

Reputation as a Snapshot of a Person's Character: Defenses for Defamatory Statements in Post Globalization Era

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Jurist Blackstone indicted that "Every man is entitled to have his reputation preserved inviolate". Person's reputation is his prime and most precious property.

Depending upon perception of that man, reputation is more valuable to him than any other materialistic and intangible property. The word defamation is driven from Latin word 'Diffamare', which means spreading evil about someone or something lowering the social worth. Thus, defamation is nothing but to cause damage or harm to someone's reputation. Renowned authors Blackburn and George defined defamation as 'the tort of publishing a statement which tends to bring a person into hatred, contempt or ridicule or to lower his reputation in the eyes of right thinking members of society generally'¹ Concept of defamation has evolved since time inbound. During CHANDRAGUPTA MAURYA'S DYNASTY, a famous treatise has come into existence. It is known as Kautilya's Arthshastra, a renowned written work. In said book, the author has dealt with defamation, in Chapter XVIII of Book III [79th Chapter since beginning]. The classification of any offence in that context is based on gravity of statement. The book is concerned with governmental roles, duties and obligations towards citizens and members of state. There are no civil rights available if a person is defamed, as it is not the same thing as the Smritis and Shastras, which deal with all the branches or areas of laws then. It may, however, as well be that the ancients refused to put a price tag on one's reputation or honour as a doctrine, any compromise on social status of an individual was refused to be entertained, it was morally degraded to accept this. According to Dharmashastra, A person if insults another by uttering whatever is censurable as per notions or by dint of making sound, signs or imitation, he commits the offence of 'VAKPARUSHYA' or

defamation². It divided this civil wrong into two categories:

- *Nishtura* meaning allegation affecting reputation of a class of people.
- *Aslila* meaning when person humiliates another regarding his character or of the member of the family

Definition on a Wider Scale- What They Say

- *PARKE B.* defines it as 'A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule'³.
- *FAULKS COMMITTEE IN ENGLAND IN 1975*⁴ said 'Defamation shall consist of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally'.
- According to *SALMOND*, it can be defined as 'the wrong of defamation lies in the publication of a false and defamatory statement about another person without lawful justification'.
- *MR. ODGER* on his book on Defamation, quoted "No man may disparage or destroy the reputation of another. Every man has a right to have his good name maintained unimpaired. This right is a jus in rem, a right absolute and good against the entire world. Words which produce, in any given case, appreciable injury to the reputation of another are called defamatory, and defamatory words if false are actionable."⁵
- *WINFIELD* also gave definition for tort as "publication of statement which tends to lower a person in the estimation of right thinking members of society, generally, or which tends to make them shun and avoid that person".

Criminal Defamation and Civil Defamation- A Short Analysis

Under the civil law, remedy is sought to be covered under the Law of Torts, a rare and slow course of relief which is witnessed in India. The person defamed can move either the high court or trial court and seek damages only in the form of monetary compensation from the accused. Plaintiff need to prove that the statement made by the defendant caused harm to his reputation and he said it without any lawful justification thus, burden of proof lies with plaintiff. There are no such codified laws for civil suits⁶ in India. The Indian Penal Code (IPC) gives an opportunity to the individual defamed to go to a criminal court, to take cognizance of his complaint from defendant. It's a bailable, non-cognizable and compoundable offence, which means no

¹ https://www.slideshare.net/shantanu_leo/defamation-law-in-india

² blogs.wsj.com/indiarealtime/.../inside-law-how-defamation-works-in-india

³ <https://www.lawteacher.net/free-law-essays/tort-law/defamation-is-the-publication-of-a-statement-law-essays.php>

⁴ Papers of Judicial Officers on defamation

⁵ Odgers, Digest of Libel and Slander (1st Am ed) 18

⁶ Manupatra legal database

police can register a case and start investigation without the court's permission. Under SECTIONS 499 and 500 of the IPC, a person found guilty can be sent to jail for two years. The Supreme Court has already reserved its verdict on a clutch of petitions challenging the constitutional validity of the two penal provisions.

Also Code of Criminal Procedure (Amendment) Act XXVI of 1955, SECTION 199-B⁷ has been inserted providing prosecution for defamation against high dignitaries, public servants in respect of their conduct in the discharge of public functions. Since the law is compoundable in nature, a criminal court can drop the charges if the victim and the accused enter into a compromise to that effect (even without the permission of the court). One can go for remedy when defamed either by words spoken or in writing. When spoken, it amounts to slander and if printed or published, it is libel.

- **Slander** is the publication of a defamatory statement in a transient form. Examples of it may be spoken by words or gestures.
- **Libel** is a representation made in some permanent form, eg; writing, printing, picture or statue.

Although libel and slander are for the most part governed by the same principles, there are two important differences⁸:

- Libel is not merely an actionable tort, but also a criminal offence while slander on other hand is only a civil injury.
- Libel is in all cases actionable per se; but slander is, saving in special cases, actionable only on proof of actual damage.

Defenses in Tort of Defamation

- **Truth:** In a civil action for defamation, truth of the defamatory matter is complete defence. A publication based on verifiable facts and grounds can escape the liability for defamation or charges imposed. It negates the charge of malice and it shows that plaintiff is not entitled to recover damages too. The burden of proof is on defendant, mere claim that he supposed the statement to be true is no defence.
- **Fair Comment:** It must be a comment i.e., an expression of opinion rather than assertion of fact. The comment must be fair and the matter commented upon must be of public interest or public in general have a legitimate interest.
- **Privilege:** Divided into QUALIFIED PRIVILEGE and ABSOLUTE PRIVILEGE, there are certain occasions when the law recognizes that the right of free speech outweighs the plaintiff's right to reputation or public image: the law treats such

occasion to be "privilege" and defamatory statement made on such occasion is not actionable.

- **Absolute privilege⁹** can be in form of PARLIAMENTARY PROCEEDINGS i.e., Article 105(2) of our Constitution provides that any comment or any statement made within the parliamentary premises either in Rajya Sabha or Lok Sabha, will not amount to tort of defamation as such will have Constitutional holdings attached to it which is supreme law of the land. Similar privilege exists in respect of state legislatures, according to Article 194(2). Also JUDICIAL OFFICERS PROTECTION ACT, 1850, safeguards the defamatory statements made within court walls and no action for libel and slander lies for any word spoken against judges, counsels, witnesses or parties to case.
- **Qualified privilege** where in this case it is necessary that the statement must have been made without malice or ill intention, it must be *bonafide*. For such defence to be available, it is further necessary that there must be an occasion for making the statement. It is regarded sometimes right and in the interest of the public that a person should plainly state what he honestly believes about a certain person and speak out his mind fully and freely about him.

Another defence available with defendant is **Consent**, where the defendant has communicated or published certain material with the consent of plaintiff or plaintiff himself has invited the defendant to repeat the defamatory words, the defendant can plead this defence of consent. If a person telephones a newspaper with false information about himself, he would not be able to sue in defamation when the newspaper publishes it.¹⁰

Defamation Act of 2013-Free Speech or Reputation? British Take on Defamation Laws

The Defamation Act 2013, received Royal Assent on 25 April 2013, it contains provisions which will reform the law of defamation including those that will be relevant to internet service providers and publishing on the internet. It was in furtherance of the bill passed in May, 2012. Some important provisions under this act are:

Section 1 talks about serious harm. Section 1(2), which was introduced at a very late stage in the Parliamentary process, requires a business (defined as a "body that trades for profit") to show that the statement has caused or is likely to cause it "serious financial loss" in order for it to meet the "serious harm" requirement.¹¹ Further, Section 2 talks about defence of TRUTH. This new

⁷ <https://polityinindia.wordpress.com/tag/criminal-defamation-in-india>.

⁸ Commentary on law of defamation, damages and malicious prosecution by Mehrotra's.

⁹ <http://mja.gov.in/Site/Upload/GR/Summary%20DefamationCivilCriminalFinal.pdf>

¹⁰ <http://www.legalserviceindia.com/article/1380-Online-Defamation.html>

¹¹ www.legislation.gov.uk

defence will replace the common law defence of justification. Section 3 regulates statutory defence of honest opinion. The statement made must be an expression of opinion and not an assertion of fact. Section 4 gives defence of publication of matter of public interest. It replaces the common law defence known as the *Reynolds* defence. Section 5 talks about operators of websites. It provides that where an action is brought against the operator of a website in respect of a statement posted on the website, it will be a defence for the operator to show that it was not the operator who posted the statement on the website. Section 8 discusses single publication rule, this means that a claimant will be prevented from bringing an action in relation to publication of the same material by the same publisher after the expiry of a one-year limitation period from the date of the first publication of that material to the public, or a section of the public. Section 10 talks about action against secondary publishers, this section offers greater protection to secondary publishers, such as booksellers, by taking away the court's jurisdiction to hear an action for defamation brought against them except where it is not reasonably practicable for the claimant to bring the action against the author, editor or publisher.

Criticism of Defamation Act, 2013

The Defamation Act 2013 was trapped in criticism as well. The new act of defamation was a 'boost for freedom of speech'. The idea under UK's Defamation Act 2013 was likely benefit the media, intermediaries, scientific and academic or popular publishers at all arenas. Under the new law, companies are likely to find it difficult to succeed if they have been defamed. Moreover, the act is 'a boost for free speech' because of the new requirement of proving harm and the numerous statutory defenses. Such changes, will work against the person claimed relief and against the right to his reputation in society. The expectations from and of the Act are, in fact, too high and unrealistic or in other words a distant dream. The Utopian idea should be that an Act should address any possible scenario or conditions and should create a realistic balance on paper which is unhealthy and impossible to attain. Even if a perfect balance is created in theory, its application lays in the hands of judiciary. For the above area of thought, the Defamation Act 2013, the contemporary law by imposing statutory solutions but at the same time leaving the text open to interpretation. The 2013 Act recognizes the importance of the judiciary's discretion in the implementation of the law on a case-by-case basis in accordance with facts. The act is a danger for the right to good reputation. The latest public interest defence, allows defendants to publish defamatory statements and avoid liability proving that the statements were believed to be in the interest of public. However, it does not take into account the judiciary intervention. The 2013 Act provides a well structured basis for the tort of defamation. The defence of public interest does nothing else but introduces a subjective and more manipulable defence. This modern approach is necessary in a society

where events are subjective, unclear and in continuum of change. In light of this, Simon Singh's statement that "now [there is] legislation which will change the landscape of free speech in Britain" appears to be the overview feeling among publishers. In conclusion, pursuing the perfect law is a naive scope which ignores the human factor. The Defamation Act 2013 is an important part of legislation which bridges the gaps of the old law and provides a modern basis for future developments. Whether the Act will work in favor of freedom of expression, or in favor of a free and fair balance is yet to be seen.

Mass Media & Global Defamation Laws

Press freedom is a pivotal issue because it raises necessary questions about the nature of restrictions on the press which can be accepted in this globalized era. There is a complex debate about principles and notions of press freedom and equality before the law as well as principles of democracy and the rule of law, namely should absolute press freedom be allowed or should the applicable law place necessary restrictions on the media. A freedom of press to express an opinion or thought is an absolute right provided for under the Constitution and relevant international conventions sanctioned. However, this should not be constructed as an absolute freedom or right without any regulation. Other legal measures are necessary to prevent the press from being misused to defame, insult, slander, or abuse others. These measures are not aimed at restricting the forth pillar of democracy but rather to ensure that the press is more professional and responsible and respects the application of law and the human rights of all individuals are set out by the Constitution and international conventions ratified. Section 15(2) of **Press Council of India** Nothing in sub-section {1} shall be deemed to compel any newspaper, news agency, editor or journalist to disclose the source of any news or information published by that newspaper or received or reported by that news agency, editor or journalist." **Press and Registration of Books Act, 1867**,¹² [PRB Act] defines 'Editor' as the person who has control over selection of material, which is to be published. Further, there is presumption under section 7 of the PRB Act. The presumption is regarding awareness of contents of newspaper and it can be raised only against the Editor whose name appears on the copy of said newspaper. It cannot be raised against other Editors like the News Editor or Resident Editor whose names do not appear in the declaration printed on the copy of said newspaper.

Information Technology Act, 2000

The object of The Information Technology Act, 2000 as defined therein is as under: "to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as 'electronic methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Banker's Book Evidence Act,

¹² rni.nic.in/prbact.asp

1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.”

66A. Punishment for sending offensive messages through communication service, etc.

Any person who sends, by means of a computer resource or a communication device-

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine¹³.

The petitions against the IT Act

Some of the petitions seeking setting aside section 66A of the Information Technology Act empowers police to arrest a person for allegedly posting offensive or obscene materials on social networking sites.

The first PIL on this issue was filed in the year 2012 by Shreya Singhal, law student from Bangalore who sought amendment in Section 66A of the Act, after two girls -- Shaheen Dhada and Rinu Shrinivasan -- were arrested in Palghar in Thane district as one of them posted a comment against the shutdown in Mumbai following the death of Chief of Mumbai's infamous political group Shiv Sena Balasaheb Thakrey and others "liked" it. Most activists and policy experts point out that the Section 66A is loosely worded and puts too much powers in the hands of the police.

Principles on Freedom of Expression and Protection of Reputation

- Everyone has the right to hold opinions/comments without interference.
- Everyone has the right to freedom of speech and expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.
- The exercise of the right may, where it can be shown to be necessary, be subject to restrictions on specific grounds, as established in international law, including for the protection of the reputations of others.

- Anyone affected, directly or indirectly, by a restriction on freedom of expression must be able to challenge the validity of that restriction as a matter of constitutional or human rights law before an independent court or tribunal.

Justice Patel's judgment is significant in context that it extends the higher threshold of defamation of public officials to all public figures or public official bodies. It also seems adopts the *Reynolds*¹⁴ defence of reasonable verification of facts in case of untrue defamatory statements, with its attendant evidential burdens. Depending on how one reads or interprets *Rajagopal*¹⁵, which may or may not be correct. In any event, it is important to notice, once again, that *Sullivan* (actual malice) is *not equivalent* to the reasonableness standard, but is substantially more speech-protective. We still await clarity for which of those standards is to be adopted under Indian civil defamation law¹⁶

Points of Focus

Whether article 19 of constitution gives license to publisher to publish defamatory matters?

Constitutional limitation on right of freedom of the expression, as mentioned Article 19(2) can be legally imposed on tort of defamation. Thus the expression 'defamation' has been given constitutional protection. This word includes expressions like libel and slander covering various other areas of that concern, including obscene libels, seditious libels and blasphemous libels and so on. The law of defamation does not infringe the right of freedom of speech guaranteed by Article 19(1) (a). It is saved by Article 19(2). It is so saved, as it was included as one of the specific purposes for which a "reasonable restriction" can be imposed. The law relating to the tort of defamation, from the purview of division of legislative power, would fall under 'Actionable wrongs' mentioned in Entry 8 of the Concurrent List in the Seventh Schedule to the Constitution of India. Criminal law also falls under the Concurrent List¹⁷. While guaranteeing such freedom, it has also provided under article 129 of constitution that the Supreme Court shall be the court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Similar power has been conferred on the high court of the states under Article 215. If the citizen, therefore in the garb of exercising right of free expression under Article 19(1), tries to scandalise the court or undermines the dignity of court, then the court would be entitled to exercise power under Article 129 or 215 as the case may be.

Cyber defamation- what can be a liability of internet service provider?

Now in the era of computer technology defamation implies anything which can be read, seen, or heard with

¹³ www.meity.gov.in/content/information-technology-act

¹⁴ *Reynolds Vs Times News Paper* 2001 2 Ac 127

¹⁵ *R. Rajagopal vs State Of T.N* on 7 October, 1994

¹⁶ www.buzzle.com/articles/why-is-freedom-of-speech-and-expression-important.html

¹⁷ Article 19,2000. <http://www.article19.org/pdfs>

the help of computers¹⁸. There is plethora of issues related to internet defamation. The most important issues are whether writing on the internet amounts to “publication” or not. In UK, the statement must have been published by the person sued. For a person to write out defamatory statements about another in a private diary does not give rise to any legal action. Internet service provider can be called a publisher if goes with Section 1(c) of DEFAMATION ACT, 2013 which says that - “he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement¹⁹.” Apart from this cyber defamation is much more vigorous and effective as quantitatively an online defamatory statement might reach much larger number of people and will affect the reputation of a person much more than an ordinary publication.

Conclusion

To conclude, quotation of renowned author William Shakespeare is the best choice. The quotation sums up defamation and its requisite perception. In his famous work ‘Othello’ he wrote that “He that filches from me my good name, robs me of that, which not enriches him, and makes me poor indeed.” So, defamation should be looked with different viewpoint, new attitude and with distinguishable skill.

¹⁸ www.helplinelaw.com/employment.../cyber-defamation-in-india

¹⁹ www.legislation.gov.uk/ukpga/2013/26/section/1/enacted