

Law & Justice
Dawn
10/8/04

Defamation law: media specific

By Shujaat Ali Khan

THE right to free expression and the right to reputation are both cherished rights. Inasmuch as the law of defamation seeks to strike a balance between the two, it tends to be restrictive of the freedom of the press and other media, the instruments of mass publicity. And if it is intended to be amended without reference to any lacuna discovered in the process of its implementation by courts of law or problems faced by the litigants, it is bound to arouse suspicion.

The proposed amendments to the Defamation Ordinance of October 2002, which attempted to codify the hitherto unwritten civil law of defamation, are apparently meant to remove certain anomalies in the parent law. But they also increase, needlessly and unreasonably, the minimum amount of 'compensatory damages' payable by a defamer to the person defamed from Rs 50,000 to Rs 300,000. Under an original provision of the ordinance, where defamation is proved, damages shall be presumed and would follow automatically. In default of payment, the defamer or the judgment debtor shall have to suffer (simple) imprisonment for one year instead of three months as initially provided.

Concurrently, the court may also pass an order directing the defendant to tender an apology, if acceptable to

the plaintiff, and publish the same in similar manner and with the same prominence as the impugned defamatory statement without extinguishing the claim to 'compensatory damages'. Additionally but by the same decree, the defamer may be asked to pay 'special damages' for the actual loss suffered by the plaintiff in his calling or business as a result of his defamation. No minimum or maximum amount has been specified in this respect and the special damages will vary from case to case.

Journalists, publishers and human rights organizations are rightly perturbed over the heavy burden placed on their shoulders. The ordinance, coupled with the proposed amendments, tips the balance in favour of the right to preserve and enjoy one's reputation at the cost of freedom of expression. The quantum of punishment seems all the more excessive as the defamer's culpability under the criminal law remains intact. He can be punished with simple imprisonment for two years or with fine or with both under the Pakistan Penal Code. The aggrieved person may proceed civilly for damages (or jail, in default) and criminally for punishment of the wrongdoer with jail and fine simultaneously. (This principle of concurrent civil and criminal liability is well rec-

ognized in Britain, India and other common law countries and the USA. An individual's right to his or her reputation is treated as quite as precious as his or her property, and its infringement is both a public and private wrong, though it has to be reconciled with another basic, constitutionally-guaranteed right — the freedom of expression).

As for the liability of the printer, publisher, editor, reporter and distributor of a libellous statement, it has always been there.

In fact, the amendment bill, which has been referred to a standing committee of the National Assembly, fails to address, rather compounds, a basic flaw in the ordinance of 2002. It leaves out 'the author' — the originator or maker of the impugned statement — from its purview. 'Defamation' has been defined to include slander (oral or transitory defamation) but 'Actionable Defamation' has been confined to 'the publication of defamatory matter'. Though 'publication' means 'communication of words to at least one person other than the person defamed', neither the original ordinance nor the proposed amendments specifically list 'the author' among the persons liable and assign him with any responsibility. Actual legal proceed-

ings are inconceivable without impleading 'the author'. The author's omission is notwithstanding the fact that the reporting and publication of substantially true accounts of certain proceedings and statements have duly been exempted and he remains exclusively responsible for his utterances.

The failure to specify the author's liability, combined with the loosely-drafted definitions of 'defamation', 'actionable defamation' and 'publication', make the law media specific. It is

evidently applicable to cases where

in the press and electronic media themselves are the originators or makers of libellous comments or remarks.

As for the other proposed amendments, they are more procedural than substantive. For instance, the district and sessions judges have exclusively been conferred the jurisdiction to try suits for defamation. The provision sought to be replaced stipulated that 'no court inferior to that of the district judge shall have jurisdiction to try cases under the this ordinance', which expression could have been construed to include high courts. The Sindh High Court has already assigned defamation cases to the district judges irrespective of the amount involved. The amending bill upholds this interpreta-

tion of the provision.

Similarly, the trial period is to be reduced from 'six months' to '90 days'. An appeal shall lie to the high court only against the final order and within 30 days of its pronouncement. The maximum period for disposal of appeals by the high courts has been extended from 30 to 60 days. In practice, such time limits are treated as directory rather than mandatory and proceedings linger for years.

A suit under the ordinance must be instituted within six months of the defamatory publication coming to the plaintiff's knowledge. The plaintiff should be preceded by a 14-day legal notice to be served on the defendant within two months of the publication. The ordinance overrides the provisions of the Limitation Act and other laws without a 'non obstante' clause. But a special law prevails over general provisions even otherwise.

Among the defences made available to the defendant by the ordinance are that the defamatory matter is a fair comment published in public interest and in good faith and as an expression of opinion rather than as an assertion of fact; that it is based on truth and was made for public good; that the plaintiff had assented to its publication; that the defendant was ready to tender a proper apology and publish

COMMENT

tion of the provision.

Similarly, the trial period is to be reduced from 'six months' to '90 days'. An appeal shall lie to the high court only against the final order and within 30 days of its pronouncement. The maximum period for disposal of appeals by the high courts has been extended from 30 to 60 days. In practice, such time limits are treated as directory rather than mandatory and proceedings linger for years.

A suit under the ordinance must be instituted within six months of the defamatory publication coming to the plaintiff's knowledge. The plaint should be preceded by a 14-day legal notice to be served on the defendant within two months of the publication. The ordinance overrides the provisions of the Limitation Act and other laws without a 'non obstante' clause. But a special law prevails over general provisions even otherwise.

Among the defences made available to the defendant by the ordinance are that the defamatory matter is a fair comment published in public interest and in good faith and as an expression of opinion rather than as an assertion of fact; that it is based on truth and was made for public good; that the plaintiff had assented to its publication; that the defendant was ready to tender a proper apology and publish

the same but the offer was declined by the plaintiff; that the matter complained of is a privileged communication such as between a lawyer and a client; and that the matter is covered by absolute or qualified privilege.

Absolute privilege extends to legislative and judicial proceedings and reports at various levels. Any fair and accurate publication of parliamentary or judicial proceedings which the public may attend and statements made to proper authorities in order to procure the redress of public grievances shall have the protection of qualified privilege.

The codification of an unwritten law is generally welcome, for it makes the law and the rights and liabilities accruing under it certain. The ordinance would have been a step in the right direction had it been issued after careful consideration. The proposed amendments do little to remove the confusion created by its provisions. The lawmakers should avail of the opportunity to revise and streamline the entire ordinance after a detailed discussion of its provisions and bring it in conformity with the socio-economic conditions prevailing in the country. Practically speaking, the ordinance has made no impact on the country's defamation regime so far.