



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Defamation: A dangerous luxury in India

Aadithya J Nair^a

^aThe National University of Advanced Legal Studies, Kochi, India

Received 13 June 2022; Accepted 22 June 2022; Published 04 July 2022

Defamation law is a dangerous luxury that needs to be used as a suit only in case of a serious infringement of the right to reputation, as it's contentious law in India. The consequences of a defamation suit are many including waste of time and money besides the obvious underutilization of judicial resources as the law is often misused for the smallest of reasons and then the case goes on in an endless loop of statement analysis and justifications. Besides, overdoing of defamation suits has a chilling effect on freedom of speech and expression due to 1) the inherent conflict between the two laws; and 2) how defamation can be used as a tool to silence truth by the accused. Defamation being a dangerous luxury should be exercised with care and caution and should not exist in a criminal form making it even more dangerous in modern society. At the end of the day, citizens shouldn't pamper themselves with the luxury of defamation law and instead, respect the law and use it only when required.

Keywords: *dangerous luxury, freedom of speech, freedom of expression, judicial resources.*

INTRODUCTION

Defamation is considered a very important and relevant concept in general legal scenarios and has transcended into the Indian scenario quite well, too. Yet it is a complex legal concept with a few clear practical and structural issues that make it a dangerous luxury¹ sometimes;

¹ Fali S. Nariman, *God Save the Hon'ble Supreme Court* (1st edn., Vol. 1., Hay House India 2018) 9

therefore, one must understand what exactly the issues are with defamation law making it such a complex and confusing law, especially in the Indian scenario. The term ‘dangerous luxury’ was used by famed advocate Fali S Nariman to describe how people often end up filing defamation cases for frivolous reasons without realizing the consequence of their actions. These cases often end up dragging on for a long time and the consequences are the alleged defamation that might have occurred ends up becoming an even more sensationalist case hogging headlines much to the plaintiff’s embarrassment. While this of course has been one of the issues facing defamation law, there are others too. First is a basic structural issue with the law, especially when proving defamation is often a tedious task for advocates who need to provide reasonable proof of the false statements that were meant to injure or tarnish the reputation of the plaintiff and when the defendant's side in most defamation cases plead truth or bona fide statement or qualified privilege, etc. These structural issues make the case even more complex than it already is and drag an otherwise a small imputation made that would have been ignored if it had not been dragged into the media spotlight through a petition (this is especially true in the case of celebrities). The second issue with the law is its conflict of interest with the freedom of speech and expression under Article 19² of the Indian Constitution, which again makes it a contentious law as often the defamation law seems to stifle the essential fundamental right of freedom of speech and expression that forms one of the basic cruxes of our democracy and civil rights. Many a time, certain lawsuits, such as defamation suits, are filed to target individuals or groups of litigants who voice their concern over important or considerable social issues in the public arena.³ The last major issue is with a specific criterion of defamation law whose existence has been repeatedly criticized by legal scholars, i.e., criminal defamation. It was not struck down by the Supreme Court in the *Subramanian Swamy v Union of India*⁴ case and yet many legal scholars feel it is unnecessary to retain a not-so-serious offence like defamation as a criminal one which essentially makes it an offence not just against a person but against the state and society at large as is the nature of criminal offences. The fact

² Constitution of India, 1950, art.19

³ Rajshree Chandra, ‘Defamation: The Weapon Of Choice To Stifle Pursuit Of Justice And Free Speech’ (*The Wire*, 11 March 2021) <<https://thewire.in/law/defamation-priya-ramani-metoo-slapp-free-speech-media>> accessed 06 June 2022

⁴ *Subramanian Swamy v Union of India* (2016) Writ Petition (Criminal) No. 184/2014

is defamation is not a wrong against society howsoever conceived, but against an individual,⁵ and since it is already a civil wrong there is no reason for it to be a criminal offence.

This research paper under the title of dangerous luxury⁶ will detail the current context and will be discussing the various issues with the law of defamation in India and why it needs to be carefully employed by litigants and analyzed by legal scholars in the future to ensure that the law as such doesn't lose sight of its original intention as a mere civil wrong that can often be settled outside the system of courts. To delve into the specific issues and understand defamation in its entirety it is important to understand the general law and how it operates in the Indian scenario. Defamation is essentially filed by anyone who feels he or she has been wrongly accused of something by someone in public, through words or gestures, spoken, written, or by inference claiming that the accusation levelled deals a blow to his/her reputation,⁷ especially among the right-thinking members of society. Defamation thus is an imputation made that tarnishes someone's reputation or dignity in the eyes of others and can be made by words written (libel) or spoken (slander). It is a law that has its early origins in England and transcended into Indian law from there. Now to prove defamation there are certain essential requirements, especially in the Indian context. First, the statement must be published, i.e., it needs to be communicated to a third person for it to be defamation, and thus private communication between two individuals is not defamation. Second, the statement in question must tarnish the reputation of the individual. Third, the statement must be false and should in the eyes of right-thinking members of society lower the reputation of the individual. In India, there are two kinds of defamation laws, namely civil and criminal defamation. In civil defamation, a person who is defamed moves either the High Court or subordinate courts and seeks damages in the form of compensation that is monetary and there is no punishment in the form of a jail sentence.⁸

⁵ Indira Jaising, 'It Is Time to Get Rid of the Law of Criminal Defamation' (*The Wire*, 16 May 2016) <<https://thewire.in/law/it-is-time-to-get-rid-of-the-law-of-criminal-defamation>> accessed 06 June 2022

⁶ Fali S. Nariman (n 1)

⁷ 'Explained: Section 499 – the defamation law in India' (*The Statesman*, 15 October 2018) <<https://www.thestatesman.com/india/explained-section-499-the-defamation-law-in-india-1502696982.html>> accessed 09 June 2022

⁸ *Ibid*

In criminal defamation, the person against whom a defamation case is filed might be sentenced to two years' imprisonment or fined, or both.⁹IPC Section 499¹⁰ defines defamation and the punishment for it under criminal defamation is given in Section 500¹¹ of IPC. 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 cases hereinafter expected, to defame that person. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with a fine, or with both. Thus, defamation exists in India both as a civil and criminal wrong and remains a contentious legal issue due to the issues mentioned above that will be elucidated making it a dangerous luxury¹².

CONSEQUENCES OF A DEFAMATION SUIT

Defamation suits often have unwarranted consequences that can make them a tricky affair. Adjudicating defamation cases can many a time be tedious. To prove that one's reputation has been tarnished is often not very easy, and many a time in defamation cases, various justifications are used to absolve the defendant of the liability, making the case only more complicated. To explain the scenarios one needs to first understand what are the justifications often employed in defamation cases. Some of the common justifications are- the truth of the statement, the defamatory statement being an opinion, consent to the publication of the statement alleged defamatory, absolute privilege (usually accorded in judicial, administrative, parliamentary proceedings, etc), qualified privilege (given to journalists and media houses based on nature of statement), retraction of statement, etc.¹³

First, the statement that has been alleged needs to be proved to be defamatory, which itself is a tedious affair since a statement made is often prone to interpretation as to whether it did

⁹ *Ibid*

¹⁰ Indian Penal Code, 1860, s 499

¹¹ Indian Penal Code, 1860, s 500

¹² Fali S. Nariman (n 1)

¹³ 'Privileges and Defenses in Defamation Cases' (*Nolo*, 22 October 2013) <<https://www.nolo.com/legal-encyclopedia/privileges-defenses-defamation-cases.html>> accessed 09 June 2022

indeed injure a person's reputation or not. Of course, if the alleged statement was false, then civil defamation can be proved (although criminal defamation cases are more complicated which will further be discussed in this paper). But in many cases, the imputation made is an opinion and not a fact which is where the case becomes a tedious affair of interpretations. A case in point is that the defendant's side can always argue and justify that the statement was either a mere opinion or truth spoken or even stated in good nature without malicious intent. Then the plaintiff's side needs to prove that it was neither of the above-mentioned justifications and the case drags on while attempting to analyze and review an imputation from various angles and perspectives, thus making a small issue a massive legal affair and wasting precious time of courts. Such cases are thus generally a tiring and costly affair that only gets resolved after many years and that is exploited by individuals and corporations with deep pockets who can afford to bear the costs of a trial and thus threaten their critics with protracted defamation suits that demand high compensation and are strategically filed in remote areas to further torture the defendant.¹⁴ Hence, defamation suits are certainly not a viable option for the plaintiff or defendant due to the high costs and time these cases take. The general inconvenience caused by defamation cases is often exploited by the privileged who can afford the time and money. Besides, the courts are also made to divert their time and resources to these endless cases of alleged defamations that don't have much value or worth in the end. Even if the defamation is proved and compensation is secured, the time and money that were invested are often a heavy price for the middle class and the poor pay. Besides, the media spotlight gained in the case involving celebrities often defeats the entire purpose of the litigation as the case now lives in public memory creating more embarrassment to the plaintiff. Especially in India defamation cases are often filed for the smallest of reasons like the defamation suit filed by Jay Shah against *The Wire* for carrying a story alleging that revenues of Shah's company had grown massively within a year of the ruling BJP coming to power in 2014.¹⁵

¹⁴ Madhav Chandavarkar & Manasa Venkataraman, 'The Need for Reform of Defamation Laws' (*Live Mint*, 5 October 2016) <<https://www.livemint.com/Opinion/QyZpUVSMbHqKymUquA7yNK/The-need-for-reform-of-defamation-laws.html>> accessed 05 June 2022

¹⁵ Rajshree Chandra (n 3)

The statement in question can be interpreted as being an opinion or a fact as no exact figure of revenue has been stated and also even if it's a fact whether it lowers the reputation of the individual is debatable as the growth of finances is not exactly defamatory and its rise along with the BJP coming to power could be argued to be coincidental. Besides, matters are further complicated as the news platform can argue in defence of its qualified privilege as the right of a media house which again is prone to more interpretation and analysis thus giving rise to more questions than answers.

A hilarious example of how wrong defamation cases can go is the one cited by renowned advocate Fali S Nariman in his book 'God Save the Honorable Supreme Court'. The case was based on a column written by a Parsi journalist, HomiDaji, on Parsi Solicitor Fardunji Dotivala in which he alleged that the solicitor in question (a bachelor) slept with his maidservant, a highly insulting imputation that immediately led to a defamation(libel) suit being filed.¹⁶ The journalist being of an unusual and quirky character refused to give a printed apology that is usually an accepted settlement outside court leading to an endless charade of litigation.¹⁷ The journalist claimed public interest as a justification and made more statements in court much to the embarrassment of the plaintiff and the case dragged on for a month. The alleged defamation would have died out if it had been left as such and instead grew into an even more scandalous story that gained the public spotlight and even more media attention and became a source of entertainment to the general public.¹⁸ Eventually, the suit was withdrawn with an apology by the journalist, and the whole affair of intense litigation became nothing more than a freakshow for the media and public.

Such cases are clear examples of the potential consequences of a defamation case. For all the time wasted, money spent, public ridicule gained and judicial resources invested one needs to analyze whether it was worth the effort. There are many other important legal issues and affairs that courts need to deal with and even though one's reputation is important, it is equally important to see whether filing a defamation suit is helping or counterproductive to

¹⁶ Fali S. Nariman (n 1)

¹⁷ *Ibid*

¹⁸ *Ibid*

the cause and often such cases can be settled out of court saving precious time and resources. In the words of Fali S Nariman, “Defamation cases in India are a luxury and a dangerous luxury at that, that they are too often filed in a hurry, and repented only at leisure. And then it is too late.”¹⁹

DEFAMATION *v/s* FREEDOM OF SPEECH AND EXPRESSION

Besides the consequences of defamation cases as discussed earlier, there is another important reason why defamation is a dangerous luxury,²⁰ and why it has a clear conflict with the fundamental right of freedom of speech and expression. This is a serious issue for one’s reputation can not take precedence over the fundamental right of freely expressing one’s thoughts and actions. To understand this one needs to evaluate the legal definition of these two terms and how they come into conflict with each other. Article 19(1)(a) states: “All citizens shall have the right to freedom of speech and expression.”²¹ This right guarantees the freedom for an individual to express his/her opinions freely without being judged or scrutinized for it and the expression of opinion can be not only through words spoken but also written and also by hand gestures or even art etc.

Of course, like all other fundamental rights, there is a reasonable restriction on the freedom of speech and expression. This is stated under Article 19(2) of the Indian Constitution. Nothing prevents a 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-clauses 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 about contempt of court, defamation or incitement to an offence.²² Now defamation is defined under IPC section 499 which states: 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

¹⁹ *Ibid*

²⁰ *Ibid*

²¹ Constitution of India, 1950, art.19(1) (a)

²² Constitution of India, 1950, art.19(2)

reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.²³

Now clearly by nature of legal definition, the two laws clash with each other, for 1) one is a fundamental right that protects the right of a person to freely express his/her views and opinion, and 2) the other is a law that tends to hold responsible the very same views or opinions if they harm somebody's reputation. The conflict of interest exists despite the reasonable restriction that may not always act as a safeguard, especially in cases where the imputation is argued to be free speech and a personal opinion on one side and a malicious allegation to injure another person on the other side. Just as it's important to protect people from the harms that untrue statements may cause, it's necessary and arguably more important to protect the right to speak freely and without fear of reprisal.²⁴

The Supreme Court adjudicated this matter in the *Subramaniam Swamy v Union of India* case²⁵ and upheld Section 499 and 500 of IPC that defines the concept and punishment of defamation respectively and said that defamation was a reasonable restriction on the fundamental right of freedom of speech and expression.²⁶ The Supreme Court also emphasized that the reasonable restriction be employed narrowly so as not to have a chilling effect on the freedom of speech and expression.²⁷

Now the Indian defamation law falls under the SLAPP (A Strategic Law Against Public Participation) in international law and this reflects in a practical scenario. The dangers of this law are obvious and despite the Supreme Court upholding it, in the practical scenario, one needs to be cautious of the effect these laws can have on the freedom of speech and expression. To quote famous British comedian and television host, Ricky Gervais, "Just because you are

²³ Indian Penal Code, 1860, 499

²⁴ David Goguen & J.D., 'Defamation of Character or Free Speech?' (*All Law*, 20 October 2020) <<https://www.alllaw.com/articles/nolo/civil-litigation/defamation-character-free-speech.html>> accessed 10 June 2022

²⁵ *Subramaniam Swamy* (n 4)

²⁶ Aparna Viswanathan, 'Seven Reasons Why Criminal Defamation Should Be Declared Unconstitutional' (*The Wire*, 14 August 2015) <<https://thewire.in/law/seven-reasons-why-criminal-defamation-should-be-declared-unconstitutional>> accessed 10 June 2022

²⁷ *Ibid*

offended doesn't mean you are right," because many a time defamation cases are filed for the smallest of reasons and often end up being an utter waste of time and money. More than the loss of reputation, it is often ego-clashes and prejudices that play a part in people filing cases, and sometimes despite the issue being an embarrassing mistake, it is unnecessarily blown out of proportion and later the parties come out unsatisfied and discontented. An example was quoted by advocate Fali S Nariman in which a prosecution solicitor filed a defamation suit because a telephone company owing to a printing error changed the name to prostitution solicitor.²⁸

The incident was certainly an embarrassing one but also a simple printing error that did not have to be made into a defamation case. Cases like these where defamation is filed for the pettiest of reasons not only waste precious judicial resources but can also slowly start to diminish our concept and notions of free speech through relentless litigation suits (a classic case of too many cooks spoiling the broth). Besides, there are other instances where defamation cases are misused by offenders to deflect blame and hound their victims. Cases such as the *MJ Akbar-Priya Ramani defamation case*²⁹ and the *Alok Nath-Vinita Nanda case* enabled the accused to drag the victim into a pointless charade to ensure they can delay justice and also induce fear into the minds of those who accuse them of the wrongs they committed.³⁰

This is a dangerous tactic employed that could stop the poor and middle-class people from raising their voices against corruption, sexual harassment, and many other pressing social issues in fear of being silenced and economically drained out through an endless charade of defamation suits. Defamation suits here act as a weapon against free speech and can be used to deflect the attention of the public and legal authorities from genuine issues that need to be addressed. Hence, it is important that the filing of defamation cases should be done with due care and consideration and not be done for the pettiest of reasons thereby wasting the time and resources of courts. Nevertheless, offenders tend to file defamation suits to escape liability and threaten and silence genuine victims and activists thus leaving a very lethal and unseen

²⁸ Fali S. Nariman (n 1)

²⁹ *Mobashar Jawed Akbar v Priya Ramani* (2021) Complaint Case No. 05/2019

³⁰ Rajshree Chandra (n 3)

effect on freedom of speech and expression. The fundamental right of free speech and expression must be safeguarded at all costs for it forms the core of India's democratic rights and that can only be done by carefully analyzing the potential dangers of defamation suits and recognizing the defamation law's obvious conflict with freedom of speech and expression. Understanding the conflict between the two statutes is key to preventing the defamation law from interfering with free speech by making defamation the last-resort litigation meant only for the worst-case scenarios and not for frivolous remarks made. Free speech is an essential right that must be protected from excessive pointless defamation suits and prevented from being silenced through vicious prosecution and misuse of defamation law.

CRIMINAL DEFAMATION

Criminal defamation is an important concept and aspect of defamation law that has again been a highly contentious issue of discussion. Defamation suits discussed in this paper have adverse consequences a clear conflict with the essential right of freedom of speech and expression but when it comes to the criminal nature of defamation, things get even more contentious and problematic. It is highly debatable as to whether defamation should even exist in a criminal form and there are strong arguments against it which will be elucidated in the following section.

As discussed earlier defamation is stated in Section 499 and its punishment is defined in Section 500 of the Indian Penal Code. In India, it exists both as a civil wrong and a criminal offence, and one can sue for defamation in a civil court to seek compensation, as well as file a criminal case to punish the offender as per Section 500 of IPC for up to two years of imprisonment or fine or both.

In *Subramanian Swamy v Union of India*³¹, despite a lot of public uproars, the Supreme Court refused to strike down criminal defamation³² thus making its stance on the matter very clear. However, public debate on the issue has continued, and for a good reason, too.

³¹ Subramanian Swamy (n 4)

First, why is defamation law as a criminal offence needed when civil remedies are adequate enough to provide justice to the affected party? If a person is defamed and thus feels his/her right to reputation has been violated, he can always sue for civil damages and get compensated. But in India, both a civil suit for defamation under the common law and a criminal suit under sections 499-500 IPC can be filed concerning the same allegedly defamatory statement.³³ This means even after receiving damages just out of pure malice the plaintiff can file a criminal case to harass the accused even more which is completely unnecessary. Besides, when a civil suit awards the person the damages for the harm caused to his/her reputation, having defamation as a criminal offence is completely unnecessary and makes defamation seem a lot more serious offence than it actually is.

Second, making defamation a criminal offense defeats the whole purpose and need for criminal law. Globally, criminal law differs from civil law because the former constitutes a more serious wrong that is an offence not just against an individual but the society and the state as a whole. Therefore, unlike civil law, damages are not enough in criminal law and punishments need to be meted out to set a moral example to society. Defamation as earlier stated is an imputation made against a person and thus in no way harms society at large. Hence, labelling defamation as a crime ends up lowering the credibility of what crimes are meant to be. Defamation is like a contract where damage has been suffered by a private individual and the solution is awarding the person damages and not sending someone to jail for it. To put it simply all people make scandalous statements at some point in their life that can potentially be defamatory and if these are labelled as criminal offences like rape and murder, a dangerous precedent of a police state will be set into motion will seriously undermine the right to free speech. Last but not the least, when defamation is labelled as a criminal offence, the state, too, is brought into the picture which is not required. The state acts as the prosecutor in criminal offences and involving the state in legal suits concerning two private individuals will set the trend of unwarranted state interference in private affairs, as

³² Bhairav Acharya, 'Criminal Defamation and the Supreme Court's Loss of Reputation' (The Wire, 14 May 2016) < <https://thewire.in/law/criminal-defamation-and-the-supreme-courts-loss-of-reputation> > accessed 10 June 2022

³³ Aparna Viswanathan (n 26)

well as waste state resources. By criminalizing defamation, the state is expected to protect the reputations of individuals while expending precious public resources to do so³⁴ thus not only wasting the precious efforts of the state in petty suits and undermining serious crimes like rape and murder that need the attention of the state. Defamation is no longer a criminal offence in countries like the UK ³⁵and it's time India did the same too.

CONCLUSION

All in all, the purpose of this paper is not to do away with defamation law altogether. Defamation is undoubtedly an important law and protects the right to reputation but it needs to be used cautiously unlike ordinary litigation that is filed at the first sign of trouble. This paper believes that it is not a suit involving wrongs as serious as a breach of contract, rape, murder, theft, etc. As discussed in this paper, the suit has serious consequences that come with it and is often filed in a hurry for trivial reasons and later regretted due to the time and money invested. Besides, India having a vast number of legal cases and issues to deal with versus her fewer courts and judges, the country's judiciary cannot afford to overburden itself with too many unnecessary defamation suits that waste precious judicial resources. Additionally, a plethora of defamation suits creates a culture of harassing victims and activists thus having a chilling effect on the fundamental right of free speech thus the essence of democracy is lost in such cases. Besides, allowing defamation to exist as a criminal offence breeds a culture of censorship and surveillance by the state that is both dangerous and unnecessary because civil remedies are available. Just like consuming antibiotics for the smallest of colds can have dangerous side effects on health, filing defamation suits for the smallest of reasons can have a chilling effect on the democracy and judicial system. It is important to not overuse the law but respect the purpose and need for defamation law and not to go beyond and above it. This paper intends to point out the various issues and fallacies of defamation law to caution litigants of the potential dangers. Perhaps, the law of defamation is here to stay but the attitude of litigants towards it needs to change.

³⁴ Bhairav Acharya (n 32)

³⁵ 'UK Government Abolishes Seditious Libel and Criminal Defamation' (*Human Rights House Foundation*, 13 July 2009) <<https://humanrightshouse.org/articles/uk-government-abolishes-seditious-libel-and-criminal-defamation/>> accessed 10 June 2022