

Preface

I HAVE great pleasure in placing in your hands this excellent monograph, somewhat modestly titled, *Law of Defamation : Some Aspects* prepared by Professor P.M. Bakshi. The monograph is fifth in the series of collaborative publications programme between the Press Council of India and the Indian Law Institute. The monograph should be of interest to the community of law and media persons, upon whose creative collaboration much of the future of constitutional democracy in India depends.

Written lucidly, this study expounds the law of defamation as it stands today with all its weaknesses and strengths and makes or endorses some fundamental proposals for legal change. Our task will be amply fulfilled if the latter receive your critical support and leadership in a law reform campaign.

Some of the suggestions for change arise because of the differences in legislative and judicial approach. For example, while most courts do not require special damages to be proved in case of slander, the Indian Limitation Act, 1963, still continues to speak of special damages (p. 17); clearly, this dichotomy has to be removed by dispensing with the requirement of special damage. Other suggestions arise also at technical law reform levels, and amount to appeals to shed legislative inertia, e.g., on unintentional defamation (pp. 34-35), direction absolving the defendant from personal appearance from court proceedings (pp. 67-68), or anomalies concerning the survival of the cause of action for defamation, which continues to be governed by the provisions of the Indian Succession Act (pp. 72-73). The survival of this latter is indeed a striking case of legislative inertia as one state—Kerala—following the 1924 Travancore Act—has already remedied these anomalies in 1976.

Even more striking is the legislative inertia retaining the notion of caste defamation in section 499 of the Indian Penal Code, which in its Explanation of "harming reputation" includes lowering of "the character of...person in respect of his caste". Professor P.M. Bakshi observes (p. 75) that so long as "caste prevails, an attempt to minimise or ignore existing conditions is contrary to public good". The conception of public good articulated by the Indian Constitution so elaborately, above all, is that of a casteless society and it forbids at the level of state action (excepting for the scheduled castes) deployment of any caste category, as an aspect of fundamental right to equality. That is the reason why the protection of Civil Rights Act makes it an offence to use insulting caste expressions attributing untouchability. To allow reputation to sustain in caste *per se* is, in the present opinion, unconstitutional. And criminal liability for defamation ought not to reinforce violation of the letter and spirit of the Indian Constitution.

Other change proposals do not belong to the genre of technical level reforms or to *status quo* by legislative default. Rather, they relate to crucial law-policy choices.

Should the law or the courts recognize 'privacy' as a tort? Neither the Law Commission of India nor the Second Press Commission think that the creation of such a tort is necessary (p. 23) but theirs need not be the last word on the subject, unless we take a view that non-governmental wisdom has no role to play in law reform process.

It is worth noting that the gerontocratic model of law reform adopted in India often creates half-hearted law reform proposals. For example, the Second Press Commission's extension of immunity of qualified privilege to translators protects the translator but not the "publication of offending matter in translation" (p. 29). While one welcomes, amidst the welter of quotational jurisprudence, this refreshing departure from the borrowed wisdom of the Faulks Committee Report (U.K.), and one admires the importance of the extension of immunity to the translator, the welcome thrust of this normative innovation is cancelled by denying the immunity to the publisher of the translation. Professor P.M. Bakshi describes this lukewarm stance reticently as "incongruous." But it, to my mind, constitutes an example of abortive law reform. If the translator is to be protected, insofar as she has translated the original in accordance with its "sense and substance", the publisher of this translation should be equally protected. Very often, the incentive to translate depends on the initiative of a good publisher; and in India, with its linguistic diversity, translation of foreign books into Indian languages and Indian books into other Indian languages, ought not to be discouraged by one-step-forward, two-step-backwards proposals such as the one under consideration.

An area of special importance is the role of the law of defamation in inhibiting corruption and related forms of criminogenic abuses of power. Can a journalist be compelled to disclose confidential sources of information in libel suits? Referring to the relevant American decisions, including the famous *Life* decision, Professor P.M. Bakshi concludes with the observation: "These sophistications need not be borrowed in India" (p. 71). While this view is entitled to respect, so is the question: "Why not?" I stand committed against all thoughtless transplants into Indian law and policy; we have borrowed too many "sophistications" as well as crudities from the First World law. But the issue is not whether we should borrow ideas. The issue relates to constitutionality of restrictions on freedom of speech and expression, in a society where public power is all too often used for private gain, and in which the struggle for accountability for the exercise of public power is an enervating process.

In discussing remedies in civil proceedings, this monograph endorses the Second Press Commission's standpoint that there ought to be a limited "right to reply" to be enforced by the Press Council. I am not clear as to why what the Commission describes as "an important remedy in the continental systems" is demoted to a system of conventional obligation. Fortunately, the Gujarat High Court has in 1981 adopted a more laudable approach to this remedy;¹ it is much to be hoped that the Supreme Court of India, in appeal, does not reverse it. Perhaps, the reason why a reference to this decision was omitted in this study was that the affirmation of the right to reply was made in the context of the right to freedom of speech and expression, and not in the context of defamation. But I believe that the compelling logic² of the Gujarat High Court's decision needs attention, even in the context of the law of defamation. If courts do pass orders, based on consent, providing full and complete apology in defamation cases, it is a short, but vital, step in this process that the remedy extends a detailed rebuttal of allegations, which is the surest and abiding way of rearticulating of injured reputations. It would be unreasonable in this preface to convey the significance of the Gujarat High Court's decision, either in terms of the invaluable fundamental right of freedom of speech and expression or in terms of its aptness and adequacy as a civil remedy to defamation. But it must be stated that what is good at the level of constitutional justification ought also to be so at the level of remedies in torts. This would even be more so in a society where electronic media remain, as in India, exclusively within the monopoly of the state.

The importance of this monograph lies not just in lucidity of exposition of a rather complex subject-matter or on the range of Indian and overseas information. To my mind it lies in a cogent plea for information through appropriate codification of the law of defamation. I hope that this book is approached as an agenda of law reform and will receive attention of the Indian Law Commission, whose primary mandate is reform of the system of administration of justice.

I must here record our warm appreciation of the patient editorial effort of Associate Professor N.S. Nahar.

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1. *M.D. Shah v. L.I.C. of India*, A.I.R. 1981 Guj. 15.

2. See, *contra*, Veena Bakshi, "Right to Reply: A Dissonant Note in the System of Freedom of Expression..." (1982) 1 S.C.C. 1-26 (*Journ.*).