

## DEFAMATION LAWS AND JUDICIAL INTERVENTION: A CRITICAL STUDY

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### Abstract

In a democratic set up, free speech and expression is considered to be a fundamental right which is not absolute but subject to certain reasonable restrictions; defamation being one of them. This paper explores the term defamation and a comparative analysis of the defamation laws. The recent developments in the legal arena have brought to the fore - the defamation debate; the central theme of which is decriminalizing defamation. The paper, therefore, examines the defamation debate in the light of *Subramanian Swamy v. Union of India* with special reference to *Shreya Singhal's* case wherein a critical study of the judgement has been made along with an analysis of the allied issues associated with the defamation debate.

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### I Introduction

NEXT TO life, what man cares most is their reputation. As per Black's Law Dictionary, defamation means the offence of injuring a person's character, fame, or reputation by false and malicious statements. The term seems to be comprehensive of both libel and slander. Defamation has become a burning issue in the present times; courtesy the growing media frenzy which has been created over the freedom of speech and expression as envisaged under article 19 (1) (a). There exists an apprehension in the mind of individuals whether in their individual or public capacity as to which statement of theirs might constitute a furore or land them behind bars.

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In the light of the aforementioned discussion, the paper aims to examine critically the conceptual definition of defamation, position of defamation laws in other jurisdictions, position of defamation laws in India and the judicial intervention in this matter by analyzing the judgement of *Subramanian Swamy v. Union of India*<sup>1</sup> with special reference to the *Shreya Singhal*'s<sup>2</sup> case. Whether it is the filing of Strategic Lawsuits against Public Participation (SLAPP) or other cases on infringement of private or public rights, defamation is adopted in defence as a matter of prerogative and that being right to reputation. Therefore, it becomes imperative to examine these issues in the light of the judgement delivered so that clouds of doubt shed away and give vent to an informed consensus on the mooted matter.

## II Defamation: Definition and elements

Defamation in law, is attacking another's reputation by a false publication (communication to a third party) tending to bring the person into disrepute. The concept is an elusive one and is limited in its varieties only by human inventiveness. Although defamation is a creation of English law, similar doctrines existed several thousand years ago. In Roman law, abusive chants were capitally punishable. In early English and German law, insults were punished by cutting out the tongue. As late as the 18th century in England, only imputation of crime or social disease and casting aspersions on professional competence constituted slander, and no offences were added until the Slander of Women Act in 1891, made imputation of unchastity illegal. French defamation law, required conspicuous retraction of libellous material in newspapers and allowed truth as a defence only when publications concerned public figures. Modern German defamation is similar but generally allows truth as a defence. In Italy, truth seldom excuses defamation, which is criminally punishable there.

Generally defamation requires that the publication be false and without the consent of the allegedly defamed person. Words or pictures are interpreted according to common usage and in the context of publication. Injury only to feelings is not defamation; there must be loss of reputation. The defamed person need not be named but must be ascertainable. A class of persons is considered defamed only if the publication refers to all its members particularly if the class is very small- or if particular members are specially imputed.

Libel and slander are legal subcategories of defamation. The advent of electronic communications has complicated the classification somewhat. Some countries treat radio defamation as libel, others as slander. Television presents similar problems. The law also recognises that printed defamation is more likely to be injurious than "mere talk".

The damages recoverable in libel and slander are also different. Libel lawsuits undertake redress for all injurious consequences of the defamation-called general damages if they involve loss of reputation and called special damages if they involve specific economic loss. In a slander action one can recover only special damages; however, some jurisdictions do not make this distinction. Defamation is criminally punishable under various statutes but in order to invoke that it should be such which directly prejudices the public interest.

Actual truth of the publication is usually a defence to a charge of defamation. Legal privilege arising from a special relationship or position also relieves liability (US Senators, for instance, cannot be prosecuted for anything they say on the floor of the Senate). In certain

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<sup>1</sup>AIR 2016 SC 2728.

<sup>2</sup> *Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

areas the mass media have broad discretion under the doctrine of “fair comment and criticism”, but such comment must pertain to a person’s work and not private affairs, and must be factually accurate.<sup>3</sup>

Defamation is the publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him.<sup>4</sup>

### Categories of defamation

For historical reasons, defamation can be divided into the following categories:<sup>5</sup>

Libel – Representation in a permanent form, *e.g.*, writing, printing, picture, effigy or statue.

Slander – Depiction in transient form. It is basically through words spoken or gestures.

### Essentials characteristics of defamation

- i. The statement must be defamatory.
- ii. The said statement must refer to the plaintiff.
- iii. The statement must be published *i.e.*, communicated to at least one person other than the claimant.

## III Defamation law: Comparative analysis

### English law

The Defamation Acts of 1952 and 1996 are the important statutes in England that lay down the law related to defamation. Under English law, there is a distinction between libel and slander. Two reasons have been accorded. *Firstly*, libel not slander is punishable under Criminal law. In fact, slander is no offence. Thus, libel is always actionable *per se*. *Secondly*; in most cases of slander “special damage” must be shown.<sup>6</sup> As far as law of torts is concerned, slander is actionable, only in exceptional cases on proof of special damage. There are four exceptional instances in which proof of special damage has to be proved:

- i. Imputation of criminal offence to the plaintiff.
- ii. Imputation of a contagious (disease) or an infectious disease to the plaintiff (which has the effect of preventing others from associating with the plaintiff).
- iii. Imputation that a person is incompetent, dishonest or unfit in regard to the office, profession, calling or trade or business carried o by him.
- iv. Imputation of unchastity or adultery to any woman or girl is also actionable *per se*. This exception was created by the Slander of Women Act, 1891.

<sup>3</sup> Defamation, 3 *Encyclopaedia Britannica* (Encyclopaedia Britannica Inc., U.S.A., 2007).

<sup>4</sup> W.E. Peel, J. Goudkamp, *Winfield & Jolowicz on Tort* 360 (Sweet & Maxwell, 19<sup>th</sup> edn., 2014).

<sup>5</sup> These example make it clear that it is only broadly true to say that libel is addressed to the eye, slander to the ear.

<sup>6</sup> *Supra* note 4.

Thus, in England slander is only a civil wrong. However, it is to be noted that civil action is more onerous than criminal action.

### **American law**

In United States (US), defamation law is much less plaintiff friendly as compared to its European counterpart due to the enforcement of the First Amendment. (Freedom of religion, press, expression. Ratified 12/15/1791). The First Amendment reads as:<sup>7</sup>

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

One very important distinction in present times is that European and Commonwealth jurisdictions adhere to a theory that every publication of a defamation gives rise to a separate claim, so that a defamation on the Internet could be sued on in any country in which it was read, while American law only allows one claim for the primary publication. Further, there is no distinction between libel and slander. This is because different states have different definitions. Some states codify what constitutes slander and libel together into the same set of laws. Some states have criminal libel laws on the books, though these are old laws which are very infrequently prosecuted.

### **Australian law**

In Australia, the law relating to defamation varied from state to state until in 2006 when uniform defamation laws were enacted. After the enactment of this Act, the law related to defamation became similar across all states and territories. The uniform laws adopted a number of statutory provisions from old laws but still retained the basic principles of common law. Under the uniform defamation laws, corporations with 10 or more employees cannot sue. This was not the case under the old system of individual state laws where almost anyone or any organisation or company could bring an action for defamation. However, individuals or groups of individuals employed by or associated with that corporation - such as company directors, CEOs or managers can still sue if they are identified by the publication. Not-for-profit organisations can still sue for defamation, no matter how many employees or members they have.<sup>8</sup>

### **Pakistani law**

In Pakistan, defamation is covered under the Defamation Ordinance, 2002.<sup>9</sup> Both libel and slander are actionable *per se*. Special damage need not be proved in case of publication of defamatory matter. Violation under said law shall constitute compensatory damages not less than 300,000 Rupees for the initiator. Although Ordinance (as amended in 2004) is still considered a new law as there are still no decided cases filed by companies against the publishers and journalists, one can consider that the defamation laws is just the beginning for

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<sup>7</sup> The Constitution of United States, Amendment 1.

<sup>8</sup>Defamation in Australia, The News Manual, available at: [http://www.thenewsmanual.net/Resources/medialaw\\_in\\_australia\\_02.html](http://www.thenewsmanual.net/Resources/medialaw_in_australia_02.html) (last visited on Feb. 9, 2016).

<sup>9</sup> Ordinance No. LVI of 2002.

Pakistan.<sup>10</sup> Section 499 -502 of the Pakistan Penal Code, 1860 (same as that of IPC, 1860) elaborates the definition, explanation, exceptions and punishment to the law related to defamation. It is worth observing that Pakistan takes “religious defamation” very seriously. Sections 295, 295A, 295B and 295C makes religious defamation (blasphemy) a crime, punishable ranging from two years imprisonment to death.

The Supreme Court of Pakistan in the case concerning, *The Nation* based its ruling squarely on the fundamental right to freedom of speech and expression embodied in article 19 of the Constitution of Pakistan. It is, as in India, subject only to “reasonable restrictions”. The court ruled:<sup>11</sup>

In the wrong of defamation the law presumes malice in the sense of wrongful act done intentionally by publishing defamatory matter but there is a lawful excuse for the publication of such matters as in the ordinary case of privileged communication or of fair comments upon a matter of public interest, the onus is upon the plaintiff to establish the fact of malice in order to maintain the action. It means that malice must be proved as a fact irrespective of the mere inference arising from the libellous character of the publication. When the plaintiff fails to prove malice by cogent evidence then he can be non suited on this ground. The burden of proving express malice both by extrinsic and intrinsic evidence lies on the plaintiff to show that the publications were actuated by some indirect or improper motive.

#### IV Defamation laws in India

In India, there is no such distinction between libel and slander. Both libel and slander are criminal offence. For better understanding, it can be divided into two categories:

- i. Criminal
- ii. Civil

#### Defamation as a crime

The IPC under chapter XXI sections 499-502 protects an individual’s / person’s reputation. Defamation against the state is contained in section 124A [Sedition], Section 153 of the Code provides for defamation of a class *i.e.*, community [Riot], while section 295A deals with hate speech with regards to outraging religious sentiments. [Hate Speech]

Section 499 of the IPC defines ‘defamation’ as being committed:

- i. Through: (i) words (spoken or intended to be read), (ii) signs, or (iii) visible representations;
- ii. Which: are a published or spoken imputation concerning any person;
- iii. If the imputation is spoken or published with: (i) the intention of causing harm to the reputation of the person to whom it pertains, or (ii) knowledge or reason to

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<sup>10</sup> The Defamation (Amendment) Act, 2004, Pakistan, *available at* : [http://infopak.gov.pk/Downloads/Ordenances/Defamation\\_Ordinance\\_2002.pdf](http://infopak.gov.pk/Downloads/Ordenances/Defamation_Ordinance_2002.pdf) (last visited on February 9, 2016).

<sup>11</sup> A. G. Noorani, “Law of Libel in Pakistan, The Nation Case” *Economic and Political Weekly*, May 11, 2002.

believe that the imputation will harm the reputation of the person to whom it pertains will be harmed.

This broad definition is subject to four explanations and ten exceptions.<sup>12</sup> If a person is found guilty of having committed defamation in terms of section 499 of the IPC, the punishment is stipulated in section 500, simple imprisonment for up to two years or fine or with both. The Cr PC, which lays down the procedural aspects of the law, states that the offence is non-cognizable and bailable. Those who are accused of the offence would generally not be taken into custody without a warrant, and as such, an aggrieved person would not be able to simply file a police complaint but would, in most cases, have to file a complaint before a magistrate. As far as the 'truth defence' is concerned, although 'truth' is generally considered to be a defence to defamation as a civil offence, under criminal law, only truth is a defence to defamation as a crime (assuming, of course, that it is demonstrably true) only in a limited number of circumstances. This can make persons particularly vulnerable to being held guilty of having committed defamation under the IPC even if the imputations they made were truthful.

### **Defamation as a tort**

As far as defamation under tort law is concerned, as a general rule, the focus is on libel (*i.e.*, written defamation) and not on slander (*i.e.*, spoken defamation). In order to establish that a statement is libellous, it must be proved that it is (i) false, (ii) written; (iii) defamatory, and (iv) published.<sup>13</sup>

An interesting aspect of defamation as a tort is that it is only a wrong if the defamation is of a nature which harms the reputation of a person who is alive. In most cases, this translates to saying that it is not a tort to defame a deceased person since, as a general rule, the plaintiff needs to be able to prove that the defamatory words referred to him. However, this does not mean that there can be no cause of action if a dead person is defamed — if, for example, a defamatory statement negatively impacts the reputation of a deceased person's heir, an action for defamation would be maintainable. Further, if an action for defamation is instituted, and defamation is found to have been committed, damages will be payable to the plaintiff (usually, the person defamed). In addition to this, a person apprehensive of being defamed in a publication may seek the grant of an injunction to restrain such publication. However, pre-publication injunctions are rarely granted as Indian courts have tended to follow the principle laid down in the 1891 case of *Bonnard v. Perryman* which is as follows:<sup>14</sup>

The Court has jurisdiction to restrain by injunction, and even by an interlocutory injunction, the publication of a libel. But the exercise of the jurisdiction is discretionary, and an interlocutory injunction ought not to be granted except in the clearest cases—in cases in which, if a jury did not find the matter complained of to be libellous, the Court would set aside the verdict as unreasonable. An interlocutory injunction ought not to be granted when the Defendant swears that he will be able to justify the libel, and the Court is not satisfied that he may not be able to do so.

This principle has been followed by a division bench of the Delhi High Court in the 2002 case of *Khushwant Singh v. Maneka Gandhi*.<sup>15</sup> As such, even if there is an apprehension that

<sup>12</sup> Indian Penal Code, 1860, s. 499.

<sup>13</sup> Ratanlal and Dhirajlal, *The Law of Torts* 279 (LexisNexis, New Delhi, 26<sup>th</sup> edn., 2013).

<sup>14</sup> (1891) 2 CH 269.

<sup>15</sup> AIR 2002 Delhi 58.

content may be of a defamatory nature, it is likely that publication would not be restrained except in exceptional cases — presumably, those cases where the later payment of damages would clearly not suffice to set right the wrong done to the person defamed. In non-exceptional circumstances, Indian courts have shown a tendency to support free speech, and have not displayed a tendency to grant injunctions which would have the effect of muzzling speech on the ground of possible defamation.<sup>16</sup> It is significant to mention that a defamation bill was proposed by the Rajiv Gandhi government to deal with the law pertaining to defamation. However, Defamation Bill, 1988 received widespread criticism from the media and opposition parties due to its draconian provisions; as a result it was withdrawn.

## V The defamation debate and judicial intervention

The apex court's judgement in *Swamy's*<sup>17</sup> case which was delivered on May 13 put a rest on the speculation of defamation being decriminalised when the constitutional validity of the contended provisions were upheld.<sup>18</sup> However, the judgement has received a mixed response and there appears to be *ex-facie* a bent towards negative. It is observed by some intellectuals that by not decriminalizing defamation, unfettered powers will vest especially with the political fora and corporations who can manipulate according to their own whims which would further unnecessary hassle while there are others who advocate that in the present times it becomes imperative to replace the colonial provisions as their application has become redundant. In this regard, it becomes imperative to revisit the case and analyse the verdict so that an informed consensus can be formulated.

### Swamy's petition: Decriminalisation and allied issues

The concurring petitions filed by leading political figures unanimously demanded decriminalizing defamation on one hand and strengthening civil remedies and financial compensation for the loss of individual reputation. The two basic contentions of the seven issues raised in the writ petition filed by Subramanian Swamy were:<sup>19</sup>

- i. Declaring Section 499 and 500 of the Indian Penal Code, 1860 as unconstitutional.
- ii. Declaring Section 199(2) of the Code of Criminal Procedure, 1973 (Cr PC) as unconstitutional.

According to the petitioner, these provisions cast an unreasonable restriction on free speech, one that falls beyond article 19(2) of the Constitution of India. Apart from that, other contentions submitted by the petitioner are as follows:

- i. In a democratic body polity, public opinion, public perception and public criticism, are the three fundamental pillars to guide and control the Executive action and, if they are scuttled or fettered or bound by launching criminal prosecution, it would affect the growth of a healthy and matured democracy.

<sup>16</sup> Available at: <http://copyright.lawmatters.in/2012/02/defamation.html> (last visited on Feb. 9, 2016).

<sup>17</sup> *Supra* note 1.

<sup>18</sup> *Subramanian Swamy v. Union of India* (Writ Petition (Crl.) No. 184/2014), available at: [http://supremecourtindia.nic.in/outtoday/wr18414p-2014\\_10\\_30.pdf](http://supremecourtindia.nic.in/outtoday/wr18414p-2014_10_30.pdf) (last visited on Feb. 9, 2016).

<sup>19</sup> *Ibid.*

- ii. Fundamental rights of liberty and free speech are controlled and not absolute as per the Constitution, but in the name of control the freedom of speech that pertains to criticism of certain governmental actions cannot be gagged.
- iii. The individual interest in the guise of reputation cannot have supremacy over the larger public interest, for the dominant interest in a democracy is the collective interest and not the perspective individualism.
- iv. The Executive does not permit expression of public opinion by instituting cases of defamation through the public prosecutors by spending the sum from the State exchequer which is inconceivable.
- v. The concept of sanction, which is enshrined under Section 199(2) of the Code of Criminal Procedure, is a conferment of unfettered power by which the citizenry right to criticize, is gradually allowed to be comotosed.

The counsel appearing for the State of Tamil Nadu submitted that sections 499 and 500 could not be said to travel beyond reasonable limits on free speech, because article 19(2) itself imposes such a restriction.<sup>20</sup> Also, there has to be a debate with regard to the conceptual meaning of the term ‘defamation’ used in article 19(2) of the Constitution and ‘defamation’ in section 499 of the IPC. It was also pointed out that the freedom of speech and expression has to be a controlled one and does not include the concept of defamation as defined under section 499.<sup>21</sup> The bench while going through the petition raised a question that whether abolition of criminal action in other countries<sup>22</sup> could really have effect when the court decides on the constitutional validity of a provision regard being given to India’s own written and organic constitution.

### **Judgement: A critical appraisal**

The division bench comprising of Dipak Mishra and Prafulla C. Pant JJ wherein Mishra J delivered the judgement, is a gargantuan 268 page document upholding the constitutional validity of sections 499, 500 of the Code, 1860 and 199 of Cr PC, 1973. A comprehensive and detailed anatomy has been undertaken whilst arriving at the decision. It commences with the conceptual exploration of the terms defamation and reputation by delving into various dictionary meanings, international instruments and allied sources. Thereafter, it classifies the various submissions of the different counsels for the petitioner in the following manner:

- i. Defamation essentially includes a civil action but not a criminal proceeding.
- ii. If it is considered that defamation includes a criminal proceeding, then the application of the principle *noscitur a sociis* has to be made so as to construe the real meaning of Article 19(2) and in the process save the fundamental right under Article 19(1) (a).
- iii. The intention of Article 19(2) is to include a public law remedy in respect of a grievance and not an actionable claim against an individual.

<sup>20</sup> *Vijay Kant v. Union of India* [T.P. (Crl) No. 94-101/2015].

<sup>21</sup> *Arvind Kejriwal v. Union of India* [W.P. (Crl) No. 56/2015].

<sup>22</sup> Cyprus, Estonia, Ireland, Romania, Sri Lanka and the United Kingdom (UK) have repealed criminal defamation as an offence against private individuals. Yet, even among these countries, considerable work is still needed. Jamaica has abolished criminal defamation laws including seditious libel. Grenada abolished criminal libel in 2012, but maintains laws criminalising seditious libel and insult of the monarch.

- iv. Defamation of a person is an assault on their reputation by another individual which cannot form a fundamental right. Hence, criminal defamation cannot claim to have its source in the word “defamation” as used in Article 19(2).

### **Defamation: Public versus individual remedy**

The arguments advanced by the petitioners emphasized that defamation is a dispute between two individuals in which the reputation of one individual is attacked by another. Hence, follows the rationale aforementioned. The apex court meticulously goes into each and every aspect. Reference is made to the constitutional assembly debates through which the court tries to establish that the framers of the Constitution too had no intention to confer a restricted meaning on the term defamation. With regard to the application of principle of *noscitur a socii*, the court rules out its application by clarifying that defamation has its own identity and cannot be given a restricted meaning.

As far as the dichotomy of defamation being a public or individual remedy is concerned, it was contended that reputation has been held to be a facet of article 21 in *Dilipkumar Raghavendranath Nadkarni*,<sup>23</sup> *Mehmood Nayyar*<sup>24</sup> and *Umesh Kumar*.<sup>25</sup> Now since, defamation involves marring the reputation of an individual, therefore, criminal defamation cannot form a public remedy. To this, the apex court gives reasoning that individuals constitute the collective and the law relating to defamation protects the reputation of each individual in the perception of the public at large. Further, a nexus is sought to be established *via* definitions of crimes that every crime is an injury; every public offence is also a private wrong, and somewhat more. It affects the individual, and it likewise affects the community.<sup>26</sup> For instance, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, the Noise Pollution (Regulation and Control) Rules, 2000 under the Environment (Protection) Act, 1986 regulate the fundamental rights of citizens *vis-a-vis* other citizens. So, the petitioners contention that that treating defamation as a criminal offence can have no public interest and thereby it does not serve any social interest or collective value holds no ground.

### **Conflict between article 19(1) (a) and right to reputation balancing of fundamental rights**

Another question which arose before the court was whether reputation of another individual or a group or a collection of persons absolutely ephemeral, so as to hold that criminal prosecution on account of defamation negates and violates right to free speech and expression of opinion. To answer this, the apex court goes into the interpretational analysis of freedom of speech and expression under article 19(1) (a), 19(2), right to reputation *vis-à-vis* article 21. After a detailed scrutiny and references to plethora of cases on each subject matter, the court resorts to the rule of harmonious interpretation and adopts the doctrine of balancing of fundamental rights. With regard to the permissibility of criminal defamation, the Court opines that it can be tested on the touchstone of constitutional fraternity (preamble) and fundamental

<sup>23</sup> *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni* (1983) 1 SCC 124.

<sup>24</sup> *Mehmood Nayyar Azam v. State of Chhatisgarh* (2012) 8 SCC 1.

<sup>25</sup> *Umesh Kumar v. State of Andhra Pradesh* (2013) 10 SCC 591.

<sup>26</sup> *Supra* note 1, para 80.

duty. However, the court finds it difficult to come to a conclusion that the existence of criminal defamation is absolutely obnoxious to freedom of speech and expression but concludes that it does not invite the frown of any of the articles of Constitution nor its existence can be regarded as unreasonable restriction.<sup>27</sup>

### Sections 499 and 500 IPC 1860 versus reasonable restrictions

The pertinent question which arose before the court was whether sections 499 and 500 of the IPC go beyond the scope of the reasonable restrictions imposed under article 19(2) of the Constitution of India?

While answering in negative, the Supreme Court gave a detailed reasoning of the explanations and exceptions appended to section 499. It was submitted by the petitioners that on two earlier occasions, *R. Rajagopal alias R.R. Gopal v. State of Tamil Nadu*<sup>28</sup> it had been observed as follows:<sup>29</sup>

In all this discussion, we may clarify, we have not gone into the impact of Article 19(1) (a) read with clause (2) thereof on Sections 499 and 500 of the Indian Penal Code. That may have to await a proper case.

In *N. Ravi v. Union of India*<sup>30</sup> wherein it had been observed as follows:<sup>31</sup>

Strictly speaking on withdrawal of the complaints, the prayer about the validity of Section 499 has also become academic, but having regard to the importance of the question, we are of the view, in agreement with the learned counsel for the petitioners, that the validity aspect deserves to be examined.

As defamatory speech is one such restriction prescribed under article 19(2) (1) of the Constitution. Therefore, in order to curb speech that is defamatory, court observed that the restriction imposed should be 'reasonable'. In *Chintaman Rao v. The State of Madhya Pradesh*<sup>32</sup> the Supreme Court laid down the meaning of the term 'reasonable restrictions'.<sup>33</sup>

The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19 (1) (g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality.

Also, whether the law that imposes the restriction is reasonable should be judged in accordance with current social, economic and political circumstances of the nation. One of the rules of statutory interpretation is to interpret the words of a statute in light of the current facts

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<sup>27</sup> *Supra* note 1, para 163.

<sup>28</sup> (1994) 6 SCC 632.

<sup>29</sup> *Id.* at 651.

<sup>30</sup> (2007) 15 SCC 631.

<sup>31</sup> *Id.* at 631.

<sup>32</sup> AIR 1951 SC 118.

<sup>33</sup> *Id.* at 119.

and situations and not based on the facts/situations of the past. In *The Senior Electric Inspector v. Laxminarayan Chopra*,<sup>34</sup> the court expounded:<sup>35</sup>

... in a modern progressive society it would be unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time the law was made, for a modern Legislature making laws to govern a society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity. Indeed, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them.

It had been the one of the contentions that the exceptions make the offence more rigorous, thereby making the concept of criminal defamation extremely unreasonable. Further, truth was not a defence and unnecessary stress on 'public good'. The apex court, after a detailed discussion concluded that neither the main provision nor the explanation nor the exceptions remotely indicated any vagueness and thus cannot be called unreasonable.<sup>36</sup> It also rejected the argument that criminal defamation was not saved by the doctrine of proportionality.<sup>37</sup>

### **Section 199, Code of Criminal Procedure, 1973**

Of the various criticism of section 199, one of it was that the term "some person aggrieved" allowed all kinds of person to take recourse to defamation. The court inferred that it will require ascertainment on due deliberation of the facts. In *John Thomas v. Dr. K. Jagadeesan*<sup>38</sup> while dealing with the "person aggrieved." The court opined that the test is whether the complainant has reason to feel hurt on account of publication is a matter to be determined by the court depending upon the facts of each case. It has also been commented upon that by giving a benefit to public servant employed in connection with the affairs of the union or of a state in respect of his conduct in the discharge of public functions to file the case through public prosecutor, apart from saving his right under sub-section (6) of section 199 Cr PC, the provision becomes discriminatory. In this regard, court ruled that a public servant is treated differently than the other persons and the classification invites the frown of article 14 of the Constitution and there is no base for such classification. It has also been argued that multiple complaints are filed at multiple places and there is abuse of the process of the court. In the absence of any specific provisions to determine the place of proceedings in a case of defamation, it shall be governed by the provisions of chapter XIII of the Cr PC, 1973 (Jurisdiction of the Criminal Courts in Inquiries and Trials). Another aspect pertained to the issue of summons. Section 199 Cr PC envisages filing of a complaint in court. In case of criminal defamation neither any FIR can be filed nor any direction can be issued under section 156(3) of Cr PC. The offence has its own gravity and hence, the responsibility of the Magistrate is more especially during the time of issue of process. Moreover, he also has to keep in view the language employed in section 202 Cr PC which stipulates about the resident

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<sup>34</sup> AIR 1962 SC 159.

<sup>35</sup> *Id.* at 163.

<sup>36</sup> *Supra* note 1, para 184.

<sup>37</sup> *Id.*, para 186.

<sup>38</sup> (2001) 6 SCC 30.

of the accused at a place beyond the area in which the Magistrate exercises his jurisdiction. He must be satisfied that ingredients of section 499 Cr PC are satisfied.<sup>39</sup>

The apex court observed that fundamental rights and reasonable restrictions interact closely and should be tested on the anvil of the principle of proportionality. If a restriction is disproportional or excessive it defeats the purpose of the fundamental right and hence is *ultra vires* the Constitution. One of the tests of checking proportionality of a restriction is that the punishment/restriction should impair ‘as little as possible’ the freedom in question. This test was laid down in *R v. Oakes*<sup>40</sup> and followed by the Supreme Court in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*<sup>41</sup> and other cases. It held that the sections 499 and 500 were within the ambit of reasonable restriction.

### **Balancing of fundamental rights**

Much of the judgement has been rested on the balancing of freedom of speech and expression, article 19(1)(a) and right of reputation, article 21. While this has been critiqued by intellectuals, the rationale of the court is that the reputation of one cannot be allowed to be crucified at the altar of the other’s right to free speech. Therefore, a balance needs to be struck depending upon the circumstances and in the instant case leads to retention of criminal defamation.

### **Internet defamation: *Shreya Singhal v. Union of India*<sup>42</sup>**

In the backdrop of *Shreya Singhal’s* case, and in context of the contemporary age of information technology and social networking, how desirable was it to on the part of judiciary to decriminalise defamation (section 66A)?

*Shreya Singhal’s* case is a landmark judgement in the field of freedom of speech and expression. This epic case brings forth various dimensions which are important facets of article 19(a). Section 66A which was widely criticised for its over breadth, vagueness and its chilling effect on speech was struck down by the apex court as it was unconstitutional. However, in *Swamy’s case* Mishra J takes a different route and points out that there is a difference in the canvas on which the *Shreya Singhal’s* case has been made. In that case there was a narrow interpretation of the provision. However in *Swamy’s* case ‘reputation’ (which is implicit in article 21) was also involved and narrow interpretation was not the case.

### **Chilling effect and overbreadth**

The term ‘chilling effect’ in legal context basically describes a situation where a speech or conduct is suppressed by fear of penalisation at the interests of an individual or group. It is the inhibition or discouragement of the legitimate exercise of natural and legal rights by the threat of legal sanction. Regarding over breadth, apex court opined that the net cast by section 66A was so wide that virtually it covered any opinion on any subject.<sup>43</sup> Nariman’s J opinion has

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<sup>39</sup> *Supra* note 1, para 197.

<sup>40</sup>[1986] SCC 46; Supreme Court of Canada [1986] 1SCR 103.

<sup>41</sup> 2009(2)) ALT (Cri) 386.

<sup>42</sup> *Supra* note 2.

<sup>43</sup> *Ibid.*

highlighted that the liberty of thought and expression is not merely an aspirational ideal. It is also “a cardinal value that is of paramount significance under our constitutional scheme.”

Article 19(1) (a) of the Constitution guarantees to citizens right to freedom of speech and expression. The immediately succeeding clause, Article 19(2), however limits this right in allowing the state the power to impose by law reasonable restrictions in the interests, among other things, of the sovereignty and integrity of India, the security of the state, public order, decency or morality, defamation, or incitement to an offence. According to the petitioners in *Shreya Singhal*, none of these grounds contained in article 19(2) were capable of being invoked as legitimate defences to the validity of section 66A of the Information Technology Act, 2000. They also argued that the provisions of section 66A were contrary to basic tenets of a valid criminal law in that they were too vague and incapable of precise definition, amounting therefore to a most insidious form of censorship. Further, in the petitioners’ argument, Section 66A produced a chilling effect that forced people to expurgate their speech and expressions of any form of dissent, howsoever innocuous. The Supreme Court agreed with the petitioners on each of these arguments. According to the court, none of the grounds, which the state sought to invoke in defending the law, in this case, public order, defamation, incitement to an offence and decency or morality, each of which is contained in article 19(2), was capable of being justifiably applied. Nariman J stated “Any law seeking to impose a restriction on the freedom of speech can only pass muster,” he further said, “if it is proximately related to any of the eight subject matters set out in Article 19(2).”<sup>44</sup> On the purported justification offered by the state on grounds of defamation, incitement to an offence, and decency or morality, under article 19(2), the Supreme Court, ruled it as pithily dismissive. The court pointed out that there was no nexus whatsoever between the criminalisation of “grossly offensive” or “annoying” speech and the restrictions permitted under the Constitution were self evident.

## VI Conclusion

The law of defamation seeks to protect individual reputation. Its central problem is how to reconcile this purpose with the competing demands of free speech. Since both these interests are highly valued in our society, the former as perhaps the most dearly prized attribute of civilized human beings while the latter the very foundation of a democratic society. The apex court gave an interim time period of eight weeks to the petitioner within which they can challenge.<sup>45</sup> Meanwhile, other cases have also arisen especially in the political fora such as defamation case filed against Gogoi<sup>46</sup> or the alleged arrest of Kiku Sharda.<sup>47</sup> The decision brings finality to the case but raises certain questions in its wake. For instance, in a progressive economy like India, is resorting to penal provisions justified especially in an era, where reformatory justice is replacing retributive justice. Besides the growing intolerance in the nation is another issue which might get a reason due to this judgement. In such situations, there becomes a need to shed one’s inhibition and discuss viable solutions. One such proposition in this area would be the right to reply. Of course, this has been debated earlier. However, owing to the chilling effect which might be incumbent on the

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<sup>44</sup> *Supra* note 2

<sup>45</sup> Krishnadas Rajagopal, “Supreme Court upholds validity of criminal defamation law” *The Hindu*, May 14, 2016.

<sup>46</sup> Samudra Gupta Kashyap, “Tarun Gogoi appears before court in Rs 100 crore defamation case” *The Indian Express*, January 18, 2016 .

<sup>47</sup> Editorial, “Arrest of a comedian” *The Indian Express*, January 15, 2016.

individual/organization; right to reply has just added on the scepticism. However, right to reply appears as a civilised manner to address matter rather than jumping on conclusions, convicting and seeking damages. Some US states and other countries have imbibed this concept. Certainly, we too can utilise this concept.

The discussion brings us to the point that in cases of constitutional interpretation, the stakes become higher. It is easy to criticize rather than actually get into the depths of matter. Of course, a healthy criticism fosters creativity and growth. Nowadays, it is easy to have a critical approach rather than actually get into the skin of the matter. Also, it cannot be ignored that the judiciary tries its best to give a harmonious construction in such matters. As citizens, we too, have a responsibility— it is time to revisit ourselves.