CHAPTER 10
THE LAW OF DEFAMATION

Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law.

Lord Wright M.R.¹

10.1 The origins of the laws relating to defamation date back as far as King Alfred the Great who, in the ninth century, decreed that slanderers should have their tongues cut out.² Although over the years the penalties imposed upon those who transgress this branch of the civil law have become financial rather than physical, the principles have remained virtually unchanged. The legal rationale was expressed with great clarity by Justice Potter Stewart of the American Supreme Court in 1966:³

The right of a man to the protection of his own reputation from unjustified invasion and


134
wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of liberty.

10.2 Like many areas of law, defamation is a marriage of conflicting rights and interests. On the one hand is the principle which wholly underlies this particular course of action i.e., that a man's reputation should be protected from wrongful injury. On the other hand there are certain prevailing social interests which the law decrees that protection of reputation will take second place. Freedom of expression is the most significant of these dominant interests and a free press is, of course, a fundamental part of that right.

10.3 When the Rajiv Gandhi Government was forced to withdraw the ill-conceived and now infamous Defamation Bill in 1988 under pressure of a nationwide demand, it was a triumph for the Press Council because its intervention in the public debate on the Bill and its attempt to establish itself as a primary consultee on legislation concerning the press gave the Council an image apart from an adjudicator of complaints. The bane of the 1988 Bill was that it was clearly aimed at the
muzzling of criticism of the government and prevention of investigative journalism, especially where governmental corruption is concerned.

10.4 In the context of the free speech guarantee it is only fit and proper for us to import some of the principles recognised and adopted in US defamation law. Basically, wherever there is a public interest component no action for defamation will lie in the United States unless the defamed person can show that the defamatory statement or allegation in question was made with actual malice. Thus in New York Times v. Sullivan⁴ a paid advertisement sponsored by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South accused the law enforcement officials in Montgomery, Alabama, of being racist, following the comments of a police official. The elected police commissioner of Montgomery brought an action for libel against the Times and several of the individual signatories to the advertisement. The court dismissed it in the following terms:

Debates on public issues should be uninhibited, robust and wide open - and may include sharp, unpleasant attacks on the government. The

⁴. (1964) 376 U.S. 255 at 270.
constitutional protection does not turn upon the "truth, popularity or social utility of the ideas and beliefs which are offered". Some degree of abuse is inseparable from the proper use of everything... Injury to official reputation affords no more warrant for repressing speech that does factual error...

The constitutional guarantee requires a federal rule that prohibits a public officer from recovering damages for a defamatory falsehood relating to his official conduct, unless he proves that the statement was made with actual malice... The Constitution affords to the press an absolute and unconditional privilege to criticize official conduct, despite the harm which may follow from excesses and abuse...

10.5 Thus a US public official is in effect debarred, in the absence of actual malice, from bringing defamation suits with regard to his official reputation. This principle was later extended by the Supreme Court in Rosenblum v. Metromedia Inc to even cover defamation of a private person if the statement concerns a matter of public importance. This decision is a clear acknowledgement of the role of the press in informing the public of certain issues in so far as it concentrates not upon the public/private character of the person defamed, but on the subject matter discussed. Where the public interest component is not present, the individual's right to privacy will prevail.

10.6 The principle of Sullivan was carried forward...
by the House of Lords in *Dartysire County Council v. Times Newspapers Ltd*. The plaintiff, a local authority, brought an action for damages for libel against the defendants in respect of two articles published in *Sunday Times* questioning the propriety of investments made for its superannuation fund. Delivering the judgment, Lord Keith recalled that in the *Spycatcher case*, the House of Lords had opined that "there are rights available to private citizens which institutions of ... government are not in a position to exercise unless they can show that it is in the public interest to do so". It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech" and further that action for defamation or threat of such action "inevitably have an inhibiting effect on freedom of speech".

10.7 Reference in this connection may also be made to the decision of the Judicial Committee of the Privy Council in *Leonard Hector v. Attorney General of Antiqua*.

---

* 1993(2) WLR 449

and Barbuda® which arose under S. 33(B) of the Public Order Act 1972 (Antigua and Barbuda). It provided that any person who printed or distributed any false statement which was "likely to cause fear or alarm in or to the public or to disturb the public peace or to undermine public confidence in the conduct of public affairs" shall be guilty of an offence. Quashing the criminal proceedings launched against a newspaper editor under the said provision, Lord Bridge of Harwich observed:

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 inidious and objectionable kind.

10.8 This private/public distinction is not altogether strange to the Indian criminal defamation law as is evident from the second and third exceptions in section 499 of the Indian Penal Code.® However, it is

®. 1990(2) AC 312.

*®. Second Exception.-It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his
negligence which is the standard for liability in such cases, and not actual malice, as with the US law, and the exceptions to section 499 have not proved as useful or protective to Indian journalists as have the US precedents to the American press. More importantly, these public/private distinctions are confined to the criminal law of defamation. The civil law recognises no such distinctions, and public officials or private individuals who have been defamed where a matter of public interest is concerned have as much standing and enjoy exactly the same rights in civil defamation law as do private individuals who have been defamed where there is no public interest component.

10.9 Recapitulating these well-known Anglo-American character appears in that conduct, and no further.

Third Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.
legal principles, our Supreme Court in a seminal judgment rendered in the Nakkheeran case\(^\text{10}\) held that the Government, local authority and other organs and institutions exercising governmental power could not maintain a suit for damages for defamation. Leaving open the issue of the right of the officials to prosecute a publication under sections 499 and 500 of the Penal Code, the court categorically asserted that neither the government nor the officials who apprehend that they may be defamed have the right to impose a prior restraint upon the publication.

10.10 It is submitted that the criminal law of defamation be altogether abolished, which is the situation in the United States, while the civil law should be reformed, incorporating these public/private distinctions. In England also criminal prosecutions for libel are on the decline; and in 1975 the Faulkes Committee on Defamation actually considered its abolition. It was concluded, however, that the offence should be preserved - particularly as a worthwhile sanction against those instances where 'the libellous matter may be gross and persistent and the conduct of the

defendant very bad indeed'. The Royal Commission on the Press, known as the McGregor Commission, however, recommended that all prosecutions for criminal libel should be conducted by the Director of Public Prosecutions, and private prosecutions for libel should no longer be permitted.  

10.11 The above submission is particularly relevant because a journalist in the present circumstances could face two separate proceedings for the same article and although civil and criminal proceedings for defamation are entirely separate and independent, with different requirements and components, the remedies are cumulative, not alternative.  

10.12 While adjudicating on a complaint filed by the Government of Tamil Nadu against the Illustrated Weekly of India alleging that an article written by Cho Ramaswamy, making various allegations of corruption


against Chief Minister M G Ramachandran and his Government was defamatory, the Press Council made the following observations on the general pleas often taken in defence of the impugned publications.

**Good faith or honest belief**

10.13 It seems to have been assumed at some places that good faith in itself is a defence to liability that might arise otherwise for a statement which is found to be untrue and defamatory or whose truth cannot be established. This, however, is not law. Good faith may be an essential ingredient of some of the defences, but it is not in itself a defence. Honest belief in the truth of an allegation also does not suffice in law to confer immunity from liability for defamation. The defendant in a proceeding for libel must prove objectively that the allegation made was in fact true. If an allegation turns out to be untrue, then even a guarded statement expressing doubt about some aspect of the character of the complainant is punishable. Nor does the fact that the person defamed is a 'public figure' make a different rule applicable.
Public interest

10.14 Fair comment on a matter of public interest is, no doubt, a well-recognised defence, but that defence is confined to comments. It does not protect untrue statements of facts, even if the matter is regarded as one of public interest. The fact must be established as true. If that is done, then the expression of honest opinion is protected where the matter is of public interest. But, the facts must be proved to be true.

Reliance on newspaper reports

10.15 If a statement is made on the basis of newspaper reports, it is no defence in itself. If the statement turns out to be untrue, it may be defamatory.

Repetition of libel

10.16 It is not a defence that an impugned statement merely repeats something published elsewhere and the use of the words such as 'alleged', 'learnt from reliable sources' and 'reported' does not, therefore, improve matters. In other words, the law does not permit an argument (i) that the maker of an impugned statement has not himself made the allegation of misconduct.
independently, and (ii) that all that he says is that a person has reported to have committed certain misconduct. Publication of rumour that a person has been guilty of misconduct is as libellous as the direct charge.

Parliamentary proceedings

10.17 It was suggested in the course of arguments that the allegations were based on matters discussed in the State Legislature and were protected on that score. This argument, however, cannot be substantiated on the facts of this case. The article in issue does not purport to be a report of an Assembly proceedings held contemporaneously or otherwise. It does not purport even to be a summary of the Assembly debates. It is intended to be an independent contribution and is expected to be so regarded by the prospective readers. It cannot, therefore, claim any protection that may be available under the Constitution or the law in regard to reports of proceedings of the legislatures.

10.18 The following principles evolved as a result of the deliberations of the Council in its adjudication on complaints relating to defamation and scurrilous writings:
1. As regards the journalistic propriety of the publication of a libel on a public servant or a public figure, two factors are relevant:

(a) The analogy of exception 2 to section 499 IPC is applicable under which matter published in good faith pertaining to the conduct of a public servant in discharging his public functions or as regards his character does not constitute libel.\textsuperscript{15}

(b) Before going into the question of good faith, the allegation must be found to be untrue. It is presumed that a person has a good character unless proved to the contrary, i.e., no presumption exists as to libellous statements being true. But it is equally true that the respondent cannot be censured unless the publication of an untrue statement is proved against him. No action may be taken against the editor unless the complainant leads evidence to support the complaint.\textsuperscript{16}


\textsuperscript{16} Ibid.
2. Comments on the public conduct of a political leader and on the views held by him are not improper. However, the same cannot be said to a reference made to his private life. The editor would not be guilty of journalistic impropriety when the facts do not clearly forbid certain inferences which the editor has drawn. 17

3. For publication of false news items without verification in order to defame the complainant, the editor is open to censure. An apology from him is not acceptable where he starts a newspaper clearly with the object of blackmailing local officials or public men, but failing in that objective, decides to close it down. 18

4. Constant publication of certain indecent, obnoxious or defamatory writings with the object of extracting money by blackmail by the editor will entail the penalty of


5. An article carrying deliberate allegations by an editor, which are not true and proved to be incorrect, is in the nature of a blackmail intended to threaten the complainant into submission to his dictates. As such, it may be described as "the worst type of journalistic impropriety and misconduct".

6. An editor may read "between the lines" and bestow political colour to events which may be correct. However, he may not publish what is characterised in the paper itself as a rumour, with apparently no evidence in support. Indulgence in this type of character assassination shows irresponsibility on his part.

7. Compromise effected between the parties

---


indulging in "libellous personal attacks without any regard to journalistic ethics or propriety" will not render a complaint liable to rejection. Mudslinging in the newspaper and the defence of the editor that it was done in retaliation of similar conduct by the complainant leaves both parties open to censure. 22

10.19 The case of Indian Express 23 is an illustrative one in understanding the position of the Press Council vis-a-vis cases of defamation. The complaint was filed by Mr Harkishan Singh Surjeet, member of the CPI(M) Politbureau, alleging that the article written by editor Arun Shourie and published on the front page of the Indian Express dated 1.6.1990 under the caption SHEKHAR, LIMAYE ENTICE CPI(M) TO BREAK GOVERNMENT: OPEN WAR was defamatory. It was alleged in the story that Mr Chandra Shekhar and Mr Madhu Limaye had met the complainant and conveyed a plan to bring down the National Front government of Mr V P Singh at the Centre and replace it by a government comprising of Janata Dal and Congress-I headed by Mr Jyoti Basu. When


controverted, the newspaper took up the position that it was standing by the story.

10.20 It has been held by the Press Council in a series of adjudications that the fundamental principles (shorn of their technicalities) underlying the Exceptions (particularly Exceptions 1 and 2) to Section 499 of the Indian Penal Code are applicable by way of analogy as part of the journalistic ethics. 24 'Good faith' is the keystone of the arch of the principle of journalistic ethics evolved by the Press Council on the analogy of Exceptions 1 and 2 to S. 499 IPC. For the purpose of giving protection of this principle (against a charge of publishing a baseless, defamatory story), nothing may be published without due care, circumspection and enquiry.

10.21 As observed by the Press Council in Vasanth Sathe/The Independent, 25 the extent, nature and mode of the enquiry is largely a question of fact depending on the circumstances of each case. Nevertheless, one broad norm of practice which, normally, in cases of this kind

---


25. Ibid.
will help is that whenever a newspaper receives a report containing allegations which are likely to lower the esteem or harm the reputation of any public figure or person, the editor should, before publishing it, verify its truth from the person concerned to elicit his version or reaction and publish that also along with the report/article. If the person concerned refuses to give his counter version, a footnote to that effect should be published. If the editor's mind is left rocking in doubt with regard to the veracity of any part of the report/article, he should omit from publishing it.

10.22 In regard to the appending of the post-script "I.E. stands by its report" to the rejoinders/denials of the complainant, the Council felt that it was not justified. In the companion complaint filed by Mr Limaye,26 the Council expressed displeasure at the sensational caption given to the story. This caption casts its shadow on the entire impugned story, giving the impression that what was Mr Shourie's own comment or speculation has been passed on as a factual comment. This style of presentation is repugnant to the norm of journalistic ethics which cautions journalists not to mix

up their own comments and conjectures with facts.

10.23 A marked increase is evident in the institution of defamation cases against the press by public men - politicians in particular. A 15-year-old case, instituted by Mr Jagmohan, former Lt Governor of Delhi, against Indian Express for a report holding him responsible for the notorious Turkman Gate demolitions during emergency, was concluded in 1992 in the court of the Metropolitan Magistrate, Delhi, with the conviction of the then editor, Mr S Mulgaokar, and reporter, Mr Javed Laiq. The judgment gave rise to varied responses on the issue of delay in the trial of the case and also on whether an editor could be held personally responsible for all that appeared in the paper. Another distressing trend discernible from the Annual Reports of the Press Council is the increasing incidence of complaints being upheld against the press by the Council on the ground of defamation. In 1992-93 the Council upheld 63 complaints while rejecting only 13 in the category of defamation. It may be noted that the total number of complaints upheld against the press during the period was 81.

10.24 The present study does not purport to be a full examination of all aspects of the law of defamation
because the focus is on the aspects of special interest to the media. Although libel actions in India are not in terms of statistics as numerous as in the United States or in the United Kingdom, the number of matters brought before the Press Council is fairly large as indicated in the preceding paragraph. The recommendations of the Council, particularly those relating to innocent dissemination of news, unintentional defamation, partial justification, fair comment, reports of certain proceedings to which qualified privilege attaches etc., deserve serious consideration by the Government while enacting a suitable legislation in line with the [English] Defamation Act. Such a legislation to replace the present uncodified position on the subject is highly necessary for removing a number of anomalies and liberalising the law keeping in view the constitutional rights regarding freedom of speech and expression and the reasonable restrictions that can be placed on it.

---