

Citation: St. Soldier Journal of Law and Social Science,  
Vol.2:1, January, 2026, PP. 86-98

## **RIGHT TO SPEECH VIS A VIS CRIMINAL DEFAMATION: BALANCING LIBERTIES AND LEGAL CONSTRAINTS**

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### **Abstract**

The freedom of speech and expression guaranteed under Article 19(1) (a) of the Indian Constitution forms the cornerstone of a democratic society, yet it is subject to reasonable limits under Article 19(2), including restrictions related to defamation. Criminal defamation, now addressed under Sections 356 and 357 of the Bharatiya Nyaya Sanhita, 2023 (BNS), raises complex constitutional and legal concerns regarding its influence on free expression. This paper explores the tension between safeguarding an individual's reputation and upholding the freedom of speech, especially in light of the Supreme Court's decision in *Subramanian Swami v. Union of India* (2016), which upheld the validity of criminal defamation by recognizing reputation as an integral component of the right to life under Article 21. Although the judgment highlighted the significance of personal dignity, the persistence of criminal defamation has been widely criticized for stifling dissent, curbing press freedom, and discouraging open public debate. With the transition from the IPC to the BNS, this study calls for a re-evaluation of India's criminal defamation framework, advocating for its decriminalization or meaningful procedural reforms to strike a more equitable balance between individual dignity and democratic expression.

**Keywords:** Freedom, Speech, Criminal, Defamation, Reputation.

Available At: <https://stsoldierjournaloflawandsocialscience.com>

## Introduction

The right to freedom of speech and expression stands as a foundational element of every democratic society which was guaranteed under Article 19(1) (a) of the Constitution of India which empowers citizens to communicate their thoughts, opinions and criticisms without undue

interference or reprisal.<sup>1</sup> This right underpins participatory governance, fosters open debate and enhances transparency ensuring that dissent and critical perspectives remain unfettered. Nevertheless, this freedom is not absolute and may be subjected to reasonable restrictions under Article 19(2) which inter alia provides for limitations aimed at preventing defamation.<sup>2</sup>

Criminal defamation was recognized under Sections 499 and 500 of the Indian Penal Code (now incorporated under Section 356 of the Bharatiya Nyaya Sanhita, 2023) which seeks to protect an individual's reputation from false and malicious attacks.<sup>3</sup> It serves as a legal deterrent against irresponsible or damaging statements made publicly, thus acknowledging that a person's reputation is a crucial aspect of their dignity and social identity, protected under Article 21 of the Constitution.<sup>4</sup>

The coexistence of the right to freedom of speech and the right to reputation has led to a continuous debate in Indian constitutional jurisprudence. On one hand, freedom of speech is essential for fostering democratic dialogue, encouraging free press and enabling criticism of governmental and societal actions. On the other hand, the right to reputation acts as a safeguard against misuse of such freedom in a way that unjustly tarnishes an individual's social standing. The conflict becomes more pronounced when statements made in public interest or criticism is challenged as defamatory. The criminalization of defamation has therefore been questioned on grounds that it has a chilling effect on speech discouraging individuals from expressing

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<sup>1</sup> The Constitution of India, *art. 19 (a)*.

<sup>2</sup> *Ibid.*

<sup>3</sup> The Indian Penal Code, 1860 (Act 45 of 1860), ss. 499, 500, The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023), ss. 356.

<sup>4</sup> The Constitution of India, *art. 21*.

opinions for fear of legal retribution. This concern is especially pertinent in the fields of journalism, academia, social activism and political opposition.

The Supreme Court of India addressed this constitutional conflict in the landmark case of *Subramanian Swami v. Union of India* (2016), where the validity of criminal defamation was upheld.<sup>5</sup> The Court ruled that the right to freedom of speech under Article 19(1) (a) must be balanced with the right to reputation under Article 21, and that criminal defamation is a reasonable restriction within the meaning of Article 19(2). It emphasized that reputation is not a mere private interest but a public good, essential for human dignity. Nevertheless, the judgment also recognized that this balance must be maintained carefully and misuse of criminal defamation provisions to suppress legitimate criticism must be guarded against. Thus, the legal and moral tension between protecting personal reputation and preserving the liberty to express remains a continuing subject of constitutional interpretation and public discourse.

### **Criminal Defamation in India: Legal Framework**

In India, the right to freedom of speech and expression is guaranteed under Article 19(1)(a) of the Constitution. This right forms the foundation of a democratic society, enabling individuals to

freely express opinions, criticize authority, and participate in public discourse. However, this freedom is not unfettered.<sup>6</sup> Article 19(2) empowers the State to impose reasonable restrictions on this right in the interest of sovereignty, public order, decency, morality, and notably defamation.<sup>7</sup> Defamation as a ground for restriction ensures that the right to free speech does not infringe upon another individual's right to reputation, which is protected under Article 21 as part of the right to life and personal dignity.

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<sup>5</sup> *Subramaniam Swami v Union of India* (2016) 7 SC 221.

<sup>6</sup> The Constitution of India, *art. 19(a)*.

<sup>7</sup> *Id. art. 19 (2)*.

Criminal defamation in India is codified under Section 499 of the Indian Penal Code, 1860, now replaced by Section 356(1) of the Bharatiya Nyaya Sanhita, 2023.<sup>8</sup> It defines defamation as any imputation made by words, signs, or visible representations, published with the intent to harm the reputation of a person.<sup>9</sup> The essential elements of criminal defamation include a defamatory statement, reference to a specific person or group, publication to a third party, and the intention or knowledge that such statement will harm the person's reputation. If these elements are established the offender is punishable under Section 500 IPC or Section 356(2) BNS, which provides for simple imprisonment for up to two years, a fine, or both.

### Key Elements Constituting Criminal Defamation

- I. **Imputation or statement:** There must be an imputation made through words, signs, visible representations, or other means.
- II. **Reference to a person:** The imputation must concern a particular person or a class of persons who are identifiable.
- III. **Publication:** The statement must be communicated to a third person, i.e., published. Mere private communication does not amount to defamation.
- IV. **Intent to harm reputation:** The imputation must be made with the intention, knowledge or reasonable belief that it will harm the reputation of the person concerned.

### Exceptions to Criminal Defamation

Section 499 IPC / Section 356 BNS also lays down ten exceptions where certain types of imputations are not considered defamatory even if they harm someone's reputation provided they are made in good faith and for public interest. Some of the exceptions are:

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<sup>8</sup> The Indian Penal Code, 1860 (Act 45 of 1860), ss. 499, The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023), ss. 356.

<sup>9</sup> *Ibid.*

- I. **Truth for public good:** Statements made which are true and made for the public good.
- II. **Public conduct of public servants:** Fair criticism of the conduct of public servants in discharge of their public functions.
- III. **Conduct of any person touching a public question:** Fair and bona fide criticism of persons involved in public questions.
- IV. **Reports of court proceedings:** Publication of substantially true reports of judicial proceedings.
- V. **Merits of a case or performance:** Expression of opinion on the merits of a case, decisions, or performance of an author or performer, made in good faith.
- VI. **Censure by authority:** Censure passed in good faith by a person with lawful authority over another (e.g., employer over employee).
- VII. **Accusation to authority:** Accusation made in good faith to an authority with lawful power to act.

### Arguments for retaining Criminal Defamation

Reputation is an integral part of the right to life under Article 21 of the Constitution of India. The Supreme Court in *Subramanian Swami v. Union of India* (2016) held that the right to reputation is not a lesser right than the right to free speech, and both must be balanced harmoniously.<sup>10</sup> In a society where an individual's dignity and honour form the basis of their social standing and personal liberty any harm to reputation can result in severe social, professional, and emotional consequences.<sup>11</sup> Criminal sanctions, therefore, act as a strong deterrent against deliberate and malicious attacks on a person's character and protect the individual's dignity in the eyes of society.

Some proponents argue that civil remedies such as damages are insufficient and ineffective in many cases especially in a country like India where the legal process is often time-consuming and

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<sup>10</sup> *Subramanian Swami v. Union of India* (2016) 7 SC 221.

<sup>11</sup> Ratanlal and Dhirajlal, *The Indian Penal Code, 1502-1503* (Lexis Nexis 2023).

financially burdensome.<sup>12</sup> Many victims of defamation may not have the resources to pursue lengthy civil suits for compensation. Criminal defamation, being a state-prosecuted offence, shifts the burden of prosecution to the state and gives access to justice even to those who cannot afford private litigation. The threat of criminal liability also acts as a preventive measure, discouraging individuals from making baseless, false, or reckless allegations under the guise of free speech.

Another key justification is that criminal defamation helps protect public officials and institutions from false allegations that can harm public trust. In the current age of social media and digital communication, misinformation and defamatory content can be spread rapidly, often without verification.<sup>13</sup> Retaining criminal defamation serves as a necessary tool to maintain the credibility of institutions such as the judiciary, armed forces, and constitutional authorities. If individuals or groups are allowed to freely defame such institutions without legal consequences, it could erode public confidence and disturb public order, thereby undermining national integrity and democratic stability.

Lastly, supporters of criminal defamation emphasize that the existing legal framework already incorporates adequate safeguards in the form of exceptions under Section 499 IPC / Section 356 BNS.<sup>14</sup> These exceptions allow for fair criticism, truth in public interest and opinions expressed in good faith.<sup>15</sup> Therefore, the law is not intended to stifle free speech but to curb malicious and unjustified attacks on reputation. Courts have also recognized the importance of ensuring that criminal defamation is not used as a tool for harassment and have imposed safeguards such as the need for prior sanction in certain cases. Thus, retaining criminal defamation ensures a balanced legal

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<sup>12</sup> *Ibid.*

<sup>13</sup> Law Commission of India, Report no. 267 : Hate Speech,33-34 (2017).

<sup>14</sup> Defamation Law, Meaning, Punishment and Complete Analysis *available at:* <https://testbook.com/judiciary-notes/section-356-bns> (last visited on October 05,2025).

<sup>15</sup> *Ibid.*

mechanism that respects both freedom of expression and the fundamental right to reputation.

### **Arguments against Criminal Defamation**

Criminal defamation poses a serious threat to the right to freedom of speech and expression guaranteed under Article 19(1) (a) of the Indian Constitution. Critics argue that the existence of criminal penalties including imprisonment creates a chilling effect on free expression. Journalists, social activists, scholars and even ordinary citizens may refrain from expressing legitimate criticism or participating in public debate out of fear of legal prosecution.<sup>16</sup> This fear undermines democratic discourse and transparency especially in a constitutional democracy where free speech is essential to challenge authority, expose corruption and advocate for reforms. Another significant concern is that **criminal defamation is often misused as a tool of harassment** by powerful individuals, corporations or public officials to silence dissent and criticism. The mere filing of a criminal complaint regardless of its merits can be used to intimidate and coerce individuals into retracting statements or engaging in self-censorship.<sup>17</sup> This misuse disproportionately affects those with limited resources or public influence making it an instrument for stifling opposition rather than serving justice. In many cases criminal defamation proceedings are strategically initiated to burden critics with legal expenses, frequent court appearances and the stigma of being accused in a criminal case.<sup>18</sup>

Furthermore, critics argue that civil defamation laws provide sufficient remedies to address reputational harm, rendering criminal sanctions unnecessary. In civil defamation victims can seek damages and injunctions which are more proportionate and restorative in nature. Unlike criminal law, civil remedies do not

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<sup>16</sup> Freedom of Speech, Defamation and Chilling effect *available at*: <https://junejalegal.firm.in/entries/general/freedom-of-speech-defamation-and-chilling-effect> (last visited on October 06, 2025).

<sup>17</sup> Time to Reform Defamation Laws in India *available at*: <https://www.drishtiiias.com/daily-updates/daily-news-editorials/time-to-reform-defamation-laws-in-india> (last visited on October 07, 2025).

<sup>18</sup> *Ibid.*

carry the risk of imprisonment or criminal conviction and they are more compatible with the principles of a free and open society.

Furthermore, critics argue that civil defamation laws provide sufficient remedies to address reputational harm, rendering criminal sanctions unnecessary.<sup>19</sup> In civil defamation victims can seek damages and injunctions which are more proportionate and restorative in nature. Unlike criminal law, civil remedies do not carry the risk of imprisonment or criminal conviction and they are more compatible with the principles of a free and open society.<sup>20</sup> Many democratic countries such as the United Kingdom have decriminalized defamation, acknowledging that civil action is a more appropriate and balanced response to protect reputation without infringing on fundamental rights.<sup>21</sup>

Lastly, from a constitutional and human rights perspective criminal defamation is seen as excessive and disproportionate especially when imprisonment is imposed for what essentially amounts to speech-related offences. International human rights bodies including the United

Nations Human Rights Committee have criticized the use of criminal defamation laws urging countries to repeal such provisions and promote less restrictive alternatives.<sup>22</sup> In the Indian context, where criminal defamation continues to exist under Section 499 IPC or Section 356 of the BNS, there is growing concern that it fails to meet the test of "reasonableness" under Article 19(2) and is increasingly incompatible with global democratic standards of free expression and media independence.

### **The Heart of Conflict: A Constant Balancing Act**

The conflict between freedom of speech and criminal defamation lies at the very core of democratic constitutionalism where the

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<sup>19</sup> Criminal Defamation in the High Court: Convictions v Dismissals *available at*: [https://www.scoobserver.in/journal/criminal-defamation-in-the-hcs-convictions-vs-dismissals/\(last visited on October 07 ,2025\)](https://www.scoobserver.in/journal/criminal-defamation-in-the-hcs-convictions-vs-dismissals/(last%20visited%20on%20October%2007%2C2025)).

<sup>20</sup> *Ibid*.

<sup>21</sup> Decriminalizing Defamation: A Comparative Law Study *available at*: <https://news.un.org/en/story/2011/07/382902> (last visited on October 07, 2025).

liberty to express oneself must coexist with the dignity of others. On one hand, freedom of speech under Article 19(1) (a) empowers individuals to challenge authority, expose corruption, voice opinions and engage in public discourse. On the other hand Article 21 guarantees the right to life and personal liberty which includes the right to reputation. The State through Article 19(2) is empowered to impose reasonable restrictions on free speech to ensure it does not encroach upon another's legally protected interests such as their reputation. This inherent tension gives rise to a delicate balancing act ensuring that speech remains free but not lawless and that reputation is protected without becoming a tool to silence legitimate criticism.

This balance becomes increasingly complex in a democratic society with expanding digital platforms, rising political dissent, and growing media influence. The chilling effect of criminal defamation laws often discourages individuals, particularly journalists, whistleblowers and activists from voicing concerns or criticism especially against powerful individuals or institutions.

At the same time unregulated and malicious speech, particularly through social media can destroy personal reputations overnight with long-lasting social and professional consequences. The legal system must therefore constantly navigate this thin line, upholding constitutional values while evolving with societal needs.

The judiciary plays a pivotal role in maintaining this equilibrium. In *Subramanian Swamy v. Union of India (2016)*, the Supreme Court of India upheld criminal defamation laws observing that reputation is a facet of human dignity and hence deserves constitutional protection.<sup>23</sup> However, the Court also emphasized that the misuse of such provisions should be checked and safeguards must be put in place to prevent harassment through frivolous complaints. Thus the judiciary seeks to strike a balance protecting individuals from reputational harm without allowing the criminal law to be weaponized against free expression.

Ultimately, the heart of this conflict is not about choosing one right over another but about balancing two fundamental rights of

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<sup>23</sup> *Subramaniam Swami v Union of India (2016) SC 7 221.*

freedom and dignity. It reflects the broader constitutional vision of India where rights are not absolute but harmonized in a manner that preserves both individual liberty and social responsibility.

### **Recent Incidents of Conflict between Freedom of Speech and Criminal Defamation**

Recent incidents highlight the ongoing tension between freedom of speech and criminal defamation in India, showcasing how defamation laws are employed and challenged in diverse contexts. The Supreme Court has shown increasing concern over the misuse of criminal defamation provisions, with recent remarks suggesting the need for decriminalization to prevent harassment of critics and journalists.

Rahul Gandhi faced a criminal defamation case for alleged derogatory remarks about the Indian Army made during his Bharat Jodo Yatra in 2022 specifically concerning the 2022 clash with Chinese forces in Arunachal Pradesh. The remarks included claims that China occupied 2,000 square kilometers of Indian Territory and that Indian soldiers were "thrashed" by the Chinese army which were challenged as false and defamatory.<sup>24</sup> The Supreme Court of India expressed strong displeasure questioning the basis of Gandhi's claims and emphasizing that as Leader of the Opposition he should raise such concerns in Parliament rather than on social media. The Court granted interim relief by staying further proceedings in the case but criticized Gandhi's comments as irresponsible and stated that freedom of speech does not extend to defamatory statements against the Army. Earlier the Allahabad High Court had rejected Gandhi's plea to quash the defamation proceedings, holding that the right to free speech is subject to reasonable restrictions including protection against defamation of the Indian Army. Additionally, Rahul Gandhi was granted bail in the case by a Lucknow court in July 2025.

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<sup>24</sup> Abraham Thomas, "If you are true Indian...SC raps Rahul Gandhi over remarks on Indian Army", Hindustan Times, August 4 2025, *available at* : <https://www.hindustantimes.com/india-news/sc-stays-defamation-case-against-rahul-gandhi-over-india-china-border-remark-101754286701771.html> (last visited on September 30, 2025)

The Calcutta High Court recently denied bail in a communal defamation case involving an influencer Sharmishta Panoli in June 2025. The court rejected her interim bail plea indicating the serious nature of the allegations related to communal tensions. This denial underscores the judiciary's strict stance on defamatory statements that could incite communal disharmony or violence reflecting the balance sought between freedom of speech and protection against harmful defamation in sensitive social contexts. In May 2025, the Supreme Court of India overturned a Delhi High Court order that had directed the Wikimedia Foundation to remove content deemed defamatory to Asian News International (ANI).<sup>25</sup> The Supreme Court emphasized the importance of free speech and cautioned against censorship that could hinder public access to information, highlighting the need to balance reputation protection with freedom of expression.

In September 2025, the Supreme Court of India signaled a potential shift in the approach to criminal defamation, with Justice M.M. Sundresh remarking that "the time has come to decriminalise defamation" during a hearing involving The Wire news portal and a JNU professor.<sup>26</sup> While defamation remains a criminal offence under Section 356 of the Bharatiya Nyaya Sanhita (formerly Section 499 IPC) the Court's observation reflects concerns over the frequent invocation of criminal defamation and the need to reassess whether such a colonial-era offence is appropriate in a contemporary democracy. This marks a departure from the 2016 Supreme Court judgment, which had upheld the constitutionality of criminal defamation to protect individual reputation as an aspect of dignity under Article 21 emphasizing instead that the social and constitutional need for criminal liability in defamation is now a matter for renewed judicial consideration.

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<sup>25</sup> Nandini Singh, "Supreme court rules in favour of Wikipedia, scraps ANI page takedown order", *Business Standard*, May 09, 2025 available at : [https://www.business-standard.com/india-news/supreme-court-quashes-delhi-hc-order-wikipedia-ani-defamation-free-speech-125050900507\\_1.html](https://www.business-standard.com/india-news/supreme-court-quashes-delhi-hc-order-wikipedia-ani-defamation-free-speech-125050900507_1.html) (last visited on September 30,2025)

## **Conclusion and Prelude**

The ongoing tension between the right to freedom of speech and criminal defamation embodies a fundamental challenge in India's democratic and constitutional framework. While freedom of speech under Article 19(1) (a) is essential for the flourishing of democracy, dissent and public accountability this right is not absolute. The protection of reputation as part of human dignity under Article 21 legitimizes restrictions on speech that is false, malicious or damaging. Judicial pronouncements have consistently sought to uphold this delicate balance recognizing that neither unregulated speech nor unchecked defamation can be tolerated in a just society. The legal framework particularly Sections 499 and 500 of the Indian Penal Code remains valid but subject to careful application to prevent misuse that could stifle legitimate expression.

Moving forward, it is critical to refine this balance to respond to contemporary challenges, especially those arising from digital media and social networks where defamatory speech can spread rapidly and widely. There is a pressing need for clearer guidelines to distinguish between legitimate criticism, fair comment and defamatory statements reducing the scope for frivolous litigation and harassment. Judicial activism and law reform should focus on strengthening safeguards such as good faith requirements, intent to harm and public interest defenses ensuring that criminal defamation laws are not weaponized against whistleblowers, journalists or dissenters.

Moreover, alternative dispute resolution mechanisms like mediation and apology based remedies could be encouraged to resolve defamation claims outside of the adversarial criminal justice system. This would reduce the burden on courts and promote reconciliation allowing both freedom of expression and reputational rights to coexist more harmoniously. Public awareness campaigns are also vital to educate citizens about responsible speech and the consequences of defamation, fostering a culture of respect alongside robust debate.

Ultimately, the way forward demands a nuanced approach one that respects free speech as the lifeblood of democracy while

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recognizing the legitimate need to protect individual dignity and reputation. By evolving the legal framework and judicial interpretation in line with changing social realities India can uphold its constitutional promise of liberty with responsibility ensuring that rights are exercised not at the expense of others but in a spirit of mutual respect and justice.