This research paper critically analyses the legal jurisprudence developed on the issues neighboring constitutionality of defamation. In doing so, it presents comprehensive analysis of the derivation of the law and the present category of defamation law in India. Supplementary, the research paper takings to evaluation the judgments of the Apex Court Subramanian Swamy and R. Rajagopal cases regarding constitutionality of criminal and civil defamation respectively. It is argued that Subramanian Swamy case fails to suitably apply the standard of rationality. As a final point, the paper concludes that court should be cautious whenever restrictions are imposed on right to freedom of speech and the problems faced by the media due to the bad effect of law. The main idea behind balancing should be exercise of individual’s freedom of speech and expression without compromising with the person’s reputation in the eyes of public. It has also been held by this Court that in judging the reasonableness of restrictions, the Court is fully entitled to take into consideration matters of common report, history of the times and matters of common knowledge and the circumstances existing at the time of legislation.

Keywords: constitution, defamation law, right to freedom of speech and expression, criminal and civil defamation, Subramanian Swamy case.

INTRODUCTION

Defamation is civil as well as criminal wrong. There is codified criminal law subject; the civil law of defamation is not codified. Defamation under civil law comes under the law of torts but in criminal law the topic is contained in sectioned Section 499 to 502 of Indian Penal Code.

J. Blackstone

Every man is entitled to have his reputation preserved inviolate.¹

---

¹ Sir William Blackstone, Commentaries on the law of England, 101-04(2nd ed. 1769)
Punishment for defamation is imprisonment up to two years or fine as per Section 500 of the IPC. In past few years, defamation cases are rapidly increasing in India like anything. The political leaders are filing defamation cases against each other on frivolous grounds and then cross defamation cases are being filed. There are a number of cases filed alongside political leaders like Arvind Kejriwal, Rahul Gandhi, Smriti Irani. This has led to disagreement in media and need to relook into defamation laws of India.

Several deliberate counterfeit statement, either printed or verbal, that problems a person's standing; decreases the respect, regard, or confidence in which a person is held; or induces disagreeable opinions or feelings against a person. The ingredients of defamation are-

(i) making or Publishing any imputation concerning any person,
(ii) Such imputation must have been made with the intention to harm with knowledge or having reason to believe that it will harm the reputation of the person concerned.

CONSTITUTIONAL VALIDITY OF SECTION 499

It has been alleged that it takes away fundamental right of freedom of speech and expression guaranteed under Article 19(1) of Constitution of India.4

- Whether defamation comes under reasonable restrictions imposed by state under Article 19(2) of Constitution?
- The reasonableness of this restriction needs to be analyzed by Court.
- There are no easy comparisons: on one hand, when it comes to practice, there is very little doubt that a criminal case, regardless of what its ultimate outcome is, is far more onerous for a person accused of defamation to have to deal with than a civil case which can often be almost entirely left in the hands of lawyers.
- On the other hand, the burdens of proof differ, and if the aim is actually to protect a reputation, the standard of proof required in civil court is lower than that which a criminal court would demand.

---

2 Section 499 to 502 of Indian Penal Code, 1860
3 Section 500 of Indian Penal Code, 1860
4 Article 19(1) of Constitution of India
• Criminal defamation, if subjective evidence is anything to go by, is, however, not used solely as a tool to protect reputations.
• It is extremely susceptible to being used as a 'matter of strategy' to contain speech by individuals: allegations of rape, for example, could be countered with the filing of a defamation FIR with the police.
• The arguments against criminal defamation do not appear to contain reference to the presence of misuse or, in fact, any data-based statements relating to the effects of criminal defamation.
• It appears that the possibility of misuse was instead brought up in arguments supporting the continued existence of Section 499: presumption of constitutionality.
• It has also been held by this Court that in judging the reasonableness of restrictions, the Court is fully entitled to take into consideration matters of common report, history of the times and matters of common knowledge and the circumstances existing at the time of legislation.
• The concept reasonable restriction conveys that there should not be excessive or disproportionate restriction. Merely because law of criminal defamation is misused or abused would not make the provisions unconstitutional if they are otherwise reasonable."

**ANALYSIS OF ARTICLE 19: FREEDOM OF SPEECH & EXPRESSION**

The fundamental right to freedom of speech and expression is regarded as one of the most basic elements of a healthy democracy for it allows its citizens to participate fully and effectively in the social and political process of the country. Freedom of speech provides opportunity to express one’s belief and show political attitudes. It ultimately results in the welfare of the society and state. Thus, freedom of speech provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

State of West Bengal Vs. Subodh Gopal Bose case stated that the State has a duty to protect itself against certain unlawful actions and, therefore, may enact laws which would ensure such protection. The right that springs from Article 19(1) (a) is not absolute and unchecked. There cannot be any liberty absolute in nature and uncontrolled in operation so as to confer a right wholly free from any restraint. Had there been no restraint, the rights and freedoms may become
synonymous with anarchy and disorder.\textsuperscript{5} S. Rangarajan v. Jagjivan Ram the Court provided the test of 'proximate and direct nexus with the expression', it was held that the Court has to keep in mind that the restriction should be founded on the principle of least invasiveness i.e. the restriction should be imposed in a manner and to the extent which is unavoidable in a given A person is entitled to right to reputation and not defamed situation. The Court would also take into consideration whether the anticipated event would or would not be intrinsically dangerous to public interest.\textsuperscript{6}

\begin{itemize}
  \item An additional person is entitled to freedom of speech and expression under Article 19 of the Constitution of India.
  \item Issues arise in determining the extent to which a person can exercise his right to freedom of speech and expression and not defame another person.
  \item Article 19 recognizes that reasonable restriction on the ground of \textit{inter alia} defamation can be imposed on such exercise of right to freedom of speech.
  \item Supreme Court in its judgments in cases of Subramaniam Swamy and R. Rajagopal cases has delved into this aspect as far as criminal and civil defamation is concerned. This essays analyses and points out the errors in the judgments.
  \item Supreme Court has confirmed the constitutional validity of colonial era’s criminal law defamation laws and explaining the rights of free speech and how it is distinct from defamation and concluded that there is no chilling effect on free speech because of criminal sanctions.
\end{itemize}

\textbf{EXPLORING THE PROBLEMATIC ASPECTS OF CONSTITUTIONALITY OF DEFAMATION}

\textbf{R. Rajagopal V State of Tamil Nadu}

This case pertains to constitutionality of civil defamation. In this case, Supreme Court of India mentioned about one of the landmark judgment of the US Supreme Court in \textit{New York Times} v.  

\begin{itemize}
  \item \textsuperscript{5} The State Of West Bengal vs Subodh Gopal Bose And Others on 17 December, 1953
  \item \textsuperscript{6} S. Rangarajan Etc vs P. Jagjivan Ram on 30 March, 1989
\end{itemize}
Sullivan\textsuperscript{7} stated that government official who is on his duty can recover damages only when the truth claim is false and reckless regard for truth. Through this case, the judges examined the relationship between free speech and civil defamation.\textsuperscript{8}

The court held that common law defamation stood unreasonably restricted under Article 19(1) (a) because it thrust undue advantage of no fault liability. The primary assault against Section 499 was that by criminalizing what is basically a private wrong. The Section added upto limitation upon free discourse.

**Subramanian Swamy V. Union of India**

Two judge bench of Supreme Court consisting of Justice Dipak Mishra and Justice P.C. Pant decided to maintain constitutional validity of the country’s criminal defamation laws, deciding that laws are not in disagreement with freedom of right to speech. The decided judgment had put most of the politicians and the media figure on the rounded side. Some even argued that it could hold back freedom of speech. The case will be remembered more for its indistinct colorful languages than for its educational values. It is clear from the announcement that there has been a alarming effect on freedom of speech. They communicated that through their analysis, there is a requirement of public for the loss of reputation they suffer and wanted to provide public remedies for private wrongs. The justification given by they provide good grounds to think that judgment is an atrocious blow against freedom of expression. Article 19 (2) of the Indian Constitution stated reasonable restrictions upon the freedom of speech, in the interests of defamation.\textsuperscript{9} But the Article does not say about the defamation whether it deals with criminal as well as civil defamation. The word reasonable entails proportionality aspect in terms of relationship between the degree to which freedom of speech contravened and the interest of the public at stake. It is not necessary for all in the chorus to sing the same song. A magistrate should be extremely careful in issuing summons on a plea for the initiation of any criminal defamation case. It is noteworthy to note that to justify the penal provisions centre pronounced about the anarchical way of how Indian society works and opined about how criminal defamation deters people from practicing freedom of speech and expression. It has been logically deduced that mostly politicians are facing the criminal defamation case.

\textsuperscript{7} New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
\textsuperscript{9} Article 19(2) of the Constitution
against their opponents.\textsuperscript{10} Subramanian Swamy v. Union of India (2016),\textsuperscript{11} the Supreme Court held Sections 499 and 500 of the IPC dealing with criminal defamation as constitutionally valid.

- It recognized the right to reputation as a part of the right to life assured to citizens under Article 21 of the Constitution.\textsuperscript{12} It declared that the right to free speech under Article 19(1) (a) had to be balanced against the right to reputation under Article 21.\textsuperscript{13}
- The Supreme Court said a free press is the heart and soul of political intercourse and is a public educator, but this freedom is not absolute and cannot be used by the media to cause injury to an individual’s precious reputation.
- The Court held that the press has to also observe reasonable restrictions and its purpose is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments.
- The Court said the reputation of an individual was an equally important right and stood on the same pedestal as free speech.
- The Court held that criminalization of defamation to protect individual dignity of life and reputation is a reasonable restriction on the fundamental right of free speech and expression.
- The right to reputation is a constituent of Article 21 of the Constitution.
- It is an individual’s fundamental right.
- It is also a human right. Cumulatively, it serves social interest.
- Upholding defamation provisions do not silence free speech.
- The court observed that deliberate injury to the reputation of an individual is not a mere private wrong, worth only a civil case for damages.
- Defamation is a crime committed against society at large and the State has a duty to redress the hurt caused to its citizen’s dignity.
- Nobody has a right to denigrate others’ right to person or reputation. Interest of the people involved in the acts of expression should be looked at not only from the perspective of the speaker but also the place at which he speaks, the scenario, the

\textsuperscript{10} Subramanian Swamy Vs Union of India, Ministry Of Law & Ors, on 13th May, 2016;
\textsuperscript{11} Subramanian Swamy v. Union of India (2016)
\textsuperscript{12} Article 21 of the Constitution
\textsuperscript{13} Article 19(1)(a) of the Constitution
audience, the reaction of the publication, the purpose of the speech and the forum in which the citizen exercises his freedom of speech and expression.

- Constitutional validity of criminal defamation, the Supreme Court also rejected demands to strike down Section 199(2) to (4) of the Cr. P. C.
- The court rejected the argument that this section creates a separate class. It also dismissed the contention that the classification enumerated in this provision has no rationale and does not bear constitutional scrutiny.
- The provision in the Cr. P. C allows public servants to file a complaint in a sessions court through a public prosecutor for alleged defamatory comments on their official acts.
- The court said the right of a public servant, under Cr. P.C. 199 (2) to (4), to file defamation complaint is over and above his or her right under Section 199 (6) to personally file a complaint before a Magistrate.
- Section 199 (6) gives to a public servant what every citizen has as he cannot be deprived of a right of a citizen. There can be cases where sanction may not be given by the State Government in favour of a public servant to protect his right and, in that event, he can file a case before the Magistrate under Section199 (2) to (4).
- The court's reasoning is not always easily penetrable: its differentiation between public and private wrongs is far from clear, it refers to scripture and works of literature without clear indication of why it does so, and it speaks of such things as (unenforceable) fundamental duty and 'constitutional fraternity'.
- Constitutional concept: Fraternity as a concept is characteristically different from the other constitutional goals. It, as a constitutional concept, has a keen bond of sorority with other concepts.
- The breed of homogeneity in a positive sense and not to trample dissent and diversity. It is neither isolated nor lonely.
- The idea of fraternity is recognised as a constitutional norm and a precept. It is a constitutional virtue that is required to be sustained and nourished.

Despite not being a model of clarity, and despite its conclusion arguably being a disappointment, the decision does not appear to significantly impact existing law. For better or worse, courtesy

---

14 Section 199 (6) Cr. P.C
15 Section199 (2) to (4) Cr. P.C
the Supreme Court's decision in the case of Subramanian Swamy v. Union of India, Ministry Of Law & Ors., defamation continues to be a crime in addition to being a civil wrong.\textsuperscript{16}

**PSYCHOANALYSIS OF SUPREME COURT JUDGMENT**

The Supreme Court verdicts upholding the provisions of the IPC that make defamation a criminal offence are retrograde and out of tune with the times. The Court has unfortunately accepted the argument by the Centre that criminal defamation does not have a chilling, inhibiting effect on the freedom of expression. In fact, there is enough evidence that its existence on the statute book leads to self censorship, and that it is often used to stifle legitimate criticism.

- The Court has sought to create an artificial balance between the fundamental right of free speech under Article 19(1) (a)\textsuperscript{17} and the right to reputation as part of one’s right to life under Article 21.\textsuperscript{18}
- The Court did not explain how the balancing exercise was to be carried out, but simply asserted that reputation could not be crucified at the altar of free speech.
- The Court’s argument was to invoke something that it called “constitutional fraternity”.
- It held that criminal defamation law protected the feeling of fraternity or solidarity between members of a society.
- Article 19(2) of the Constitution, which specifically limits the circumstances under which the State can restrict speech to eight enumerated categories.\textsuperscript{19}
- The word fraternity is mentioned in the Constitution’s Preamble, as an inspirational goal for the newly independent Indian Republic, alongside liberty and equality.
- Fraternity, then, was meant to complement civil rights, not to destroy them. Over the last 30 years the court has radically expanded the scope of the right to life and personal liberty under Article 21.\textsuperscript{20}

\textsuperscript{16} Subramanian Swamy Vs Union of India, Ministry Of Law & Ors, on 13th May, 2016;
\textsuperscript{17} Article 19(1) (a) Constitution of India
\textsuperscript{18} Article 21 Constitution of India
\textsuperscript{19} Article 19(2) of the Constitution
\textsuperscript{20} Article 21 of the Constitution
• Article 21 as a sword to cut down the fundamental right to freedom of speech and expression.

• This new doctrine of death by Article 21 emerged as a serious threat to the future of constitutional rights.

• Article 21 has now become so vast, that if its use as a sword becomes a regular feature, then it will likely soon swallow up the rest of the fundamental rights chapter.

• Equally problematic are the silences, the arguments that the court failed to engage with.

• Section 499 does not allow for “honest mistake” as a defence.

• Section 199 of Cr. P.C., the vague terminology used in Section 199, that any “person aggrieved” can file a defamation complaint, would open the flood-gates for frivolous litigation.

• The Court did not provide any mechanisms to check/punish for frivolous litigations. The Court merely said that this would be determined by courts in each case according to “fact situation.”

• Section 199 (2) to (4) of Cr.P.C the Court has held that the public servants are a “different class”.

**CONCLUSION**

• Supreme Court in Subramanyam Swami Vs Union of India case has recently upheld the constitutional validity of Section 499.

• Defamation is a tool that can be used by any person in a way that can harm the interest of society. So, decriminalizing such law can be detrimental to society only.

• The essential conception of democracy but it has to be taken into consideration as per the present scenario of the Country where every other law is challenged on the foundation of freedom of speech and expression.

• The problem occurs when it makes journalists and comedian under the ambit of facing criminal action for their alleged defamation of power individuals or corporations.

• Indian laws are shown as dysfunctional institutions and manifest penal provisions as attractive.
• Present law system is it seems reluctant to interfere in cases that infringe upon the fundamental rights but it also rushes into policy matters which are not relevant for them.
• Defamation law i.e. sections 499 and 500 of IPC is a double-edge sword. If a false criminal suit is lodged for defamation, the respondent can file a counter claims.
• Replacing criminal sanction with the civil sanction cannot fulfill the criteria to balance the right of freedom of expression with the right to reputation.
• The main idea behind balancing should be exercise of individual’s freedom of speech and expression without compromising with the person’s reputation in the eyes of public.