

Is the evil of whose deeds is made fair-seeming to him, so that he sees it good (like the man who is rightly guided)? Allah leaves in error whom He will and guides whom He pleases. Do not let your soul expire in grief for them: Allah has knowledge of all their actions.

(Surah Al-Fatir, Verse 8)

Defamation and freedom of press

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The civility of a society is best measured by the degree of freedom enjoyed by its press. In Pakistan, like other pillars of democracy, press has lived in chains for a better part of our history. After a long and painful struggle we have at last reached a stage where those shackles have been broken or at least so it seems.

The freedom of speech and press is protected by Article 19 of the constitution. Article 19 as originally enacted also contained 'defamation' but in 1975, the word 'defamation' was substituted by the Fourth Amendment to the Constitution and instead the words 'commission of' were introduced in the provision. The effect of the constitutional amendment was that any law which relates to any offence, including defamation, may provide a shield against claim for the exercise of this fundamental right.

The law relating to defamation clearly restrains the freedom of expression but every civilised system provides for it. At stake are two competing but equally important values. The freedom of the press and right of the public to know clashes with an individual's right to have his reputation and dignity protected which may be irreparably damaged by a small tilt of a poisonous pen.

There is a constant friction between the two and unless a delicate balance is struck, either could fall victim. A free press is essential for the survival of democracy and no democratic society could flourish without a vibrant and vigilant media.

There is criminal as well as civil liability of defamation under our laws. Chapter XXI of the Pakistan Penal Code, 1860, provides for criminal liability for the offence of defamation. For civil liability there is no statutory provision and like the English legal system, the liability

workers during the darkest decade of our history. Even after the restoration of democracy the role of the media in enlightening the populace deserves recognition.

However, it cannot be denied that like other powerful institutions, the press in itself carries the potential of excesses. Indeed, occasionally the delicate balance between free press and the individual has been disturbed to the detriment of the weaker component of the equation. Many public figures have genuinely felt the grievance of mis-treatment at the hands of media. Indeed, even journalists have experienced as to how it feels like when one is unjustifiably defamed. This was demonstrated by the recent disclosure that some of our prominent journalists were recipients of favours from the Intelligence Bureau. They have reacted with understandable vehemence because the allegations, they say, are unfounded and malicious. One can appreciate their anger but there is positive lesson for the journalists too. One does not need to be a journalist to be deeply offended when maliciously defamed. Just as a journalist feels frustration and annoyance on being maligned, so do other public figures.

Although it may be a rare specie which is on the verge of extinction in our country, yet there may be honest public figures whose sole asset is their reputation. It is ironic that the corrupt and the dishonest are the ones who care least for what their critics have to say. It is the honest who stands to loose most from malicious defamation.

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It is well known that under our existing laws, it is a truly gargantuan task to bring a successful claim for damages even if there is malicious defamation. This area of law calls for urgent reforms and the laws must be modified to meet the current realities. It calls for a delicate balancing because if there is too much fear of defamatory suits it may have a 'chilling effect' on the

defamation. For civil liability there is no statutory provision and like the English legal system, the liability is based on common law. There is, therefore, a civil liability to pay damages to the aggrieved party.

The essence of defamation is harming the reputation of a person. This can be done in a variety of ways. *Altaf Gauhar v. Wajid Shamsul Hasan* (PLD 1981 Karachi 515) is one of the rare cases in Pakistan where a successful action for damages was brought. In that case the Court observed that, "In order to succeed in an action for defamation, the Plaintiff in a suit has to prove (a) that the words complained of are defamatory (b) that they refer to the Plaintiff, and; (c) that there has been a publication to a third party. If all these three elements are proved by the Plaintiff, the falsity of the charge and the malice are presumed by the Court. If, however, the Defendant succeeds in proving that what is stated by him is true and privileged, then the Plaintiff has to further establish malice on part of the Defendant."

At a simpler level, if a defamatory statement is made and unless it is true, the person making the statement is liable to pay damages. Although a claim for defamation can be made against any individual making the defamatory statement, most often the claim is made against the press. Similarly any aggrieved person can bring an action for defamation but it is mostly initiated by public figures. The person in both instances being too obvious to require further elucidation.

Reconciling the freedom of press with protection of an individual's reputation is a real test for a democratic society. The true measure of a mature democracy is not how effectively the majority is governing but how well protected is an individual's liberty. The right of an individual to be left alone, to be free not only from the arbitrary governmental restraints but also from prejudicial actions of non-governmental entities cannot be ignored. Just as an individual cannot be allowed to be physically injured by other private persons, his reputation cannot be allowed to be damaged by irresponsible action of others. And merely because an individual assumes a public position, he should not cease to enjoy the fruits of individuality which is his birth right.

In the United States the media has been described as the fourth pillar of the state. Fortunately in Pakistan our print media is also fast emerging as one of the pillars of our multi-pillared political structure. It is a tribute to its perseverance, that the press has flourished in spite of draconian laws particularly during the last martial law. The press actively participated in the struggle waged by political

ing because if there is too much fear of defamatory suits it may have a 'chilling effect' on the press. Much of the true information will not see the light of the day if the editor is required to verify every fact which his reporters bring to him. Similarly, if politicians make allegations against their political opponents the editor should not be expected to verify all the facts.

He should not be held liable for what one public figure has to say about other. Similarly, the columnists should have complete freedom to express their views. As the American Supreme Court observed in a case, "There is no such thing as false ideas. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of ideas." It is in the realm of facts that the real controversy arises.

No amount of legal reform can provide a better mechanism than the internal restraints exercised by the editors themselves. We must repose our faith in self-censorship which is by and large exercised fairly. In the residual cases, the individual must be protected. In recent years an unfortunate phenomenon has emerged. There are journalists who have breached the tradition of neutrality and used their newspapers to project their personal agenda.

Even worse in some cases they have been launched and financed by one political group to damage the reputation of the other. Some journalists have literally joined political parties and yet they want to enjoy the immunities of the press. One only needs to pick up few of these papers and the impression they convey is that of total catastrophe and breakdown. They are full of character assassination of the opponents of their political patrons. Lives are destroyed not because they deserve to be, but because they are politically on the wrong side. This is certainly not journalism. Indeed they are a threat to the integrity of the institution.

It is against this irresponsible and politically motivated harassment that law of defamation must aim at. It is not argued that the corruption must not be exposed, indeed those corrupt people are our enemies worse than the enemy across the border. The thrust of the argument is against political victimisation. And this trend must not be seen in isolation. It is a manifestation of a greater threat to the fabric of our society.

The mob rule, the religious harassment, the ethnic strife are all the ills which have the potential of tearing our society apart. It is against this moral decline that all efforts should be concentrated and defamation is but a small aspect of it.