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Law of Defamation: Concept and Application in the Islamic Republic of Pakistan

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Abstract

A person's dignity and reputation is considered an inviolable fundamental right and needs to be protected by the state through legislative instruments. It may be secured in civil or criminal adjudication to provide a safeguard to the reputation of a person, as no one has the right to tarnish and defame others to lower them before the general public. The internet period in the shape of social media has further heightened the situation in the publication of defamatory material. Therefore, the case even becomes more complex when the computer/device is used by the third person at various places; as such states have enacted laws to curtail defamatory acts and offences. However, various laws have been enacted in Pakistan to cope with defamatory acts and offences of civil and criminal nature. This article deals with all such thin lines that lead to constitute defamation along with certain exceptions in reference with Pakistani laws. Moreover, what ways can be adopted to conform our laws of defamation in reference to Islamic principles?

Key Words: Defamation; Pakistan; defamatory material; Tort; Civil; Criminal; Internet

1.1 DEFAMATION

Defamation is a generic term that refers to undermining any person's reputation, while in some legal systems; the defamation is categorized in to libel and slander, meaning thereby, written and spoken statement

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respectively. Therefore, in reference with adjudication, it is categorized into criminal and civil defamation. The kind of defamation which is a crime against the state is adjudicated as per criminal system of the state but when it is a civil wrong must be dealt by the civil court by instituting a civil suit.¹

1.2 LAW OF DEFAMATION

The defamatory law is unique in the sense that the question of meaning of words has to be determined by the court; as such, this law is based on common sense. Therefore, the courts on various occasions have established that the creation of defamatory material is not a legal issue, but the sense of defamatory material has been conveyed to an ordinary person is more important. The basic problem which the adjudicating courts face is to ascertain the language issue, either the words spoken or conveyed are of defamatory nature or not. Therefore, utmost care should be taken to understand the sense and meanings of the publication. In a series of case laws and Mc Key committee on defamation have concluded various formulations and factors as follows:

- i. The statement which lowers down the complainant before right thinking people.
- ii. False statement is referred to a person to his credit.
- iii. An unjustified publication aimed to injure the reputation of another person to face ridicule, hatred or contempt.
- iv. Statement about the person which tends to make others to avoid him.

These four above mentioned definitions have a common substance that the defamatory publication must inflict the harm to the reputation of the complainant, but the question here arises about the exact meaning and extent of reputation. The concept of reputation in itself is a complex problem, because reputation is a social evaluation construct growing in the minds of society members for any person. So, one can say that publication of a defamatory statement is one which instigates the members of the society to change their opinion for the complainant. Courts consider the linguistic aspects of the statement to distinguish between denotative and connotative meanings, for which denotative means having the same meaning and connotation means the cultural and personal association. The courts often declare that in ascertaining the defamatory sense, a “context” has a crucial place, as the defamatory sense should not be inferred easily from any statement but the intention of the speaker is irrelevant if the statement lower downs the complainant in the appraisal of the common man. As regards the position of reader, in modern law, it doesn’t depend

as how the reader perceives the statement, but depends on the adjudicating court to ascertain the impact on the minds of general public.²

1.2.1 Right to Reputation:

Right to reputation in its vital aspects doesn't concerned neither to distinction or fame nor to special or intellectual acquirements, unlikely, the repute is built on the basis of integrity, conduct and living in right, so, the law of defamation aims to protect the reputation not character. The distinction between reputation and character is that what the person seems to be and what a person really is, so reputation is more vulnerable than character. In the present legal parlance, the right to reputation is confusing but in the written defamation; the right to reputation is an absolute right to be respected like a right to security.³ However, mere insult does not amount to defamation. Insult, attends against man's dignity what involves no false statement or suggestion but defamation is a false statement of suggestion for a fact to the prejudice of man's reputation.⁴ A person's reputation is needed to be preserved inviolable as an inherent right and an integral part of personal security that should be acknowledged.⁵ However, this right is *jus in rem*, a right against all worlds. Reputation of a person is considered as his property, which is more valuable than any other property.⁶

1.3 LAW OF DEFAMATION AND INTERNET ERA

1.3.1 Social Media:

The law of defamation is to be distinguished between primary and subordinate publications, meaning thereby, the person writing or speaking original defamatory statement is actually liable, but all those administrators who are controlling social media networks and allowing defamatory material to be posted and published are also liable for publishing such like defamatory material.⁷ The protection of reputation depends on the construction of defamatory statement in tort of defamation, especially in the era of internet publications such as face book, websites, twitter, emails, blogs, websites etc. It is common that cyber-libel has become one of cyber defamation in the modern Era because defamatory remarks can easily be posted online against any person for whom the basic question arises: how the protection of reputation is balanced with freedom of expression in this internet era. The first important question here arises to assess, how, the statement published here is defamatory in its meanings and construction, so, the first test of evaluators is to assess, whether the statement has lowered the reputation of complainant in the general estimation of the public because the people tend to use this medium of internet for jocular and light hearted statements and general public take

these statements in loose or figurative sense, as the statements on electronic forums are taken less serious than bulletin boards.⁸ In an Australian case law, it has been established that the social networking sites are liable for defamation regarding statements by third parties.⁹ The courts have established that the defamation occurs at more than one place and multiple times. In case of the internet, every defamatory page being downloaded at various places and times will constitute a separate defamatory cause of action.¹⁰

1.3.2 Cyber Defamation:

Cyber defamation is the same phenomenon as the ordinary/conventional defamation, however cyber defamation is to defame the reputation of any person through computer/internet, subject to the following three ingredients are found in any statement:

- i. Statement is referred to the plaintiff.
- ii. False and defamatory statement towards plaintiff.
- iii. The statement should have been published through electronic means.

If the above narrated constituents are found in any statement, it is called the cyber defamation. If the statement is published through electronic means against any bank, financial institution, company or organization who is competing in the market which has resulted its loss in the market, then this loss is a cyber-defamation, however, the main problem in cyber defamation arises, when the computer of any company or organization is used or website of any organization is hacked and defamatory material is uploaded on that website.¹¹

1.4 DEFAMATION IN ISLAM

Freedom of expression or speech is a most important aspect of life in Islam and is not a matter of pleasure but regarded as one of the fundamental rights which are esteemed, honored and secure by the Islamic law. In Islam, the word 'freedom of opinion' discusses the individual's right to express his or her own view without violating the Islamic principles.¹²

There are some elements of Defamation under Islamic Law as follows:

1. The statement was not an express accusation of adultery/fornication.
2. The defendant made a statement about the plaintiff to another, publicly or privately.
3. The statement was injurious to the plaintiff's reputation.
4. There was an intention to harm or disparage the plaintiff.
5. The statement was false or sufficiently ambiguous enough to imply falsehood.
6. There are no privileges in effect when making such a statement.

On the occasion of his farewell pilgrimage the Prophet said, “Your lives, your wealth, and your dignity are sacred between you like the sacredness of this day, in this month, in this land”.¹³

1.5 LAW OF DEFAMATION IN PAKISTAN IN THE ISLAMIC REPUBLIC OF PAKISTAN

The section 295-C of Pakistan Penal Code, 1860 specifically declared to cater a situation of any derogatory remarks used by any person in respect of the Holy Prophet (PBHU) in shape of words (spoken or written), by imputation, by visible representation, innuendo and insinuation to defame the sacred name of the Holy Prophet (PBHU) or the name of any of his wives or family members or companions and caliphs. The state agencies must be reminded the preamble of the Constitution of Pakistan, 1973, Article-2A which emphasizes the principles of freedom, tolerance, equality and social justice. Each community’s right has been balanced whilst the right of freedom of speech and expression is sublime of Pakistan’s Constitution; however, this term “Right of Expression” must not be so stretched to defile the sacred personalities of any one religion. It is now a clear view that in spite of Muslim community, all religions of the world have suffered immensely because of this unnecessary and unlawfully stretch of the right of freedom of expression, as such, Salman Rushdi wrote a book which hurt the feeling of all Muslims and was dully banned in 1988, in the same way James Laine, wendy Doniger wrote books to thwart the feeling of their sects. Distortion of any religion cannot be allowed in guise of freedom of speech and expression which amounts to a new form of terrorism which the international community also concedes.¹⁴

The Constitution of Islamic Republic of Pakistan, 1973 has explained in detail the right to free speech and expression in its Article 19 as “limited” and a “controlled” right, and never been taken as an absolute freedom. However both honorable courts held that the right of free speech is not unrestrained but a restricted one.

1.5.1 Civil adjudication:

A) In Pakistan, there is defamation ordinance 2002 according to which, the publication of defamatory material is actionable wrong which is liable to be adjudicated without any proof of special damages to the plaintiff, where there is defamation, damages are presumed (section-4 of Defamation Ordinance, 2002). The person/defendant has the following defenses in the defamatory case as follows:

- i. The defendant is not the author of publication

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- ii. The statement published is fair, in good faith, in public interest and expression of fair opinion.
 - iii. The statement was made for the public good.
 - iv. The consent of the plaintiff was sought before the publication.
 - v. The plaintiff makes offer to publish apology and that was refused by the defendant.
 - vi. Offer is made by the plaintiff to publish denial or contradiction, but was refused by the defendant.
 - vii. The statement/matter under complaint is of privileged communication:
 - a. The matter regarding federal or provincial legislation, reports, papers, proceedings of assemblies, judicial proceedings etc. have the absolute privilege, and
 - b. Any fair and true publication of reports, statements, judicial proceedings to redress the general public's grievances come in the preview of qualified privilege (section-5, 6 & 7 of Defamation Ordinance, 2002).
- B) A legal right arises through a protected interest-an interest protected through a state law- to assign a legal duty however, the violation of absolute right leads to a legal damage and actual loss is not needed to be proved but in case of other legal rights, actual loss is needed to be substantiated to complete the injury to be redressed.¹⁵ Defamation is representation or image disseminated or conveyed to a third person through any tangible medium of perception such as print, oral, audio, visual media or devices of any combination thereof causing harm and diminishing to the reputation or good will of a person.¹⁶ Promulgation of Defamation ordinance, 2002 has made defamation actionable under statute law (S. 3, 4 and 9 of defamation ordinance, 2002). Once it is established that the libel has been committed, injury or damage to the reputation, and good will is presumed. Once defamation was proved, damage, injury and impairment to the reputation, good will or estimation of person, vocation or goods as the case may be, is invariably presumed.¹⁷ Making of imputation or defamatory statement, communication to a third party or publication, an intention to injure and having reason to believe that such injury will harm that person's reputation.¹⁸
- C) Publication as understood in the context of law of defamation would mean communication of defamatory matter to a third person or making known of a defamatory matter to any person other than the
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one about whom it was published.¹⁹ Therefore, defamation is communication to third party of false statements about a person to injure his reputation and cause personal harm to him. Filing of suit for compensation on account of civil action is permissible, if in the case of special nature in which suit for damages, independent of cost award in the suit, can be maintained. Matter is deemed defamatory if it exposes the plaintiff to hatred, ridicule or tends to injure him in his profession or trade.²⁰

- D) Defamation by e-mail is clearly liable in terms of S. 3(4) of Defamation ordinance, 2002, if defendant attaches an e-mail of a journalist with his e-mail, such e-mail of a journalist will amount to libelous act committed by such journalist and not defendant who is merely its recipient and not its author or originator. Plaintiff had not pleaded in plaint that there was possibility of defendant having dictated such e-mail to his secretary. Dictation of e-mail by defendant to secretary would constitute a distinct and separate publication in its own right. Each act of publication of alleged defamation being a separate act of defamation must be alleged, pleaded and proved accordingly. Plaintiff had to prove defamation, and if defendant denied publication, then he had to prove publication as well. Plaint did not contain any averment regarding publication of e-mail by defendant. As to whether she really had the capacity to understand its consequences, as to whether it was a mental act i.e. whether the mind accompanied the hand that executed it or deed was just in itself, and that whether the entire transaction was free from circumstances throwing any shadow of doubt of suspicion on the inception, execution and application of the deed. Wherever a transaction was challenged by a 'parda' observing lady on fraud, collusion and misrepresentation, the beneficiary of the transaction was under legal duty to prove by producing over whelming evidence to establish the genuineness of the sale transaction.²¹
- E) For constituting offence of defamation, Mens Rea or intention is essential ingredient. Criticism is essential for healthy society. Newspapers act within its legitimate sphere when it offers criticism of what they considers and bonafide belief to be good for community. Freedom of speech under Article 19 of the constitution and freedom of press under 4th amendment Act of 1975 has widened its scope. Media is supposed to take lead reflecting if anything wrong is taking place.²²

1.5.2 Criminal Adjudication:

The state is responsible to prevent any act by adopting all necessary legal measures which later on be declared as an offence for example firstly to prevent the crime and secondly, if the crime has been committed, then to bring the culprit before the competent court of law for trial. Therefore, Article 5 of the Constitution of Pakistan, 1973 shifts the burden on the state functionaries to be loyal to the state and to ensure obedience to the law to curb crimes from the society. Defamation is a wrong which is committed through writing or its equivalent or through speaking, the term libel denotes to written and slander denotes to spoken defamation.²³ In common law libel is criminal offence and a civil wrong whilst slander is a civil wrong though spoken words leads to the criminal as treated blasphemous, obscene, seditious, to solicit to commit crime or contempt of court however, in Indian law libel and slander are criminal offence (S. 499, IPC).

1.6 DEFENSES OF DEFAMATION

To make it in more elaborate form and in extensive description, the following are the main defenses of defamation:

- i. Truth in defamatory matter is the basic defense in libel and slander except in a criminal trial.²⁴ The scope of the defense of justification in a defamatory matter is not to depend on the way of pleading a case by the plaintiff but it depends on the meanings of the published matter however, the defendant has the right to plead his justification in alternative meaning.²⁵ The maxim “the greater the truth the greater the libel” never had an application to civil action for damages. In criminal law truth is only a justification if it is shown that the publication was for the public good. According to the Indian penal Code, The defendant has that the words complained of are true, but he has also to prove that the utterance of words was in the public benefit to be published. (IPC S. 499).
- ii. A fair and bonafide comment on a matter of public interest is no libel. The word fair bears a meaning of an honest so, the view as to be expressed must be with honesty to be termed it as a fair criticism.²⁶ However, the public interest matter not be understood in narrow view but to be understood in the sense that the public is interested and is concerned legitimately.²⁷
- iii. At various occasions, it is in the interest of the society that a man should speak in mind without any fear or fervor e.g. during parliamentary proceeding, state proceedings, military,

naval or judicial proceedings. To such occasions, therefore, the law attaches an absolute privilege as it depends upon the principle that community interest is more important than individual interest. Recognized categories of absolute privilege are not to be lightly extended. Generally, absolute privilege is needed and required with suspicion and be requested till the demonstration of its fair necessity. Whilst in case of qualified privilege, there is the presumption of the fact of malice in defamatory words however, this presumption can be contradicted by showing that the words spoken on privileged occasion, if in affirmative then it covers all incidental communications and publications in normal parlance.²⁸

- iv. A fair, substantial, bonafide, impartial, and correct report of proceeding in any court of justice open to the public.²⁹
- v. If the complaining party calls on the defendant to repeat again the words complained of before a witness then, it will be assumed that the complainant has consented to the publication of words, it will be defense in defamation.³⁰
- vi. Where there is the apology and its acceptance, then it is in itself is the extinguishment of the case and the defendant can resist, whilst the publication of regret and contradiction is not equal to an apology.³¹
- vii. Where defamatory communication was confined only to the person being allegedly defame and there was no publication/circulation thereof, then there could be no defamation.³²

CONCLUSION

From the above discussion, it can safely be inferred that the laws of defamation is playing an important role in curbing the acts of defamation in Pakistan either on civil or criminal adjudicating fronts, however the internet era has created complexities in the determination of defamatory statements and materials being uploaded on various websites, blogs, twitter, Facebook etc. and specifically when any computer/device of any office, organization or individual is used by the third-party to defame any person and the relevant laws are needed to be upgraded as per modern societal diversity. It is specifically mentioned in Art.2 of the Constitution of Pakistan 1973 that “Islam shall be the State religion of Pakistan” and hence this is the responsibility of State to enforce the principles of Islam in Pakistan. If someone is defamed in this society must be punished as per Islamic principles relating to Defamation. However, there is a weak

implementation of defamation laws in Pakistan which must be conformed as Islamic principles and should be included as Fundamental Rights in the Constitution of Pakistan, 1973.

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