DECRIMINALIZATION OF DEFAMATION: A CRITICAL ANALYSIS

Asth Saxena

ABSTRACT

Although it is hard to conceive of a society without criminal law, but the existence of coercive rules/law backed by punishment is in fact problematic. Therefore, due to advent of over-criminalisation, the sanctity of criminal law has been greatly subverted.

In this paper, the author intends to examine the validity of criminalizing the offence of defamation law. Since criminal sanctions are being used “to enforce morals, to provide social order and to ensure good and fair justice system” but this has far reaching adverse effects, which has become a debatable topic and created a great impact on criminal justice system of India. This indeed raises question of legitimacy and sanctity of criminal sanctions which is actually seems to be disappeared because of such over-criminalisation.

This paper broadly divided in four parts, First part gives the explanation of justification that exists for criminalising any conduct. Also, it describes and analyses various principles (Harm principle, deminimis, etc.) in order to substantiate the reason behind the same. The second part of it takes a look into the current position of criminalizing the offence of defamation in India and briefly analyses its adverse consequences. Further, this paper tests the validity of criminalising the offence of defamation taking in account all the criteria that exists under the justification of criminalising any conduct. With these, the parameters for testing the validity has been described in following questions: “Whether the offence of defamation is serious enough to get harsh punishment which is laid under law?”, “What will be the benefits if it gets limited to civil offence rather than make it criminal offence?” At last, it concludes that criminalization of defamation does not fall in the ambit of criminal offences, it goes against the basic principles which is required to make any conduct criminal. Hence, in order to preserve the sanctity and legitimacy of criminal law, defamation must be decriminalized.

1 2nd year Bcom.LLB student, Institute of law, Nirma university
WHAT JUSTIFY CRIMINALISATION?

In today’s era of evolving world with rich and varied diversity in thoughts and action, justifying the
criminalisation of conduct has become a difficult task. To agree on a particular definition of crime, or
criminalisation seems to be impossible.

“There is no satisfactory definition of crime which will embrace the many acts and omissions which
are criminal and which will at the same time exclude all those acts and omissions which are
not.” However, various definition of crime has broadly divided in two categories where in one talks
about procedural definition of crime while other simply states the crime as violation against state and
it is something which is against public at large.

The procedural definition of crime -“A crime (or offence) is a legal wrong that can be followed by
criminal proceedings which may result in punishment”. Whereas the other states “Crime is an act
which is both forbidden by law and revolting to the moral sentiments of the society”

The procedural definition of crime will be apposite for this paper. This paper can only fulfil its purpose
by considering the foremost definition of crime as other one talks about morality and it is a matter of
prudence to not to include morality within the definition of crime. The concept and idea of morality
keep changing. It changes from time to time and place to place. Therefore, what may be considered
immoral today could very well be the accepted norm in another time, or immorality may vary across
countries and continents. Thus, considering the procedural definition of crime will serve its purpose
to this paper. Now, the question arises what conduct can be labelled as crime?

In order to answer this question we first need to establish what is criminalisation mean and then have
to dig out when it is justified to criminalize something. According to Andrew Ashworth, “To
criminalise any conduct is to create threat of punishment among the wrong doer, to declare it should
not be done and to censure those who nevertheless do it”. The urgency of justification of criminality
comes into scenario because of the growing pattern of ill consequences of over-criminalisation. The
severity of punishments at times where the conduct could be controlled or censured by alternative is
the matter of concern. The coercive laws and punishment should be reserved for grave offences. The
over-criminalisation leads to societal condemnation of an individual accompanied by being labelled as
a criminal which he/she carries in his/her whole life after being completed sentence in jail. The central

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3 3 GRANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW, 27 (2nd edn.1999).
4 O.P. SRIVASTAVA, PRINCIPLES OF CRIMINAL LAW, 7 (6th end. 2013)
5 Available at Legalbloc.com (last accessed on 25/01/2017)
6 PRINCIPLES OF CRIMINAL LAW, 22 (5th end. 2006)
function of the criminal law be described as the declaration of forms of wrongdoing that are serious enough to justify the public censure inherent in conviction and punishment. To explore this description further, we need to look upon the works of many scholars notably, John Feinberg who agreed upon four basic principles which justify the criminalisation of any conduct. Several principles may underpin decisions about criminalization. These are the Harm Principle, the Offence principle, Legal moralism and Legal Paternalism.⁷ The ambit of this paper is only limited to harm principle as this principle has been widely used in justifying criminalization.

**HARM PRINCIPLE**

It is first expounded by J.S Mill in his book *On Liberty* in which he believes that the harm principle is the only legitimate ground for criminalising any conduct. “The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.”⁸ This principle was further propounded by Joel Feinberg in his treatise *Harm to Others*, namely as Joel Feinberg’s harm principle where he defines “It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harms to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values.”⁹ For mill, the harm to others is the sole legitimate reason for repressive state intervention, but for Feinberg it is a good reason but not necessarily the only one. Feinberg also made a line of distinction between a non-normative sense of harm as setback to interest and a normative. Sense of harm as a wrong that is a violation of a person’s right. However, he accepted the latter one within the ambit of justifying any conduct. Therefore, any act which interferes with others’ personal right or violate it is the sufficient and reasonable ground to make that act fall under the category of Crime.

To substantiate the reasoning further, De Minimis limitation (principle of minimalism) is also an important element. It describes that while deciding any act as a crime, both negative and positive aspect of it needs to be considered.¹⁰ These includes the analysis between two elements as why one should make any act criminal or what happen if that act don’t get criminalized. Because of the intrusive and blatant nature of criminal law, it should be the last resort for any conduct. For that, state have the

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⁸ JOHN STUART MILL, ON LIBERTY, 104 (1859)
⁹ Supra Note 7
¹⁰ Ashworth
burden to proof that no alternative other than criminalisation can safeguard the interests of stakeholders. Thus, the criminalisation is the only effective way of controlling conduct.¹¹

**CRIMINAL DEFAMATION OF INDIA**

Sec 499¹² of IPC states Defamation as “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 the cases hereinafter expected, to defame that person. This section also says about ten exceptions to the offence of defamation. An accused charged with the offence of defamation may take the resort of any of these ten exceptions as defence. These are the privileged occasions. These privileged occasions exempt a person from criminal liability. These are defence of truth, an opinion expressed in good faith on a public servant, judicial decision, conduct of witness, public performance, or for the good of a person etc.

Further, section 500¹³ stipulates an imprisonment of up to two years, with or without fine, for someone held guilty of criminal defamation.

Thus, the offence of defamation is the right against reputation that an individual has or enjoys. The reputation of a person is a vulnerable entity, which is built up through years of “integrity, honourable conduct and right living.”¹⁴ The right against reputation is very important right of an individual. It has both intrinsic and instrumental value.¹⁵ The reputation of an individual should be protected as its distortion can lead to adverse effect, can lead to seclusion or ostracized of a defamed person which is psychologically and mentally harmful. It has been observed rightly, that reputation “alone gives to material possessions, their value as sources of happiness.”¹⁶

Unlike many countries in the West and some near home, such as Sri Lanka, defamation in India is both civil and criminal offence. Under the civil law, the person defamed can move either the high court or trial court and seek damages in the form of monetary compensation from the accused. It seeks its remedy under tort law. Civil law is mean to safeguard right of the people whose reputation is being

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¹¹ Available at Legalbloc.com (last accessed on 26/01/2017)
¹² Penal code, (1860)
¹³ Supra 12
¹⁵ Legalbloc.com
¹⁶ Supra 14
tarnished. Criminal action on the other hand meant for maintaining social order. The basis of criminal law is crime against society. That is why, crimes like rape, murder etc. are prosecuted by state under criminal offence. How does defamation fit under this definition? If I am defamed, how social order get disturbed? All such questions made us to think about curbing criminal defamation.

In recent years, sec 499/500 of IPC has been misused for various reasons. There has been various incident where powerful and dominant people try to threaten the publisher or journalists. This section has become a tool of tyranny for them. Hence, it’s high time to revise such laws in order to prevent substantial harm coming out from criminalising the offense of defamation.

Thus, brief analysis of law of defamation make it clear why there is strong need to curtail criminal defamation. This will be further discussed in the next part of the paper.

**DECRIMINALISATION OF DEFAMATION**

Last year, this had been the hot topic among various politicians in our country. Constitutional validity of sec 499 and sec 500 is being questioned. The main contention is that it violates fundamental right to speech and expression as guaranteed by constitution. This paper will look upon the validity of this section under the harm principles as has been defined in first part of the paper.

The offense of defamation does not fulfil the required elements of harm principle. Though, this act of making defamatory statement tends to lower or harm the reputation of aggrieved person but this harm is not public. It is private. Moreover, it does not create harm to other which is the important and foremost element of the Harm principle.

Criminalization of defamation is not effective in curbing this wrongful act rather it makes the situation worse off. While the threat of Sec. 500 does curb individuals from making defamatory statements, it also affects a number of people who are not committing this offence. There has been many cases under which it has said that laws of criminal defamation “are, in practice deployed to harass and intimidate journalists, critics of large industries and human right defenders.” The threat of criminal sanctions is used to place the critics of powerful and dominant people into silence. The main victim of this is Media. Due to intimidation, they are not able to discharge their duty. Media is unable to fulfil

17 Ibid
its role as so called fourth pillar of the democracy, not able to maintain check and balance between society and government. Thus, the harm being caused by criminalizing defamation is substantial enough to justify decriminalizing it.\textsuperscript{19}

Further, in order to strengthening the argument, now this paper will aim at the second aspect of harm principle i.e. \textit{de Minimis} principle or \textit{minimalism} which supports the purpose of this paper by stating that as long as alternative remedy is available, which effectively curb the act, criminalization of defamation should not be there. Criminal remedy should only be used as last resort. In present scenario the civil remedy. The aggrieved party seeks remedy under tort law which effectively safeguard the interests of both the party. By claiming monetary compensation or by public apology the defamed person can restore his/her tainted reputation which is a much better alternative than making this offense criminal. While on other hand, the accused do not have to suffer the societal abasement of being called or labelled as criminal or prisoner even after completing the sentence. Civil remedy also prevents intimidation of journalist as the action is taken against media houses who are capable of defending and bearing the brunt of litigation as opposed to criminal sanctions which target individual journalists who have a limited capability to defend themselves against the state.\textsuperscript{20} Thus, civil remedy seems to be most effective way of curbing defamation than making it criminal offence. Criminalization of defamation violates fundamental right of an individual.

Article 19(1) (a) of the Constitution of India guarantees all Indian citizens the right to freedom of speech and expression. Article 19(2) allows the state to make laws which impose reasonable restrictions on this right 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 in relation to contempt of court, defamation or incitement to an offence.\textsuperscript{21} But only defamation safeguards the private interest of protecting an individual’s reputation. While rest of the interests are specifically of public interests. Now the author intended to focus on whether the law of defamation is a “reasonable restriction” on free speech or not.

In line with this discourse,” Reasonable restriction “means that the “limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature beyond what is needed in the


\textsuperscript{20} Fernandes, \textit{supra} note 18

\textsuperscript{21} Fundamental rights constitution of India
interests of the public.” 22 If the restriction is too broad, it will have a “chilling effect on speech” 23 which will make it unconstitutional.

Now, coming to the argument regarding decriminalisation of defamation, first come the question of reasonability of restriction. Sections 499-500 IPC do not constitute a “reasonable restriction” on speech because, even truth is not a defence. Although it is one of the exception mentioned under sec 499 but again it comes with a clause – “truth will only be a defence if the statement was made for the public good”, which actually is a question of fact to be analysed by the court. This is an arbitrary rule that stop people from making statements regarding politicians or political events even which they know to be true because they fear the risk of a court proceedings and court not finding it to be for the public benefit or for public good. Another lacuna of this law is that Instead of making the plaintiff prove that the accused made a false statement, section 499 gives the accused the burden of proving that the statement was not only true but also for the public good.

Secondly, a person can be prosecuted under section 499 even if he or she has not made any verbal or written statement at all. There is nothing in section 499, nor in the case law, which protects a person who has not made any statement at all but only conspired with the person who actually made defamatory statement from being dragged into a defamation case. Thus section 499 have ill effects to the person who are not even making any defamatory statement.

Thirdly, a person can be prosecuted even for a statement about the dead. While in civil law defamation of a deceased person is not a tort. Restricting speech to protect the reputation of the deceased is excessive and over-broad. The main aim of defamation law is to protect the reputation of a private person such that his ability to earn a livelihood and his reputation in the society is not deterred or ruined. It is arbitrary and unreasonable to extend this protection to the deceased or dead person since there is no longer harm to his reputation and ability to earn livelihood. Even an ironical statement can amount to defamation 24. This provision is also excessive, arbitrary and beyond reasonable limits. To judge what is ironically is again a matter of subject. It differs from person to person. Thus, section 499 is need to be prohibited. Hence, criminalizing defamation is an oppressive and disproportionate sanction. At one side, Most of the western countries who still do retain this law, and has made efforts to abolish it. At other side most of the countries have considered this law as obsolete and dead

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22 Chintaman rao v. state of Mp  
23 Article by Aparna Vishwanathan, a Delhi based lawyer.  
24 Explanation 3 of sec 400 of IPC.
legislation. Thus, brief analysis of arguments and principles stated under which defamation should be decriminalised made it clear that by having criminal law in case of defamation is ineffective way of controlling this conduct. It rather causes substantial harm to public at large, which cannot be ignored. Thus, it is argued that defamation should only be covered under civil law to have better control over the conduct.

**CONCLUSION**

There are many harms that flowing from over-criminalisation of defamation which has already been pointed out in throughout the paper. In conclusion, it is submitted that defamation should be decriminalised otherwise it will greatly subverted the legitimacy of justice system of India. Using criminal law, as a quick fix will lead to long-term harms that will ultimately affect the State’s ability to enforce criminal sanctions in cases where it is actually necessary.\(^{25}\) Thus, it has become very important that government should look upon it and revise the legislation or IPC that was written during British time since we are living in a more mature society. Sections 499-500 of the IPC are vestiges from India’s colonial past that are not appropriate for a modern democracy. Just as it did in the case of section 66A of the IT Act, the time has come for the Supreme Court to once again take a stand in defence of freedom of speech in India.\(^{26}\)

We are surely suffering from a colonial hangover by retaining criminal defamation. Some laws are indeed do not fit in today’s scenario that demand to be changed or revised.

This paper deeply scrutinised the merits and demerits of criminalization of defamation. Many questions were raised in doing so but their answers were all pointed out to only one thing i.e. the best way to secure the legitimacy and to solve the problem is to decriminalise defamation.

It is really not necessary to put an accused person in the case of defamation with hard-core criminals, when least alternative is available – Civil remedy.

At last, it is submitted that punishment provided in criminal law is very harsh and invasive which is not proportionate to the harm caused due to defamatory statement. The burden of the state is that this


\(^{26}\) Ibid 11
laws should not be misused. Criminal defamation is actually quick fix of a problem and such quick fix will always prove to be detrimental in long turn. This law has been proven wrong under various principle that has laid down in the paper. Hence, it is a strong call that criminal defamation should be decriminalised in order to safeguard sanctity of criminal law.