damage to his reputation…, words written of a man which are likely to provoke him to commit a breach of the peace or, if seen by others, to hold him up to hatred, ridicule or contempt, or to damage his reputation."_ Per Du Parq in R. v Wicks

The ultimate mischief which criminal libel was designed to protect was a social interest factor, namely, maintenance of public order by prevention of any tendency to a breach of the peace.
The public order element soon disappeared.

Du Parq opined:

“There, is however, in our judgment, no ground for the suggestion made at the bar that it is incumbent upon the prosecution to prove that the libel in question would have been unusually likely to provoke the wrath of the person defamed, or that the person defamed was unusually likely to resent an imputation upon his character.” Citing Mansfield CJ in Thorley v Lord Kerry: “There is no doubt that this was a libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt and ridicule; for all words of that description an indictment lies.”

The personal interest factor and class preservation in these offences is readily discernible. It is in keeping with the theology of the day:

“The rich man in his castle,
   The poor man at his gate,
   God made them high and lowly,
   And ordered their estate

The law of Criminal Libel in Grenada:

Title XIX of the Code is headed “Libel” The scheme of the legislation creates and defines two offences: a) Negligent Libel (6 months) and

   b) Intentional Libel (2 years)

Section 253 of the Code:

“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.”

Actus reus – Unlawfully publishes, defamatory matter.

Section 254 defines “defamatory matter”

“(1) Matter is defamatory which imputes to a person any crime, or misconduct in public office, or which is likely to injure him in his occupation, calling or office, or to
expose him to general hatred, contempt or ridicule.”

(2) In this section, ‘crime’ means any offence punishable on indictment under this Code

The law of seditious libel presupposes integrity and incorruptibility in the sovereign or government. Thus it permits candid, full and free discussion of any public matter, unless the discussion takes place in circumstances calculated to create disaffection and outrage as may lead to violence. A writer may also freely criticize the proceedings of courts of justice and of individual judges, but to impute corruption to judges has been held to be seditious.

It seems that liability depends not on the truth of the words used nor on the motive of the publisher, but on the question whether the words used, having regard to the audience addressed, were calculated to promote public disorder, physical force or violence in a matter of state (R v Aldred) Statements about the Sovereign, which if published of subjects would be defamatory, appear to be regarded as seditious and are incapable of justification. (r v. Duffy)

So guarded was the jewel of reputation that in criminal libel the role of “truth” has always been a troublesome matter. Per Lord Campbell CJ in R. v John Henry Newman (1853) I E and B 268: “Before the recent statute(6 and & Vict. C.96 s.6) the truth of the charges contained in a libel was no defence to an indictment or criminal information for publishing it.” The statute brought legislative relief, but only in so far it could be shown that the publication of the defamatory statements, though absolutely true, was made for the public benefit. For the purposes of avoiding criminal liability the whole statement had to be true. Substantial truth was only a mitigating factor for sentence after conviction.

It seems that truth remains a problematic matter in Grenada of to-day. Per Lord Rodger at para 31:

“In any trial for criminal libel in terms of section 253 of the Code, where the defendant raises the defence of section 257(1)(h) that the defamatory matter was true and its publication was for the public benefit, and there is evidence before them on which the jury could reach that view, the onus is on the prosecution to prove first, that the defamatory matter published by the defendant was not true and, secondly that it was not for the public benefit that it should be published. Only by proving both will the prosecution establish that the defendant published the matter unlawfully.”

The statutory protections of Reputation have been forged initially by the common law and are structured in the Civil Law of Defamation as well in the criminal sanctions of libel and sedition. The essential difference in the mechanisms of protection is that in the civil law proceedings are moved by the person defamed whereas in the criminal law it is the state which is enforcing the protection of reputation. Civil defamation results in the payment of damages; criminal defamation results in loss of liberty.
It is acknowledged that the protective mechanisms of the criminal law on libel are rarely invoked, and persons defamed almost invariably resort to the civil remedy. Such prosecutions as are brought for criminal libel involve public figures.

As a member of the Commonwealth Grenada shares in the values espoused in the Latimer House Guidelines which indicate that “it is legitimate for the State to suppress and to use criminal sanctions against public statements which can be proved to be promotion or advocacy of hatred or incitement to violence on the basis of race, religion, ethnic or linguistic group membership, sex or sexual orientation.”

While it makes recommendations that blasphemous libel should be repealed or restricted in its scope, it makes no mention of the law of sedition. Its recommendations for protecting and securing social values are confined to suppression of behaviour which is antipathetic to the tolerance of a pluralistic society.

However, The Commonwealth Statement on Freedom of Expression annexed to the Latimer House Guidelines for the Commonwealth adopted at the Colloquium in June, 1998, states: “The law of criminal libel, if not already repealed, should only be used to protect public order; it should not be used to control expression.”

Its recommendations on the law of Criminal Libel are clear even if terse. If retained at all criminal libel should only be invoked in support of public order in the breach of the peace context.

No doubt in framing the tenet of the Statement on Freedom of Expression the Colloquium took into account the experiences of emerging Commonwealth nations in which the information on the nations’ affairs were locked behind the protective barriers of Official Secrets Acts; that we function in a governmental climate which adheres to the position that all governmental information is secret until positively and authoritatively disclosed to the public.

The social tensions in a democratic society between freedom of expression and the laws of libel have largely been articulated in the cases coming before the courts which are concerned with the nature and limits of “political speech” as a generic category of privilege. What has been said in the cases about the “chilling effect” of the civil law on Libel upon the exercise of free expression is equally applicable to the criminal law.

The decision of the Privy Council in the case of GEORGE WORME Civil Appeal No.71/2002 the judgment in which was delivered on 29th January, 2004, stands in stark contra-distinction to the postulates of the Commonwealth Statement on Freedom of Expression. The decision affirms the validity of the criminal law control of expression as a valid restriction upon free speech imposed to assure the protection of reputation.

At para 42 Lord Rodger of Earlsferry observed:
"The protection of good reputation is conducive to the public good. It is also in the public interest that the reputation of public figures 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 situations where the publication was not for the public benefit."

In view of the polarity between that dictum and the tenet of the Commonwealth Statement on Freedom of Expression, the basis of that polarity needs to be explored.

The law on libel, civil or criminal, pre-dates the evolution of the concept of supremacy of a constitution and the distillation of principles aimed at promoting and preserving the dignity of man.

The value which the laws of criminal libel and sedition safeguard is the interest in reputation measured by social regard of the individual according to his station in life which crystallised against the background of 19th century materialism.

The constitutional right to freedom of expression transcends the narrow purpose of curtailing legislative and executive authority to which reference has already been made. The societies in which constitutional fundamental rights operate are far different in values and complexities than that in which the balance between free speech and reputation had originally been made. The core value which the right to freedom of expression safeguards is the proliferation of ideas on the knowledge plane, self-fulfilment of the individual and the retention of social stability expressed in a changing society which strives at the perfection of democracy within the context of the twentieth century.

It is difficult for those who swear and are bound by allegiance to the abstraction of Constitutional Supremacy to be reconciled with those nurtured in fealty to a liege lord.

In George Worne the Privy Council adopted the Austinian approach of measuring the validity of the law on the basis of what the law is stated to be and not what the law ought to be taking into account; the content of the criminal law should be informed by the moral content of the experiences and particularities of the society measured against the normative structure of the Constitution itself.

Standing upon that base of utilitarianism and sheltered under the format of the Oakes Test and the De Freitas formulation the Law Lords failed to weigh in the scale the respective values of reputation and constitutional freedom of expression as distinct from free speech as it operates in the UK: At para 42:

"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 situations 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 a crime of theft is unnecessary.” [Utilitarian application]

It is in the balancing exercise between the minimal impairment of the right and the overbreadth of the measure that the respective values between the constitutionalized fundamental right to freedom of expression and the common law right to reputation come into play and must be put in the scale.

It is submitted that in GEORGE WORME the Privy Council neither dealt with the respective values of the competing rights in the constitutional democratic context, nor did it conclude the Oakes Test of Proportionality in the fullness of Form and applicability as was required.

It is true that at paragraph 42 Lord Rodger presented the position as follows:

“For present purposes, the crime of intentional libel, as interpreted by the Board, is committed where a defendant publishes any false defamatory matter, imputing to another person a crime or misconduct in any public office, with the intention of damaging the reputation of that other person, in circumstances where the jury consider that the publication was not for the public benefit. The intention to damage the other person’s reputation is important. The law rightly attaches a high value to a person’s reputation not only for that individual’s sake but also in the wider interests of the public.”

The Board went on to consider the value of Reputation as Lord Birkenhead had determined it to be in REYNOLDS v TIMES NEWSPAPERS LTD. [2001] AC 127

However, what the Board failed to do was to ascribe actuarial weights to the value to be ascribed to reputation and freedom of expression for the effective balancing exercise which the constitutional provisions mandated. Having cited from Reynolds, the Board concluded that: L

“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 situations where the publication was not for the public benefit.”

Having relied upon Reynolds, the Board did not take into account the decision in Lingens v Austria (1986)8 EHHR in which the European Court applied the principle of proportionality in a private criminal prosecution for libel of a public figure and concluded that the interference with Lingens’ exercise of freedom of expression was not necessary
in a democratic society ….for the protection of the reputation of others; the interference was disproportionate to the legitimate aim pursued. Neither did the Board take into account the circumstances specifically high-lighted in Lange v Atkinson which is post Reynolds. Lange was specifically sent back to the New Zealand courts for reconsideration in light of their Lordship’s contemporaneous decision in Reynolds. The New Zealand courts roundly rejected the reasoning in Reynolds as being inapplicable to the modality of their constitutional democratic governance.

Accordingly, the Board in George Worne went on to avoid the issue of proportionality on the basis of the respective weight and value which they should have put upon the scale, by concluding:

“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 conversions shows that a 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.”

Four points must be noted:

1. The content of these laws were informed and a balance struck between reputation and free communication in an age when reputation was sanctified and no prioritised value had been given to human rights.

2. Now prioritised values have been accorded and free speech is regarded as the core value of a democratic society and that core value has been constitutionalised in Grenada.

3. The comparison between civil and criminal libel and the civil tort of conversion and the crime of theft is not apt. Firstly, because the availability of the Civil remedy which recognises a need to balance the tensions between the right to freedom of expression and reputation was available, the issue of proportionality should have come to the fore for analysis at that stage. The existence of a civil remedy for the protection of reputation warranted a more critical evaluation of the social circumstances of Grenada and the appraisal of the principles of minimal impairment of the right and the over-breadth of criminal sanctions.

Secondly, the right to property is no longer the raison d’etre of the state and is not therefore the core value of a participatory constitutional democracy. Freedom of expression is the source of other rights and the proportionality in inhibiting it by both a civil as well as a criminal sanction should have been adequately examined for over-breadth in a modern day constitutional democracy.

4. The fact that the law of criminal libel has not been invoked in recent years is a social fact in demonstrating the obsolescence of criminal libel except by a willing law enforcement authority acting at the behest of a public officer thereby maintaining “a chilling effect” in the interest of public officers when the general public has demonstrated its unwillingness or inability to have recourse to it. In the
concept of Olivecrona and Lundstet, the society has shown that it no longer accepts that criminal law as one of the facts of its social circumstance. As such it becomes an instrument of oppression in the interest of political power.

The social tension between common law free speech and the protection of reputation is reflected both in criminal and civil libel. However, in civil libel that tension has been somewhat relieved by the balancing exercise which has witnessed the emergence of defences of truth, privilege – absolute or qualified – and fair comment.

But the emergence of the expanded fundamental right to freedom of expression has demanded a new process of balance to relieve the new dimensions of the expanding social tensions which exist between the recognition of freedom of expression as a source from which other rights spring and the continuing necessity of protecting the individual from injury to reputation in a world of complex competition...

*The Civil Law*

The focus of the new balancing exercise has been on the civil law of libel.

The extent to which their Lordships relied upon *Reynolds* for their decision in *George Worne* demonstrates the relevance of the development of new principles for re-balancing taking place in the field of civil law libel to the new balancing exercise which is required in the area of criminal law libel.

_We come then to the Consideration of How the Respective Competing Values Between Freedom of Speech and Reputation Have Been Reconciled in the Civil law field and globally_

The Authorities show the Law to be in a State of Flux

In the USA, based on the First Amendment, *Sullivan* accords a constitutional privilege with respect to defamatory statements concerning public officials. Per Brennan J:

> “It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.”

In Australia’s *Lange v Australia Broadcasting Corp [1997] 4 LRC 192* a more limited privilege is accorded such statements. Subject to the qualification that the publisher is required to prove reasonableness,

> “The common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information - about government and
political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter.”

In the UK of Reynolds no generic category of privilege of “political speech” is to be recognised. The courts must proceed on a case by case basis to determine whether the defamatory matter falls within the established protection of qualified privilege. The ultimate question in each case is whether the occasion of the particular publication, in the light of its particular circumstances, contained the necessary ingredients giving rise to qualified privilege as an aspect of public policy, on the basis that such protection had to be fairly warranted by any reasonable occasion or exigency.

Zambia- In Sata v Post Newspapers (No.2) [1995] 2 LRC 61 at p 75 Ngulube CJ agonised:

> “If we were in the same boat with the Americans and the Australians, I would side with the Australians and the way they have proposed to protect the freedom to debate political issues and the fitness of a politician to hold office……..

> In sum, it is my considered opinion that the constitutional protection of reputation and free speech or press can best be balanced in Zambia, when the plaintiff is a public official who has been attacked in that character, by a more generous application of the existing defences. ……The trick is to balance the competing rights and freedoms and on principle, …the solution lies in the application of the existing law in a more imaginative way in order to meet the requirements of an open and democratic new Zambia. In this way, the press can be given some breathing space without the courts suggesting that freedom of the press will be freedom to defame.”

As a consequence the court in Sata formulated the principle that since those in public positions were taken to have offered themselves to public attack, impersonal criticism of public conduct leading to injury to official reputation should not attract liability provided that criticism contained no actual malice and even if the truth of all facts alleged was not established, the imputation complained of was competent on the remainder of the facts which were proved.

In New Zealand, Lange v Atkinson [2000] 4 LRC is the high –water mark in the recognition of political discussion as a generic category of privileged speech in the field of defamation. It proceeds upon the principle that any bona fide communication in the case of political discussion and within the defined subject matter was likely to have been made on an occasion of qualified privilege. New Zealand Lange is directly opposed to Reynolds.

In George Wurme the Privy Council focused upon the value of reputation as determined in Reynolds and ignored the revisited restatement of the platform of experiences and
cultural particularities which stand behind the modality of a constitutional democracy as laid out by the New Zealand Court in *Lange v Atkinson et al* [2000] 4 LRC 596

The combined effect of *Reynolds* and *Lange* was to throw into sharp relief how the differences in the modalities of government influence and fashion the permissible modes of free expression. Upon the central issue whether or not democratic governance has come to the point where political discussion should be recognised and protected as a generic category of qualified privilege within the context of the law of defamation, Reynolds says “No” and Lange says “Yes”

Their respective answers mirror the divergences in their respective forms of government, the differences between their social organisations and circumstance and the differences in the values attributed to the right of freedom of expression and of reputation. In the climate of Parliamentary Supremacy there is neither room nor mechanism for judicial pronouncement on the validity or invalidity of law. In the climate of Constitutional Supremacy, the testing of valid law is ever recurring and is one of the exercises of self-correction in constitutional democracies.

In ascribing the high value to reputation as already indicated, *Reynolds* rejected the possible emergence of the generic category of political speech as a weight in the defamation law and held that the question whether or not a political speech falls within the scope of qualified privilege must be assessed on each occasion.

i) Was the publisher under a legal, moral or social duty towards those to whom the material was published;

ii) Did those to whom the material was published have an interest to receive the material, and

iii) Were the nature, status and source of the material, and the circumstances of the publication such that the publication should in the public interest be protected in the absence of proof of express malice.

In the second Court of Appeal decision in *Lange* there is a swing of the pendulum in the weight value and the heft and dominance are restored to freedom of expression. Richardson P speaking for the Court concluded that Reynolds altered the structure of the law of qualified privilege in a way which added to the uncertainty and chilling effect almost inevitably present in that area and reduced the role of the jury in freedom of speech cases. His observations at p 608 command verbatim reporting:

“New Zealand’s constitutional structure and relevant statute law

In 1998 this court mentioned three major features of New Zealand’s constitutional and political system (see [1998] 2 LRC 563 at 603-46). The Privy Council asks this court to address the differences between our system and the United Kingdom and Australian systems (see para [1] above). The three countries share the main relevant features of a parliamentary democracy, based on universal suffrage, with a government which is responsible to Parliament and, through it to the electorate,
and which is subject to the law. There are, however, major differences in the electoral systems. In particular only the New Zealand system enables each voter to vote on an equal nationwide basis for the party which the voter wishes to see in the House of Representatives and in the government. And the court said in 1998, the electoral system now recognises more directly than it did, the competition organised by and through political parties for the power of the state exercised through Parliament and the executive government (see [1998] 2LRC 563 at 604.

By contrast, the general elections for the United Kingdom Parliament are still on a plurality, constituency by constituency basis. The limited movement towards partial proportionality as seen in the arrangements for Scotland and Wales and for European elections would not appear to be relevant to statements about candidates for and members of the United Kingdom Parliament, the equivalent situation to the present one. While the Australian electoral systems are more proportional than those of the United Kingdom, they too do not provide for voting on a national basis. In both countries of course the voting system tells only part of the story since all three national elections are fought by parties on a country wide basis.

Freedom of information legislation was the second matter mentioned in the 1998 judgment. Here too there is a major distinction. While in New Zealand the Queen’s papers have become the people’s, in the United Kingdom they are still in the Queen’s hands (or rather those of her ministers and officials). United Kingdom law and practice relating to access to and release of information has yet to emphasise, in the way found here, the rights of citizens to participate in the process of policy and decision making and to call the government to account. Again, Australian state and federal legislation is closer to New Zealand’s. The contrast is marked by the extensive and common release in New Zealand litigation of Cabinet and ministerial documents.

The third major matter in the 1998 judgment was the New Zealand Bill of Rights Act 1990 which as from October this year is to be matched by the United Kingdom Human Rights Act 1998. Australia, at the state and federal levels, has no comparable legislation. The New Zealand Act has a significantly narrower focus than the United Kingdom Act which gives effect to all the substantive provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950 TS 71(1953)Cmd 8969) (the European Convention) and certain of its protocols”.

Richardson P went on to consider the “Local political and social conditions, including the responsibility and vulnerability of the press” in terms formulated by the Committee on Official Information:

“New Zealand is a small country. The Government has a pervasive involvement in our everyday national life. This involvement is not only felt, but is also sought, by New Zealanders, who have tended to view successive Governments as their agents, and have expected them to act as such. The Government is a principal agency in deploying the resources required to undertake many large
scale projects, and there is considerable pressure for it to sustain its role as a major developer, particularly as an alternative to overseas ownership and control. Our social support systems also rely heavily on central government. History and circumstances give New Zealanders special reasons for wanting to know what their Government is doing and why.”

What is said there of New Zealand can be applied whole-scale to the constitutional climate of Grenada and the wider Caribbean region.

Upon the basis of those articulated values the Court of Appeal lent its approval to the emergence of a generic category of political speech as an occasion of qualified privilege.

“Our consideration of the development of the law leads us to the following conclusions about the defence of qualified privilege as it applies to political statements which are published generally: (1) The defence of qualified privilege may be available in respect of a statement which is published generally. (2) The nature of New Zealand’s democracy means that the wider public may have a proper interest in respect of generally published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office. (3) In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibility. (4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern. (5) The width of the identified public concern justifies the extent of the publication.”

The Court in 2000 amplified its position to show that a statement the subject matter of which qualifies for protection is not by dint of that fact alone always made on an occasion of privilege. Ordinaril that would be so, because the shared interest test is likely to be satisfied. But there may be times when a communication within that subject matter will not be made on an occasion of qualified privilege, because there is in the particular circumstances no shared interest in the particular communication between its maker and recipient. E.g. a gratuitous slur upon a politician in a publication concerned with a quite different topic. However, it reaffirmed that any bona fide communication in the course of political discussion and within the defined subject matter is very likely to be made on an occasion of qualified privilege.

I have dealt in some detail with Lange because it stands in sharp contradiction to Reynolds the authority upon which the Board rested its value of reputation in the criminal context of George Worne. The principles and values distilled in Lange are relevant in informing the content of the criminal law in the same way as Reynolds was used to inform George Worne.
I posit the view that Reynolds regards the existing law of Defamation as establishing a defined and appropriate balance between the exercise of freedom of expression and the protection of reputation. Despite their Lordships avowals that there is no difference between freedom of speech as understood in England and freedom of expression in Article 10 of the Convention, Reynolds and Derbyshire reflect the limited value of free speech as it emerged historically at Common Law in a governmental structure of a supreme parliament. This is the value imported into George Worme through Reynolds. Consequently, a need for a new balancing exercise is not recognized.

Lange reflects the multi-dimensional value of freedom of expression as a fundamental human right enabling a multi-dimensional development of the individual in a democracy of constitutional supremacy. Consequently, it recognizes that a new balance must be struck. It is that latter value which is engaged in the Grenadian context, and which warrants a re-balancing in the law of defamation between freedom of expression as guaranteed by the Constitution and the interest in reputation as recognized by the provision of section 10 (2)(b)

Regrettably none of the cases took into account the seminal analysis of the value of free speech as it developed at common law and the distinction in the value of freedom of expression as a fundamental right conducted by Mason CJ in Theophanous

Accordingly, the weight placed on reputation in the public officer ‘s context in George Worme was wholly inappropriate to the constitutional context of Grenada.

At p 387 Mason CJ cited Lord Keith in Derbyshire CC v Times Newspapers [1993] 2LRC 617 at 624:

.:”While these decisions (Sullivan and City of Chicago v Tribune Co) were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlay them are no less valid in this country. What has been described as “the chilling effect” induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available.”

On the appropriateness of the balance which has already been struck in the field of defamation law, he observed:

”None the less, there is an argument that, despite that tendency of the law of defamation, it does not amount to an infringement of the freedom because the common law of defamation has endeavoured to achieve an acceptable balance between the public interest in giving effect to freedom of speech and the competing public interest in protecting the reputation of individuals who are defamed. The defences of truth, privilege and fair comment have been developed with a view to resolving the tension which exists between recognition of freedom of speech and the necessity of protecting the individual from injury to reputation. Thus, it may be said that, because the common law of defamation has been
moulded by the judges with that end in view, the law has arrived at an appropriate balance of the competing interests so that freedom of communication is not infringed. The answer to this argument, so it seems to us, is that in reaching that balance the courts have not taken account of the fact that there is an implied freedom of communication. The decisions which establish the common law principles have not been concerned to assess the inhibiting impact of the law of defamation and threats of action for defamation on the exercise of that freedom. It follows, in our view, that the court is not justified in concluding that the balance achieved by the common law in protecting reputation of the individual defamed and the publication of political discussion necessarily means that there is no inconsistency between common law principles and the freedom."

The multi-dimensional nature of the guaranteed freedom of expression and its capacity to be a source of other rights have transformed that freedom into a social engineering tool. As a consequence, the interests of society demand that a new balance between the guaranteed right and the protection of the asset of reputation ought to be calibrated.

CONCLUSIONS

1. Deducible from the foregoing is the assertion that the existing balance which has been struck between the right of free communication and reputation in the context of the pre-human rights environment in the law of criminal libel is not the appropriate balance upon which we can stand and go forward to give effect to the fulsomeness of the fundamental right to freedom of expression and to the perfection of a constitutional democratic way of life. A new balance ought struck by putting in the scale the full weight of the fundamental human right of freedom of expression and the value of the individual’s interest in reputation. What is more they should be weighed and measured in the context of a constitutional democracy.

2. The plethora of initiatives to combat corruption in all branches of public life and good governance have exploded the myth of innate integrity and incorruptibility of public officials and have vitiated the presumption of integrity and incorruptibility as the underpinnings of the laws of sedition in a democracy of constitutional supremacy.

3. The sedition laws as understood are a restriction upon the exercise of the right to participatory democracy, are geared to the maintenance of the status quo and therefore, inimical to stability in society reconciled with the requirement of orderly social change.

4. Since the global factual experiences demonstrate that criminal libel is rarely prosecuted, and when invoked is done in the interest of the protection of the reputation of public officers, the chilling effect of criminal libel operates as a detriment to the perfectibility of participatory democracy, the known ideal construct of good governance.

5. The availability of the remedies of civil libel renders criminal law libel as an over-broad prescription for the protection of reputation. That over-breadth is underscored by the fact that criminal libel impacts negatively upon both the fundamental right of freedom
of expression and the right of the individual to his liberty. The adequacy of the remedy of civil libel as a safe-guard for the protection of reputation is demonstrated by the fact that it is that remedy which is invariably invoked.

6. This is especially so since the focus upon breach of the peace no longer dominates in the law of criminal libel. The balance in application at present is tilted too far against freedom of expression in favour of the need to protect the private interest of public officers in their reputations.

7. The ongoing balancing process between freedom of expression in the fullness of its dimensions and the protection of reputation is best left to be undertaken in the Civil Law field in which law can be more readily developed in a climate of social change.

8. In the social context of a constitutional democracy in which politicians are accorded far-reaching immunities and privileges, the extent of their ready and penetrative intrusions into the lives of the citizenry in all aspects of community life, demand a mutuality of immunization for the individual from criminal prosecution for the publication of inaccuracies in statements of and concerning political matters. Because this immunity in the publication should not be carte blanche, the circumscription to the immunity is best left to be re-balanced in the civil law remedy. The state should not become the defender of the public officer’s reputation in the form of criminal prosecutions.


BERNICE V. LAKE Q.C, B.A (Hons)(Lond) LLB (Lond)