CHAPTER I

Introduction

THE LAW of defamation, with which this study is concerned, presents, in a microcosm, the perennial conflict between the individual and the society. Its aim, to put the matter simply, is to protect reputation. But in defining the limits of the protection, one faces at every stage difficult questions arising from conflicts of values.

Two questions dominate the debate about liberty. The first is, when is it permissible to interfere with an individual's liberty ? The answer is simple—when the individual's actions cause harm to the other members of society. The second question is a difficult one—What is liberty, and what acts are to be regarded as permissible interference ? In other words, what kind of harm should be regarded as serious enough to justify the interference of the law ? These questions set up an antithesis between individual freedom and the demands of society. They also require us to consider more deeply what freedom and the community may have to offer to one another.

As these questions are always difficult whenever any point affecting the freedom of expression is at issue, they become still more so when one comes to defamation in relation to the freedom of expression. The reason is that defamation, by definition, deals with statements that harm the reputation of an individual (or an entity). By the very hypothesis, one begins with something harmful. *Ab initio*, the scales are tilted in favour of the individual defamed. This places a heavy burden on the other individual who seeks to tilt the scales in his own favour, by asserting the freedom of expression as justifying the causing of harm. He must convince the law-maker that there are overriding considerations which justify the making of a damaging statement and its publication. Those overriding considerations he must seek in some circumstance that persuades the law-maker that the harm to the individual must be disregarded in the interest of the good of society. In other words, he must persuade the law-maker that though the individual is harmed by a statement falling in a particular category, the harm to society would be greater if the statement were not allowed to be made and published; the individual's grievance must give way to the social interest in the freedom of expression. A mention of these considerations may sound to be unnecessary (since some would regard them as very elementary propositions). But they come up again and again when any issue pertaining to law of defamation on any topic arises—both when the controversy is concerned with what the present law on that topic *is* as a matter of reality, and when it is concerned with what the law *ought* to be as a matter of the ideal.

Habermas, a German writer on the science of politics, has analysed the rights guaranteed by the nineteenth century constitutions and other enactments, into four categories :

(*i*) rights relating to the reasoning public (for example, freedom of expression, freedom of assembly;

(ii) rights constituting the political prerogatives of private persons (for example, right to vote, right of petition);

(iii) right of an individual as a free person (for example, personal liberty, sanctity of correspondence); and

(iv) rights in the nature of property (for example equality before law, freedom from control, protection of private property including right to inheritance)[1].

The right of the reasoning public to freedom of expression falls in the first category, while the right of an individual to reputation falls in the third category. The two may conflict with each other, and the business of the law of defamation is to lay down rules for adjusting the conflict between the two.

The importance of this branch of law grows with civilisation. With an increase in the use of mass media of communication and with the spread of literacy, the growth of reading habit and the technological advances that enable the spoken and the written word to be conveyed to a very large number of people, there is naturally an increase, not only in the volume of written as well as oral matter, but also in the audience that it reaches or is capable of reaching. This increases the likelihood of harm to reputation. At the same time, with the advent of democracy and the recognition of the importance of freedom of expression and the emphasis placed on the right of the public to know the truth on certain matters, some parts of the law of defamation may need reform, so that a proper balance between private interest in reputation and public right to information about public matters is maintained.

Defamation is both a crime as well as a civil wrong. Criminal law on the subject is codified in India. On the subject of civil liability for defamation, there is no codified law in India and the rules that are applied by our courts are mostly those borrowed from the common law.[2] However, many of those rules of the common law have themselves undergone modification in the United Kingdom and in several other Commonwealth countries. Apart from that, some of those rules themselves need re-examination in the light of the changes that have taken place in various fields recently.

This study does not, however, profess to deal with the entire field of the law of defamation. It is confined to points on which there is a substantial justi-

1. Habermas, cited by Gianfrone. Poggi, *Development of Modern State* 104, 105. (1978).
2. See *infra* p. 4

fication for reform. Some preliminary matters may be disposed of before discussing the law topicwise.

Constitutional Competence

First, as to the question of the constitutional competence, the law relating to the tort of defamation would, from the point of view of distribution of legislative power, seem to fall under "actionable wrongs"[3] mentioned in entry 8 of the Concurrent List in the Seventh Schedule to the Constitution. Criminal law also falls under the Concurrent List.[4] This would cover the offence of defamation.

Questions of defamation frequently arise in regard to newspapers. The particular topic of "newspapers, books and printing presses" is also covered by entry 39 of the Concurrent List. Special forms of communication such as wireless, broadcasting and the like, find a mention in entry 31 of the Union List. Statements made at elections would seem to fall under entry 72 ot the Union List. The subject of privileges of Parliament and the state legislatures (entry 74 of the Union List and entry 39 of the State List) will be outside the scope of the study. The field of legislation relating to defamation is thus within Parliament's competence.

There still remains the aspect of fundamental rights. Under article 19(1) (*a*) of the Constitution of India, all citizens have the right to freedom of speech and expression, but, under article 19(2), reasonable restrictions can be imposed on the exercise of the right in the interests, *inter alia*, of public order, decency or morality, or in relation to defamation. The expression 'defamation' has thus been given a constitutional status. Force of habit may lead writers to use the expressions "libel" and "slander", but these are now giving way to "defamation", which is a more precise and meaningful expression. Incidentally, "libel" as used in many of the English text books is a wide word, transcending the boundaries of merely defamatory publications and covering many other species of libel, such as obscene libels, seditious libels, blasphemous libels and so on.

The Indian Constitution, while guaranteeing freedom of speech, allows restrictions to be imposed by law upon that freedom, provided the restrictions are (*a*) reasonable, and (*b*) imposed for one of the specified purposes—which specifically include defamation. The law of defamation does not infringe the right of freedom of speech guaranteed by article 19(1)(*a*). It is saved by clause (2) of that article.[5]

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3. As to meaning of "actionable wrongs", see *State of Tripura* v. *Province of East Bengal*, A.I.R. 1951 S.C. 23.

4. Entries 1 and 2 of the Concurrent List mainly relate to criminal law and procedure.

5. *Namboodiri Pad* v. *Nambiar*, A.I.R. 1970 S.C. 2015, 2019.

Civil Liability for Defamation

As already stated above,[6] the law relating to defamation as a civil wrong has not been codified in India, unlike its counterpart in criminal law. Isolated enactments touching some aspects of defamation as a civil wrong are to be found in the statute book. Also, there has been considerable legislative activity in the field of protection of statements published from parliamentary proceedings. However, by and large, the rest of the law has to be deduced from the rules of the English common law without the substantial statutory modifications of the law that have been enacted in the United Kingdom, particularly the Defamation Act, 1952. The artificial distinction between libel and slander, which has dominated the common law for long, has not, however, been favoured by the majority of the courts in India. But in other respects the English common law rules are allowed to operate in this field, as on most topics falling within the domain of the law of torts.[7]

It is worthwhile to state some of the essential features of the law which may be basic to a consideration of the reforms that may be needed.

(i) First, the interest which the law of defamation seeks directly to protect is the interest which a person has in the good opinion of *others*. It is not an injury to that person's feelings that is sought to be remedied by the action for defamation, but an injury to his honour and reputation in the shape of a depreciation of the respect and esteem entertained by his fellowmen towards him. This aspect is of some importance, because, in recent times, increasing emphasis has been placed on another aspect dealing with a person's private life—the need for recognition of the right of privacy. While privacy is mainly intended to protect a person's feelings, the law of defamation protects his reputation. The first is subjective, while the second is objective.

(*ii*) Secondly, publication of the defamatory statement is an essential ingredient of the crime or tort of defamation. The law of defamation protects a person in regard to the good opinion entertained by *others*. If there is no publication of the statement, then there can be no harm to reputation, as the good opinion of others cannot then be adversely influenced by a statement which is not published.

(*iii*) Thirdly, like most other rights recognised by law, the right of an individual to reputation is not absolute and is subject to many over-riding considerations. There is a conflict of interest between individual interest in reputation and the public interest in having information (and even guidance) about public matters. On the one hand is the interest of the plaintiff in the continuance of his good reputation, which certainly needs protection: on the other is the freedom of speech to be allowed to other persons, being a freedom

6. See *supra* p. 2
7. *Cf.* Justice Mookerjee, in *Satish Chandra* v. *Ram Dayal De*, I.L.R. 48 Cal. 388. (1920).

which is needed not only for the full development of their personality but also for the right of the public to information about public affairs and (in some cases) certain private affairs also. Whenever a problem relating to the law of defamation has to be dealt with by a court or by the legislature, an attempt to balance the one against the other and an assessment of the relative values of each is usually involved. The attitude of the law in this regard is, therefore, fluctuating from time to time and from country to country. Broadly speaking, the common law recognised an almost unqualified and extremely wide right to reputation. Subsequent efforts towards reform of the law have almost all been negative, in the sense that they have sought to limit the remedy and thus to favour the prospective defendant. However, recently the pendulum seems to have occasionally swung in the opposite direction.

One finds, in this respect, a contrast between the English approach and the position in the United States. English law tended to give preference to the private interest in reputation while the law in the United States gave preference to the public interest.[8]

This does not however mean that the common law is plaintiff oriented. The common law has been much concerned that the imposition of liability for harmful speech should not interfere unduly with freedom of expression. The rule of strict liability in defamation was hedged with an elaborate system of privileges designed to protect public as well as private interests.[9] It is not as if the values of freedom of expression which, in India, have now been given constitutional status, have been neglected by the common law. The common law has all along taken cognizance of these values, if not in terms of a system superimposed by the constitution, then certainly in terms of a system intrinsic to the common law. And the result is that there is not only much that can be learned from the common law, but also much that can be left to it.

It may be mentioned that the common law of defamation is permeated with a comprehensive system of privileges—some of them absolute, but many of them conditional—allowing the speaker considerable leeway for error, and defeasible if the privilege is abused.[10] Where the defamatory statement was made on a privileged occasion (qualified privilege), malice became critical. The rationalisation underlying the privilege was that the circumstances dispelled the presumption of malice otherwise arising from defamatory statement.[11] Excessive publication was held to be evidence of malice. Excessive fault in failing to ascertain falsity was also evidence of malice.

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8. *Cf.* the cases collected in Kenneth Davis, *Mass Media and the Supreme Court* 199-257 (1979, reprint).
9. Alfred Hill, Defamation and Privacy under the First Amendment, 76 *Columb. L.R.* 1205, 1311 (1976).
10. *Adams* v. *Ward*, [1917] A.C. 309, 326.
11. *Clark* v. *Molyneux*, (1877) 3 Q.B.D. 237.

It is because of the need for maintenance of a proper balance between public interest and private interest that one finds so many topics belonging to the law of defamation coming up again and again for consideration before academicians and law reformers—for example, (*i*) the defence of justification, (*ii*) the defence of fair comment, (*iii*) various categories of statements in respect of which a privilege should be recognised on the score that the statements were made on special occasion for special purposes; and (*iv*) if such a privilege is to be recognised, the controversy as to whether the privilege ought to be absolute or qualified. Sometimes, the wider public interest is victorious over the narrow interest of an individual, but at other times it is not so.

A person's reputation is his property and possibly more valuable than other properties and any words calculated to infringe this right afford a good cause of action.[12] The enjoyment of one's reputation includes all the moral and material advantage to which it may entitle him in his relationship with the society as a whole, or what Slesser, L.J., calls "the opportunities of receiving respectful consideration from the world".[13] In our recorded history, we have an authentic account of the administration of law at the time of Chandra Gupta Maurya in the shape of the famous treatise known as *Kautilya's Arthashastra*,[14]

Scope of Study

It should be mentioned at this stage that the present study does not purport to be a full examination of all aspects of the law of defamation. The focus will be on the aspects of special interest to the media. However, some matters, though not directly relevant to the media as such, will be dealt with in order to put the discussion in the proper perspective.

It is in the light of the need to balance several considerations that the social utility and the juristic soundness of the present law will have to be approached. Ordinarily, when considering the question of reforms in India on any subject, it is appropriate to begin with Indian material as the primary source. In the present case, however, an exception can be legitimately made. There has been a very valuable examination on the subject by two English committees—the Porter Committee and the Faulks Committee of 1975. It would be pedantic not to utilise the English experience. As regards the report of the Porter Committee, many of its recommendations have been already implemented in the United Kingdom. (Many other Commonwealth countries have also either anticipated the English reforms, or followed suit).

The Porter Committee was appointed in 1939 under the chairmanship of Lord Porter to consider the reforms of the law of defamation in pursuance of

12. *Rahim Baksh* v. *Bachcha Lall*, A.I.R. 1929 All. 214.
13. *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Ltd.*, 50 T.L.R. 588 at 587 (1934).
14. In Chapter XVIII of Book III of that treatise (which is the seventy-ninth chapter from the beginning), we find the author dealing with defamation.

an assurance given in Parliament when a private member's Law of Libel Amendment Bill was withdrawn.[15] After the committee gave its report, government could not find time to put forth a legislative measure implementing the recommendations of the committee, and ultimately, it was again a private member (Harold Lever) who introduced the Defamation Amendment Bill.[16]

The important defects existing in the law, in respect of which reforms were recommended by the Porter Committee in the United Kingdom, can be enumerated as follows :—

(*i*) unintentional defamation;

(*ii*) distinction between libel and slander, particularly, its operation in relation to radio and television;

(*iii*) privileges of newspapers;

(*iv*) defence of justification and defence of fair comment; and

(*v*) other changes. (These were mostly concerning procedural matters or matters of detail).

Many of these recommendations have been carried out in the Defamation Act, 1952. Subsequent to that, the Faulks Committee reported on the law of defamation. Its recommendations yet await implementation.

15. See 16 *Modern Law Review* 198 (1953).

16. See 494 *House of Commons Debates*, column 2390.