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LAW COMMISSION OF INDIA**

**THE LAW ON CRIMINAL DEFAMATION**

**Report No. 285**

**January, 2024**

The 22<sup>nd</sup> Law Commission was constituted by Gazette Notification for a period of three years vide Order No. F No. 45021/1/2018-Admn-III(LA) dated 21<sup>st</sup> February, 2020 issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi. The term of the 22<sup>nd</sup> Law Commission was extended vide Order No. FA No. 60011/225/2022-Admn.III(LA) dated 22<sup>nd</sup> February, 2023.

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Law Commission of India



D.O. No. 6(3) 316/2017-LC (LS)



Date: 31<sup>st</sup> January, 2024

Hon'ble Sri Arjun Ram Meghwalji;  
Nemaskar!

I am pleased to forward you **Report No. 285** of the Law Commission of India on "**The Law on Criminal Defamation.**" The Law Commission received a reference from the Ministry of Law & Justice, *vide* letter dated 04<sup>th</sup> August, 2017, requesting the Commission to examine various issues relating to the Defamation laws and make recommendations thereon.

The Hon'ble Supreme Court had the occasion to examine the constitutionality of criminal defamation in *Subramanian Swamy v. Union of India* [(2016) 7 SCC 221]. Having examined the issue at length, the Hon'ble Supreme Court dismissed the challenge to Section 499 of the Indian Penal Code, 1860, and held it to be constitutionally valid on account of it being a reasonable restriction under Article 19(2) to the freedom of speech and expression enshrined in Article 19(1)(a).

In pursuance of the same, the 22<sup>nd</sup> Law Commission undertook an extensive study, analysing the history of the law of defamation, its relationship vis-à-vis the right to freedom of speech and expression, and the various judgments rendered by the Courts across the country. The Commission, *inter alia*, also studied the relationship between right to reputation and the right to freedom of speech and expression, and how the two need to be balanced. Further, the Commission looked into the treatment of criminal defamation across various jurisdictions.

Having considered the above in-depth, the Commission recommends that criminal defamation be retained within the scheme of criminal laws in the country. In this regard, it is important to keep in mind that right to reputation flows from Article 21 of the Constitution of India, and being a facet of right to life and personal liberty, needs to be adequately protected against defamatory speech and imputations. Accordingly, this Report is being forwarded for your kind perusal.

With warmest regards,

Yours sincerely,

(Justice Ritu Raj Awasthi)

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We are thankful to the numerous legal experts, scholars, and practitioners who generously shared their knowledge and perspectives during interviews and discussions. Their inputs have enriched the content of this Report and provided valuable context to the complex issues surrounding criminal defamation laws in India.

Further, we acknowledge the diligent efforts of **Mr. Rishi Mishra, Mr. Gaurav Yadav, Mr. Shubhang Chaturvedi, Ms. Priya Rathi, Ms. Ruchika Yadav, Ms. Deepika Chaudhary, Mr. Kumar Abhishek, and Mr. Anubhav Dubey**, who worked as Legal Consultants. Their incisive and vital inputs in the research and drafting of this Report is worthy of special mention. Their dedication and commitment has been essential in ensuring the accuracy and comprehensiveness of the content presented herein. We place on record our heartfelt appreciation for their painstaking efforts in the preparation of this Report.



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## **1. INTRODUCTION**

### **A. Reference to the Commission**

- 1.1. The 21<sup>st</sup> Law Commission received a reference *vide* letter dated 04<sup>th</sup> August, 2017 from the Ministry of Law & Justice, wherein, the Commission was requested to examine the subject of Defamation laws and the issues incidental thereto. The reference arose from a letter dated 01<sup>st</sup> September, 2016 by a then Member of Parliament, wherein, a request was made to the Ministry of Law & Justice to review and deliberate upon the defamation laws. While accepting the need for the law on civil defamation, it was stated therein that the request pertains to the need for a review related to the impact of the law of criminal defamation on the freedom of speech and expression.
  
- 1.2. The said reference suggested a need to reform the law on defamation, stating that existing laws neither serve the interests of the aggrieved person nor the principle of free speech. The law of criminal defamation is enumerated in Sections 499, 500, 501 and 502 of the Indian Penal Code, 1860 (hereinafter, “IPC”). It was stated in the reference that criminal defamation traces its origin from the colonial era and is in conflict with the democratic values and free speech as enshrined under Article 19(1)(a) of the Constitution of India.
  
- 1.3. Accordingly, the 22<sup>nd</sup> Law Commission decided to take up this issue and review the law relating to criminal defamation in light of the existing criminal laws, including the Bharatiya Nyaya Sanhita, 2023 and the Bharatiya Nagarik Suraksha Sanhita, 2023, as well as the judgments concerning the subject matter.



## B. Background

- 1.4. A broad, panoramic view of the contemporary constitutional discourse suggests that most constitutions in their text provide for the scope of constitutional right and secondly, implicitly or explicitly, provide for limitations to which such right is subjected to.<sup>1</sup> While the scope delineates the area, content and the boundaries of the right, the limitations set forth the conditions under which these rights may be less than fully realized. These conditions allow for the constitutional rights to be limited, in a reasonable manner, by a sub-constitutional norm.<sup>2</sup> These limitation clauses, thus, make explicit the process of limitation necessary for translating indeterminate constitutional rights into determinate rights suitable for application.<sup>3</sup>
- 1.5. These limitations, thus, often assist the courts in balancing the delicate task of adjudicating upon the competing claims of the right-holders. In this vein, the law of defamation has been described as ‘a tale of two interests.’ In the first, the right holders possess the constitutional right of ‘free speech’ that stands as a beacon of democratic values, fostering open dialogue and the exchange of diverse ideas; and on the other end, lies the crucial right to reputation. The law of defamation, thus, becomes an arena where these competing interests converge, demanding a nuanced examination of the boundaries that should govern speech to ensure a fair equilibrium between the protection of reputations and the preservation of robust public discourse. Thus, the issue has been a focal point of widespread judicial and

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<sup>1</sup> Aharon Barak, “Proportionality (2)”, in Michel Rosenfeld, András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* 739 (Oxford Academic, Online Edn., 2012).

<sup>2</sup> *Ibid.*

<sup>3</sup> GCN Webber, “Introduction: On the Limitation of Rights” in *The Negotiable Constitution: On the Limitation of Rights* 1-12 (Cambridge University Press, 2009).



scholarly attention to reconcile, harmonize, and compromise the overlapping and conflicting interests.

- 1.6. In a democratic society, the right to free speech and expression is revered as a foundational tenet. However, as the Indian jurisprudence unfolds, it is evident that the protection of individual reputations is not a mere tangential concern but a fundamental facet of human dignity. The need for a legal provision addressing criminal defamation arises from the essential task of balancing these constitutional values. The fabric of a vibrant democracy relies on open discourse and the exchange of ideas, yet it also demands the protection of individuals from malicious falsehoods that can tarnish their character.
- 1.7. Criminal defamation, as enshrined in the Indian Penal Code, 1860, emerges as a response to this inherent tension, acknowledging that the right to express oneself freely should not come at the expense of irreparable damage to personal reputation. A crime affects the society. It causes harm and creates a dent in social harmony. It is the ‘public’ element that is inherent in the language of Section 499 of IPC that strives to protect the reputation of an individual in the eyes of the public at large. It needs to be emphasised that public wrong is not a wrong that injures the public, but as one that violates the shared value that normatively defines the political community.
- 1.8. The constitutional values enshrined in the Constitution, among other things, seek to promote dignity.<sup>4</sup> Against this backdrop, Article 19(2)

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<sup>4</sup> See, The Constitution of India, Preamble, arts. 21, 51-A. For e.g., see *Nilgiris Bar Association v. T.K. Mahalingam and Anr.*, AIR 1963 SC 1088; *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni*, (1983) 1 SCC 124; *Umesh Kumar v. State of Andhra Pradesh & Anr.*, (2013) 10 SCC 591; *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221.



imposes certain reasonable restrictions to enable right-holders to enjoy the rights guaranteed under the Constitution more meaningfully. Moreover, the International Covenant on Civil and Political Rights (ICCPR), to which India is a signatory, expressly recognise ‘reputation of an individual’ as a restriction upon the right of expression.<sup>5</sup>

### C. Issues to be Analysed

- 1.9. The right of freedom of speech and expression is protected under Article 19(1)(a) of the Constitution of India and the reasonable restrictions have been prescribed in Article 19(2). Article 19(2) enumerates grounds on which restrictions on the freedom of speech and expression can be imposed, one of which is defamation. The offence of defamation as provided under Section 499 of the Indian Penal Code, 1860, seeks to protect the reputation of an individual. As held in a catena of judgments, the right to reputation is an integral part of the right to life and liberty under Article 21.<sup>6</sup> Thus, it is imperative to scrutinise whether the limitation or restrictions imposed are constitutionally compliant or not. The issue does not require the prevalence of a particular right, rather it evaluates whether one’s right of unrestricted speech encroaches upon other’s right to reputation.

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<sup>5</sup> Article 19 of the ICCPR provides that:

19. (1) Everyone shall have the right to hold opinions without interference.  
(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice  
(3) The exercise of the rights provided for in Para (2) of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:  
(a) for respect of the rights or reputations of others;  
(b) for the protection of national security or of public order (order public), or of public health or morals.

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



1.10. The issue necessarily entails the balancing of competing interests. A long well established jurisprudence settles the precarious relationship of these competing interests by taking recourse to proportionality enquiry. As long as the law satisfies the principles of proportionality, it is deemed to be falling within the permissible limits for violating the constitutional right.<sup>7</sup> The Indian Supreme Court in *K.S. Puttaswamy (Privacy-9J.) v. Union of India*,<sup>8</sup> has laid down the test for proportionality; i.e., (i) The action must be sanctioned by law; (ii) The proposed action must be necessary in a democratic society for a legitimate aim; (iii) The extent of such interference must be proportionate to the need for such interference; (iv) There must be procedural guarantees against abuse of such interference. Therefore, a review of criminal defamation which has also been adjudged by the Supreme Court in the case of *Subramanian Swamy v. Union Of India*,<sup>9</sup> will also involve analysis of criminal defamation as given in the IPC and the importance and comparison of right to reputation vis-à-vis right of speech and expression.

1.11. The legal issue to be enquired is whether the law of defamation as defined/punished in IPC is an unreasonable restriction on the fundamental right to freedom of speech and expression and whether only a civil remedy for the impingement of reputation of a person is sufficient to make up for the loss of an aggrieved person. This examination will provide a response to the question of whether the possibility of penalty/imprisonment for criminal defamation acts as an undue restriction on the freedom of expression. Another factor that must be carefully considered is the significance of an individual's reputation, which is considered essential to

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<sup>7</sup> R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, Oxford University Press, 2002).

<sup>8</sup> (2017) 10 SCC 1.

<sup>9</sup> AIR 2016 SC 2728.



their right to life under Article 21, as well as the balance between the “right of freedom of speech and expression” and the “right to reputation.”

A handwritten signature in green ink, appearing to read "Dawn".

## **2. DEFAMATION IN CONCEPT, THEORY & LAW**

### **A. *History of Law of Defamation***

- 2.1. The law of defamation professes to protect personal character and public institutions from destructive attacks, without sacrificing freedom of thought and the benefit of public discussion. The estimate formed of the relative importance of these objects, and the degree of success attained in reconciling them, would be an admirable measure of the culture, liberality, and practical ability of each age.
- 2.2. The law of defamation is not the deliberate product of any period. It has grown by aggregation, with little intervention from legislation. Special peculiar circumstances have from time and again shaped its varying course. In the ancient Roman law, abusive chants were dealt with through capital punishments. In the Middle Ages, reputation was amply protected in England by combined secular and spiritual authorities. Thereafter, the jurisdiction of defamation went to the Judges in Courts.
- 2.3. In the early seventeenth century, when the potentialities of printing press dawned upon the absolute monarchy, the emergency was met through direct importation from the Roman law. In Roman law, sufficient scope was given to a man's character and remedy was awarded for verbal defamation in the form of civil damages.
- 2.4. The original Common Law doctrine of defamation, based upon the nature of the imputation, stereotyped as the law of spoken defamation or slander, inherited from Roman law and became the law of written and printed



defamation.<sup>10</sup> The popular action in the case of *De Scandalis Magnatum* brought defamation to the fore. It was directed against political scandal and the law was administered in the Star Chamber. This cognizance of defamation considered as a political and criminal offence was repeatedly confirmed and it had a greater influence upon the making of the laws.

- 2.5. Defamation was codified in English law as early as thirteenth century during the reign of Edward I and thereafter in seventeenth century, during the reign of James I under Attorney General Edward Coke who started a series of libel prosecutions. In Common Law, defamation remained faintly protected by the courts against the wishes of the Church and the Crown. It was later that the courts started differentiating between the words actionable per se and words actionable only on the proof of special damage.
- 2.6. The jurisprudence on defamation was, “*Where words spoken do tend to the infamy, discredit or disgrace of the party, there the words shall be actionable.*”<sup>11</sup> The case *De Libellis Famosis*<sup>12</sup> was the formal starting point of the English law on libel. Through this, a new form of actionable defamation based on mere form was introduced in English law. Earlier, what was generally brought under the scope of treason or sedition was now dealt separately under libel.
- 2.7. Lord Campbell’s Libel Act of 1843 led to codification of the English law on Defamation. Thereafter, Defamation as an offence reached other settled nations. The Common Law on Defamation found reflection in United States where the First Amendment to the Constitution gave freedom of

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<sup>10</sup> Van Vechten Veeder, “The History and Theory of Law of Defamation”, 3(8) Col. L. Rev. 546-573 (1903).

<sup>11</sup> *Small v. Hammond*, 1 Bulstrode 40.

<sup>12</sup> *Supra* note 10.



press. In *New York Times v Sullivan*<sup>13</sup>, the law on defamation was laid down by the US Court as the charge by a public figure could be sustained only if the offending statement was made with “actual malice”.<sup>14</sup> The law on defamation, therefore, deepened its roots across nations.

- 2.8. The genesis of defamation laws in India can be found as early as in the *Manusmriti*. It had emphasised on the harm to reputation due to ill speaking against a person. During the British rule, laws such as the Vernacular Press Act, 1878 and the Newspaper (Incitement to Offences) Act, 1908, etc. were enacted in order to curb criticism against the imperial British Government. Most of the laws were inspired from the Common Law.
- 2.9. The British Government was eager to control the press, but they never succeeded in passing a single press regulation law. Instead of the legislations specifically targeting newspapers that supported yellow journalism, regulations were put in place to restrict the newspapers that reported the real public opinion.
- 2.10. India’s defamation law has evolved in response to changing social and political conditions. After being drafted in 1837, the criminal defamation laws were eventually codified into the Indian Penal Code in 1860. According to Section 499, any false statement made about a person—whether verbal, written, or otherwise—that is likely to harm that person’s reputation is illegally defamatory. There has been a visible shift from prosecuting mass media and newspaper publishers in pre-independence



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<sup>13</sup> *New York Co. v. Sullivan*, 376 US 524 (1964).

<sup>14</sup> “Defamation”, available at: <https://www.britannica.com/topic/defamation> (last visited on Dec. 24, 2023).

times to prosecuting individuals expressing views on social media and other platforms.<sup>15</sup>

- 2.11. In 1898, the Indian Penal Code was amended to include Sections 124A and 153A following the foundation of the Indian National Congress. Subsequently, the Indian Press Act, 1910, a harsh legislation, was implemented. It was reported that more than a thousand newspapers were prosecuted, five hundred publications were proscribed and almost five lakh rupees were handed over to the government in lieu of securities and forfeiture. Later on, the Indian Press Emergency Powers Act, 1931 was also passed.
- 2.12. These laws were brought about with the covert intention of suppressing criticism of the state in vernacular languages.<sup>16</sup> The law of sedition, which has been deemed by judges to constitute both a criminal offence as well as defamation of the government, was also used by the colonial government as a tool to suppress the voice of the critical thinkers.<sup>17</sup> In lieu of the above modes of suppressing dissent, the law of defamation was also used as a mechanism to suppress the unfavorable voices against the imperial rulers.
- 2.13. The law of defamation has a changed connotation with the development of social media and fora of mass influence. It is used not to suppress unfavorable opinion but in order to protect the right to reputation of individuals or organizations. The reputation of a person has become

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<sup>15</sup> David S. Ardia, "Freedom of Speech, Defamation and Injunction", 55 Will. & Mary L. Rev. (2013-2014), available at: <https://scholarship.law.wm.edu/wmlr/vol55/iss1/2/> (last visited on Dec. 24, 2023).

<sup>16</sup> Reba Chaudhuri, "The Story of the Indian Press", EPW, (March, 1955), available at: [https://www.epw.in/system/files/pdf/1955\\_7/11/the\\_story\\_of\\_the\\_indian\\_press.pdf](https://www.epw.in/system/files/pdf/1955_7/11/the_story_of_the_indian_press.pdf) (last visited on Dec. 26, 2023).

<sup>17</sup> *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).



vulnerable as the same is subject to opinion of a huge viewership online. It has expanded its application to safeguard the honour and dignity of the members of society and ensure protection to them against malicious publications.

#### **B. Definition of Defamation**

- 2.14. A man<sup>18</sup> acquires fame and repute in society through his hard work. He wishes to protect his reputation, honour, dignity and character in the society just as much as his right to enjoyment of property, health, liberty, etc. An injury to his reputation in the society is termed as defamation. The philosopher in Aristotle inspired him to give preference to reputation even in the ancient times. He had stated "*Be studious to preserve your reputation; if that be once lost, you are like a cancelled writing, of no value, and at best you do but survive your own funeral*".
- 2.15. 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 the society generally or tends to make them shun or avoid him.<sup>19</sup> According to the classical definition of the term 'defamation', as given by Justice Cave in *Scott v. Sumpson*<sup>20</sup>, defamation means a false statement about a man to his discredit. In other words, defamation can be explained as publication of a statement without justification or excuse of that which is calculated to injure the reputation of another, tending to bring him into hatred, ridicule or contempt<sup>21</sup> in the estimate of right-thinking members of the society.

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<sup>18</sup> Man, here, includes woman and the third gender; 'He' includes her and the third gender.

<sup>19</sup> W.V.H. Rogers & PH Winfield, *Winfield and Jolowicz on Tort* 515 (Sweet & Maxwell, London, 17<sup>th</sup> edn., 2006).

<sup>20</sup> 1882 QBD 491.

<sup>21</sup> *R. v. Robinson*, (1971) 1 QB 357.



- 2.16. As stated in the Draft Penal Code<sup>22</sup>, defamation consists of the tendency to cause pain, which is felt by a person who knows himself to be the object of the unfavourable sentiments of the fellow creatures and those inconveniences to which a person, who is the object of such unfavourable sentiments, is exposed.<sup>23</sup> This right is acknowledged as an inherent personal right and is a *jus in rem* i.e., a right good against all persons in the world. One can exercise this right against individuals as well as against the society collectively.
- 2.17. As per the Black's Law Dictionary, defamation means "*The offence of injuring a person's character, fame, or reputation by false and malicious statements*".<sup>24</sup> Therefore, the inherent definition of defamation has remained the same over the years but its horizon has expanded based on human inventiveness. It has expanded from statements related to character, competence, social disease to disagreeable opinions and ridicule.
- 2.18. The law of defamation is founded on the principle that every man is entitled to the good name and to the esteem in which he is held by others and has a right to claim that his reputation shall not be disparaged by defamatory statements about him to a third person without lawful justification or excuse.<sup>25</sup>
- 2.19. Libel and Slander are legal sub-categories of defamation. Libel is defamation in some permanent form such as written, printed, etc., and

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<sup>22</sup> The First Draft Penal Code was proposed by the First Law Commission, chaired by Thomas Babington Macaulay in 1834. It was submitted to the Governor General of India in 1835.

<sup>23</sup> Draft Penal Code, Note R, 175-177.

<sup>24</sup> Achal Gupta, "Defamation - A Tort", SCC Online Blog, available at: <https://www.scconline.com/blog/post/2021/02/12/defamation-2/> (last visited on Dec. 26, 2023).

<sup>25</sup> 28 Halsbury's Laws of England 3 (LexisNexis UK, 4<sup>th</sup> Edn., 1997).



slander is defamation through spoken words or gestures. In libel, the statement is addressed to the eyes and it is actionable per se irrespective of the proof of actual damage. However, in slander, the statement is addressed to the ears and it is not actionable unless proof of actual damage exists.

- 2.20. The aim of the law of defamation is to protect one's reputation, honour and dignity in the society. It is both a crime and a civil wrong. A criminal prosecution as well as a civil suit for damages can be filed. In civil law, defamation falls under the Law of Torts, which imposes punishment in the form of damages awarded to the claimant. In case of criminal law, defamation is the act of offending or defaming a person by committing a crime or offence. While the law of criminal defamation is codified in Sections 499 to 502 of the Indian Penal Code, the law of civil defamation is uncodified and largely based on case laws.
- 2.21. The international human rights treaties have time and again emphasised on the right to reputation. The foundation is laid through Article 12 of the Universal Declaration on Human Rights, 1948, which clearly stipulates that no one shall be subjected to attack on his honour and reputation.<sup>26</sup>
- 2.22. Similarly, Article 17 of the International Covenant on Civil and Political Rights (hereinafter, "ICCPR") provides for protection against unlawful attacks on a person's honour and reputation.<sup>27</sup> Article 19(3) of the ICCPR also makes reference to the rights and reputation of others as a legitimate ground for limitation of the right to freedom of expression. Reputation is

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<sup>26</sup> Charter of The Universal Declaration of Human Rights, 1948, available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (last visited on Dec. 27, 2023).

<sup>27</sup>Charter of ICCPR, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (last visited on Dec. 27, 2023).



therefore, the underlying basis in any claim of defamation, whether slander or libel.

2.23. Similarly, Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, "ECHR") provides that everyone has the right to respect for his private and family life, his home and his correspondence. The international covenants explicate that the individual honour and reputation is of great value to human existence being attached to dignity and constitute an inalienable part of a complete human being.<sup>28</sup>

### C. *Defamation as an Offence*

2.24. The offence of defamation is based on certain essential characteristics. It is only when the act falls under the following criteria does it amount to defamation. Firstly, the statement must be defamatory. Defamatory content is defined as one calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule. However, the test of a right-minded citizen is applied where meaning of the content is considered to be what a common, ordinary man will comprehend it to be.

2.25. Secondly, the defamatory statement must refer to the plaintiff. The content must be clearly addressing a particular person or a very small group for it to be defamation. A statement referring to a larger group like a profession is not defaming. The court has stated that such collection of individuals must be an identifiable body so that it is possible to say that with

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<sup>28</sup>*Subramanian Swamy v. Union of India*, WP(Crl.) 184 of 2014, 79.

definiteness that a group of particular persons, as distinguished from the rest of community, was defamed.<sup>29</sup>

2.26. Thirdly, the statement must be published, i.e., it must be communicated to at least one person other than the claimant.<sup>30</sup> An act that fulfils all the above essentials will be classified as an offence of defamation.

2.27. Defamation is not an absolute offence. The respondent is entitled to certain defences in order to prevent miscarriage of justice. In order to establish that not all statements could be defamatory, certain defences can be availed by the respondent. For instance, it is not defamation to impute anything, which is true, concerning any person.<sup>31</sup> No defamation suit can be brought against someone if he imputes something true or for public good.<sup>32</sup> It has been accepted that if a newspaper report is true and accurate or if the accused had a bonafide belief that the version of someone is true and on that basis published the report in good faith, it cannot be said that he intended to harm the reputation of the complainant.<sup>33</sup>

2.28. Similarly, a fair comment, i.e., a comment which is a fair expression of an opinion and is made in public interest, is also a defence against a suit for defamation. Fair comment must be expression of opinion rather than assertion of fact. The comment must be fair and must also be made in public interest.<sup>34</sup>

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<sup>29</sup> *G. Narasimhan & Ors. etc. v. T.V. Chokappa*, AIR 1972 SC 2609.

<sup>30</sup> *Mahender Ram v. Harnandan Prasad*, AIR 1958 Pat 445.

<sup>31</sup> *Alexander v. N.E. Rly.*, (1865) 6 B&S 340.

<sup>32</sup> The Indian Penal Code, 1860 (Act 45 of 1860), § 499, exception 1.

<sup>33</sup> *Jawaharlal Darda v. Manohar Ganpatrao Kapiskar*, (1998) 4 SCC 112.

<sup>34</sup> *Slim v. Daily Telegraph*, (1968) 1 All ER 497.

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2.29. Likewise, a privileged communication is exempted from defamation as it is protected by law. A defence lies with the accused as he is protected by law from disclosing certain communications such as Parliamentary proceedings, communication with judges and advocates, etc. A communication can fall under absolute privilege, i.e., there is absolute immunity from a law suit on charge of defamation such as in case of defence and judicial communication. It could alternatively fall under qualified privilege where the defence would lie only if it is made without malice, i.e., in the course of legal, social or moral duty.

2.30. Defamation has various facets and connotations. Its scope has expanded with the evolution of society and technological advancement. It is still in accordance with the freedom of speech and expression and it protects the reputation of law-abiding individuals of society.

#### **D. *Defamation in Indian Law***

2.31. Defamation is an all-encompassing term which can stretch from aspersions, statements, malicious publications injurious to reputation, fame and social image. Due to its vast length and breadth, the law of defamation has found its existence in the Indian laws since the British introduced it during the colonial era.

2.32. The Indian Constitution contains provision for defamation in the form of a reasonable restriction. The right to uninhibited freedom of speech conferred by Article 19(1)(a) is basic and vital for the sustenance of parliamentary democracy. The “reasonable restrictions” are those which are meant to prevent the expression of a thought which is intrinsically dangerous to public interest. Contempt of court, defamation and incitement



to an offence are some exceptions. Apart from the Constitution, defamation is an offence under the criminal law.

- 2.33. The Indian Penal Code, 1860 has comprehensive provisions pertaining to criminal defamation. Chapter XXI contains Sections 499-502, which exclusively deal with the offence of defamation. Defamation against the state is contained in Section 124A as the offence of Sedition, Section 153 of the Code provides for defamation of a class i.e., community, while Section 295A deals with hate speech with regards to outraging religious sentiments.
- 2.34. According to Section 499, "*Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.*"<sup>35</sup> This makes it unlawful to communicate any false information about an individual with the intention of harming their reputation or having reasonable suspicion that doing so will lead to lowering the reputation of that person.
- 2.35. The aforesaid section provides four explanations and ten exceptions. In *Mohd. Abdulla Khan v. Prakash K.*<sup>36</sup>, the Supreme Court examined Section 499 of the Indian Penal Code in detail and enumerated its essentials. To constitute an offence of defamation, it requires a person to make some imputation concerning any other person.

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<sup>35</sup> The Indian Penal Code, 1860 (Act 45 of 1860), § 499.

<sup>36</sup> (2018) 1 SCC 615.

- 2.36. Any material in order to qualify as a criminal defamation must be communicated through various mediums, such as spoken words, written content, or gestures, with the condition that it is made known to a third party. There must be an imputation and such imputation must have been made with the intention of harming or knowing or having reason to believe that it will harm the reputation of the person about whom it is made.<sup>37</sup> It is vital to understand that intention plays a significant role in constituting the offence of defamation and no defamation shall occur if the alleged wrongful acts were not committed without the necessary *mens rea*.<sup>38</sup>
- 2.37. In essence, the offence of defamation is the harm caused to the reputation of a person. It would be sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant, irrespective of whether the complainant actually suffered directly or indirectly from the imputation alleged.<sup>39</sup>
- 2.38. The difference between imputation and publication is that if 'X' tells 'Y' that 'Y' is a criminal — 'X' makes an imputation, whereas if 'X' tells 'Z' that 'Y' is a criminal — 'X' publishes the imputation. The essence of publication in the context of Section 499 is the communication of defamatory imputation to persons other than the persons against whom the imputation is made.
- 2.39. An imputation can be said to harm a person's reputation if that imputation directly or indirectly, in the estimation of others-

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<sup>37</sup> *Jeffrey J. Diermeier v. State of W.B.*, (2010) 6 SCC 243.

<sup>38</sup> *Mohd. Abdulla Khan v. Prakash K.*, (2018) 1 SCC 615.

<sup>39</sup> *Jeffrey J. Diermeier v. State of W.B.*, (2010) 6 SCC 243.

- Lowers the moral or intellectual character of that person, or
- Lowers the character of that person in respect of his caste or of his calling, or
- Lowers the credit of that person, or
- Causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.<sup>40</sup>

2.40. If an imputation is made regarding a deceased person, having the tendency to harm the reputation of that person as if he were living, it may amount to defamation, if it is intended to be hurtful to the feelings of his family or other near relatives.<sup>41</sup> An imputation expressed in the alternative or expressed ironically may also amount to defamation.<sup>42</sup>

2.41. Imputation concerning a company or an association of persons or collection of persons may also amount to defamation under Section 499 of IPC<sup>43</sup>, if such imputation fulfills other essential ingredients of the offence of defamation as discussed hereinabove.

2.42. In *G. Narasimhan & Ors. v. T. V. Chokkappa*<sup>44</sup>, the Supreme Court while deciding whether a conference sponsored and organised by Dravida Kazhagam was a body which could come within the scope of Explanation 2 of Section 499, observed that:

*"Explanation 2 to the section 499 lays down that it may amount to defamation to make an imputation concerning a company or an association or collection of persons. But such a collection of persons must be an identifiable body, so that, it is possible to say with*

<sup>40</sup> The Indian Penal Code, 1860 (Act 45 of 1860), § 499, Exp. 4.

<sup>41</sup> The Indian Penal Code, 1860 (Act 45 of 1860), § 499, Exp. 1.

<sup>42</sup> The Indian Penal Code, 1860 (Act 45 of 1860), § 499, Exp. 3.

<sup>43</sup> The Indian Penal Code, 1860 (Act 45 of 1860), § 499, Exp. 2.

<sup>44</sup> AIR 1972 SC 2609.



*definiteness that a group of particular persons is distinguished from the rest, of the community, was defamed. Therefore, in a case where Explanation 2 is resorted to the identity of the company or the association or the collection of persons must be established so as to be relatable to the defamatory words or imputations. If a well-defined class is defamed, every particular member of that class can file a complaint even if the defamatory imputation does not mention him by name.*

*The test whether the members of a class defamed are numerous or not would not be apt in a criminal prosecution where, technically speaking, it is not by the persons injured but by the state that criminal proceedings are carried on and a complaint can lie in a case of libel against a class of persons, provided always that such in class is not indeterminate or indefinite but, a definite one. There is no difference in principle between this rule of the Common Law of England and the rule laid down in Explanation 2 to s. 499 I.P.C.*

*The conference sponsored and organized by Dravida Kazhagam clearly was not an identifiable or definitive body so that all those who attended it could be said to be its constituents, who, if the conference was defamed, would, in their turn, be said to be defamed. It is impossible to have any definite idea as to its composition, the number of persons who attended, the ideas and ideologies to which they subscribed, and whether all of them positively agreed to the resolution in question.”*

2.43. Further, in *M.P. Narayana Pillai & Ors. v. M.P. Chacko & Anr*<sup>45</sup>, the Kerala High Court held that:

*“There cannot be defamation against a community as such. Community as such may not have a reputation, but the reputation will only be of individual members. When the defamatory matter affects each and every member of an ascertainable class or group each of them or all of them could set the law in motion. If actually a collection or class of people is ascertainable with definiteness it could be said that the specific group of persons as distinguished from the rest of the community-was defamed. Identity of the collection of the people will*

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<sup>45</sup> 1986 Cri LJ 2002.

*have to be established in relation to the defamatory imputations. Where persons in the association or collection as such are ascertainable and the words or imputations are shown to be against all the persons in the association or collection as such, any one of the members could make a complaint. The cardinal rule is that the offence consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it."*

2.44. For every offence, certain defences, in the form of general or special exceptions are available to the accused. Similarly, for the offence of defamation, in addition to general defences, several exceptions are provided under Section 499 of the IPC itself. These exceptions define the circumstances where the act of the accused alleged to be defamatory shall not amount to the offence of defamation.<sup>46</sup> The courts have time and again stated that the exceptions mentioned under Section 499 are exhaustive and no defence can be permitted beyond what is mentioned in the Code.<sup>47</sup>

2.45. The defences for defamation as provided under Section 499 of the IPC are:

- i. Imputation of truth which public good requires to be made or published.

Public good is a question of fact. Good faith also has to be established as a fact<sup>48</sup>. In *Chaman Lal v. State of Punjab*<sup>49</sup>, the Supreme Court elaborated on scope of the First Exception to Section 499 of the Penal Code and held that:

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<sup>46</sup> *Baburao Shankarrao Chavan v. Biban Baban Pahelwan*, (1984) 1 Bom CR 194.

<sup>47</sup> *Tiruvengada Mudali v. Tripurasundari Ammal*, (1926) 51 MLJ 112.

<sup>48</sup> *Chaman Lal v. State of Punjab*, (1970) 1 SCC 590.

<sup>49</sup> *Ibid.*



*"In order to come within the First Exception to Section 499 of the Penal Code, 1860 it has to be established that what has been imputed concerning the respondent is true and the publication of the imputation is for the public good. The onus of proving these two ingredients, namely, truth of the imputation and the publication of the imputation for the public good is on the appellant."*

- ii. Expression of any opinion in good faith respecting conduct of a public servant in discharge of his public functions or respecting his character, so far as such character appears in that conduct.

Good faith requires care and caution and prudence in the background of context and circumstances.<sup>50</sup> In order to establish good faith, it has to be shown that the publication was made honestly in the belief of its truth and there were reasonable grounds for such a belief. Further, it needs to be shown that publication was made after the exercise of such means to verify its truth, as would be taken by a man of ordinary prudence under similar circumstances. The plea of good faith implies the making of a genuine effort to know the truth. A mere belief in the truth, without any reasonable grounds for such belief, is not synonymous with good faith.<sup>51</sup>

In *Jawaharlal Darda v. Manoharao Ganpatrao Kapsikar*<sup>52</sup>, a news item was published disclosing an accurate and true report of proceedings of Legislative Assembly, consisting of a statement of a Minister disclosing misappropriation of government fund. In such a statement, name of the complainant was mentioned as one of the persons involved in such misappropriation. It was held that the news

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<sup>50</sup> *Chaman Lal v. State of Punjab*, (1970) 1 SCC 590.

<sup>51</sup> *J. Sudhir Chandrashekhar v. T. Lokaprakash*, 2001 SCC OnLine Kar 210.

<sup>52</sup> (1998) 4 SCC 112.



report was published about public conduct of public servants for public good, in good faith, believing the statement to be true. Hence, the publishers weren't held liable for the offence of defamation.

- iii. Expression of any opinion in good faith respecting conduct of a person touching any public question, and respecting his character, so far as such character appears in that conduct.
- iv. Publication of true reports of proceedings of a Court of Justice, or of the result of any such proceedings.
- v. Expression of any opinion in good faith respecting merits of a case decided by a Court of Justice, or respecting conduct of a person as a party, witness or agent, in any such case, or respecting character of such person, as far as such character appears in that conduct.
- vi. Expression in good faith of any opinion respecting merits of any performance submitted by the author to the judgment of the public or respecting character of the author so far as his character appears in such performance.
- vii. Passing censure in good faith on the conduct of a person by a person having authority over that person, either conferred by law or arising out of lawful contract.
- viii. Preferring accusation in good faith against any person to any person having lawful authority over that person with respect to subject-matter of accusation.
- ix. Making imputation in good faith over character of another for protection of interests of maker or any other person or for public good.



The difference between the Eighth Exception and the Ninth Exception was elaborated by the Supreme Court in *Chaman Lal v. State of Punjab*<sup>53</sup>, wherein the Court stated that:

*“Under the Eighth Exception, statement is made by a person to another who has authority to deal with the subject-matter of the complaint whereas the Ninth Exception deals with the statement for the protection of the interest of the person making it. Interest of the person has to be real and legitimate when communication is made in protection of the interest of the person making it.”<sup>54</sup>*

The Delhi High Court in *Standard Chartered Bank v. Vinay Kumar Sood*<sup>55</sup>, discussed the scope of Ninth Exception to Section 499 and observed that:

*“9th Exception relates to private communication which a person makes in good faith for the protection of his own interest. This exception covers not only such allegations of facts as can be proved true but also expression of opinions and personal inferences. Ninth exception has been incorporated to protect the interests of the parties in their business transaction which are generally done bona fide and, therefore, the rule of public good on which this principle is based is, that honest transaction of business and social intercourse would otherwise be deprived of the protection which they should enjoy.”*

While dealing with the nature and scope of onus of proof which the accused has to discharge in answer to charge of defamation, while taking plea of defence of Exception 9, the Supreme Court in

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<sup>53</sup> (1970) 1 SCC 590.

<sup>54</sup> *Kanwal Lal v. State Of Punjab*, AIR 1963 SC 1317.

<sup>55</sup> 2009 SCC OnLine Del 227; (2009) 108 DRJ 709.

*Harbhajan Singh v. State of Punjab*<sup>56</sup>, has laid down following principles:

*"The nature and scope of the onus of proof which the accused has to discharge in seeking the protection of Exception 9 to Section 499 is as under:—*

- (i) *If it is shown that the accused has led evidence to show that he acted in good faith, and by the test of probabilities that evidence establishes his case, he will be entitled to claim the benefit of Exception 9.*
- (ii) *The proof of truth of the impugned statement is not an ingredient of the Ninth Exception as it is of the first; under the Ninth Exception it is not necessary, and indeed it is immaterial, to consider whether the accused has strictly proved the truth of the allegations made by him.*
- (iii) *It is true that the mere plea that the accused believed that what he stated was true by itself, will not sustain his case of good faith under the Ninth Exception. Simple belief or actual belief by itself is not enough. It must be shown that the belief in the impugned statement had a rational basis and was not just a blind simple belief. That is where the element of the due care and attention plays an important role. If before making the statement the accused did not show due care and attention, it would defeat his plea of good faith. But it must be remembered that good faith does not require logical infallibility.*
- (iv) *It is not possible to lay down any rigid rule or test for deciding whether an accused person acted in good faith under the Ninth Exception. The question has to be considered on the facts and circumstances of each case, what is the nature of the imputation made, under what circumstances did it come to be made, what is the status of the person who makes the imputation; was there any malice in his mind when he made the said imputation, was any enquiry made by him before he made it, are there reasons to accept his story that he act with due care and attention and was satisfied that the imputation*

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<sup>56</sup> AIR 1966 SC 97.



*was true? These and other considerations would be relevant in deciding the plea of good faith under the Ninth Exception.*

*(v) Absence of personal malice may be a relevant fact in dealing with the accused's plea of good faith, but its significance or importance cannot be exaggerated. The accused will have to show that he acted with due care and attention, even in the absence of personal malice."*

Further, it has been held that "*where to the charge of defamation under Section 500, Penal Code, the accused invokes the aid of Exception (9) to Section 499, good faith and public good have both to be established. The failure to prove good faith would exclude the application of the Ninth Exception in favour of the accused even if the requirement of public good is satisfied.*"<sup>57</sup>

- x. Conveying caution in good faith to one person against another for good of the person to whom it is conveyed or of some person in whom he is interested or for public good.

In *Jeffrey J. Diermeier v. State of W.B.*<sup>58</sup>, while discussing the scope of tenth exception to Section 499 of IPC, the Supreme Court held that:

*"It is trite that where to the charge of defamation under Section 500 IPC the accused invokes the aid of Tenth Exception to Section 499 IPC, "good faith" and "public good" have both to be established by him. The mere plea that the accused believed that what he had stated was in "good faith" is not sufficient to accept his defence and he must justify the same by adducing evidence. However, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt.*

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<sup>57</sup> *J. Sudhir Chandrashekhar v. T. Lokaprakash*, 2001 SCC OnLine Kar 210.  
<sup>58</sup> (2010) 6 SCC 243.

*The question has to be considered on the facts and circumstances of each case, having regard to the nature of imputation made; the circumstances on which it came to be made and the status of the person who makes the imputation as also the status of the person against whom the imputation is allegedly made. These and a host of other considerations would be relevant and required to be considered for deciding the appellants' plea of "good faith" and "public interest". All these are questions of fact and matters for evidence."*

- 2.46. Section 500 of the Indian Penal Code specifies the punitive measures, including imprisonment for a period extending up to two years, a fine, or a combination of both.
- 2.47. Section 501 of the Code defines and punishes the 'printing or engraving the matters known to be defamatory'. It says that whoever does the above said act with the intention or with a reason to believe that such matter is defamatory, "*shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.*"
- 2.48. Section 502 punishes the sale or an offer for sale of any such printed or engraved substance. It also contains the same punishment as in Section 501.
- 2.49. **The Bharatiya Nyaya Sanhita, 2023** (hereinafter, "BNS"), has been recently introduced as a replacement of the long standing Indian Penal Code, 1860. The last chapter of BNS, i.e., Chapter XIX contains offences related to criminal intimidation, insult, annoyance and defamation.
- 2.50. Section 354 of the BNS defines defamation and corresponds to Section 499 of the IPC. Unlike four distinct sections as given in IPC, the new Act



provides for one single offence under section 354. It comes with the same number of explanations and exceptions as were given in section 499 of IPC. The only amendments that have been made in the criminal law of defamation is with respect to the punishment.

- 2.51. Section 354(2) prescribes the punishment of criminal defamation as "*Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both or with community service.*" (emphasis added)
- 2.52. The Code of Criminal Procedure, 1973 provides for prosecution for defamation. Section 199 of the Code provides that defamation is a bailable, non-cognizable and compoundable offence. Therefore, the police cannot start investigation of defamation without a warrant from a magistrate. The accused also has a right to seek bail. Further, the charges can be dropped if the victim and the accused enter into a compromise to that effect, even without the permission of the court. **The Bharatiya Nagarik Suraksha Sanhita, 2023** (hereinafter, "BNSS") has the same provision under Section 222 under the head "*Prosecution for defamation*".
- 2.53. The application of criminal defamation statutes has not been without contestation. Some claim that these rules could unintentionally violate people's fundamental right to freedom of speech and expression since people may be afraid of facing legal consequences for publicly expressing their thoughts.<sup>59</sup> Furthermore, worries about possible abuse, i.e., the use of defamation laws to suppress reasonable criticism or dissent have sparked

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<sup>59</sup> Article 19(1)(a) of the Constitution of India enumerates the right to freedom of speech and expression.



conversations about re-evaluating a balance between preserving reputations and defending the democratic ideal of free speech.

- 2.54. The criminalization of defamation remains a topic of debate internationally as well, with some advocating for a shift towards civil remedies to address reputational harm while others emphasising on maintaining the stringent protection against one's reputation.
- 2.55. Section 499 IPC (or Section 354 of BNS) read with the Exceptions provided therein, incorporates all the three classical elements of a crime while penalizing certain forms of speech and expression. The provision criminalizes only that speech which is accompanied by malicious intention to harm or with knowledge that harm will be caused or with reckless disregard. The requirement of guilty intention, knowledge or proof of recklessness (absence of good faith) that form the bedrock of various provisions of IPC is also incorporated in the law of defamation as given in the Code<sup>60</sup>.
- 2.56. Libel is not merely an actionable tort but also a criminal offence. But slander is only a civil injury. The distinction between libel and slander has not been recognized and followed with unanimity in Indian courts. In *Hirabai v Dinshaw*<sup>61</sup>, the Bombay High Court took the view that imputing defamation is punishable both civilly and criminally without proof of special damages. Similarly, other courts have also held that slander is actionable even without proof of damages.<sup>62</sup> In India, civil and criminal

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<sup>60</sup> *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221.

<sup>61</sup> AIR 1927 Bom 22.

<sup>62</sup> *Rahim Bakhsh v. Bachchalal*, AIR 1929 All 214.



proceedings can be instituted simultaneously against a person for publication of defamatory news items.<sup>63</sup>

2.57. In the case of *State of Gujarat v. Hon'ble High Court of Gujarat*,<sup>64</sup> the court opined that an honour which is lost or life which is snuffed out cannot be recompensed. Therefore, reputation plays a very crucial role in safeguarding social order and harmony.



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<sup>63</sup> *Servants of the Peoples Society v. Pyari Mohan Mohapatra*, AIR 2006 Ori 75.  
<sup>64</sup> (1998) 7 SCC 392.

### **3. RIGHT TO REPUTATION VIS-À-VIS FREEDOM OF SPEECH & EXPRESSION**

#### **A. Freedom of Speech and Expression**

- 3.1. The freedom of speech and expression is a right which is explicitly provided in Article 19(1)(a) of the Constitution of India. It is a natural right<sup>65</sup> recognized and guaranteed by the Constitution and cannot be curtailed except through legislation passed by the laid down procedure<sup>66</sup>. It is a basic right which is recognized as a natural right of every citizen.<sup>67</sup> It finds its immaculate reflection in the oft-quoted statement by Voltaire, "*I may not agree with what you have to say, but I will defend to the death your right to say it.*"
- 3.2. Various international conventions, such as the International Covenant on Civil and Political Rights<sup>68</sup>, the European Convention on Human Rights and Fundamental Freedoms<sup>69</sup>, and the Universal Declaration of Human Rights<sup>70</sup>, guarantee the freedom to speak and express freely.
- 3.3. The importance of freedom of speech and expression has also been underlined by Bhagwati, J. in *Maneka Gandhi v. Union of India*<sup>71</sup>:

<sup>65</sup> *Maneka Gandhi v. Union Of India*, 1978 SCR (2) 621.

<sup>66</sup> OH Phillips & Paul Jackson, *Constitutional and Administrative Law* (Sweet & Maxwell, London, 7<sup>th</sup> Edn., 1987).

<sup>67</sup> *State of West Bengal v. Subodh Gopal Bose*, AIR 1954 SC 92.

<sup>68</sup> Article 19(2) of the International Covenant on Civil and Political Rights provides that, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

<sup>69</sup> Article 10(1) of the European Convention on Human Rights provides that, "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

<sup>70</sup> Article 19 of the Universal Declaration of Human Rights provides that, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

<sup>71</sup> (1978) 1 SCC 248; AIR 1978 SC 597.

*"In a democratic system, the only means of correcting government activity is through free debate and open discussion. Every person must have the right to participate in the democratic process if democracy is defined as the government of the people, by the people, and for the people."*

- 3.4. It has been made clear by the court that Article 19 only deals with certain particular rights, which in their origin are attributes of freedom of person. In other words, freedom of person is not the outcome of Article 19 itself.<sup>72</sup>
- 3.5. Before getting into the wide horizon of freedom of speech and expression, the purpose and jurisprudential essence of this article must be explored. This right is a foundation without which many of the ancillary rights cannot be enjoyed. These rights, including attainment of self-fulfillment, participation in decision making, discovery of truth, etc. cannot be achieved unless freedom of speech is utilized in a bonafide way. This allows individuals to contribute in good governance, raise dissent and work for the just cause.<sup>73</sup>
- 3.6. This right guarantees to every citizen the right to state his views, opinions and convictions. Under this right, a person is free to express his views by word of mouth, writing, printing or any other way. As held by the Supreme Court in various judgments, this right consists of the following rights amongst others:
  - Right to propagate one's views as well as view of others
  - Freedom of Press
  - Freedom of commercial advertisement
  - Right to telecast

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<sup>72</sup> A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

<sup>73</sup> V. Govindu, "Contradictions in Freedom of Speech and Expression", 72(3) IJPS 641-650 (2011).

- Freedom of silence
- Right to know
- Right to demonstration but not right to strike
- Right against imposition of pre-censorship on a newspaper

- 3.7. According to Justice Hidayatullah in *Ranjit D Udeshi v. State of Maharashtra*<sup>74</sup>, “*Freedom of speech and expression is that cherished right on which our democracy rests and is meant for the expression of free opinions.*”
- 3.8. In *Romesh Thapar v. State of Madras*,<sup>75</sup> the Supreme Court dealt with the ban by the Madras Government on entry and distribution of ‘Red Cross’, an English Journal in Bombay, and held that the order was unconstitutional as it was a violation of the freedom of speech and expression as “*without freedom of distribution, publication would be of little value.*” The court also observed that, “*freedom of speech and expression includes freedom of propagation of ideas which is ensured by the freedom of circulation.*”
- 3.9. In another landmark judgment of the Supreme Court in *Bennett Coleman & Co. v. Union of India*<sup>76</sup>, the Court struck down a government policy restricting the import of newsprint and allocating it among newspapers in a discriminatory manner as unconstitutional. It was observed by the court that:

“*If as a result of reduction in pages, the newspapers will have to depend on advertisements as the main source of their income, they will be denied dissemination of news and views. That will also*

<sup>74</sup> AIR 1965 SC 881.

<sup>75</sup> AIR 1950 SC 124.

<sup>76</sup> AIR 1973 SC 106.



*deprive them of their freedom of speech and expression. On the other hand, if as a result of restriction on page limit, the newspapers will have to sacrifice advertisements and thus weaken the limit of financial strength, the organisation may crumble. The loss on advertisements may not only entail the closing down but also affect the circulation and thereby infringe on freedom of speech and expression.”*

- 3.10. In *S Rangarajan v. P. Jagjivan Ram*<sup>77</sup>, a ban on a film depicting inter-caste marriage and communal violence was challenged. The Supreme Court held this ban to be unconstitutional as it violated the right to receive and impart information and ideas, which is a part of wider freedom of speech and expression.
- 3.11. This right is used by media, press, individuals and any other entity which have the freedom to express and opinionate. The exercise of this right has originated for the protection of rights of people who may not raise their voice and for raising voice against the unjust. This has roots in the democratic structure of the country and cannot be compromised except by restriction given under the Article itself. This right has such broad connotations and it just cannot be limited to targeting a person's reputation and dignity. Speech includes words and statements, which if used in a right way, can motivate people for centuries and if used negligently, can lead to a loss of life as well.<sup>78</sup>
- 3.12. The Indian philosophy has stressed on the importance of true and fair speech. A quote in Sanskrit says:

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<sup>77</sup> (1989) 2 SCC 574.

<sup>78</sup> Japanese wrestler Hana Kimura took her own life after bullying and insults on social media. Thereafter, the Japan's Parliament amended the criminal law of defamation and increased the penalty and fine for the same.



*Satyam brūyāt priyam brūyān na brūyāt satyam apriyam |*

*Priyam ca nānṛtam brūyād esa dharmah sanātanah ||*

It means that “*Speak what is true; speak what is pleasing; Do not speak what is unpleasant, even if it is true; And do not say what is pleasing, but untrue; this is the eternal law.*”<sup>79</sup>

- 3.13. Another quote was given by the great Tamil poet-saint Thiruvalluvar in 31 BCE, in his classic work “*Thirukkural*”, which when translated comes out as:

*“In flesh by fire inflamed, nature may thoroughly heal the sore;  
In soul by tongue inflamed, the ulcer healeth never more.”*

- 3.14. It is not in dispute that even when there was no law, the right of free speech was still restricted by certain advices and moral injunctions. Therefore, it cannot be said that the unlimited exercise of the right of freedom of speech and expression has always been the norm.
- 3.15. Article 19(1)(a) is limited by restrictions which are prescribed in Article 19(2), which states as follows:

*“Nothing in sub-clause (a) of clause (I) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.”*

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<sup>79</sup> *Kaushal Kishore v. State of U.P & Ors.*, (2023) 4 SCC 1.



- 3.16. In *N.K. Bajpai v. Union of India*<sup>80</sup>, the Supreme Court commented on reasonable restrictions under Article 19, and observed that:

*"Part III of the Constitution is the soul of the Constitution. The fundamental rights are basic rights, but they are neither uncontrolled nor without restrictions. In fact, the framers of the Indian Constitution themselves spelt out the nature of restriction on such rights. (...) It is difficult to anticipate the right to freedom or liberty without any reasonable restriction.*

...

*Imposition of restrictions is a concept inbuilt into the enjoyment of the fundamental rights, as no right can exist without a corresponding reasonable restriction placed on it."*

- 3.17. The term 'reasonable restrictions' seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of clause (1) of Article 19 and the social control permitted by any of the clauses (2) to (6).

- 3.18. As held in *Anuradha Bhasin v. Union of India*<sup>81</sup>, the Supreme Court observed that:

*"The rights provided under Article 19(1) of the Constitution have certain exceptions, which empower the state to impose reasonable restrictions in appropriate cases. With respect to the freedom of speech and expression under Article 19(1)(a), restrictions are provided under Article 19(2) of the Constitution. The ingredients of Article 19(2) are that : (a) the action of the state must be sanctioned by law; (b) the proposed action must be a reasonable restriction; (c) such restriction must be in furtherance of the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an*

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<sup>80</sup> (2012) 4 SCC 653.

<sup>81</sup> (2020) 3 SCC 637.

*offence.....Reasonability of a restriction is used in a qualitative, quantitative and relative sense."*

- 3.19. The claim or the goal that the right of freedom of speech should be absolute is very much questionable. While the robust protection of right to freedom of speech and expression serves as a cornerstone in fostering diverse viewpoints and enabling societal progress, yet it unavoidably intersects with the equally significant right to reputation. And it is imperative to strike a delicate balance between these rights, acknowledging that the exercise of one should not unjustly infringe upon the other.

#### **B. Right to Reputation**

##### **i. Right to Reputation as a Basic Human Right**

- 3.20. The society has always been governed by the regulations as prescribed by the law of the land. Every jurisdiction has certain code of conduct which is made as per the respective culture and tradition. When we talk about the basic human rights of an individual, we look upon Article 21 of the Constitution of India. But even before Article 21 came into being, individuals enjoyed basic inviolable rights in the society such as the right to food, water, shelter, etc. One such right that has been around since time immemorial is the 'right to reputation' of a human being.

- 3.21. Human beings are distinguishable from all other living creatures as they are the only ones who are capable of free critical and analytical thinking, feeling and expressing. An individual is the one who is capable enough to exercise rights and claim the remedy too. When seen from a legal point of view, the study of a legal system is conducted from the understanding of human nature as the law is made to preserve the benefit of a human being.



An individual being a free and social animal is allowed to express and propagate whatever he wants. His conduct is as per his own free will and the same is unrestricted unless its regulated by the rule of law. As per *Hitopadesha Prastavika*, human beings and animals enjoys certain common pleasures of eating, sleeping and enjoyment. However, the distinctive attribute of a human being is the capability to obey the '*Dharma*', which is the law made to regulate the natural conduct of a human.<sup>82</sup> Therefore, the limits to one's actions are given in the law and the protection to one's dignity has also been safeguarded under the same.

3.22. The right to reputation is a part of right to decent and dignified life which is an inalienable right. The rights that stem from an individual's inherent value and sovereignty are presumably universal, constituting, at the very least, fundamental human rights. Instead of responding to what is best for the individual (i.e., what is in his interest), we could argue that certain rights are a response to the good (value, importance, dignity) of the person and his sovereignty over himself.<sup>83</sup> It can be further said that a right can simply be a duty of another person to exercise his respective right in a reasonable manner. It can be said that like other basic human rights, right to reputation has its origin in the concept of natural law. Natural law theory with time has led to the theory which is intrinsic to modern human rights, i.e., that basic human rights are inherent in one's personality. These rights are inviolable and cannot be legally taken from that person since any denial or deprivation of these human rights leads to a violation.<sup>84</sup> This is similar

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<sup>82</sup> Rama Jois, *Seeds of Modern and Public Law in Ancient Indian Jurisprudence* 4(Eastern Book Company, 2<sup>nd</sup> Edition, 2000).

<sup>83</sup> Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2004).

<sup>84</sup> Manoj Kumar Sinha, *Implementation of Basic Human Rights* 5 (LexisNexis, 1<sup>st</sup> Edn., 1999).



to any other fundamental right and a right to maintain one's name or reputation is also a right conferred naturally upon a person.<sup>85</sup>

## ii. Right to Reputation and Judicial Pronouncements

- 3.23. The courts in various jurisdictions have recognized the existence of right to reputation as an integral part of one's life. Justice Brown, while emphasizing on the importance of the right to reputation, in *D.F. Marion v. Minnie Davis*<sup>86</sup>, observed that:

*"The right to the enjoyment of a private reputation, unassailed by malicious slander, is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty, and property. The foundation of an action for libel or slander is a malicious injury to reputation, and any false and malicious imputation of crime or moral delinquency by one published of and concerning another, which subjects the person to disgrace, ridicule, odium, or contempt in the estimation of his friends and acquaintances, or the public, with resulting damage to his reputation, is actionable either per se or per quod."*

- 3.24. A three-judge bench of the Supreme Court, in the case of *Kiran Bedi & Ors v. Committee of Inquiry and Anr*<sup>87</sup>, emphasized on the importance on the issue of one's reputation and referred the right as one's personal right. The court cited the definition of 'person' as "*the term "person" includes not only the physical body and members, but also every bodily sense and personal attribute, among which is the reputation a man has acquired.*"<sup>88</sup> The Court further observed that:

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<sup>85</sup> Roscoe Pound, *Jurisprudence* 56 (Lawbook Exchange Ltd., Reprint, 2000).

<sup>86</sup> 55 American LR 171.

<sup>87</sup> 1989 AIR 714 : 1989 SCR (1) 20.

<sup>88</sup> 77 Corpus Juris Secundum 268 (Thomson West, 2017).



*"A man's reputation is a part of himself, as his body and limbs are, and reputation is a sort of fight to enjoy the goods opinion of others, and it is capable of growth and real existence, as an arm or leg. Reputation is, therefore, a personal fight, and the right to reputation is put among those absolute personal fights equal in dignity and importance to security from violence. The laws of the ancients, no less than those of modern nations, made private reputation one of the objects of their protection.(....) Detraction from a man's reputation is an injury to his personality, and thus an injury to reputation is a personal injury, that is, an injury to an absolute personal right."*

- 3.25. The court, in *State of Maharashtra v. Public Concern of Governance Trust*<sup>89</sup>, held that the right to life, liberty, and property were all guaranteed by the Constitution, and maintaining a good reputation was one aspect of personal protection. It has been decided that the right extends to a person's reputation during and after his death. In light of this, Article 21 would surely apply to any improper conduct by the state or its authorities that damages the reputation of a good person.
- 3.26. In *State of Bihar v. Lal Krishna Advani*,<sup>90</sup> a two-member committee was constituted on October 24, 1989, to investigate the communal unrest in the district of Bhagalpur. The respondent's reputation as a public figure was damaged by the comments the committee made in the report, all without giving him a chance to be heard. According to the apex Court's ruling, it was abundantly evident that everyone has the right to safeguard their reputation in addition to having the right to have and maintain one.

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<sup>89</sup> AIR 1989 SC 714.

<sup>90</sup> AIR 2003 SC 3357.



3.27. In *Gian Kaur v. State of Punjab*<sup>91</sup>, the court observed that the right to reputation is a natural right.

3.28. In *Mehmood Nayyar Azam v. State of Chhattisgarh and Others*<sup>92</sup>, the court discussed the importance of life and the glory of reputation associated with it. The court observed that:

*"A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, "a brief candle", or "a hollow bubble". The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence". When a dent is created in the reputation, humanism is paralysed...."*

3.29. In *Vishwanath Agrawal v. Saral Vishwanath Agrawal*<sup>93</sup>, the court observed that reputation is not only the salt of life, but also its purest gem and most priceless fragrance. It generates income for both the here and now and for future generations.

3.30. In *Umesh Kumar v. State of Andhra Pradesh & Another*<sup>94</sup>, a two-judge bench of the apex Court noted that a person's right to reputation is one of their personal rights. As a component of personal security, a good reputation is guaranteed by the Constitution along with the right to life, liberty, and property. For this reason, it has been deemed essential to a citizen's right to life under Article 21 of the Constitution. The right to

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<sup>91</sup> (1996) 2 SCC 648.

<sup>92</sup> (2012) 8 SCC 1.

<sup>93</sup> (2012) 7 SCC 288.

<sup>94</sup> (2013) 10 SCC 591.



freedom of expression and the right to hold opinions are recognised by the International Covenant on Civil and Political Rights, 1966, under Article 19, subject to the right of others to have their reputations protected.

- 3.31. In *Nilgiris Bar Association v. T.K. Mahalingam and Another*<sup>95</sup>, the court, again interpreting the legal definition of person, held that:

*"The term "person" includes not only the physical body and members but also every bodily sense and personal attribute among which is the reputation a man has acquired. Reputation can also be defined to be good name, the credit, honour or character which is derived from a favourable public opinion or esteem, and character by report. The right to enjoyment of a good reputation is a valuable privilege of ancient origin and necessary to human society. "Reputation" is an element of personal security and is protected by the Constitution equally with the right to enjoyment of life, liberty and property. Although "character" and "reputation" are often used synonymously, but these terms are distinguishable. "Character" is what a man is and "reputation" is what he is supposed to be in what people say he is. "Character" depends on attributes possessed and "reputation" on attributes which others believe one to possess. The former signifies reality and the latter merely what is accepted to be reality at present. ..."*

- 3.32. It can be thus be concluded that the courts have undoubtedly kept the right to reputation at a very high pedestal. The courts have acknowledged the value of reputation of an individual and the importance attached to it. It is of no debate that the right of reputation is an internal facet of Article 21. The courts have accepted it as it has been persevered and valued by the society since time immemorial. The courts work based on the conscience of the society and reflect the same in the judgments. Therefore, it can be

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<sup>95</sup> AIR 1963 SC 1088.



said that the right to reputation, being intrinsic to right to life and liberty, is upheld both by the courts and the society.

### C. *Striking Balance Between Reputation and Freedom of Speech*

3.33. It is well settled that both right to reputation and freedom of speech and expression are fundamental to one's freedom. The freedom of speech is vital to one's freedom to give opinion, thoughts and to meaningfully participate in democracy, while reputation is something which has been associated as the most precious asset to an individual. Further, it has been already discussed that the right to freedom of speech has limitations too. The right can be limited on the basis of the restrictions as specified in Article 19(2) and it also must not encroach on the right of any other person as well. On this basis, balancing of the two fundamental rights is done in order to give a harmonious construction to both. This part will analyse that whether the existence of law of defamation for the protection of right to reputation is a reasonable restriction on the right of freedom of speech and expression.

#### i. Balancing of Fundamental Rights by Courts

3.34. The Indian jurisprudence on the fundamental rights emphasises on sustenance and balancing of separate rights. The argument of giving more weight to a particular right does not stand tall. The concept of counter-weighting fundamental right does not have to be done as a fundamental right cannot exist in isolation or in a watertight compartment.<sup>96</sup> The co-existence of a fundamental right in harmony with another fundamental

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<sup>96</sup> Acharya Mahajshri Narendra Prasadj Anandprasadji Maharaj and Ors. v. The State of Gujarat and Ors., (1975) 1 SCC 11.



right or duty is in interest of the social welfare of the society. The courts have time and again reiterated that all the fundamental rights individually are part of an integrated scheme in the Constitution and they all must be mixed to obtain the optimum flow of complete and impartial justice.<sup>97</sup> The courts have explained the spirit of maintaining balance by stating that it's necessary to mediate balance between past traditions and present's convenience, between the society's need for stability and the requirement of change.<sup>98</sup>

- 3.35. The court, in *Mr. X v. Hospital Z*<sup>99</sup>, had the duty to decide between fundamental right to life and fundamental right to lead a healthy life. The court, giving way to fundamental right to health over privacy, held that such a right has to be advanced which gives way to public morality or public interest. The court added that the judges cannot sit like mute structures and should act considering the morality of the present day.
- 3.36. The court in another case, while striking a balance between Article 15(4) and 16(4) of the Constitution, held that any fundamental right cannot be ignored and relevant considerations have to be placed in order to proceed objectively in balancing them.<sup>100</sup>
- 3.37. Justice Krishna Iyer in the case of *Maneka Gandhi v. Union Of India*<sup>101</sup>, had opined that:

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<sup>97</sup> *Delhi Transport Corporation v. D.T.C. Mazdoor Congress and Ors.*, 1991 Supp (1) SCC 600.

<sup>98</sup> *St. Stephen's College v. University of Delhi* (1992) 1 SCC 600.

<sup>99</sup> (1998) 8 SCC 296.

<sup>100</sup> *Post Graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association and Others* (1998) 4 SCC 1.

<sup>101</sup> 1978 SCR (2) 621.



*“..... the law is now settled, as I apprehend it, that no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the direction and correction needed for interpretation of these basic provisions. Man is not dissectionable into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis. The proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached.”*

- 3.38. The courts through their interpretation take an expansive approach so as to expand the ambit of the right rather than curtailing it. The courts have many a times acknowledged that their duty is not only to safeguard the fundamental rights but also to maintain a balance between the rights in harmony subject to social control. The apex Court, emphasising on the nature of fundamental rights, held that<sup>102</sup>:

*“Freedom of expression is not an absolute value under our Constitution. It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of freedom of expression as it is for other values.”*

- 3.39. The court, while dealing with issue of criminal defamation vis-à-vis freedom of speech in the case of *Mohd. Arif alias Ashfaq v. Registrar, Supreme Court of India and Others*<sup>103</sup>, had encountered a similar issue. The court was posed with the argument that:

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<sup>102</sup> *Sahara India Real Estate Corporation Ltd. v. Securities & Exchange Board of India & Anr.*, 2013 (2) SCC 732.

<sup>103</sup> (2014) 9 SCC 737.



- Continuance of criminal defamation is constitutionally inconceivable as it creates a dent in freedom of speech and expression;
- That criminal defamation is a pre-Constitution law and is completely alien to freedom of speech.

3.40. The court in the aforesaid case, while rejecting both the contentions, held that no fundamental right is absolute and in such a case, balancing of fundamental rights becomes a constitutional necessity. In such cases, the court must ensure that balancing is done in a way that the values enriched in each of the rights are sustained. The court held that right to reputation is an inextricable aspect of right to life under Article 21 and the State being responsible for the safety of everyone, has kept the remedial safeguard under Section 499 of IPC. The court rejected the second argument by stating that the purpose of defamation as a law is to safeguard what is protected under Article 21 and in the name of freedom of speech and expression, the right and reputation of an individual cannot be jeopardised.

3.41. The Supreme Court, in another landmark judgment, held that no fundamental right is absolute and no one can be compelled to forbear the repercussion of other's act based on unjustified use of their right. One cannot, while exercising their fundamental right, encroach upon others' right and liberty. The court stated that "*Article 19(1)(a) cannot be pressed into service for defeating the fundamental right guaranteed by Article 21*".<sup>104</sup>

3.42. The two possible alternatives to resolve friction are either to compromise a right in light of the other or to give way to both by balancing them. It is

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<sup>104</sup> *In Re: Noise Pollution*, 2005 (8) SCC 796.



seen in various judgments that the courts instead of counterweighing a right, have balanced both by justifying the essence of both of the rights. The courts, while balancing, have also analysed the restriction to be feasible or not. This is seen to be as a conclusion that a balance is struck between both the rights by adjudicating the law of criminal defamation as a reasonable safeguard to protect one's reputation. Therefore, it was reasonable for the court to hold that applying the principle of balancing of fundamental rights, the presence of defamation as a criminal offence is not beyond the ambit of Article 19(2) of the Constitution, especially when the term 'defamation' has been specifically mentioned as a restriction therein.

- 3.43. The rights under Article 21 and under Article 19(1)(a) have been read and balanced by the courts on several past occasions. Article 19(2) lays down specific limitations on the right of freedom of speech and expression under 19(1)(a). Any legislation that aims to restrict the right under Article 19(1)(a) must inevitably adhere to the restrictions as outlined in Article 19(2). In case of a friction between the two fundamental rights, the court strikes a balance so that each right can be exercised meaningfully.
- 3.44. The court, in the case of *Thalappalam Service Cooperative Bank Ltd. v. State of Kerala*<sup>105</sup>, struck a balance between two interests emerging from Article 19(1)(a) and Article 21, respectively. The case related to seeking information through a RTI from a society under the administrative control of Registrar of Co-operative Societies, Kerala (ROCS), which neither came under the definition of "State" under Article 12 nor under the definition of "public authority" under section 2(h) of the Right to Information Act, 2005. The court on one hand, encountered the right to know under Article

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<sup>105</sup> 2013 (16) SCC 82.

19(1)(a) and on the other hand, the right to privacy and personal information under Article 21. The court observed that both the rights are not absolute and can be regulated in the larger public interest. The court, while balancing, gave way to Article 21 and held that disclosure that is not in public domain is an unwarranted infringement of privacy to which an individual is entitled. The court further held that the right to information and privacy are not unbridled and can be restricted whenever impinged mutually.

3.45. In the case of *R. Rajagopal alias R.R. Gopal v. State of Tamil Nadu*<sup>106</sup>, the court again maintained a neat balance between both the rights. The case related to an attempt by the prison official to prevent the magazine from publishing the autobiography of a prisoner. The petitioner challenged the same on the ground that it is a restriction on the freedom of speech and expression of the prisoner<sup>107</sup> as well as of the petitioner's magazine. The officials took a plea that the content of the magazine is defamatory and can hurt the reputation of the officials. The court applied the principle of balancing and held that the state and its officials cannot have an option to impose a pre-restriction on the publication on the apprehension that it may be defamatory to them. The court stated that their right to sue for defamation will still be alive and will arise after publication is done. Hence, the court fuelled life to both the fundamental rights and balanced the dignity of both the parties.

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<sup>106</sup> AIR 1995 SC 264.

<sup>107</sup> The prisoner had given prior permission to publish his auto-biography in the magazine.



3.46. The court, in *People's Union for Civil Liberties v. Union of India & Ors.*<sup>108</sup>, analysed the relationship between the two fundamental rights. The case related to the constitutional validity of Section 5(2) of the Telegraph Act, 1885 which permitted 'phone-tapping' in certain situations, without the permission of the person concerned. This also lacked procedural safeguards for fair exercise of the process. The court observed that the telephonic conversations were safeguarded under the right of speech and expression and interception of the same must be through a reasonable restriction as mentioned under Article 19(2). The court held that the same was done without any nexus with the restriction and was a serious violation of Article 21.

3.47. It is pertinent to note that the court has given weight to the right to privacy over anything. The courts' judgements reflect the ideology of the society which also treats the right to life and liberty as paramount. The courts, in various judgments, have safeguarded the interest of an individual by incorporating it under the umbrella of Article 21. It is also seen that the courts get more vigilant and protective when the right of an individual is violated.

3.48. A similar situation is also observed in the cases where right to reputation of an individual is affected. In the case of *Ram Jethmalani v. Union Of India*, the court held that:

*"Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless*

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<sup>108</sup> AIR 1997 SC 568.



*they act in an unlawful manner. (...) The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values. The rights of citizens, to effectively seek the protection of fundamental rights, under Clause (1) of Article 32 have to be balanced against the rights of citizens and persons under Article 21. (...) That right cannot be extended to being inquisitors of fellow citizens. An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others."*

## ii. Proportionality Test

- 3.49. The proportionality test is one of the approaches that has been used in various jurisdictions to justify the limitations on the fundamental freedoms. Proportionality has been adopted by constitutional courts for adjudicating the viability of limitations on fundamental rights. It is a tool which is used to determine the constitutional validity of an action which is aimed to limit a fundamental right.<sup>109</sup> In a traditional proportionality test, the reason for limiting a right has to be a good and sound reason, what otherwise can be called as 'public reason'.<sup>110</sup> It means that the reasons for restrictions have to be through the use of values and standards that are publicly available and acceptable. It is of value as the reason has to be accepted by both majority and minority groups, giving it a constituent element of equality. The proportionality test includes four elements, the first being that the state must serve a 'compelling' and 'legitimate' interest while restricting the

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<sup>109</sup> *Bank Mellat v. HM Treasury (No 2)*, [2014] AC 700, 790-91 (UK Supreme Court).

<sup>110</sup> J Rawls, *Political Liberalism* 212-2554 (Columbia University Press, New York, 2005).

right.<sup>111</sup> The second relates to the ‘suitability test’, which says that there must be a reasonable nexus between the measure used to limit the right and the legitimate interest. The third element gives the ‘necessity test’ that prescribes that the measure must be necessary in advancing the interests that have been safeguarded. Then the fourth and final being the ‘proportionate test’ which talks about weighing the level of the right which has been curtailed against the interest that has been advanced.<sup>112</sup> The proportionality test is used in different jurisdictions with different modus operandi. In German Federal Constitutional Courts, the balancing comes at the last stage, while the Canadian Supreme Court considers balancing at an earlier stage.<sup>113</sup>

3.50. The Indian Supreme Court also follows the four-stage proportionality mechanism, wherein the test of balancing comes at the last.<sup>114</sup> The present analysis encounters the proportionality between right to reputation and right of freedom of speech.<sup>115</sup> The first stage of the test includes the analysis of right to reputation as a legitimate and compelling interest while restricting the freedom of speech and expression. It has been previously discussed that right to reputation is a natural human right and is integral to one’s right to life and liberty. The interest being compelling on the ground that the reputation is safeguarded by the apex Court in various judgments. An interest is compelling when it is fundamental to an individual.

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<sup>111</sup> LB Tremblay, “An egalitarian defence of proportionality-based balancing”, 12(4) Int'l. J. of Const. Law 864-890 (2014); FJ Urbina, “Is it Really That Easy? A Critique of Proportionality and ‘Balancing as Reasoning’”, 27(1) Canadian Journal of Law & Jurisprudence 167-192 (2014).

<sup>112</sup> J Rivers, “Proportionality and Variable Intensity of Review”, 65 Cambridge Law Journal 174-207 (2006).

<sup>113</sup> D Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence”, 57 University of Toronto Law Journal 383-397 (2007).

<sup>114</sup> Aparna Chandra, “Proportionality in India: A bridge to Nowhere”, 3(2) University of Oxford Human Rights Hub Journal, available at: <https://ohrh.law.ox.ac.uk/wp-content/uploads/2021/04/U-of-OxHRH-J-Proportionality-in-India-1.pdf>. (last visited on Jan. 10, 2024).

<sup>115</sup> G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007).



Reputation as a right has been dear to an individual since time immemorial.<sup>116</sup> In early times, the purpose of giving punishment also included the offence of defaming the person as it directly affected the right to reputation of that individual. It is of no question that fundamental rights are not absolute and a sensitive right of speech and expression cannot be given absolute interpretation as an individual cannot be permitted to say anything regardless the circumstances.<sup>117</sup> Therefore, it can be said that the right to reputation is a compelling and legitimate interest which makes it justifiable to restrict the freedom of speech reasonably. The second test talks about the modus operandi which has been used to limit the right. The element beneath the suitability test is that there must be a reasonable nexus between the right and the restriction. As far as the concept of restriction is concerned, the judiciary has specifically mentioned in judgments that the restriction must be reasonable. Article 19(2) contains the limitation of freedom of speech and overtly lays down defamation as a restriction of the freedom of speech. The courts have also justified the nexus and have stated that the State, in pursuit of protection and preservation of the reputation of an individual, has kept the provision under Section 499 IPC as part of the criminal law. It has also been held that the fundamental point is the permissibility of criminal defamation explicitly acting as a justifiable reasonable restriction under Article 19(2) of the Constitution.<sup>118</sup>

3.51. Thereafter comes the ‘necessity test’, wherein it has to be shown that the measure is necessary in order to achieve the legitimate interest, i.e., the measure of criminal defamation as a restriction is necessary to protect the

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<sup>116</sup> Grégoire Webber, “Proportionality and Limitations on Freedom of Speech”, Queen’s Law Research Paper Series 2019.

<sup>117</sup> Laurent B. Frantz, “Is The First Amendment Law? A Reply to Professor Mendelson”, 51(4) California Law Review 750 (1963).

<sup>118</sup> *Mohd Arif alias Ashfaq v. Registrar, Supreme Court of India and Others*, (2014) 9 SCC 737.



right of reputation of an individual. This comes down to proving the necessity of criminal defamation for restoring the harm caused to one's reputation. The court in *Subramanian Swamy v. Union Of India*, have upheld the constitutional validity of criminal defamation stating that criminal defamation is a valid provision which does not unreasonably restrict the fundamental right of speech. The petitioner in the aforementioned case had drawn attention towards a bunch of judgments wherein the Supreme Court had examined on the question of validity of defamation laws in India.<sup>119</sup> The relevant concepts for the consideration of the court were the ideas of defamation vis-à-vis reputation, freedom of speech and expression and reasonable restrictions. The two questions that needed to be considered were whether criminal defamation was an undue constraint on the right to freedom of speech and expression and whether the criminal defamation laws included in sections 499 and 500 are **arbitrary** because of their **ambiguous language**. The absence of **public harm** in criminal defamation was also an argument put forward for decriminalization of the offence. The court, while deciding the issue, held that right to reputation is a fundamental aspect of Article 21 and the restrictions under Article 19(2) are necessary to strike a balance between the two fundamental rights. Further, the court held that the defamation of an individual is a **public wrong** as what affects the individual affects society as a whole. Hence, it is valid to treat defamation as a public wrong. It held that criminal defamation is not a disproportionate restriction on free speech, because protection of reputation is a fundamental right as well as a human right. The court observed:

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<sup>119</sup> *R.R. Gopal & Another v. State of Tamil Nadu & Others*, (1994) 6 SCC 632; *N. Ravi & Others v. Union of India & Others*, (2007) 15 SCC 631.



*"Protection of reputation is a fundamental right, it is also a human right. (.....) Reputation of a person was intrinsic to most precious right to life guaranteed under Article 21 and for its protection, Parliament has kept intact Sections 499 and 500 of IPC. Cumulatively, it serves social interest. Each person is entitled to dignity of person and of reputation. Nobody has a right to denigrate others' right to person or reputation."*

3.52. Therefore, the Court concluded that section 499 is not an excessive restriction on the fundamental right to freedom of speech and expression by observing that, "*It is extremely difficult to subscribe to the view that criminal defamation has a chilling effect on the freedom of speech and expression.*"

3.53. Further, the Court held that Sections 499 and 500 of IPC are not vaguely worded or ambiguous. Using the Constituent Assembly Debates to understand what the framers of the Constitution meant by the word "defamation" in Article 19(2), the Court held that the word has its own independent identity. It stands alone and defamation laws have to be understood as they were when the Constitution came into force.

#### **4. JUDICIAL PRECEDENTS**

- 4.1. Defamation is the wrong done by a person to another's reputation by words, signs, or visible representations. A statement or representation is defamatory when it can injure a person's reputation. A defamatory statement is one which exposes a person to contempt, hatred or ridicule, or tends to injure him in his profession or trade, or causes him to be shunned or avoided by his neighbours or society.<sup>120</sup>
- 4.2. The constitutionality of laws surrounding criminal defamation has been questioned several times at the touchstone of freedom of speech and expression.
- 4.3. The right of freedom of speech and expression shares the stage with another indispensable facet of the Constitution, the right to reputation. The Supreme Court has time and again reiterated the importance and significance of right to reputation as a very integral part of a person's right to life under Article 21. In fact, the right to reputation has always been considered higher than life from time immemorial, across cultures in the oldest known texts.<sup>121</sup>
- 4.4. In *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni*<sup>122</sup>, it has been ruled that right to reputation is a facet of right to life of a citizen under Article 21 of the Constitution.

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<sup>120</sup> *J. Sudhir Chandrashekhar v. T. Lokaprakash*, 2001 SCC OnLine Kar 210.

<sup>121</sup> *Subramanian Swamy v. Union of India & Ors.*, (2016) 7 SCC 221.

<sup>122</sup> (1983) 1 SCC 124.



- 4.5. In the case of *Kiran Bedi v. Committee of Inquiry*<sup>123</sup>, the Supreme Court while observing that the reason for the importance attached with regard to the matter of safeguarding the reputation of a person being prejudicially affected is not far to seek, reproduced a passage from *D.F. Marion v. Davis*<sup>124</sup>:

*"25. ... The right to the enjoyment of a private reputation, unassailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property."*

- 4.6. However, in *R. Rajagopal v. State of Tamil Nadu*<sup>125</sup>, the Supreme Court tried to find a balance between the freedom of press and the right to privacy. In this case, the prison authorities forcibly tried to prevent a magazine from publishing an autobiography written by a prisoner. The court concluded that the magazine had the right to publish the autobiography, and that the state can't place prior restrictions on the publication of materials that may defame the state. The court stated that:

*"Applying the above principles, it must be held that the petitioners have a right to publish, what they allege to be the life story/autobiography of Auto Shankar inssofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication."*

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<sup>123</sup> (1989) 1 SCC 494.

<sup>124</sup> (1927) 55 ALR 171 (Alabama).

<sup>125</sup> (1994) 6 SCC 632.



- 4.7. The court also noted that the remedy of the affected public officials/public figures, if any, is to sue for defamation after the article is published.
- 4.8. Then, in *R. Rajagopal v. J. Jayalalitha*<sup>126</sup>, the Madras High Court emphasised on the fundamental right to freedom of speech against public officials temporarily conducting the affairs of the government. The court observed that:
- "In a free democratic society those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind."*
- 4.9. Similarly, in *Petronet Lng Ltd. v. Indian Petro Group*<sup>127</sup>, the plaintiff's request for a permanent injunction prohibiting the defendant news provider from publishing confidential or deceptive material was denied by the Delhi High Court. The plaintiff claimed that its right to confidentiality of information and privacy had been violated. The Court denied the plaintiff's claim for privacy, ruling that even if the plaintiff had a right to confidentiality of information, publications by defendant were protected speech and could not be suppressed by an injunction. According to the Court, it was necessary to "carry out a balancing operation, weighing the public interest in maintaining confidence about a countervailing public interest favouring disclosure."

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<sup>126</sup> AIR 2006 Mad 312.

<sup>127</sup> (2009) 158 DLT 759.



4.10. But then, in *Vishwanath Agrawal v. Sarla Vishwanath Agrawal*<sup>128</sup>, although in a different context, while emphasising on the importance of right to reputation, the Supreme Court observed as follows,

*“.....reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity.”*

4.11. In 2015, in *Shreya Singhal v. Union of India*<sup>129</sup>, the Supreme Court while striking down Section 66A<sup>130</sup> of the Information Technology Act, 2000 in its entirety on the ground that it is violative of provisions of Article 19(1)(a) and not protected under Article 19(2) of the Constitution, attempted to strike a compromise between the rights protected by Article 19(1)(a) and the reasonable limitations allowed by Article 19(2). The Supreme Court noted in its judgement that “*when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme.*”

4.12. The conflict between freedom of speech and expression and defamation was finally adjudicated by a two-judge bench of the Supreme Court in *Subramanian Swamy v. Union of India*<sup>131</sup>, wherein the Court upheld Sections 499 and 500 of IPC that defines the offence of defamation and provides punishment for it, respectively. The Court held that defamation is

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<sup>128</sup> (2012) 7 SCC 288.

<sup>129</sup> AIR 2015 SC 1523.

<sup>130</sup> Section 66(A) of the Act penalised the sending of offensive messages through a computer or other communication devices. Under this provision, *any person who by means of a computer or communication device sends any information that is: grossly offensive; false and meant for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will; meant to deceive or mislead the recipient about the origin of such messages, etc., shall be punishable with imprisonment up to three years and with fine.*

<sup>131</sup> (2016) 7 SCC 221.

a reasonable restriction on the right to freedom of speech and expression under Article 19(2) of the Constitution of India. The Court, commenting on right to reputation being a part of Article 21, stated that:

*"Reputation being an inherent component of Article 21, we do not think it should be allowed to be sullied solely because another individual can have its freedom. It is not a restriction that has an inevitable consequence which impairs circulation of thought and ideas..... the balance between the two rights needs to be struck. "Reputation" of one cannot be allowed to be crucified at the altar of the other's right of free speech."*<sup>132</sup>

- 4.13. Laws surrounding defamation maintain this delicate equilibrium by penalising those who, under the guise of exercising free speech, damage the reputation of another, and concurrently, protecting those who communicate truth or make statements in good faith or public good.
- 4.14. In *Subramanian Swamy v. Union of India*<sup>133</sup>, several politicians who had been charged with the offence of criminal defamation had filed petitions under Article 32 of the Constitution of India challenging the same as provided in Sections 499 and 500 of the Indian Penal Code, 1860 and Sections 199(1) to (4) of the Code of Criminal Procedure, 1973, arguing that it inhibited their right to freedom of speech and expression.
- 4.15. The judgment was delivered by Dipak Misra, J. with whom Prafulla C. Pant, J. concurred. The court analysed the terms 'defamation' and 'reputation' and observed that:

*"Reputation has its innate universal value. It is a cherished constituent of life and is not limited or restricted by*

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<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*



*time.....International covenants explicate that individual honour and reputation is of great value to human existence being attached to dignity and all constitute an inalienable part of a complete human being.”*

- 4.16. The Court found that the concept of ‘defamation’ was included in the protection of ‘dignity’, which was part of right to life under Article 21 of the Constitution of India.
- 4.17. The Supreme Court also recognized the sanctity and significance of the right to freedom of speech and expression as a highly treasured value under the Constitution and that the voice and dissent or disagreement has to be respected and not to be regarded as unpalatable criticism. However, the Court further pointed out that as all rights, right to freedom of speech and expression is not absolute and is subject to reasonable restrictions. Such restrictions should not be excessive and must be in public interest. The legislation by which restrictions are imposed should not invade the rights and should not smack of arbitrariness.<sup>134</sup>
- 4.18. Recognising the necessity to balance fundamental rights, the court observed that:

*“It is the duty of the Court to strike a balance so that the values are sustained..... We have already held that reputation is an inextricable aspect of right to life under Article 21 of the Constitution and the State in order to sustain and protect the said reputation of an individual has kept the provision under Section 499 IPC alive as a part of law..... It is an individual’s fundamental right and, therefore, balancing of fundamental right is imperative. In the name of freedom of speech and expression, the right of another cannot be jeopardised.”* It was further stated that, “Reputation being an inherent component of Article 21, we do not think it should be

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<sup>134</sup> *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221.



*allowed to be sullied solely because another individual can have its freedom. It is not a restriction that has an inevitable consequence which impairs circulation of thought and ideas. In fact, it is control regard being had to another person's right to go to court and state that he has been wronged and abused. He can take recourse to a procedure recognised and accepted in law to retrieve and redeem his reputation. Therefore, the balance between the two rights needs to be struck. "Reputation" of one cannot be allowed to be crucified at the altar of the other's right of free speech. The legislature in its wisdom has not thought it appropriate to abolish criminality of defamation in the obtaining social climate."*<sup>135</sup>

4.19. The Court observed that the legislature has kept criminal defamation on the statute book as in the existing social climate, it subserves the collective interest because reputation of each is ultimately inhered in the reputation of all.

4.20. The Court also addressed the question as to whether the criminal defamation provisions were vague or arbitrary, and after examining the Explanations to Section 499, concluded that these were neither vague nor ambiguous:

*"Court can strike down a provision, if it is excessive, unreasonable or disproportionate, but the Court cannot strike down a provision, if it is unnecessary or unwarranted. .... Reasonableness is examined in an objective manner from the standpoint of the interest of the general public and not from the point of view of the person upon whom restrictions are imposed. .... Criminal defamation law in form of Section 499 and 500 IPC is not a restriction on free speech that can be characterised as disproportionate. Right to free speech cannot mean that a citizen can defame others."*

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<sup>135</sup> *Ibid.*

4.21. The Madras High Court, in *Grievances Redressal Officer, Economic Times v. V.V. Minerals Pvt. Ltd.*<sup>136</sup>, sought to limit the use of criminal defamation as a tool to stifle free speech. The court made note of the importance of freedom of press and the function of higher judiciary as the defender of rights. In this judgment, the Court referred to the judgment of US Supreme Court in *New York Times v. Sullivan*<sup>137</sup> in which it was held that an error does not make a statement defamatory unless accompanied by actual malice, i.e., unless it is made in a malicious manner. The US Supreme Court also emphasised on the fact that “*free speech needs a breathing space to make error and mistakes*”, which is important for democracy.

4.22. However, recently, the Delhi High Court in *Vinai Kumar Saxena v. Aam Aadmi Party*<sup>138</sup>, followed the judgment in *Subramanian Swamy v. Union of India*<sup>139</sup>, and held that the fundamental right to freedom of speech has to be counterbalanced with the right of reputation. The Court stated that:

*“Article 19(1)(a) of the Constitution afford the right of freedom of speech and expression to all persons. However, the same is subject to restrictions under Article 19(2), which includes defamation. Therefore, the right to freedom of speech and expression is not an unfettered right in the garb of which defamatory statements can be made to tarnish the reputation of a person. The fundamental right to freedom of speech has to be counterbalanced with the right of reputation of an individual, which has been held to be a basic element of the right to life consecrated in Article 21 of the Constitution of India.”*

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<sup>136</sup> 2020 (3) M.L.J. (Crl) 241.

<sup>137</sup> 376 U.S. 254, 270.

<sup>138</sup> 2022 SCC OnLine Del 3093.

<sup>139</sup> *Ibid.*

- 4.23. The law of defamation aims at safeguarding the reputation of an individual in society. The examination of judgments pertaining to criminal defamation underscores the intricate balance between protecting freedom of expression and safeguarding an individual's right to reputation. The right to reputation has been upheld as an inherent facet of human dignity at multiple instances. While the courts have emphasised upon the importance of freedom of speech and expression in a democratic society in a multitude of judgments, they have also acknowledged the potential harm caused by defamatory statements, stressing upon the need for accountability and responsibility in speech.
- 4.24. The law of criminal defamation provides a legal mechanism which can be initiated by a person when his right to reputation and dignity is violated by the malafides of any person, and therefore, it is important to provide penal consequences and liability for such person who violates the dignity and reputation of an individual, and along with that disturbs the peace in the society. Through a nuanced analysis, it becomes evident that criminalizing defamation serves as a crucial deterrent against malicious or false statements that could severely damage one's reputation, social standing, and livelihood.
- 4.25. Further, while advocating for freedom of expression, courts have reiterated that this freedom is not absolute and must not infringe upon the fundamental right of individuals to protect their reputation from unwarranted attacks. Criminalizing defamation acts as a deterrent against the misuse of speech to spread falsehoods or engage in character assassination, thereby fostering a more responsible exercise of free speech.

A handwritten signature in blue ink, appearing to read "Dinesh".

4.26. In essence, the above analysis reinforces the necessity of the offence of criminal defamation, highlighting the intrinsic connection between protecting one's reputation and maintaining societal harmony. It underscores the significance of balancing rights, emphasizing the need for legal measures that deter defamation while safeguarding freedom of expression within reasonable bounds. This holistic approach aligns with the broader objective of preserving the dignity and integrity of individuals in a democratic society.

A handwritten signature in blue ink, appearing to be a stylized 'R' or a similar character, followed by a horizontal line.

## **5. COMPARATIVE ANALYSIS OF CRIMINAL DEFAMATION LAWS**

- 5.1. The issue of criminal defamation embodies the delicate balance between protecting an individual's reputation and ensuring the unfettered flow of information and expression. As societies navigate through their cultural, legal, and social norms, the treatment of defamation as a criminal offence remains a contentious and multifaceted subject.
- 5.2. Across continents and cultures, nations have devised distinctive approaches to tackle defamatory acts. The global landscape boasts a spectrum of legal nuances, from stringent criminalization in certain countries like Germany, to decriminalisation in countries like United Kingdom, Australia and New Zealand, and to a more balanced interplay between civil and criminal aspects in Italy. While India grapples with debates surrounding the conflict of defamation laws and free speech, Japan showcases a more rigorous example of maintaining the delicate balance between individual reputation and freedom of expression.
- 5.3. Examining these divergent approaches reveals different thresholds and criteria for criminalizing defamation. From penalties and sanctions to the role of intention, truth as a defence, and considerations of public interest, each legal system paints a unique picture, shaping the contours of legal provisions on defamation.
- 5.4. This Chapter endeavours to explore criminal defamation provisions within select countries, where defamation constitutes a criminal offence. Through this exploration, it seeks to elucidate the definition, punitive measures, and handling of criminal defamation cases, providing a comprehensive

understanding of the legal foundations underpinning the criminalization of defamation and its consequential effects. This Chapter will also deal with countries which have totally or partially decriminalised defamation.

#### A. Countries Having Legal Provisions on Criminal Defamation

##### i. Japan

- 5.5. The Japanese Constitution promises freedom of speech under Article XXI. It provides that, "*freedom of... speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.*"<sup>140</sup>
- 5.6. The Japanese law treats defamation on the basis of the effect it has on reducing respect for the individual in the community, or lowering the person in the estimation of others.<sup>141</sup> This treatment is based on Japan's cultural emphasis on group cohesion over personal autonomy, which is evident in the remedies available to the injured parties under Japanese law, including public apology.<sup>142</sup>
- 5.7. Japan operates under a civil law system,<sup>143</sup> hence, defamation and libel receive detailed attention under both the Japanese Civil and Criminal Codes.

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<sup>140</sup> The Constitution of Japan, art. XXI.

<sup>141</sup> Masao Horibe, "Press Law in Japan" in Pnina Lahav Press Law in Modern Democracies: A Comparative Study 315, 334 (1985).

<sup>142</sup> Ellen M. Smith, "Reporting the Truth and Setting the Record Straight: An Analysis of U.S. and Japanese Libel Laws", 14 Mich. J. Int'l. L. 871 (1993).

<sup>143</sup> Hiroshi Itoh & Lawrence W. Beer (eds.), *The Constitutional Case Law of Japan: Selected Supreme Court Decisions: 1961-70*, 8 (University of Washington Press, 1978). Japan's pre-1945 Constitution and laws were heavily influenced by the French and German legal traditions. The country's present judicial system was designed by U.S. and Japanese Occupation agencies after World War II.



- 5.8. The Japanese Penal Code holds the defamer strictly liable for defamation, regardless of the circumstances.<sup>144</sup> Under Article 230, paragraph 1 of the Japanese Penal Code, it is provided that, “*a person who defames another person by making allegations in public, regardless of whether such facts are true or false, is punished by imprisonment or imprisonment without work for not more than 3 years or a fine of not more than 500,000 yen.*”<sup>145</sup>
- 5.9. In 1969, the Supreme Court of Japan in *Kochi v. Japan*<sup>146</sup> tried to harmonize Article 230 of the Japanese Penal Code with the guarantee of legitimate speech under Article XXI of the Japanese Constitution. It held that the press could avoid punishment for defamation on showing that it had a reasonable belief that the statements were true, in light of the surrounding circumstances. In other words, the courts will not impute criminal intent, and therefore will not find criminal liability, if the media defendant can prove that it believed that the libelous statements regarding public matters were true,<sup>147</sup> and had made a good faith effort to ensure they were in fact true.
- 5.10. Punishments for defamation were made more stringent in June 2022 by amendments in the Criminal Code of Japan. These amendments enhanced the punishment for the offence of insults. A person who insults another person in public, whether the accusation alleges facts or not, can be jailed for up to one year or fined 300,000 yen, or a detention or a fine.<sup>148</sup> It is a significant increase from the former punishment of detention for fewer than 30 days and a fine of up to 10,000 yen.

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<sup>144</sup> *Supra* note 141.

<sup>145</sup> Penal Code (Act no. 45 of 1907), art. 230, para. 1.

<sup>146</sup> *Kochi v. Japan*, Saikosai [Supreme Court], 23 Keishu 7, Judgment of June 25, 1969.

<sup>147</sup> *Id.* at 259.

<sup>148</sup> Penal Code (Act no. 45 of 1907), art. 231.



5.11. The distinction between defamation and insult crimes lies in whether the act constituting offence involves stating factual information. Initially, the severity of harm to an individual's reputation determined the heavier statutory punishment for defamation. However, looking at the actual situation of slanderous acts that damage a person's honour on the internet, imposing significantly different punishments based on factual assertions came to be considered inappropriate. Consequently, to deal strictly with particularly malicious insults, the statutory punishment for insult crimes was increased to align with the punishment prescribed for defamation. However, detention and fines remain prescribed penalties, aiming not to punish all insults uniformly heavily, including those with low malice.

## ii. China

5.12. Defamation laws in China are predominantly regulated through both civil and criminal law statutes, emphasizing the protection of individual reputations and societal harmony.

5.13. The Constitution of People's Republic of China confers on citizens the right to protect one's reputation, wherein the personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited under the same.<sup>149</sup> Further, right to privacy is also guaranteed whereby the freedom and privacy of correspondence of citizens is protected by law. Individuals and organizations are prohibited from infringing the freedom and privacy of citizens' correspondence except to meet the needs of state security or of investigation into criminal offences, public security.<sup>150</sup>

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<sup>149</sup> Constitution of People's Republic of China (PRC), art. 38.

<sup>150</sup> Constitution of PRC, art. 40.



- 5.14. Under the Chinese Penal Code, defamation is deemed a criminal offence, encompassing acts that harm an individual's reputation through false information or statements. Those who openly insult others by violence or other means or fabricate facts to slander others, if the circumstances are serious, are liable to a sentence of fixed-term imprisonment of not more than three years, criminal detention, public surveillance, or deprivation of political rights.<sup>151</sup> The severity of penalties often correlates with the perceived impact on social stability and public order.
- 5.15. These provisions aim to safeguard public order and social stability, reflecting the state's emphasis on maintaining social harmony. It is pertinent to note that both online and offline defamation constitute criminal offences in China.
- 5.16. Intent plays a crucial role in determining culpability in defamation cases. Accusations deemed intentionally malicious or harmful to societal harmony carry more significant penalties. Verification of truth as a defence is also available, however it is not a complete defence. Even if the information is accurate or not completely false, it must not contain words that are outrageously insulting.<sup>152</sup>

### iii. Canada

- 5.17. Canada's Criminal Code contains provisions criminalizing blasphemous libel<sup>153</sup> and defamatory libel<sup>154</sup>. Section 298(1) of the Canadian Criminal

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<sup>151</sup> Criminal Law of PRC 1997, art. 246.

<sup>152</sup> Henry Liao, Danhua Huang et.al., "Protecting Reputation Rights from Online Defamation: China" Thomson Reuters, Jan 1, 2020 *available at:* <http://www.schindlerslaw.com/uploads/uploads/file/2020/01/21/c56643e8be38b2c561b51b615cdf8220.pdf> (last visited on Jan. 29, 2024).

<sup>153</sup> Canada Criminal Code (R.S.C., 1985, c. C-46), § 296.

<sup>154</sup> Canada Criminal Code (R.S.C., 1985, c. C-46), § 298.



Code describes ‘defamatory libel’ as a “*matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.*”<sup>155</sup> A defamatory libel is punishable by up to two years in prison, or up to five years where the person publishes a defamatory libel that he knows is false.<sup>156</sup>

5.18. In addition to general defences (e.g., duress) available to defendants, the Criminal Code establishes a number of defences against claims of defamatory libel, including truth<sup>157</sup>, absolute privilege, which normally applies to the communication between state officials<sup>158</sup> and also includes publication and fair reporting of the proceedings of the courts or parliamentary papers, qualified privilege, if the publication was invited or necessary, provides answers to inquiries or gives information to interested persons<sup>159</sup> for public benefit<sup>160</sup>, fair comment on a public person or a work of art<sup>161</sup>, and publication in good faith for the redress of a wrong<sup>162</sup>.

5.19. Canada’s criminal defamation laws have a very broad application, without making any distinction between media so long as the libelous information was exhibited in public, or it was caused to be read or seen, or shown to (or intended to be shown to), the person whom it defames or any other person.<sup>163</sup>

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<sup>155</sup> Canada Criminal Code (R.S.C., 1985, c. C-46), § 298.

<sup>156</sup> Canada Criminal Code (R.S.C., 1985, c. C-46), § 300-301.

<sup>157</sup> Canada Criminal Code (R.S.C., 1985, c. C-46), § 311.

<sup>158</sup> *Dowson v. Canada*, [1981] F.C.J. No. 426, at para 15.

<sup>159</sup> Canada Criminal Code (R.S.C., 1985, c. C-46), § 315.

<sup>160</sup> Canada Criminal Code (R.S.C., 1985, c. C-46), § 309.

<sup>161</sup> Canada Criminal Code (R.S.C., 1985, c. C-46), § 310.

<sup>162</sup> Canada Criminal Code (R.S.C., 1985, c. C-46), § 312-314.

<sup>163</sup> Canada Criminal Code (R.S.C., 1985, c. C-46), § 312-314.

5.20. In 1982, the Canadian Charter of Rights and Freedoms was enacted which provided the right to freedom of expression under Section 2(b) which also includes the freedom of the press and other media of communication.<sup>164</sup> In 1984, in the wake of the adoption of the Canadian Charter of Rights and Freedoms, the Law Reform Commission of Canada published Working Paper 35 on Defamatory Libel, advocating a complete abolition of defamatory libel from the Canadian Criminal Code. The Canadian Supreme Court, however, found criminal defamation (libel known to be false) to be consistent with the requirements of the Canadian Charter of Rights and Freedoms, so long as the action required proof "beyond a reasonable doubt that the accused intended to defame the victim."<sup>165</sup>

5.21. Regarding the objective of the defamation provision, it was found that reputation protection was part of the purpose. On the point whether this offence is minimally impairing of the freedom of expression, it was held that the various limits on the offence including the requirement of subjective intent to defame makes it less impairing, and it was easily outweighed by the reputational objective.<sup>166</sup>

5.22. The Supreme Court of Canada, in the landmark decision of *Grant vs Torstar Corp*<sup>167</sup>, held that "freedom of expression" is not absolute. One limitation on free expression is the law of defamation, which protects a person's reputation from unjustified assault. However, the Court held that the law of defamation does not forbid people from expressing themselves. It merely provides that if a person defames another, that person may be

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<sup>164</sup> The Canadian Charter of Rights and Freedoms, § 2(b).

<sup>165</sup> *R. v. Lucas*, [1998] 1 S.C.R. 439, para 68.

<sup>166</sup> *R. v. Stevens*, [1995] 4 WWR 153 (Man CA).

<sup>167</sup> (2009) 3 SCR 640.



required to pay damages to the other for the harm caused to other's reputation.<sup>168</sup>

#### iv. European Countries

- 5.23. In majority of the European nations, defamation laws serve a singular and crucial role: safeguarding an individual's right to reputation, i.e., the esteem in which one is justifiably held among one's peers or the public. This principle resonates deeply in how criminal defamation is defined within the legal frameworks of these countries. Subjectively, those targeted by false and malicious accusations face substantial emotional, personal, and vocational consequences. Without a fair opportunity to adequately respond to these allegations, they might be wrongly mistrusted or shunned by their community, or denied opportunities that they otherwise deserve.
- 5.24. In the European Union, out of the 27 member States, only four (Cyprus, Ireland, Malta and Romania) have decriminalized defamation; but even among those that have done so, Cyprus still has some sort of defamation-related criminal offence in force<sup>169</sup>. In Cyprus, insulting the armed forces<sup>170</sup>, foreign heads of state<sup>171</sup> and libel against the memory of the deceased<sup>172</sup> still remain criminal offences.
- 5.25. Among the 23 EU states where defamation still stands as a criminal offence, 20 nations retain the option of imprisonment as a potential

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<sup>168</sup> *Thiru N. Ram v. Union of India* 2020 (3) M.L.J. (Crl) 289.

<sup>169</sup> Centre for Media Pluralism and Media Freedom, "Decriminalisation of Defamation" (January 2019), available at: [https://cmpf.eui.eu/wp-content/uploads/2019/01/decriminalisation-of-defamation\\_Infographic.pdf](https://cmpf.eui.eu/wp-content/uploads/2019/01/decriminalisation-of-defamation_Infographic.pdf). (last visited on Jan. 11, 2024).

<sup>170</sup> Cyprus Criminal Code, art. 50D.

<sup>171</sup> Cyprus Criminal Code, art. 68.

<sup>172</sup> Cyprus Criminal Code, art. 202A.



punishment. Notably, Bulgaria, Croatia, and France deviate from this norm by imposing fines instead. On an average, the highest possible term of imprisonment permissible for defamation across EU states is two years<sup>173</sup>. However, imprisonment is not the only punishment that remains on the books. In select European nations, individuals convicted of defamation may, under certain circumstances, face deprivation of political rights—such as right to elect the members of general representative bodies and to be elected as members of these bodies or hold public office (e.g., the Netherlands, Spain)—or the loss of the right to practice a particular profession, as seen in cases within Bulgaria and the Netherlands, for instance.

5.26. The table below outlines a compilation of few European countries where criminal defamation is an offence, detailing the legal definitions of the offence and the corresponding punitive measures.

<b>Country</b>	<b>Criminal Defamation Provision</b>	<b>Legal Definition</b>	<b>Punishment</b>
Austria	Defamation ( <i>üble Nachrede</i> ) <sup>174</sup>	Accusing someone of a disreputable characteristic or disposition, dishonourable behaviour or of a behaviour offensive to good morals that may denigrate that person or bring him/her into	Imprisonment up to six months or fine; (For defamation committed through print, broadcasting “ <i>or by any other means by which the defamatory content is made accessible to a wider public</i> ”, the

<sup>173</sup> International Press Institute, “Out of Balance: Defamation Law in the European Union: A Comparative Overview for Journalists, Civil Society and Policymakers”, (January 2015).

<sup>174</sup> Austrian Criminal Code (*Strafgesetzbuch*), § 111.



		disrepute in the eyes of the public.	possible punishment is up to one year and fine).
Czech Republic	Defamation <sup>175</sup>	Communication of false information about another person that is capable of seriously endangering his reputation among fellow citizens, in particular, harming him at work, and disrupting his family relationships or causing him some other serious harm.	Imprisonment for up to one year (general); Imprisonment for up to two years or prohibition from practicing his profession (for defamation committed by way of media or other public manner).
Denmark	Defamation <sup>176</sup>	Violating the personal honour of another by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens.	Imprisonment for up to four months or fine (general); Imprisonment for up to two years or fine [Defamation committed in bad faith (maliciously) - If a charge is made or disseminated against better knowledge, or if the perpetrator lacked reasonable grounds to believe it to be true].
Finland	Defamation <sup>177</sup>	Spreading "false information or a false	Fine only (general); Imprisonment for up

<sup>175</sup> Czech Criminal Code, § 184.

<sup>176</sup> Danish Criminal Code, §§ 267-268.

<sup>177</sup> Finnish Criminal Code, arts. 24.9, 24.10.



		<i>insinuation of another person so that the act is conducive to causing damage or suffering to that person, or subjecting that person to contempt" or "disparaging another person in any other manner".</i>	to two years or fine (Aggravated Defamation - Act that causes "great suffering or particularly significant damage").
France	Defamation <sup>178</sup>	Any allegation or accusation of a fact that causes an attack on the honour or consideration of a person.	When directed at private persons, punishable with a fine of €12,000; When committed against public officials, maximum fine increases to €45,000.
Germany	Defamation ( <i>üble Nachrede</i> ) <sup>179</sup>	Asserting or disseminating a fact related to another person which may defame him or negatively affect public opinion about him.	Imprisonment for up to one year or fine (general); Imprisonment for up to two years can be imposed if the act is " <i>committed publicly or through dissemination of written materials</i> ".
Greece	Defamation and Slander <sup>180</sup>	Claiming or disseminating before a third party facts about another person that may	Imprisonment for up to two years or a fine or both (general); Imprisonment of at least three months or

<sup>178</sup> The Law on the Freedom of the Press of 29 July 1881, arts. 29-32 (France).

<sup>179</sup> German Criminal Code, art. 186.

<sup>180</sup> Greek Penal Code, arts. 362-363.



		harm that person's honour or reputation.	a fine (Slander - If the defamation is such in which the information was false and the perpetrator knew it to be false).
Hungary	Defamation ( <i>rágalmazás</i> ) <sup>181</sup>	Engaging in the written or oral publication of anything that is injurious to the good name or reputation of another person, or using an expression directly referring to such a fact.	Imprisonment for up to one year (general); Imprisonment for up to two years if the act of defamation is committed " <i>for a malicious motive or purpose</i> ", is published with great publicity (media), or causes " <i>considerable injury</i> " to the claimant.
Iceland	Defamation and Slander <sup>182</sup>	Defamation - Making insinuations about another person of a nature that would damage his or her reputation, or spreading such insinuations.  Slander - Making or disseminating a defamatory insinuation	Fine or imprisonment for up to one year.  Imprisonment for up to two years; If an insinuation is made or

<sup>181</sup> Hungarian Criminal Code, art. 226.

<sup>182</sup> General Penal Code, No. 19/1940, arts. 235-236 (Iceland).

		against one's better knowledge.	disseminated publicly even though the person making it had no reason to believe it to be correct, it shall be punishable by fine or imprisonment for up to two years.
Italy	Defamation <sup>183</sup>	Injuring the reputation of an absent person via communication with others.	Imprisonment for up to one year or fine of up to €1,032 (general); If the act of insult or defamation consists in allegation of a specific fact, the punishment is increased to imprisonment for up to two years or a fine of up to €2,065; If defamation is committed by means of press or otherwise publicly, the punishment is a fine of at least €516 or imprisonment from six months to three years.
Lithuania	Libel <sup>184</sup>	Spreading of " <i>false information about another person that could arouse contempt</i>	Imprisonment for up to one year or fine.

<sup>183</sup> Italian Penal Code, art. 595.

<sup>184</sup> The Criminal Code of Republic of Lithuania, art. 154.

		<i>for this person or humiliate him or undermine trust in him".</i>	
Netherlands	Slander ( <i>smaad</i> ), Libel ( <i>smaadschrift</i> ) and Aggravated Defamation ( <i>laster</i> ) <sup>185</sup>	<p>Slander - Intentionally harming a person's honour or reputation through the allegation of a particular fact with the aim of making that fact public.</p> <p>Libel - An act of defamation that occurs by means of publicly accessible writing or images.</p> <p>Aggravated Defamation - An act of slander or libel in which the offender knows that the statement or assertion in question is false.</p>	<p>Fine or imprisonment for up to six months.</p> <p>Fine or imprisonment for up to one year.</p> <p>Fine or imprisonment for up to two years.</p>
Poland	Defamation <sup>186</sup>	Imputing " <i>to another person, a group of persons, an institution or organisational unit, conduct or characteristics that may discredit them in the face of public opinion</i> ".	<p>Fine or restriction of liberty (general);</p> <p>Fine or restriction of liberty or imprisonment for up to one year, if offence committed through mass media.</p>
Portugal	Defamation ( <i>difamação</i> ) <sup>187</sup>	Alleging a fact or formulating a judgment (or reproducing such)	Imprisonment for maximum six

<sup>185</sup> Dutch Penal Code, arts. 261-262.

<sup>186</sup> Polish Penal Code, art. 212.

<sup>187</sup> Portuguese Penal Code, arts. 180, 183.

		<p>about a third person that is offensive to that person's honour or reputation.</p>	<p>months or fine (general);</p> <p>If the act concerns allegation of a particular fact that the offender knows to be untrue or committed with publicity, the penalty is increased by one-third;</p> <p>If the act is committed through media, the punishment is increased to imprisonment for up to two years or fine.</p>
Slovakia	Defamation <sup>188</sup>	<p>Communicating false information about another person that can seriously damage the person's reputation among fellow citizens, the person's career, business, and/or family relations, or cause the person serious harm.</p>	<p>Imprisonment for up to two years (general);</p> <p>If the act of defamation causes substantial damage, the maximum term of imprisonment is increased to five years;</p> <p>If the act results in large-scale damage, loss of employment, or divorce, the offender faces imprisonment for a</p>

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<sup>188</sup> Slovak Penal Code, sec. 373.

			term of three to eight years.
Slovenia	Defamation, and Slander <sup>189</sup>	<p>Slander - Asserting or circulating something about another person, capable of causing damage to the honour or reputation of that person.</p> <p>Defamation - Asserting or circulating something untrue about another person, capable of causing damage to the honour or reputation of that person, knowing that what he claims or spreads is untrue.</p>	<p>Fine or imprisonment for up to three months (general); If the offence is committed via media, it is punishable by fine or imprisonment for up to six months; If the offence had “grave consequences” for the offended party, the maximum punishment increases to imprisonment for up to one year.</p> <p>Fine or imprisonment for up to six months (general); If the offence is committed via media, it is punishable by fine or imprisonment for up to one year; If the offence had “grave consequences” for the offended party,</p>

<sup>189</sup> Slovenian Criminal Code, arts. 159-160.

			the maximum punishment increases to imprisonment for up to two years.
Turkey	Insult <sup>190</sup>	Attributing an act, or fact, to a person in a manner that may impugn that person's honour, dignity or prestige, or attacking someone's honour, dignity or prestige by swearing.	Imprisonment for three months to two years or a judicial fine (general); If the act is directed against a public officer due to performance of his public duty, or committed in response to a person's religious, political, social, or philosophical beliefs, the term of imprisonment to be imposed shall not be less than one year.

#### B. Countries where Defamation has been Decriminalised

5.27. Defamation laws may serve as crucial safeguards against false statements harming someone's reputation, but they can also be misused easily. Criminalisation of defamation might jeopardize freedom of expression, and may produce a 'chilling effect' on journalistic freedom. Instead, journalists and media should be able to operate and perform their duties without any fear<sup>191</sup>. With this aim in mind, since 1990s, a lot of countries

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<sup>190</sup> Turkish Criminal Code, art. 125.

<sup>191</sup> *Supra* note 169.



have decriminalised defamation provisions. United Kingdom, from where India has borrowed most of its law, itself repealed criminal defamation law in 2009. Few other countries which have decriminalised defamation include Cyprus, Ireland, Malta, Romania, Australia, New Zealand, Ukraine, Sri Lanka, Maldives, Norway, Zimbabwe and Kenya.

- 5.28. The **United States of America** does not have any uniform criminal defamation law. There is no criminal defamation law at the federal level. Each of its states as well as the District of Columbia, have their own set of laws, which include a corpus of tort law that is mostly based on Common Law but has been altered by state legislation and judicial oversight. Nonetheless, the American constitution severely limits each state's ability to customise its defamation laws. The First Amendment of the US Constitution<sup>192</sup> guaranteed freedom of speech and freedom of press, and thus, provided a protection against defamation charges, but the same was not used much in defamation cases until 1964, when in *New York Times Co. v. Sullivan*<sup>193</sup>, the Supreme Court of USA established that a public officials' ability to file a defamation lawsuit is limited by the First Amendment's safeguards for free expression. In order to succeed, a public official must not only prove the normal essentials of defamation but also that the media outlet either knew that the information was wholly false or that it was published with disregard to its truth or falsity. In 1966, the United States Supreme Court held that most criminal libel laws violated the First Amendment protection of free speech in *Ashton v. Kentucky*.<sup>194</sup> In some its states and territories, the criminal defamation laws at the state level have either been repealed or struck down as unconstitutional.

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<sup>192</sup> The Constitution of the United States of America, Amendment I.

<sup>193</sup> 376 U.S. 254.

<sup>194</sup> *Ashton v. Kentucky*; 384 U.S. 195 (1966).



- 5.29. The **United Kingdom** decriminalised defamation laws in 2009 by an amendment in the Coroners and Justice Act, 2009 which also repealed criminal offences of seditious libel, defamatory libel, and obscene libel in England, Wales and Northern Ireland.<sup>195</sup> The Act was justified based on the argument that criminalization of defamation provisions had set an example for other countries to restrict free speech.
- 5.30. **Sri Lanka** became one of the first countries in Asia to decriminalise criminal defamation in 2002, due to strong opposition from civil society organizations, professional organizations and trade unions which advocated for full enjoyment of right to freedom of speech and expression. This movement also led the country to ratify International Covenant on Civil and Political Rights (ICCPR) and International Convention on Economic, Social and Cultural Rights (ICESCR).
- 5.31. In **Kenya**, the offence of criminal defamation was declared unconstitutional by the High Court of Kenya in *Okuta v. Attorney General*<sup>196</sup> for violating the right to freedom of expression. The court reasoned that criminalizing defamation is unnecessary if there is a civil remedy serving the same purpose. According to the court, invoking criminal defamation was “disproportionate and therefore excessive”.
- 5.32. Defamation is not a criminal offence in **Australia** and **New Zealand**. The remedy against defamation in both of these countries is a civil one. In Australia, a uniform defamation legislation was introduced in 2005 vide the Defamation Act<sup>197</sup>, 2005 by which even the distinction between libel

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<sup>195</sup> The Coroners and Justice Act 2009, § 73.

<sup>196</sup> 2017 SCC OnLine Ken 1.

<sup>197</sup> Defamation Act, Act 77 of 2005.



and slander was abolished. The offence of defamation was decriminalised in New Zealand in 1993 vide the Defamation Act of 1992<sup>198</sup>.

5.33. Some legal entities at both international and regional levels, have emphasised the significance of freedom of expression and opinion. They have also supported the call to decriminalize defamation.

5.34. The **Inter-American Court of Human Rights** has repeatedly affirmed that criminal defamation violates the freedom of expression. For instance, in the *Herrera Ulloa v. Costa Rica*<sup>199</sup>, the Court emphasized that effective freedom of expression is integral to democracy. It also noted the importance of subjecting public figures to greater scrutiny than private figures for the public interest. Moreover, in the case of *Ricardo Canese v. Paraguay*<sup>200</sup>, the Court highlighted the necessity of allowing a wider margin of tolerance for opinions expressed in public discourse and matters concerning public interest.

5.35. Similarly, the ruling by **African Court on Human and Peoples' Rights** in *Lohe Issa Konate v. Burkina Faso*<sup>201</sup> in 2014, prompted numerous regional countries to decriminalize defamation. In this case, according to the court, the laws restricting freedom of expression should not only serve a legitimate government interest but also maintain proportionality concerning the potential harms they address. The court found out that sentence of imprisonment of twelve months and fine of \$12,000 USD imposed on a journalist for publishing articles criticising local prosecutors

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<sup>198</sup> Defamation Act, Act no. 105 of 1992.

<sup>199</sup> Judgment of June 2, 2004, Series C, No. 107.

<sup>200</sup> Judgment of August 31, 2004, series C, No. 111.

<sup>201</sup> 2015 SCC OnLine Ken 2823.

was excessively severe, violating both the African Charter on Human and Peoples' Rights and the ICCPR. The court also opined that criminal repercussions for defamation are never justified, advocating instead for individuals to seek civil remedies.

- 5.36. In 2010, **the African Commission on Human and People's Rights** adopted a resolution for repeal of criminal defamation laws in the continent, as it leads to abuse and harsh consequences for journalists and media serving public interests.<sup>202</sup>
- 5.37. In delving into the criminal defamation provisions across diverse jurisdictions, this Chapter has traversed a spectrum of legal frameworks, penalties, and societal implications. Criminalizing defamation has been a contentious subject, with diverse opinions worldwide. While some jurisdictions lean towards decriminalization or emphasize civil remedies, several countries advocate for retaining criminal provisions for defamation.
- 5.38. According to data published by UNESCO, 160 countries in the world criminalize defamation. In the last few years, a number of new laws have been passed to combat cyber security, fake news and hate speech, whereby several states have harshened or reintroduced provisions on libel, defamation and insult.<sup>203</sup>
- 5.39. The comparative analysis of criminal defamation provisions in these jurisdictions highlights the rationale for advocating criminalization. By

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<sup>202</sup> Resolution on Repealing Criminal Defamation Laws in Africa - ACHPR/Res.169(XLVIII)10 (2010).

<sup>203</sup> UNESCO, *The Misuse of the Judicial System to Attack Freedom of Expression: Trends, Challenges and Responses* (2022).



imposing penalties, criminalization seeks to instill accountability, deter wrongful defamation, and safeguard individual reputations. These provisions have been frequently justified on the grounds of their role in preserving societal harmony, individual integrity, and upholding accountability in the realm of public discourse.

- 5.40. Additionally, criminal defamation provisions have often bridged the gap between legal deterrence and the protection of individual rights. While free speech is a fundamental right, it is not absolute. Criminal provisions, when applied judiciously, strike a balance between the right to express opinions and the responsibility to respect the dignity and reputation of others.
- 5.41. Furthermore, the existence of criminal defamation laws underscores the importance of ensuring accountability in the digital age. In an interconnected world where information spreads rapidly across various online platforms, legal measures are crucial to address the misuse and abuse of communication channels that can lead to increase in defamatory content.
- 5.42. While the debate on criminalisation of defamation persists, advocating for these provisions involves recognizing their role in protecting individual reputations, upholding accountability, preserving societal values, and fostering responsible expression. It is also crucial to ensure that defamation laws remain adaptable, equitable, and aligned with international human rights standards.



## 6. CONCLUSION

### A. *Constitutionality of Criminal Defamation*

- 6.1. Criminal defamation laws in India have faced debates regarding their constitutionality. While some argue that these laws restrict free speech contradicting the constitutional protection of freedom of speech and expression, others uphold them asserting that they protect reputation and prevent abuse. The Supreme Court of India in *Subramanian Swamy v. Union of India*<sup>204</sup> upheld criminal defamation, balancing free speech and right to protect reputation, but the debate continues regarding its alignment with constitutional freedoms.
- 6.2. It is evident that not all speech is worthy of protection, and this is especially true of defamatory speech, which has the potential to do great harm. The right of freedom of expression and the right to reputation, which are linked to the right to dignity, must be balanced in accordance with the law of defamation.<sup>205</sup> It appears that the victim's right to dignity has been given more weight by the courts in striking this balance. The present criminal defamation legislation is primarily justified by the need to safeguard an individual's reputation, therefore ultimately, the interest in freedom of expression must be weighed against this social purpose.
- 6.3. The Supreme Court of Canada ruled in *R v. Lucas* that the criminal offence of defamatory libel could legitimately restrict the right to freedom of expression because it prevents harm to one's reputation from occurring,

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<sup>204</sup> AIR 2016 SC 2728.

<sup>205</sup> *National Media Ltd v. Bogoshi*, 1998 (4) SA 1196 (SCA) 1207.

which is a “legitimate goal of the criminal law,” and because the value of defamatory expression is “negligible.”<sup>206</sup>:

*“Defamatory libel is so far removed from the core values of freedom of expression that it merits but scant protection. This low degree of protection can also be supported by the meritorious objective of the [sections of the Criminal Code setting out defamatory libel]. They are designed to protect the reputation of the individual. This is the attribute which is most highly sought after, prized and cherished by most individuals. The enjoyment of a good reputation in the community is to be valued beyond riches.”<sup>207</sup>*

- 6.4. Skweyiya, J. addressed remarks regarding the chilling effect of defamation actions in *Dikoko v. Mokhatla*<sup>208</sup> by stating that:

*“The chilling effect on freedom of expression envisaged in defamation cases would play out in the following manner. A person who suspects that they may possibly be about to defame someone else is cognizant of the fact that if they do, there may be legal consequences. As a result, they either refrain from making the utterance or doing some background checking first. So the kinds of utterances which are chilled are those which an ordinary person may suspect to be defamatory in nature. The chilling of this kind of expression is by no means an undesirable result and is in line with the framework of intersecting rights ... in which freedom of expression may well have to take a back seat to dignity in certain circumstances. ... Thus rather than being contrary to the constitutional scheme for the protection of expression, ‘chilling’ defamatory statements or those that may be suspected as such, are precisely what the Constitution requires in light of its commitment to dignity as a foundational value.”*

- 6.5. The Supreme Court of Appeal in South Africa dismissed an appeal against the conviction on approximately 22 charges of criminal defamation in *S v.*

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<sup>206</sup> Carl Fischer, “An Evaluation Of The Constitutionality Of The Common Law Crime Of Criminal Defamation”, NMMU (2008), available at: <https://core.ac.uk/download/pdf/145044662.pdf>. (last visited on Jan. 15, 2024).

<sup>207</sup> *R. v. Lucas*, [1998] 1 SCR 439.

<sup>208</sup> 2007 (1) BCLR 1 (CC).



*Hoho*<sup>209</sup>. The allegations against certain political office-bearers were contained in a number of published pamphlets. The court especially addressed the question of whether defamation was still a Common Law wrongdoing and whether it was constitutionally sound. After reviewing prior legal cases, a relevant South African Law Commission report, academic writers' opinions, and the Electoral Act 73 of 1998's statutory extension of the offence, the court found that the offence of defamation does not contravene the Constitution. The court noted that restriction on freedom of expression is valid and constitutional, if it strikes a balance between protection of expression and protection of human dignity. Further, the court also held that, "*although a criminal conviction and the sanction arising therefrom may be more severe than an order to pay damages the limitation of the right to freedom of expression is, in my view, not.*"

- 6.6. The Constitutional Court, in *Khumalo v. Holomisa*<sup>210</sup>, proceeded to hold that the crime of defamation was not unconstitutional, and that it did not agree with the views of some writers that it ought to be decriminalized. Furthermore, the court argued as to why should it be that bodily injury could be prosecuted in the form of assault, but injury to reputation in the form of defamation could not.<sup>211</sup>
- 6.7. Criminal defamation serves to protect reputation and dignity of individuals. Under Article 19(2) of the Constitution of India, reasonable restrictions can be imposed in relation to defamation for safeguarding the reputation of individuals. Criminal defamation acts as a deterrent against

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<sup>209</sup> (2009 (1) SACR 276 (SCA)).

<sup>210</sup> 2002 (8) BCLR 771 (CC).

<sup>211</sup> Shannon Hector, "The Crime of Defamation - Still Defensible in a Modern Constitutional Democracy", OBITER 2013, available at: <https://journals.co.za/doi/pdf/10.10520/EJC137225>.

false and malicious statements, preventing damage to one's reputation that civil remedies might not adequately address. Moreover, the law ensures a balance between freedom of expression and right to reputation, essential to maintain social harmony and protecting individuals from unwarranted harm caused by defamatory statements.

#### **B. Misuse of Criminal Defamation**

- 6.8. The Indian Constitution and international treaties to which India is a member guarantee the right to freedom of expression. Newspapers, television, internet, and social media often host heated debate between politicians, activists, and the general people. Many governments have vowed to uphold the right to free speech.<sup>212</sup> But it has been argued that the criminal defamation laws, intended to protect individuals and entities from false and damaging statements, have been increasingly subject to misuse and abuse. While defamation laws serve to safeguard reputation and prevent the spread of false information, their application in a criminal context has been often seen as stifling free speech and impeding legitimate criticism or expression.
- 6.9. One of the primary concerns regarding criminal defamation laws is their potential to be weaponised by powerful entities, including corporations, or influential individuals, to silence dissent, intimidate journalists, and critics. Such laws can be used as tools of censorship, hindering investigative journalism and limiting public discourse on matters of significance.

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<sup>212</sup> Human Rights Watch, *Stifling Dissent: The Criminalization of Peaceful Expression in India* (2016).



- 6.10. Moreover, criminal defamation can also have a chilling effect on freedom of expression. While some prosecutions have resulted in convictions, most of the prosecutions for criminal defamation laws have resulted in dismissal or have been withdrawn<sup>213</sup>.
- 6.11. The fear of legal repercussions can dissuade individuals from speaking out, even when they have valid concerns or evidence to support their claims. This fear can hamper the exposure of wrongs and prevent the public from accessing crucial information.
- 6.12. The misuse of criminal defamation laws has been observed in cases involving powerful actors who seek to overwhelm the defendant through protracted legal proceedings, excessive costs, and the related psychological burden. SLAPPs (Strategic Lawsuits Against Public Participation) focused on defamation charges are frequently used to discourage journalists from advancing their work by preventing the publication or removal of certain content and discouraging others from covering the same issues.<sup>214</sup>
- 6.13. Often, these cases are filed not necessarily to seek justice for damage to reputation but to target whistle-blowers, journalists exposing corruption, activists advocating for change, or ordinary individuals expressing their opinions online. The misuse becomes evident when cases are filed for

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<sup>213</sup> In a study done by Supreme Court Observer on criminal defamation judgments delivered by the High Courts in 2018, it was found that out of all the judgments delivered with respect to Section 499 of IPC, only 14.29% resulted in conviction, whereas 57.14% of the judgments resulted in dismissal.

<sup>214</sup> UNESCO, "Defamation Laws and SLAPPs increasingly "misused" to curtail Freedom of Expression", (last modified April 20, 2023), available at: [https://www.unesco.org/en/articles/defamation-laws-and-slapps-increasingly-misused-curtail-freedom-expression?TSPD\\_101\\_R0=080713870fab200006a1136fc89bf4aa2f15357e5ac814692cc36bfc5639459439090ba7a599274b08af6c833114300003a53fd5893f89765f30338e880a0b5f8422bce6575af5baf0593297ffd6a747922d635d3f3ed1964745c2a4e08d8332">https://www.unesco.org/en/articles/defamation-laws-and-slapps-increasingly-misused-curtail-freedom-expression?TSPD\\_101\\_R0=080713870fab200006a1136fc89bf4aa2f15357e5ac814692cc36bfc5639459439090ba7a599274b08af6c833114300003a53fd5893f89765f30338e880a0b5f8422bce6575af5baf0593297ffd6a747922d635d3f3ed1964745c2a4e08d8332](https://www.unesco.org/en/articles/defamation-laws-and-slapps-increasingly-misused-curtail-freedom-expression). (last visited on Jan. 29, 2024).

trivial matters, or when disproportionate legal action is taken against those expressing legitimate concerns or attempting to expose corruption or wrongdoing.

- 6.14. The Supreme Court, in *Vijaykant v. City Public Prosecutor*<sup>215</sup>, while staying non-bailable warrants against a politician from opposite party in a defamation case by the Tamil Nadu Government, remarked that defamation cases should not be used as a political counter weapon against critics of government. The court observed that, "*The penal provision on defamation should not be used to throttle dissent.....the court must step in, if there are continuous efforts to harass persons by filing a number of defamation cases.*" In the same case, the court also questioned the large number of cases filed by the State Government against its critics.
- 6.15. In *Indiabulls Real Estate Ltd v. Veritas Investment Research*<sup>216</sup>, a research report titled 'Bilking India' was published by Veritas Investment group, in which an analysis of various companies of Indiabulls group was made, after which the share prices of Indiabulls group fell sharply in the stock market. Criminal defamation complaints were filed by Indiabulls against Veritas group. The Delhi High Court, condemning the conduct of the Indiabulls group, observed that:

*"While the remedies of Indiabulls against any report, which according to it may have contained incorrect or misleading facts, were always available to them, to threaten criminal action for publication of a research report was an extreme step.... Such a reaction in the face of publications and articles written by*

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<sup>215</sup> Writ Petition (Crl.) No. 43/2016, Order dated 28.07.2016.

<sup>216</sup> 2019 SCC OnLine Del 8294.

*researchers could have a “chilling effect” on publishing.”*

- 6.16. In *Thiru N Ram v. Union of India*<sup>217</sup>, the Madras High Court, recognizing the misuse of Section 199(2) of the Code of Criminal Procedure (CrPC) in prosecutions launched by the Public Prosecutors in cases of defamation of the State, and while elaborating on the care and caution a Public Prosecutor ought to take in criminal defamation proceedings, concluded that the State should not be impulsive like any ordinary citizen in defamation matters and invoke Section 199(2) of CrPC. The court observed that:

*“The Legislature would never have intended to launch prosecution through a Public Prosecutor to serve the personal interest of the public servant/constitutional authority alone, even if the said defamation of the public servant/constitutional authority was made in the discharge of his/her public functions.”*

- 6.17. In *Vijay v. Rajendra Ghisulal Gupta*<sup>218</sup>, the Nagpur bench of the Bombay High Court condemned the misuse of criminal defamation provisions, while holding that a reporting of information in public domain by a newspaper without any insinuation cannot justify defamation charges. In this case, a Marathi daily had reported on a First Information Report. The person named in such FIR filed a criminal defamation complaint alleging that the newspaper didn't act with due diligence as he was not named as an accused in the chargesheet. The court observed that, *“the freedom of making a true report regarding the affairs which are in the public domain is a right, which flows from the freedom of speech. The action of defamation about true and faithful reporting is unhealthy for a democratic setup.”* The court further remarked that:

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<sup>217</sup> 2020 SCC OnLine Mad 1023.

<sup>218</sup> Criminal Application No. 393 of 2022, Judgment dated 20.06.2022.

*“Filing complaints about defamation on such news items are nothing but an attempt to shut up and stifle the Reporters /informants and to force them to withdraw the report filed against the persons who are allegedly defamed.... Continuation of such prosecution amounts to abuse of the process of the Court and would not sustain in the eyes of law.”*

- 6.18. The misuse of criminal defamation, with its potential to muzzle dissent and stifle free expression, is antithetical to democracy. When criminal defamation provisions are exploited as tools to silence individuals, journalists, or critics, it not only hampers the free flow of information but also impedes the democratic principles of accountability and transparency. Such misuse establishes a culture of fear, inhibiting the public from engaging in discussions on matters of public interest and ultimately eroding the democratic fabric by curtailing the exchange of ideas and viewpoints that are integral to a vibrant and democratic society.
- 6.19. This situation often raises a question, as to whether the criminal defamation provisions are optimal solutions for safeguarding reputation, especially in view of the fact that civil defamation remedies are also taken recourse of to claim damages for harm to reputation.
- 6.20. To mitigate the misuse of criminal defamation laws, demands are made time and again for legal reforms balancing the protection of individual reputations with upholding the right to freedom of speech and expression. Such reforms should discourage frivolous or malicious complaints, provide safeguards against misuse, and encourage a more robust public discourse without the fear of legal reprisal.

### C. Necessity of Criminal Defamation

6.21. One of the challenges in enforcing defamation laws is striking the right harmony among the two conflicting rights to free speech and an unharmed reputation. Lord Nicholls gave careful consideration to public concerns in the *Reynolds v. Times Newspapers*<sup>219</sup>, stating that when reputation is harmed, “society as well as the individual is the loser” since safeguarding reputation is beneficial to the public interest. The rules pertaining to title to sue, publication, defamatory matter, defences other than the “new” defence of “reasonable publication,” onus of proof, fault, and remedies all work together to provide a workable balance between the protection of these two valued interests, i.e., reputation and free speech.<sup>220</sup> It appears that there is a significant difference in strategy between, on the one hand, denying certain entity or person the chance to use the defamation law to defend their reputations right away and, conversely, giving everyone, excluding the State or Government, the right to file a defamation lawsuit. However, everything hinges on the final compromise that is reached during the trial between the right to free speech and protection of reputation. Whether there is a difference in practice between these two seemingly different approaches will depend on the concept of “reasonable publication” and the balance struck between the competing rights of reputation and free speech within each element of liability and its corresponding defences.

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<sup>219</sup> *Reynolds v. Times Newspapers Ltd and Others*, [2001] 2 AC 127.

<sup>220</sup> Jonathan Burchell, *Private Law and Human Rights* 180 (Edinburgh University Press).

## **Arguments for Retaining the Law of Criminal Defamation**

- 6.22. It is apparent that the conduct criminalized by the defamation law safeguards a crucial personality interest - that of reputation. The ability to express oneself freely, especially politically, is essential for achieving dignity in areas like self-actualization, self-governance, and the recognition of human value. Also, whereas the right to political expression is central to the concept of freedom of expression, the right to reputation is closer to the periphery.<sup>221</sup>
- 6.23. *Stronger Deterrent Effect:* Compared to possible monetary damages in civil lawsuits, criminal punishment, such as fines or imprisonment, have a greater deterrent effect against intentional and destructive defamation. This can be crucial in situations where there are vulnerable parties or public interest issues.
- 6.24. *Public Interest in Protecting Reputation:* A person's reputation and general well-being can be seriously impacted by defamation. Criminal prosecution conveys a message stating that such injury is not acceptable and acknowledges the public interest in protection of reputation. The US Supreme Court recognized the public interest in vigorous debates on subjects of public importance and set a high threshold for renowned persons to win defamation actions in *New York Times Co. v. Sullivan* (1964, US)<sup>222</sup>. Even when made against renowned persons, malicious and blatantly false statements are nonetheless subject to criminal law.

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<sup>221</sup> *Supra* note 10.

<sup>222</sup> *New York Times Co. v. Sullivan* 376 U.S. 254 (1964).



Relevant extract of the aforesaid judgment is as follows:

*"The public official rule rests on the postulate that criticism of their official conduct does not necessarily damage their reputation; or, if it does, that they cannot complain because they have thrust themselves into the vortex of public controversy. Thus, the central meaning of this rule is that we would base liability for defamation on the standard of 'actual malice' – that is, with knowledge of falsity or with reckless disregard of whether it was false or not. Debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The New York Times advertisement, even if its factual error had been highly damaging to Sullivan's reputation, could not constitutionally justify an award of damages without proof that it was published with knowledge of its falsity or with reckless disregard of the truth."*

- 6.25. *Protecting Vulnerable Groups*: Criminal laws pertaining to defamation can provide important safeguards against discrimination and hate speech directed towards marginalized communities or minorities, among other vulnerable groups. Criminal penalties may be justified by the public interest in preventing such damaging comments.
- 6.26. A court must consider the "*attitudes, beliefs, and prejudices of the relevant community*" while evaluating the impact of reputational harm because it is a socially created injury. In defamation trials, then, the jury's role is "*to act as a tribune of the people; to be a popular institution with veto power over government sanctions for speech.*"<sup>223</sup>
- 6.27. Since monetary damages are a severely inadequate remedy and cannot restore a reputation once it has been damaged or ease emotional distress

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<sup>223</sup> Lyrissa Barnett Lidsky, "Defamation, Reputation, and the Myth of Community" 71 Washington Law Review 13 (1996).



once it has been experienced, it should be easier for a plaintiff to satisfy the criterion of irreparable injury. However, such relief is rarely granted by courts. Libel claimants are instead restricted “to less effective remedies because we fear over enforcement of rules against tortious or criminal speech” by the no injunction rule.<sup>224</sup>

- 6.28. It may be argued that anyone making an assertion should be able to support it with evidence, and the person making the accusation should have a chance to refute it. Therefore, resolving the factual basis for the offensive remark would be necessary for an acceptable remedy. But as the history of defamation law demonstrates, this is no simple undertaking.

#### *D. Inadequacy of Civil Defamation*

- 6.29. The risk that the civil tort system “under-punishes” and does not offer sufficient compensation for wrongs committed is quite significant. The factors that indicate why the criminal justice system, not just the civil law system, should deal with the offence of defamation are that criminal prosecution is not dependent on the victim’s willingness to pursue justice; criminal punishment is accompanied by shame and disgrace, something that civil law does not provide. The purpose of civil law is to price individuals out of driving, not to stop people from driving; rather, it seeks to put an end to reckless and dangerous driving. Criminal law is designed to guarantee that particular forms of behaviour cease entirely. Then, unlike the civil law, the criminal law is able to impose morally binding guilt and

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<sup>224</sup> John Kelly, “Criminal Libel and Free Speech”, 6 University of Kansas Law Review 295 (1958).



punishment. It effectively conveys the message that doing so is forbidden for anything that has no societal value.<sup>225</sup>

6.30. It is argued that making all falsehoods and dishonest behaviour illegal would be both impractical from an administrative and legal standpoint, and it would not even be desirable. Here, such a stance is not being promoted. After all, maximizing the general welfare and functionality of society is one of the goals of the criminal law. This is one of the reasons alcohol is not prohibited, despite the fact that it contributes to depression, domestic violence, and general crime. It is also the reason why the speed restriction on cars is x mph, even though a speed limit of less than x mph would be better and would actually lower the number of accidents and fatalities. At some point, the law decides—consciously or unconsciously, perhaps—to permit people to engage in potentially hazardous behaviours since outright banning them could have a greater negative impact on welfare and general happiness than tolerating them. It is ultimately a balancing act. For example, using tobacco is not prohibited. But there are laws governing smoking that limit who can smoke and where they can smoke based on age.<sup>226</sup> The penal code is not suited to correspond with the moral denunciations of lying as we live in a pluralistic society with conflicting ideas of what is right and evil. But just because lying is so common in society doesn't mean that it's right or appropriate behaviour. The fact that lying is implicitly accepted in some situations and has become ingrained in some people does not exempt it from criminal prosecution.

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<sup>225</sup> Bryan H. Druzin And Jessica Li, "The Criminalization Of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?", 101 *The Journal of Criminal Law and Criminology* 529-573 (2011).

<sup>226</sup> *Ibid.*



6.31. One argument against the defamation crime's existence is that the civil remedy for the act is a forceful and successful way to make amends for the harm done to a person whose reputation has been unjustly attacked. In *S v. Hoho*<sup>227</sup>, the court took this issue into consideration and examined academic writing to that end, but ultimately determined that the criminal penalty was essential and crucial. The Supreme Court of Canada reached the same conclusion in considering the analogous offence of defamatory libel in *R v. Lucas*<sup>228</sup>, where it was held that:

*"...while victims who have been libelled deserve compensation, perpetrators who wilfully and knowingly publish lies deserve to be punished for their grievous misconduct... The fact that a person can claim monetary compensation for damages does not exclude the need for a corresponding public expression of society's profound disapproval."*

6.32. It was thus held by the Court in *S v. Hoho*<sup>229</sup>:

*"Although it is important to recognize the right of the person defamed to sue for monetary damages it is equally if not more important that society discourage the intentional publication of lies calculated to expose another individual to hatred and contempt ... Defamatory libel can cause long-lasting or permanent injuries to the victim. The victim may forever be demeaned and diminished in the eyes of her community ... The harm that acts of criminal libel can cause is so grievous and the object of the section to protect the reputation of individuals is so meritorious that the criminal offence is of such importance that the offence should be maintained."*

6.33. The Privy Council, in *Worme v. Commissioner of Police of Grenada*<sup>230</sup>, also emphasized that the need for the criminal sanction for libel was in no

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<sup>227</sup> (2009 (1) SACR 276 (SCA)).

<sup>228</sup> [1998] 1 SCR 439.

<sup>229</sup> (2009 (1) SACR 276 (SCA)).

<sup>230</sup> [2004] UKPC 8.



way undermined by the existence of the civil law remedy:

*"Of course the tort of libel provides a civil remedy for damages against those who make such attacks, but this no more shows that a crime of intentional libel is unnecessary than the existence of the tort of conversion shows that the crime of theft is unnecessary."*<sup>231</sup>

- 6.34. Not only does the crime of defamation serve a legitimate and important goal of the criminal law by protecting a person's reputation from the intentional publication of a lie, but it provides protection in cases where the civil remedy would be deficient. Thus, the civil remedy does not provide a practical alternative where the victim does not have the financial means to pursue it, or where the offending party does not have the means to satisfy an order of payment of monetary damages to the victim.
- 6.35. The irony for those who suffer reputational harm is that money is an especially inadequate remedy for defamation. This is because reputational injuries are not readily translatable into monetary relief as money can neither restore a diminished reputation nor make a plaintiff's emotional distress go away. Furthermore, because of the procedural protections available to libel defendants, a plaintiff must incur substantial legal costs to see a defamation lawsuit through to completion, but very few libel plaintiffs suffer enough provable pecuniary loss to justify litigating their case.
- 6.36. In *Citizens Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*<sup>232</sup>, the court refused to enjoin a libel and stated:

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<sup>231</sup> Shannon Hoctor, "The Crime of Defamation - Still Defensible in a Modern Constitutional Democracy", OBITER 2013, available at: <https://journals.co.za/doi/pdf/10.10520/EJC137225>.

<sup>232</sup> 171 F. 553 (1909), United States Circuit Court of M.D. Alabama.

*"Defendant has a right to have the truth or falsity of the issue determined by a jury trial as at Common Law. That it cannot get in a court of equity. A person cannot be enjoined from doing any act unless it is fairly apparent the act is wrongful, or the person sought to be enjoined has no right to do that act. How can a court of equity be satisfied where the right lays in the matter of the alleged false statements? It cannot try the question for itself, or determine the right in advance of the law court."*

- 6.37. The political theorist, Joel Feinberg, in his principle of "mediating maxims" states:

*"Generalizing then from the clearest cases of legitimate or proper criminalization, we can assert tentatively that it is legitimate for the state to prohibit conduct that causes serious private harm, or the unreasonable risk of such harm, or harm to important public institutions and practices. In short, state interference with a citizen's behaviour tends to be morally justified when it is reasonably necessary (that is, when there are reasonable grounds for taking it to be necessary as well as effective) to prevent harm or the unreasonable risk of harm to parties other than the person interfered with. More concisely, the need to prevent harm (private or public) to parties other than the actor is always an appropriate reason for legal coercion.<sup>233</sup>"*

- 6.38. Courts have considered issuing an injunction against defamatory speech in the great majority of situations, but have declined to do so on the grounds that doing so would constitute an unlawful prior restraint. Most people agree that the prior restraint theory prohibits speech limits imposed by the government before they are published.<sup>234</sup> While there are many different types of government actions that qualify as prior restraints, speech-related injunctions are regarded as the quintessential example of prior restraint. Chief Justice Burger noted the pernicious effect such orders have in *Nebraska Press Ass'n v. Stuart*, in which the Court held that, "a state trial

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<sup>233</sup> Larry Alexander & Emily Sherwin, "Deception in Morality and Law", 22 Law & Phil. 393, 396 (2003).

<sup>234</sup> David S. Ardia, "Freedom of Speech, Defamation, and Injunctions", 55 WM. & MARY L. REV. 1 (2013).

*judge's injunction prohibiting the news media from publishing or broadcasting accounts of a criminal defendant's confession was an impermissible prior restraint.*<sup>235</sup>

- 6.39. This draws attention to the three main objections against allowing judges to enjoin speech before it is published: the need to protect free speech for society as a whole, the unavoidable overreach of injunctions, and the lack of procedural safeguards before subsequent civil and criminal penalties are imposed.

#### **E. Recommendation by 42<sup>nd</sup> Report of Law Commission of India**

- 6.40. The Fifth Law Commission of India, in its 42<sup>nd</sup> Report on the 'Indian Penal Code', dealt with revision of the Indian Penal Code. The Law Commission had floated a questionnaire seeking suggestions from the public, in which it had pointedly asked whether defamation as an offence should be retained in the Indian Penal Code, as it is a restriction on the freedom of speech and expression. Mostly, the answer to this question was that it should be retained. As per the Report, the reason was that, "*if the sanction of criminal law is removed, the only remedy left to a defamed person would be a suit for damages, which is not only expensive but also in many cases useless. Many such persons guilty of defamation are men of no substance and nothing can be recovered from them. Further, public servants are being frequently defamed and the criminal law alone can effectively deal with such law breakers.*"<sup>236</sup>

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<sup>235</sup> *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539.

<sup>236</sup> Law Commission of India, *42nd Report on Indian Penal Code* 330 (June, 1971).

6.41. In the aforesaid Report, the Law Commission recommended that Section 500 of the Indian Penal Code, which punishes the offence of defamation, should be amended to provide that the nature of imprisonment provided under the section should be altered to ‘imprisonment of either description’, rather than ‘simple imprisonment’ as is currently provided in the section. Similarly, the nature of imprisonment provided under Sections 501 and 502 of the Indian Penal Code, which provide punishment for printing and engraving defamatory matter, and for selling the printed or engraved defamatory matter respectively, was also recommended to be altered to ‘imprisonment of either description’.<sup>237</sup> It was further suggested that sub-section (2) be added to Section 500 to empower courts to order publication of fact of offender’s punishment in newspaper in cases where the defamatory statement is published in a newspaper and thus made known to a large number of persons. Sub-section (3) was also recommended to be added to Section 500 to provide that the cost of such publication shall be recoverable from the convicted person as a fine. It was reasoned that such a step would afford more satisfaction to the innocent victim than the mere punishment of the offender.<sup>238</sup>

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<sup>237</sup> *Id.* at 332.

<sup>238</sup> *Id.* at 331.



## 7. RECOMMENDATIONS

- 7.1. It may be argued that criminal prosecution for defamatory statements is opposed to the right of freedom of speech and expression. However, the protection of reputation is not the only impetus behind criminalising defamation as avoiding public disturbances is an equally important motivation. Publications that harm a person's reputation are an inherent part of the political process in a democracy, and stifling the same would be endangering the political process. Consequently, it is absurd to argue for states to have the unchecked authority to prosecute publishers of any such material because their publications constitute defamation. Any form of speech should not be illegal in general unless there are very specific and unusual circumstances. Indeed, utmost caution needs to be exercised while doing so. Speech, ought to be illegal only when it is meant to do substantial harm and when such harm materializes.
- 7.2. Remarkably, the main goal of all these arguments is deterrence, and they are all consequentialist in nature. It is not appropriate to limit behaviour that could seriously harm someone else to civil law consequences. While it is perfectly acceptable for the act to result in tort consequences, it should also be appropriately considered in the context of criminal law, since this is the legal framework in which such behaviour can be appropriately condemned and punished.
- 7.3. Therefore, an inference can be drawn from the above analysis that reputation being an integral facet of Article 21, it cannot be allowed to be jeopardised just because an individual has to enjoy his freedom of speech at the expense of hurting the sentiment of another. It is to be understood



that the restriction is not completely on one's thoughts and ideas. It is a protection that one can avail in a situation where his reputation is hurt. There is no absoluteness in any of the rights and both have to be harmoniously construed in its spirit to make the society peaceful and liveable.

- 7.4. A report by the Organization for Security and Co-operation in Europe (OSCE) found out that forty-two of the fifty-seven OSCE member countries have criminal defamation provisions in one form or other. It also found out that nearly all OSCE member countries having criminal defamation provisions, provide for imprisonment as a possible punishment, and that majority of these countries provide for imprisonment for a period of up to two years. Most of the member-countries of the OSCE are economically developed nations, and it is seen that the presence of criminal defamation provisions in such countries has not hindered the economic and political development<sup>239</sup>.
- 7.5. India is a country which skilfully and blissfully sustains different languages, ideas and thoughts. The social fabric is such that the people want to enjoy their freedom and also want to protect what is dear to them. Reputation is something which can't be seen and can only be earned. It's an asset which is built in a lifetime and destroyed in seconds. The whole jurisprudence around the law on criminal defamation has the essence of protecting one's reputation and its facets.

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<sup>239</sup> Organization for Security and Co-operation in Europe, *Defamation and Insult Laws in the OSCE region: A Comparative Study* (March 2017).



- 7.6. The Bharatiya Nyaya Sanhita, 2023 has added a provision of community service as an additional punishment. This law itself gives a balancing approach, wherein it has safeguarded the interest of the victim and has also neutralized the scope of misuse by giving an alternate punishment of community service. The law acknowledges that harm to reputation is not only an attack on an individual, rather an imputation on the whole society, for which the perpetrator may be punished to serve the community as an act of remorse. Through introduction of this punishment, Indian law has shown the most balanced approach in protecting one's reputation and speech too.
- 7.7. Therefore, the Commission recommends that criminal defamation as an offence be retained within the scheme of criminal laws in our country.

The Commission recommends, accordingly.

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*DR*  
31.1.2024

[Justice Ritu Raj Awasthi]

Chairperson



[Justice K.T. Sankaran]

Member



[Prof. (Dr.) Anand Paliwal]

Member



[Prof. D.P. Verma]

Member



[Dr. Niten Chandra]

Member (*Ex-Officio*)



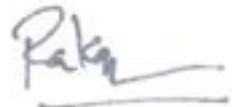
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