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Defamation: An In-Depth Legal Analysis and Its Impact on Free Speech

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*In a democratic society, the freedom of speech and expression is a core value that allows people to share ideas, raise their voices, and participate meaningfully in public life. However, this freedom is not unlimited. It comes with some reasonable restrictions, one of the most significant of which is defamation, which protects an individual's reputation from false and wrongful statements. This research paper examines defamation, its definition, origins, and current application. It explores the concepts of historical background, the legal framework in India, and how it has evolved in modern challenges, particularly in the age of digital communication. A key focus of the paper is the debate around criminal defamation in India. Through a detailed analysis of landmark cases like *Subramanian Swamy v Union of India*, where the Supreme Court upheld the constitutionality of criminal defamation, and *Shreya Singhal v Union of India*, which emphasised the importance of online free speech, this paper examines how courts attempt to keep a balance between protecting personal reputation and upholding free speech. By comparing global legal approaches and highlighting emerging issues in the digital age, this study aims to reflect on whether criminal defamation is necessary or if it imposes an unfair burden on free speech. Ultimately, the paper aims to contribute to the broader discussion on how the law can safeguard both dignity and democratic dialogue in a rapidly evolving world.*

Keywords: *defamation, slander, libel, criminal offences, free speech.*

INTRODUCTION

Defamation is a law related to injury to the reputation or image of a person in society through a wrongful or harmful statement. According to Black's Law Dictionary, "*Defamation is a deliberate wrong communication either published or publicly spoken, that injures false communication either published or publicly spoken, that injures another's reputation or good name.*"¹

It involves the publication of a statement that is not only false but also likely to lower the subject in the estimation of others or expose them to hatred, contempt, or ridicule. Defamation law provides a remedy to individuals whose personal or professional reputations are unjustly damaged. It plays a crucial role in maintaining the dignity and honour of individuals in a civilised society.

The two legal subcategories of defamation are:

1. **Libel** – A statement which is made in a permanent form, like in a statute, published online, written, effigy, or broadcast.
2. **Slander** – A statement which is made in a transient form, like spoken words or gestures. Slander generally requires proof of actual harm unless it falls under specific categories like imputations of crime, disease, unchastity, or professional incompetence.

In the modern era, the use of electronic communication has blurred traditional distinctions, with some nations classifying radio defamation as libel and others as slander, while television faces similar challenges in categorisation. Defamation laws aim to protect a person from reputational harm while ensuring speech freedom is not unduly restricted. The advent of media and online platforms has made defamation laws more complex, leading to new challenges. Social media platforms, blogs, and digital content can quickly spread false information, making the enforcement of defamation laws more difficult and urgent.

RESEARCH OBJECTIVES

1. To analyse the evolution of defamation law.
2. To analyse the historical development of defamation law.

¹ Henry Campbell Black, *Black's Law Dictionary* (7th edn, West Publishing Co 1990)

3. To explore the impact of social media on defamation cases.
4. To assess whether defamation laws restrict freedom of speech.

DEFAMATION AND BHARATIYA NYAYA SANHITA (BNS)

BNS defines defamation in section 356 as *“Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes in any manner, 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”*².

Defamation can be elucidated with the famous case of *D.P. Choudhary v Kumari Manjulata*.³ The newspaper published that a 17-year-old girl, Manjulata, eloped with a boy. The family was well known, and due to this article, her reputation got tarnished along with her family, and they faced disgrace. However, it was found that this news was completely fake and irresponsible published and the court held that a sum of Rs.10,000 must be provided to the defendant as it amounted to defamation.

HISTORICAL DEVELOPMENT OF DEFAMATION LAW

In a historical context development of defamation law can be traced back in common law and statutory law. The legal precedents of Roman Law introduced the *Lex Cornelia de Injuriis* (81 BCE), which penalised public defamation, showing an early recognition of reputational harm from wrongful statements. Similarly, the English common law began to address defamation in the late 16th century, categorising libel as a serious and punishable offence due to its long-lasting impact.

The Star Chamber Court in England (1606) criminalised libel, strengthening strict penalties for defamatory statements. In the modern era, the landmark U.S. case *New York Times Co. v Sullivan* (1964)⁴ established the actual malice standard, which mandates that public figures must demonstrate that defamatory statements were made with knowledge of their falsity or

² Bharatiya Nyaya Sanhita 2023

³ *D.P. Choudhary v Kumari Manjulata* (1997) AIR RAJ 170

⁴ *New York Times Co. v Sullivan* [1964] 376 U.S. 254

with reckless disregard for the truth. In English law, specifically in criminal law, libel has been recognised as an offence, whereas Slander is no offence.

The laws of Defamation have also evolved in civil law countries. France's Article 29⁵ of the Press Law of 1881 broadly defines defamation, while Germany's Section 185 of the Penal Code criminalises insult-based defamation, reinforcing stricter statutory control over reputational harm. Different jurisdictions have developed different legal frameworks for defamation. In the United States, the First Amendment strongly protects free speech, and truth is an absolute defence in defamation cases. Public figures must meet the actual malice standard, as established in *New York Times Co. v Sullivan*. In contrast, the United Kingdom introduced reforms under the Defamation Act 2013⁶, requiring claimants to prove serious harm to reputation, while defences such as truth, honest opinion, and public interest offer stronger protection to defendants.

In India, defamation remains a criminal offence under Section 356 of the Bharatiya Nyaya Sanhita (BNS). The Supreme Court upheld its constitutionality in *Subramanian Swamy v Union of India* (2016)⁷, holding that free speech rights don't get violated. Cases like *Ram Jethmalani v Subramanian Swamy* (2017)⁸ have reinforced the significance of damages in defamation claims. Meanwhile, the European Union balances defamation laws with Article 10 of the European Convention on Human Rights (ECHR)⁹, which protects free expression but permits restrictions to prevent reputational harm. The degree of legal protection and enforcement varies across EU countries, reflecting diverse approaches to balancing speech rights and reputation protection.

DEFAMATION LAWS IN INDIA

There is no such difference between libel and slander in India. Both are criminal offences. For better understanding, it can be divided into two categories: criminal and civil.

⁵ Press Freedom Act of the French Republic 1881

⁶ Defamation Act 2013, s 26

⁷ *Subramanian Swamy v Union of India* (2016) 7 SCC 221

⁸ *Ram Jethmalani v Subramanian Swamy* (2006) 126 DLT 535

⁹ European Convention on Human Rights 1950

Defamation as a Crime: Under chapter XIX of the BNS, section 356 protects a person's reputation. Section 356 of the Code provides for defamation of a class, i.e., community [Riot], while section 299 deals with hate speech about outraging religious sentiments. [Hate Speech]

The definition of defamation has subject of ten subject exceptions and four explanations. If an individual is convicted of defamation under section 356 of the BNS, they are deemed legally responsible for making a defamatory statement. The procedural aspects of the law state that the offence is not cognizable¹⁰. An aggrieved person would not be able to simply file a police complaint but would, in most cases, have to file a complaint before a magistrate.

As far as the truth defence is concerned, although truth is generally considered to be a defence to defamation as a civil offence, under criminal law, only truth is a defence to defamation as a crime (assuming, of course, that it is demonstrably true) only in a limited number of circumstances. This can make persons particularly vulnerable to being held guilty of having committed defamation under the BNS even if the imputations they made were truthful.

Defamation as a Tort: Defamation in tort generally focuses on libel (written defamation) and not on slander (spoken defamation). To establish a libellous statement, it needs to prove that it is false, written, defamatory, and published. An interesting part of defamation in a tort is that it is only a wrong if the defamation harms the reputation of a person who is alive. In almost all cases, this means that it is not a tort to defame a deceased person since, general rule says that the plaintiff needs to prove that the defamatory words referred to him.

However, that doesn't mean there can be no cause of action if a dead person is defamed, for example, a defamatory statement negatively impacts the reputation of a deceased person's heir, an action for defamation can be maintainable moreover, if a defamation lawsuit is brought and the court determines that defamation occurred, the plaintiff (typically the individual who was defamed) will be entitled to receive damages.

In addition to this, a person anxious about being defamed in a publication may seek the grant of an injunction to restrain such publication. Although injunctions are hardly granted, as Indian courts have inclined to follow the principle laid down in the 1891 case of *Bonnard v*

¹⁰ Bharatiya Nagarik Suraksha Sanhita 2023, s 2(g)

Perryman,¹¹ which is as follows: “*The Court has jurisdiction to restrain by injunction, and even by an interlocutory injunction, the publication of a libel. But the exercise of the jurisdiction is discretionary, and an interlocutory injunction ought not to be granted except in the clearest cases – in cases in which, if a jury did not find the matter complained of to be libellous, the Court would set aside the verdict as unreasonable. An interlocutory injunction ought not to be granted when the Defendant swears that he will be able to justify the libel, and the Court is not satisfied that he may not be able to do so*”.¹²

The principle has been followed by a division bench of the Delhi High Court by a division bench in the 2002 case of *Khushwant Singh v Maneka Gandhi*¹³. Therefore, even if there is a concern that the content might be defamatory, courts are unlikely to prevent its publication unless there are truly exceptional circumstances. Usually, courts don’t stop something from being published just because it might be defamatory unless it’s a really serious case where money alone wouldn’t be enough to fix the damage done to someone’s reputation. In most situations, Indian courts have leaned toward protecting free speech and haven’t been quick to grant orders that would silence someone over a potential defamation claim.

Interestingly, back when Rajiv Gandhi was Prime Minister, his government introduced a Defamation Bill to change how defamation was handled. But the bill sparked a lot of outrage from journalists and opposition parties because it was seen as too extreme. In the end, the backlash was so strong that the government had to withdraw it.

ESSENTIALS OF DEFAMATION

The Essentials of Defamation are as follows:¹⁴

1. The statement must be defamatory.
2. The said statement should refer to the plaintiff.
3. For a statement to amount to defamation, it must be made known to someone other than the plaintiff.

¹¹ *Bonnard v Perryman* [1891] 2 Ch. 269

¹² *Ibid*

¹³ *Khushwant Singh v Maneka Gandhi* (2002) AIR DELHI 58

¹⁴ *Thimmaiah v T.M. Rukimini* (2013) 2 KANT LJ 28

4. In cases of slander, liability arises either when specific harm (special damage) is proven or when the slander falls within certain grave categories that are considered actionable without the need to prove actual damage (actionable per se).

1. The Statement must be Defamatory: A statement that causes injury to the reputation of the plaintiff is known as defamation. Defamation is the publication of a statement that tends to lower a person in the estimation of right-thinking members of society generally¹⁵ or which makes them shun or avoid that person¹⁶. The statement can be made in contrasting ways. For example, it can be oral, written, printed, or by the exhibition of a picture, statue, or effigy, or by some conduct. In Salmond's Law of Torts, the following thesis on the nature of a defamatory statement has been made.¹⁷: *'A defamatory statement has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right-thinking members of society generally and in particular to cause him to be regarded with feeling of hatred, contempt, ridicule, fear, dislike or disesteem'*.

The Statement must refer to the Plaintiff: For the action of defamation, the plaintiff needs to prove that the statement refers to them. The defendant may still be held liable if a reasonable person receiving the statement could infer that it referred to the plaintiff.

In *Hulton Co. v Jones*,¹⁸ the defendants published a fictional article in the Sunday Chronicle, written by their Paris correspondent. Pretending to narrate a motor festival at Dieppe. The article contained defamatory remarks about the morals of a fictional character named Artemus Jones, described as a Churchwarden from Peckham who attended a festival. However, a real individual named Artemus Jones, a practising barrister, filed a defamation suit against the publishers. The case was assigned to him for consideration. The defendants argued that the name 'Artemus Jones' was purely fictional and created solely for the article, asserting they did not know the plaintiff and had no intention to defame him. Being given the defence, the court held them liable.

The Statement must be Published: A defamation statement must be published, that means the statement must be known by people other than the person defamed, unless the act is done,

¹⁵ *Sim v Stretch* [1936] 52 TLR 669

¹⁶ Edwin Peel and James Goudkamp, *Winfield and Jolowicz On Tort* (19th edn, Sweet & Maxwell 2014)

¹⁷ *Deepak Kumar Biswas v National Insurance Co. Ltd.*, (2006) 4 AKAR (NOC) 563 (GAU)

¹⁸ *Hulton Co. v Jones* [1910] A.C. 20

no action for defamation lies. Communication of the defamatory statement solely to the plaintiff is insufficient, as defamation involves harm to reputation, which depends on how others perceive the individual, not on the individual's view of themselves.¹⁹ Simply sending a defamatory letter to the person it's about, in a language they understand, doesn't count as defamation, because defamation is about harming someone's reputation in the eyes of others. A complaint lodged with an Enforcing Agency cannot be considered to be the publication of a defamatory statement.

DEFENCES IN DEFAMATION

The defences to an action for Defamation: Justification or Truth, Fair comment and Privilege, which may be either absolute or qualified.

The Defamation Debate and Judicial Intervention: The Supreme Court, in the judgement of *Subramanian Swamy v Union of India*,²⁰ the case has put an end to the postulation about the decriminalisation of defamation, as the court upheld the constitutional validity of the relevant provisions. However, the judgment has triggered mixed reactions, with many expressing concerns. Some intellectuals argue that by not decriminalizing defamation, the power to misuse the law will be unreasonable in the hands of politically influential figures and corporations, who could use it for their advantage and create unnecessary nuisance. On the other hand, some believe that, in today's modern world, it's essential to update or replace our colonial-era provisions that no longer serve a useful purpose.

Swamy's Petition: Decriminalisation and Allied Issues: The concurring petitions filed by leading political figures with one mind demanded decriminalizing defamation on one hand and building up civil remedies and compensation for the loss of individual reputation. Subramanian Swamy's writ petition raised seven issues, centred around two main contentions:

- Declaring Sections 499²¹ and 500²² of the IPC as unconstitutional.
- Declaring Section 199(2)²³ of the CrPC as unconstitutional.

¹⁹ *Pullman v Hill* [1891] 1 Q.B. 524

²⁰ *Subramanian Swamy v Union of India* (2014) 7 SCC 221

²¹ Indian Penal Code 1860, s 499

²² Indian Penal Code 1860, s 500

²³ Code of Criminal Procedure 1973, s 199(2)

The petitioner argued that these provisions placed an unfair restriction on free speech, one that goes beyond what Article 19(2) of the Indian Constitution allows. In addition to that, the petitioner also raised the following points:

- In a democracy, public opinion, perception, and criticism play a crucial role in keeping the government in check. If people are threatened with criminal charges for speaking out, it can seriously harm the development of a healthy and mature democratic system.
- Fundamental rights of liberty and free speech are controlled and not absolute as per the Constitution, but in the name of control, the freedom of speech that pertains to criticism of certain governmental actions cannot be gagged.
- Personal reputation can't be placed above the broader public interest, because in a democracy, what matters most is the well-being of society as a whole, not just individual concerns.
- It's hard to justify the government using public money to file defamation cases through public prosecutors just to silence criticism, especially in a democracy where free expression should be protected.
- The government discourages free public expression by filing defamation cases through public prosecutors, using taxpayers' money, which is hard to accept in a democratic setup. Section 199(2) of the Criminal Procedure Code gives the government unchecked power to approve defamation cases, which can slowly silence citizens' right to criticise and hold leaders accountable.

The counsel on behalf of the State of Tamil Nadu asserts that sections 499 and 500 could not be said to travel beyond reasonable limits on free speech, because Article 19(2) in itself imposes a restriction. Also, there should be a debate about the conceptual meaning of the term defamation used in Article 19(2) of the Indian Constitution and defamation in section 499 of the IPC.

It was also indicated that the freedom of speech and expression has to be in a controlled manner and does not include the concept of defamation as defined in section 499. While reviewing the petition, the bench questioned whether the fact that other countries have scrapped criminal defamation should matter when deciding the constitutional validity of a law in India, especially since India has its own unique written and evolving Constitution.

SOCIAL MEDIA AND THE NEW FACE OF DEFAMATION

The advent of online defamation presents a major challenge in the digital era, where social media and digital platforms like Facebook, Instagram, and X (Twitter) enable the rapid spreading of both false and malicious statements. While traditional defamation was related to newspapers, television, and print media, online defamation can reach people all over the country in seconds, and its effects can be hard to battle against.

As everyone from individuals to organisations relies mostly on platforms like Twitter, Facebook, Instagram, and LinkedIn for communication, there is more vulnerable to reputational damage from false allegations, misleading statements, and defamatory material. This large viral spread of online information, combined with the opaque shields of the internet, has clouded the legal recourse available for defamation, rendering it harder to enforce and find liable parties.

Online defamation is generally of two kinds: libel (the written form of defamation, for example, tweets, blog posts, and comments on social media) or slander (the spoken form of defamation, for example, a live stream with insults or a voice note). To amount to defamation, the statement must be false, published, and the issue related to the plaintiff's case to a third party, clearly identify the plaintiff, and cause reputational harm.

The biggest challenge in Online defamation is that of being permanent and accessible, because once you post some defaming comments, they can be shared, archived, or screenshotted, and they will never be completely removed from the Internet. Another significant challenge is the anonymity of online users, and defamers can hide under false accounts, and it difficult to track and settle them. Online Defamation: Legal Systems Around the World Face Unique Challenges.

A major challenge in declining jurisdiction is that each country has its defamation laws, and one country inflicting defamation posts can affect other people beyond its borders. Using an example, a U.S. defamatory tweet can tarnish the reputation of a person in India, thus we have cross-border legal disputes. Another issue is the social media platforms' liability, as most jurisdictions place accountability of user-generated content on the user, leaving the platforms free from liability.

In the U.S., Section 230 of the Communications Decency Act (1996)²⁴ protects social media firms in many cases, while in the European Union, the Digital Services Act²⁵ has stricter requirements for platforms to take down illegal material. And requiring proof of reputational damage in online defamation cases is problematic, as online defamation cases often require digital evidence, expert testimony, and forensic analysis.

Many landmark cases emphasise the complication of online defamation. Domestically, *Elon Musk v Vernon Unsworth* (2019)²⁶ found that in the United States, not all offensive statements are actionable as defamation; Musk's pedo guy epithet was protected as opinion. In India, *Swami Ramdev v Facebook, Google & Twitter* (2019)²⁷ marked a crucial development, as the Delhi High Court ordered global removal of defamatory content, reflecting the growing importance of cross-border enforcement in digital defamation cases.

BALANCING OF FUNDAMENTAL RIGHTS

Most of the judgment in India has rested on balancing the freedom of speech and expression, Article 19(1)(a)²⁸ and right of reputation, article 21. Although some intellectuals have criticised this decision, the court reasoned that one person's reputation cannot be sacrificed in the name of another's right to free speech. In other words, both rights need to be balanced based on the situation. In this case, the court found that keeping criminal defamation laws in place was the right approach.

Internet Defamation: Shreya Singhal v Union of India: Shreya Singhal's case, a landmark judgement in the field of freedom of speech and expression. The case brings various dimensions that are important aspects of Article 19(a). Section 66A, which was being criticised for its over-vagueness and its chilling effect on speech, was struck down by the Supreme Court as it was unconstitutional.

Article 19(1) (a) of the Constitution talks about the right to freedom of speech and expression. Article 19(2), which directly follows, sets boundaries on this freedom by permitting the state to enforce reasonable legal restrictions to protect things like the sovereignty and integrity of

²⁴ Telecommunications Act of 1996

²⁵ The Digital Services Act 2022

²⁶ *Elon Musk v Vernon Unsworth* [2019] 2:18-cv-08048-SVW-JC

²⁷ *Swami Ramdev v Facebook, Google & Twitter* (2019) AIRONLINE Del 1749

²⁸ Constitution of India 1950, art 19(1)(a)

India, the security of the state, public order, decency or morality, defamation, or incitement to an offence. In the petitioner's view, none of the reasons listed under Article 19(2)²⁹ could be used as valid justifications to defend the legality of Section 66A of the Information Technology Act 2000³⁰. The petitioners argued that the provisions were excessively vague and lacked clear definitions, effectively resulting in a subtle yet dangerous form of censorship. Moreover, they contended that Section 66A created a chilling effect, compelling individuals to self-censor any expression of dissent, no matter how harmless.

The Supreme Court accepted the petitioner's arguments, stating that none of the reasons cited by the state, such as public order, defamation, incitement to an offence, or decency and morality, all listed under Article 19(2), could be justifiably applied in this case. Nariman J stated,³¹ any law seeking to restrict the freedom of speech can only pass muster, he further said, if it is proximately related to any of the eight subject matters set out in Article 19(2). The Supreme Court dismissed the government's reasoning for limiting free speech in Article 19(2), which was based on defamation, inciting crime, and maintaining integrating. The court clearly stated that criminalising speech just because it is offensive or annoying has nothing to do with the actual limitation allowed by the Constitution of India.

CONCLUSION

In conclusion, the defamation law sits at a complex interchange between the right to protect reputation and the fundamental right to free speech and expression. While defamation remains a fair limitation under constitutional frameworks, particularly in democratic states like India, its criminalisation continues to agitate significant legal and ethical debate. Through an exploration of its historical evolution, comparative legal frameworks, and landmark judgments, especially *Subramanian Swamy v Union of India*³² and *Shreya Singhal v Union of India* study highlights the pressing need to reevaluate the scope and application of defamation laws in the modern digital age.

Courts around the world are increasingly tasked with striking a delicate balance between safeguarding individual dignity and ensuring robust democratic discourse. As technology

²⁹ Constitution of India 1950, art 19(2)

³⁰ Information Technology Act 2000, s 66A

³¹ *Shreya Singhal v Union of India* (2015) SCC OnLine SC 248

³² *Subramanian Swamy v Union of India* (2016) 7 SCC 221

evolves and speech takes new forms, the legal system must adapt accordingly, ensuring that laws meant to prevent harm do not become tools for suppressing dissent.