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## DEFAMATION AND ITS CONSTITUTIONAL VALIDITY UNDER THE BHARATIYA NYAYA SANHITA: A JUDICIAL AND PROPORTIONALITY ANALYSIS

~ *Mahisha Malar*

### Abstract

Defamation significantly restricts the fundamental right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Indian Constitution. Defamation is recognized as a justifiable restriction under Article 19(2) and aims to protect an individual's reputation, which is a part of the right to life under Article 21. The legal basis for criminal defamation has not changed much since the Indian Penal Code was replaced by the Bharatiya Nyaya Sanhita, 2023 (BNS). According to the law, defamation is the act of damaging someone else's reputation through written or spoken words, signs, or outward manifestations. Section 499 of the Indian Penal Code, 1860 is superseded by Section 356 of the Bharatiya Nyaya Sanhita (BNS), 2023. This clause protects individuals and organizations against undue reputational harm while also providing fair criticism for the benefit of the public.

This article examines judicial reasoning, proportionality principles, and changing democratic values in modern Indian constitutional jurisprudence, as well as the relevant BNS clauses and the validity of defamation in light of Supreme Court precedent.

Keywords: Defamation; Constitutional Validity; Bharatiya Nyaya Sanhita, 2023; Article 19(1)(a); Article 19(2); Article 21; Right to Reputation; Criminal Defamation.

### Introduction

Democracy depends on the right to free speech and expression because it allows for unrestricted discussion, criticism, and idea sharing. This freedom is not unqualified, though. Defamation is one of the constitutionally recognized restrictions that aims to stop unfair harm

to an individual's reputation. The State's commitment to using criminal law to preserve reputation was reaffirmed with the adoption of the Bharatiya Nyaya Sanhita, 2023, which replaced the Indian Penal Code. Courts have generally ruled that criminal defamation prosecutions cannot be upheld based only on ambiguous or unsupported charges; instead, they must be backed by prima facie evidence of imputation, intention, or knowledge of reputational harm. In *Subramanian Swamy v. Union of India*, the Supreme Court maintained criminal defamation while highlighting procedural safeguards and legislative exclusions to stop abuse. Concerns about forum shopping, numerous or pointless complaints, and the deterrent effect of criminal prosecutions on journalists and political critics have also been voiced, raising ongoing constitutional issues about the necessity and proportionality of criminal defamation.

### **Constitutional Framework of Defamation**

Article 19(1)(a) of the Indian Constitution provides freedom of speech and expression, acknowledging it as a fundamental right necessary for public discourse, democratic engagement, and idea sharing. Citizens can express disagreement, challenge authority, and influence public opinion thanks to this freedom. Nevertheless, this freedom is not regarded as absolute by the Constitution.

The Indian Constitution's Article 19(2) allows the State to put reasonable limitations on the right to free speech and expression for the following reasons:

- Sovereignty and integrity of India
- Security of the State
- Friendly relations with foreign States
- Public order
- Decency or morality
- Contempt of court
- Defamation
- Incitement to an offence

The framers' intention to strike a balance between individual liberty and social duty is shown in the inclusion of slander as a constitutionally allowed restraint. The goal of defamation law is to shield a person's reputation from malicious and inaccurate remarks that could damage their social position, professional integrity, or sense of dignity. The Supreme Court has always

acknowledged that reputation is a constitutional asset directly associated with the right to life and personal liberty under Article 21, rather than just a private interest.

The Supreme Court categorically ruled in *Subramanian Swamy v. Union of India* (2016) that the right to reputation is a fundamental component of human dignity and is covered by Article 21. The Court noted that fundamental rights must be harmonized rather than hierarchically structured, rejecting the claim that freedom of speech should take precedence over reputation. According to this perspective, the preservation of dignity and individual expression are balanced in the constitution.

Defamation law, therefore, operates at the intersection of two fundamental rights

- a. the right to freedom of speech and expression under Article 19(1)(a); and
- b. the right to reputation as an aspect of the right to life under Article 21

and making sure that limitations imposed by defamation laws pass the reasonableness test is the constitutional difficulty. Any restriction under Article 19(2) must be reasonable, essential, and backed by a valid state interest, the Supreme Court has emphasized. Because criminal defamation has the potential to restrict personal freedom and stifle free speech, it is especially subject to closer scrutiny. Defamation laws include safeguards like the mens rea requirement, acknowledged exceptions for truth, fair criticism, and public interest, and judicial control at the cognisance stage to allay these worries. These measures are intended to prevent abuse while upholding the fundamental goal of the law, which is to preserve reputation. Defamation laws must be implemented carefully in a democratic society that upholds constitutional values to prevent them from being used as a means of stifling criticism or dissent. Therefore, the constitutional structure necessitates a careful and ongoing balancing act that preserves reputation without compromising the democratic ideal of free speech.

### **Section 356 of Bharatiya Nyaya Sanhita (BNS)**

Under this provision, persons and organisations are safeguarded from unjustified reputational loss and at the same time fair criticism for the public interest.

- (1) 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.

## **Explanations**

- Explanation 1:  
Defamation may be committed against a living person, a deceased person (if it harms the reputation of their family), or a company or association.
- Explanation 2:  
An imputation concerning a person's profession, caste, character, or creditworthiness may amount to defamation.
- Explanation 3:  
An imputation in the form of an alternative or ironic expression may also constitute defamation.
- Explanation 4:  
No imputation harms reputation unless it lowers the moral or intellectual character of the person in the estimation of others.

## **Elements of Defamation**

1. Act or Omission: A person is guilty of defamation if they: Make or disseminate an imputation about another person using spoken words, written words, signs, or visible representations.
2. Intention: The act must be done with the knowledge or reasonable belief that it will damage the person's reputation, or it must be intended to cause harm.
3. Reputation: The impacted person's reputation must be damaged by the imputation.

This comprises:

- Intellectual or moral character.
  - Their social standing, occupation, or caste.
  - Indicating shameful personal or physical circumstances.
4. Defamation includes:
    - Deceased Persons: If the imputation is meant to hurt the feelings of the deceased's family or relatives and would damage their reputation if they were still alive.
    - Entities: Businesses, organizations, or social groups are likewise shielded from slanderous accusations.

## **Illustrations:**

- A publishes a statement on a social media platform alleging that B, a school teacher, accepts bribes for giving higher marks to students. The allegation is false, and A knows that such publication is likely to harm B's reputation in the eyes of parents and society. A has committed the offence of defamation.
- (c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it falls within one of the exceptions.

### **Punishments**

1. General Defamation: Simple imprisonment for up to 2 years, a fine, or both.
2. Printed or Engraved Material: Publishing or distributing defamatory material  
Simple imprisonment for up to 2 years, a fine, or both.
3. Sale of Defamatory Material: Selling or offering such material with knowledge of its content - Simple imprisonment for up to 2 years, a fine, or both.

### **Exceptions to Defamation:**

The law includes specific exceptions to protect freedom of speech, public interest, and good faith communications:

1. Truth and Public Good:
  - True statements made for the public good are not defamatory. The determination of "public good" is a question of fact.
  - Illustration:  
A, a journalist, publishes a report based on official audit records stating that B, a municipal contractor, misappropriated public funds. The report is true and published to inform the public.
2. Opinions on Public Servants:
  - Good-faith opinions about the **conduct or character of public servants** in their **official capacity** are not defamatory.
  - Illustration:  
A writes an article criticising B, a police officer, for misuse of power during an official operation, based on verified facts and without malice.
3. Opinions on Public Questions:

- Good-faith opinions on public issues or the conduct of individuals involved in public matters are exempt.
- Illustration:  
During a public debate, A expresses an opinion that B, a candidate in a local election, lacks administrative competence, based on B's public record.

4. Court Proceedings:

- Publishing true and fair reports of court proceedings is not defamatory.
- Explanation. — A Magistrate or other officer holding an inquiry in open Court preliminary to a trial in a Court, is a Court within the meaning of the above section.

5. Opinion of Judicial Decisions:

- Good-faith opinions about court cases or the conduct of individuals as parties or witnesses in such cases are protected.
- Illustration:  
A, a legal commentator, publishes an article stating that the judgment delivered in a civil case involving B was weakly reasoned and that B's testimony appeared unreliable based on the evidence recorded by the court. The comments are made honestly, without malice, and are confined to the facts and reasoning contained in the judicial record.

6. Criticism of Public Submissions:

- Authors, speakers, performers, and others who voluntarily submit their work to public judgment can be criticized, provided it is done in good faith and does not extend beyond the work submitted.
- Illustration:  
A, a literary critic, publishes a review of a novel written by B, stating that the book lacks originality and contains weak character development. The criticism is confined to the contents of the novel, is expressed in good faith, and does not attack B's personal character beyond the work submitted for public judgment.

Explanation. — A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

7. Censure Under Lawful Authority:

- Authority figures, like judges, parents, or employers, may censure others in good faith within their legal or contractual jurisdiction.

Illustration. — A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders, a parent censuring in good faith a child in the presence of other children; a school master, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier are within this exception.

8. Good-Faith Accusations:

- Accusations made in good faith to authorities with jurisdiction over the accused are not defamatory.
- Illustration. — If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father, A is within this exception.

9. Protective Imputations:

- Statements made in good faith to protect personal or public interests are not defamatory.

Illustrations:

(a) A, a shopkeeper, says to B, who manages his business—"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception if he has made this imputation on Z in good faith for the protection of his own interests.

(b) A, a Magistrate, in making a report to his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.

#### 10. Cautions in Good Faith:

- Warnings or cautions conveyed in good faith for the benefit of the recipient or the public are exempt.

### **Changing Democratic Values and Digital Speech**

With the rise of social media, defamation law faces new challenges. While online platforms amplify speech, they also magnify reputational harm. This necessitates a nuanced approach that protects reputation without suppressing legitimate dissent.

The judiciary's continued reliance on criminal defamation must be reassessed in light of evolving democratic values and international human rights standards.

### **Conclusion**

Defamation continues to be constitutionally recognised as a reasonable restriction on freedom of speech. The Bharatiya Nyaya Sanhita reaffirms this position by retaining criminal defamation provisions. Supreme Court jurisprudence has consistently upheld the validity of such laws by balancing free speech with the right to reputation. However, evolving democratic values and proportionality principles demand cautious application. A nuanced approach that prevents reputational harm without stifling legitimate expression is essential to uphold constitutional democracy.

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