

**January 31, 2022.**

**Shri Amit Shah**

**Minister for Home Affairs**

**Government of India**

**North Block, New Delhi – 110011**

**Subject:- Proposal for deletion of criminal law for defamation i.e. Sections 499 and 500 of the IPC, and let defamation law be a civil code**

**Dear Amit Shahji:**

**With regard to your letter dated 31st December 2021; I, after consultation with my colleagues and juniors, propose that since Defamation is a private wrong, criminalising it is disproportionate punishment and therefore an unreasonable restriction on free speech.**

**Under the Indian Constitution, the fundamental right to free speech (Article 19) is subject to "reasonable restrictions". What is reasonable is subjective in a society; it can only be developed to some objectivity by cases decided in courts [‘case law’] and according to the political culture of the times. At present, reasonableness is codified in two laws—first, in exceptions to criminal culpability incorporated in Sections 499 and 500 of the British colonial statute known as the Indian Penal Code 1860; and second, the limits to civil liability incorporated as tort law. In India, defamation proceedings can be initiated under either**

or both, together or in sequence. Most democratic countries have however done away with the criminal law which is archaic and draconian. But India has not yet done so. (*Defamation Litigation: A Survivor's Kit by Dr. Subramanian Swamy*, published in *The Hindu* on *September 21, 2004*)

In India, the defamation law obstructs free expression more than it protects reputations. The scope and criminal character of defamation law is theoretically flawed and provides for sanctions that are grossly disproportionate and overarching. Section 499 is overly broad in its design and fails on the touchstone of the "Test of Proportionality". The Sections 499 and 500 of the IPC do not conform to a common practice in defamation laws laid down by the Supreme Court of India in the *Rajgopal Case* (AIR 1995 SC 264), based on the *Sullivan's Test*. However, in order for someone to escape a charge of criminal defamation, it is not only necessary that he prove the defamatory statement to be true, but he also has the additional burden of proving that publishing such a statement was for the public good. This is clearly an overbroad and archaic restriction on free expression shadowed by the colonial vintage.

In case of civil defamation, the principle laid down by the Supreme Court in the *Rajgopal Case* is wonderfully protective of free speech: if a person in public life, including one in government, feels aggrieved by a defamatory statement, that person must first prove in court that the defamatory statement is not only false, but that the maker of the statement knew it to be false. That is, it must be proved by the

**defamed plaintiff to be a reckless disregard of the truth by the defaming defendant. This principle thus reversed the traditional onus on the defamer to prove his or her allegation, and placed the burden of proof on the defamed.**

**This reversal of burden of proof is just, essentially because a public person has the opportunity to go before the media and rebut the defamation in a way aggrieved private persons cannot do. If criticism and allegations against a public person have to be proved in a court of law, what is likely to happen is that public spirited individuals will be discouraged from making criticism. This is what the U.S. Supreme Court in the famous *New York Times* case [376 U.S. 254 (1964)] characterised as a "chilling effect" on public debate—it held this to be bad for democracy.**

**The peculiar position of defamation law is thus: the civil law is more protective than the criminal law. This goes against the very basic tenet of the criminal law jurisprudence. The criminal law is always narrowly drawn as compared to the civil law because it has a potential of directly depriving a person of their liberty, and it further attaches a mark of social stigma alongside a tag of "Criminal".**

**Making any offence a crime is a huge undertaking in view of the fact that in criminal law the government uses its "coercive power" to control the behaviour of an individual. The supplementary draconian facet of criminal law is the "power to destroy". If any individual, even once, gets prosecuted under the criminal law, the consequences to**

**follow are very regressive in magnitude and nature. Furthermore, the person is tagged as “A CRIMINAL” into the eyes of the society. Also, the mental agony, and the harassment undergone by an individual in the criminal proceedings is an undeniable truth. The “Process” as they say, “itself is the punishment.”**

**This is contrary to the character and ilk of the civil law. Therefore, it is submitted that the criminality of defamation is a sheer attempt at exaggeration and over-penalization.**

**Therefore, a legal scholar and theorist – among others – has maintained that the recognition of *“defamation as a criminal offence which is essentially a private wrong, the Section 499 and 500 of the Indian Penal Code amounts to a disproportionate restriction upon free speech. Private wrongs – that is, wrongs to individuals at the hands of other individuals – are meant to be pursued through the civil courts, with damages and compensation as the remedy. It is only when there is a public element to the wrong (e.g., murder, endangering the peace of the society as a whole, etc. ) that the State steps in. Interestingly, there was a public element involved at the time when defamation was first criminalised, in England – it was to stop people from resorting to duels in order to vindicate their honour.”* The foundation of criminal defamation was also discussed by the Law Commission of Ireland in its *Consultation Paper on the Crime of Libel* (August 1991).**

**With the passage of time and advancement of civil society, the trend is towards decriminalisation of private offences, while**

**encouraging civil remedies. India, however, seems to be moving in the wrong direction in this regard, as we continue to cling to penal action for wrongs that are substantially private and civil in nature.**

**In modern democracies, the public-private divide in terms of law needs to be made clear. In the absence of well codified civil defamation laws, the penal solution becomes attractive, since it is the definitive one at hand. The lack of robust civil courts thus, cannot be the reason to criminalise a civil wrong.**

**Therefore, going by the jurisprudence as articulated above, it is amply clear that the Sections 499 and 500 of the IPC unjustly violate the freedom of speech and expression by imposing criminal liability on what is essentially a civil wrong.**

**Admittedly, the freedom of speech—as any other freedom—is not absolute in nature, but there is a test prescribed by the Supreme Court of India by the name of “test of proportionality”, recently in the case of *KS Puttaswamy*, which mandates the extent to which the rights enshrined in the part III of the Constitution can be restricted. The word “reasonable”, according to the judgment of the Supreme Court, requires a relationship of proportionality between the purpose sought to be achieved by the restraint, and the degree to which it can infringe the corresponding right.**

**This standard—as laid down by the Hon'ble Supreme Court—requires, *first*, that a restriction upon rights be imposed only through a law, which has a rational connection with the purpose of the**

**law; *secondly*, that the law infringe rights only to the minimal extent necessary to achieve the State's goal (least restrictive measure); and *thirdly*, that there be an overall balancing between the extent to which the right is infringed, and the importance of the legitimate aim.**

**It is, therefore, submitted that the provisions of Sections 499 and 500 of the IPC fails to adhere to these prescribed standards.**

**In an open democratic society the colonial relic of Criminal Defamation laws unjustifiably violate freedom of expression by imposing a criminal sanction on the civil wrong of defamation. Hence, the offence of criminal defamation does not strike a balance between freedom of expression and the limitation clause in Article 19(2), but arbitrarily and excessively invades the right in Article 19 (1)(a) which is not justifiable in a democratic society.**

**It is pertinent to note that the criminalisation of defamation is not a reasonable or justifiable restriction on freedom of expression and that the civil tort under common law is sufficient, and provides a far less restrictive means of achieving the required purpose.**

**The protection of fundamental rights against arbitrary or excessive infringement is a crucial work of any constitutional government across the globe.**

***“Having regard to all of the foregoing, I say that the harmful and undesirable consequences of criminalising defamation, viz. the chilling possibilities of arrest, detention, and two years imprisonment, are manifestly excessive in their effect. Moreover, there is an appropriate***

***and satisfactory alternative civil remedy, available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting reputations, rights and freedoms of other persons,”*** ruled the Kenyan High Court while decriminalising defamation.

**Additionally, the Sections 499 and 500 of IPC also create an unreasonable procedure the burden is placed on the speaker. It primarily includes:**

- 1.)The burden on the speaker is compounded by the fact that under S. 199 of the CrPC, which lays down the provision for prosecution, there is no limit upon the number of cases that can be filed against a person who has allegedly made a defamatory statement. This, is arbitrary and lends itself to abuse, and significantly chills speech. This was noted in my Op-Ed article in The Hindu titled *Defamation Litigation: A Survivor’s Kit (September 21, 2004)*.**
- 2.)The defences of S. 499 of the IPC are available only at the stage of trial, thereby creating a chilling effect on the freedom of speech, since it requires the Magistrate to issue bail on a mere prima facie claim of defamation.**
- 3.)The constant fear of detention and arrest, if found guilty, constitutes the most serious chilling effect on free speech and restriction on the fundamental rights under Article 19 of the Constitution. Especially so, on the people from speaking their mind engaged in journalism and whistle blowing activities.**

**Hence, it is clear that all these excessive burdens that go beyond the civil law, cast a regime of self-censorship and chilling effect upon public spirited speakers. This is precisely why the presence of a lesser burdensome procedure—available by the way of civil law— which is equally efficacious ought to be promoted and left as the sole remedy for defamation. Therefore, the Ss. 499 and 500 which are not narrowly drawn, and excessively restrict the freedom of speech, are henceforth liable to be scrapped.**

**The present Indian Penal Code is of 1860 vintage, and imposed on us by the British Colonial regime. Since 1993, United Kingdom, which includes Britain, has abolished the criminal sections of their Penal Code relating to the law of defamation. Furthermore, the USA, most of the European countries, and several nations in Africa have also abolished the criminal law of defamation. Hence, it is eminently necessary for India, as the world's largest democracy, to do the same.**

**With Regards,**

**Yours sincerely,**

**(SUBRAMANIAN SWAMY)**

**In association with:**

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