

FREEDOM OF SPEECH AND EXPRESSION *VIS-À-VIS* DEFAMATION

by

Bushra Sarfaraj Patel

Parul Institute of Law, Parul University

INTRODUCTION

Freedom of speech embodied in article 19 of the constitution of India, is the building block of India's democratic structure. "The freedom of speech and expression is regarded as 1st condition of liberty. It occupies a preferred position in hierarchy of liberties giving succour and protection to all other liberties." It enables a free atmosphere where citizens can freely portray their thoughts and believes. India being a land of diversified culture and linguistics, freedom of speech and expression is necessary for the harmonious functioning of our democratic society. The concept of Freedom of speech and expression has been reiterated by Supreme Court since 1950's. In *Maneka Gandhi v Union of India*, "Justice Bhagwati has emphasised on the significance of freedom of speech and expression in these words. Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic setup. If democracy means government of the people by people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential." **LAWS RELATING TO FREEDOM OF SPEECH IN INDIA** Freedom of speech and expression is embodied in article 19(1) of the constitution of India. Article 19(1)(a) guarantee to all its citizens freedom of speech and expression it gives citizens the right to express their thought freely through any medium, e.g. by words of mouth, writing, printing, picture, film movies. However article 19(2) imposes some reasonable restriction on the freedom of speech and expression, such as-

- (a) security of state,
- (b) sovereignty and integrity of India,
- (c) friendly relation with foreign states
- (d) incitement to and offence,

- (e) contempt of court,
- (f) defamation,
- (g) public order and morality.

Freedom of speech in digital India is also subject to above mention restrictions. In Prashant Bhushan contempt case, "a three-judge bench headed by Justice Arun Mishra found two tweets by lawyer Prashant Bhushan amounting to serious contempt of court. Facts of the case- on twitter, lawyer Prashant Bhushan had criticized the CJI for appearing in public without a mask at a time when physical hearings had been suspended due to the Covid-19 pandemic, and also blamed the court for destroying democracy in the last few years. The bench rejected Bhushan's arguments that the tweets were part of his right to free speech and was a bona fide criticism of the court. It also rejected his arguments that the tweets were only against the present CJI and the past three CJIs in their individual capacity and not calculated to interfere with the course of justice. It has the tendency to shake the confidence of the public in the institution of judiciary and the institution of the CJI. "In our considered view, it cannot be said that the above tweets can be said to be a fair criticism of the functioning of the judiciary, made bona fide in the public interest." In response to this decision, "a group of 41 lawyers have appealed to the apex court to review the standard of criminal contempt. They said "A bar silenced under the threat of contempt, will undermine the independence and ultimately the strength of the court. A silenced bar cannot lead to a strong court Indian democracy works on the pillar of separation of power between the three organs of government i.e. legislature, executive, and judiciary despite this division there is a system of check and balance which is necessary for the efficient working of the democracy. "A mob attacked the house of Pulakeshinagar MLA Akhanda Srinivas Murthy over an alleged derogatory facebook post by P. Naveen Kumar, Murthy's nephew". In *Shreya Singhal v UOI*, the court held that the law may curtail the freedom only when a discussion or advocacy amounts to incitement.

Information Technology Act 2000 and Freedom of Speech In *Shreya Singhal v. Union of India*", the issue raised was whether Section 66A of IT Act violated the right to freedom of expression guaranteed under Article 19(1)(a) of the Constitution of India. As an exception to the right, Article 19(2) permits the government to impose "reasonable restrictions 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 offense." The Court first discussed three fundamental concepts

in understanding the freedom of expression: discussion, advocacy, and incitement. According to the Court, "[mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart" of the right. And, the law may curtail the freedom only when a discussion or advocacy amounts to incitement.

As applied to the case in hand, the Court found that Section 66A is capable of limiting all forms of internet communications as it makes no distinction "between mere discussion or advocacy of a particular point of view, which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of State etc."

The Court further held that the law fails to establish a clear proximate relation to the protection of public order. According to the Court, the commission of an offense under Section 66A is complete by sending a message for the purpose of causing annoyance or insult. As a result, the law does not make distinction between mass dissemination and dissemination to only one person without requiring the message to have a clear tendency of disrupting public order. The Court also held that the government failed to show that the law intends to prevent communications that incite the commission of an offense because "the mere causing of annoyance, inconvenience, danger etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all." The Court also addressed whether Section 66A is capable of imposing chilling effect on the right to freedom of expression. It held that because the provision fails to define terms, such as inconvenience or annoyance, "a very large amount of protected and innocent speech" could be curtailed. The Court also noted the intelligible difference between information transmitted through internet and other forms of speech, which permits the government to create separate offenses related to online communications. Based on the forgoing reasons, the Court invalidated Section 66A of IT Act in its entirety as it violated the right to freedom of expression guarantee under Article 19(1)(a) of the Constitution of India."

CHANGING DYNAMICS OF OF 'FREEDOM SPEECH AND DEFAMATION

Defamation has been defined in section 499 of the Indian penal code, a "whoever, by words either spoken or intended to be read, or by signs or by visible representation, 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 to defame that person". It is of two kinds- (1) Libel-defamatory statement published in written form. (2)

Slander- verbal form of defamation. Publication of the defamatory sentence to a third party is necessary for section 499 to apply.

Cyber defamation- When defamation take place on social media platforms like posting something defamatory on facebook or twitter etc. such type of defamation is coined as cyber defamation. There is no separate law for cyber defamation in India however section 469 of the IPC (forgery for purpose of harming reputation) has been amended by the Information Technology Act, 2000 to include 'electronic record forged' and now reads as a whole as "whoever commits forgery, intending that the document or electronic record forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine". Now author of the defamatory material and the service provider or intermediaries can be held liable under the information technology act 2000. Cyber defamation and the Intermediaries- According to Section 79 of the Information Technology Act, 2000, an intermediary shall not be liable if it does not initiate or modify such defamatory content but merely acts as a facilitator. Further, this protection is also subject to the condition that the intermediary shall comply with the due diligence and Intermediary Guidelines requirements issued by the Central Government and also remove such unlawful content on being notified by the appropriate Government or its agency or upon receiving actual knowledge.

Free speech and cyber defamation- Freedom of speech and expression is guaranteed under article 19(1)(a) of the constitution of India but this freedom is subject to reasonable restriction. In case of cyber defamation free speech should not hamper the right to live with dignity of other citizen. As mention in Shreya Singhal V UOI, free speech leading to incitement will be restricted in the interested of the society. Free speech made on factual basis or mere discussion or advocacy, is not subjected to any restriction."

Indian judiciary and Cyber defamation- In SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra", one of the employee of a corporation was sending derogatory, defamatory, obscene, vulgar and abusive emails to other employers and subsidiaries all over the world with intention to tarnish the reputation of the Managing Director of the company. Delhi high court restrained the defendant from sending derogatory or defamatory mails to any employer or the subsidiaries. Further, the High Court also restrained the defendant from publishing, transmitting or causing to be published any information in the actual world as also in cyberspace which is derogatory

or defamatory or abusive of the plaintiffs. In *State of Tamil Nadu v. Suhas Katti*, the defendant was sending defamatory, obscene emails to a woman on yahoo message group he also forwarded the message from a fake id to other people because which the woman started getting phone calls from unknown people who believed that she was soliciting for sex work. The magistrate found the accused guilty and he was sentenced to rigorous imprisonment for 2 years under section 469 IPC and to pay a fine of Rs.500/-, one year simple imprisonment and Rs 500 fine under 509 IPC and two years imprisonment with a fine of Rs 4,000 under section 67 of IT Act. 2000. All sentences were to run concurrently.

FREEDOM OF SPEECH IN AMERICA

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

- The First Amendment to the U.S. Constitution. The first amendment to the American constitution was part of bill of rights. As per the Bill of Rights United States Congress has been prohibited from making laws, infringing the freedom of speech, freedom of the press and limit the right to peaceably assemble, etc. Thus bill of rights has provided a watertight compartment to freedom of speech. The Supreme Court has interpreted the First Amendment's guarantee of freedom of speech very expansively. *Schenck v. United States*, was the one of the first important case where Supreme Court was first requested to strike down a law violating the Free Speech Clause. It was a case related to Sedition Act of 1918 which criminalized "disloyal," "scurrilous" or "abusive" language against the government. Supreme Court held in this case "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Thus in this case court evolved a new doctrine of "clear and present danger". In the case of *Debs v. United States*, the "clear and present danger" scope was expanded in this case again by Justice Oliver Wendell Holmes. The case involved a speech made by Eugene v. Debs, a political activist. Debs had not spoken any words that posed a "clear and present danger" to the conscription system, but a speech in which he denounced militarism was nonetheless found to be sufficient grounds for his conviction. Justice Holmes suggested that the speech had a "natural tendency" to occlude the draft. The test of clear and danger was further upheld by the court in *Dennis v. United States*. court that "clear and present danger" test did not require the government to "wait until the putsch is about to be executed,

the plans have been laid and the signal is awaited", thereby broadly defining the words "clear and present danger."

Freedom of speech and defamation- American Constitution also recognizes the defamatory law in form of libel or slander. *New York Times Co. v. Sullivan*, was a landmark judgment passed by the US Supreme Court on the freedom of speech protection embodied by the 1st Amendment to the US Constitution that restrict the ability of American public official to sue for defamation. The Court held that if a plaintiff in a defamation law suit is a public official, he or she should prove that the statement was made with the intention to tarnish the image of the officer and the defendant believed or knew that the said statement was false. The adoption by the Supreme Court of the actual malice standard reduced the financial exposure from potential defamation claims, and thus frustrated the efforts of public officials to use these claims to suppress political criticism. In *Hustler Magazine, Inc. v. Falwell*, this case widened the scope of 'actual malice standard' to 'intentional infliction of emotional distress'. In this case the court ruled in favor of the magazine, upholding that a parody ad published in a magazine depicting political commentator Jerry Falwell as an incestuous drunk. was protected speech since Falwell was a public figure and the parody could not have been reasonably considered believable. Therefore the emotional distress inflicted on Falwell by the ad was not a sufficient reason to deny the First Amendment protection to speech that is critical of public officials and public figures. Hence the Constitution of America gives impetus to the freedom of speech and expression.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 19 of the declaration protects the freedom of speech and expression as follow: "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."

CONCLUSION

Freedom of speech and expression plays an important role for the coherent working of the society. As mentioned in *Shreya Singhal's* case that freedom of speech should only be curtailed if it leads to incitement and not on mere advocacy or discussion. System of check and balance between the government and the society plays a crucial role especially in a democratic structure like India. The citizens should be given the right to question the working of the government and its various organizations and the government is bound to respond to their questions unless

it is necessary to conceal the information for the larger interest of the society. Freedom of speech and expression demarcates democracy from dictatorship.

