The Movement Against Criminal Defamation: Lessons For A Postcolonial India

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This paper seeks to consolidate tools in the form of uncanvassed constitutional arguments that must be considered by the Supreme Court in a challenge to the law of the criminal defamation, as they ought to have been in Subramanian Swamy v. Union of India. We move past anecdotal accounts of the colonial origins of this law to examine its history, and intent, as well as its presence in modern India as the 'afterlife of colonialism'. Viewing it, thus, from a postcolonial standpoint, we critically examine case laws, which prove mainstream arguments of this law being misused by the political and corporate elite, replicating structures of oppression reminiscent of the colonial era. This sets up the case for another challenge to this law, which we argue, if it follows modern constitutional jurisprudence, should be struck down for falling foul of the standard of a 'reasonable restriction' under Article 19(2). To prove this, the primary tool that we propose the Court must take up is the proportionality review, a test arguably befitting the role envisaged for the Court according to the Constitution of India. A comparative analysis to this effect draws from Kenya, Lesotho and Zimbabwe, countries socio-legally comparable to India, which are adapting to stricter judicial review. Using primarily the proportionality review as well as constitutional values that India's jurisprudence espouses, we criticise the Swamy judgment to finally advocate that defamation must be solely a civil offence.

Keywords: Criminal defamation, proportionality, Subramaniam Swamy v. Union of India, reasonable restriction, post-colonial India

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1. Introduction

The law on criminal defamation has subsisted on the statute books of India since its first inclusion by the British during the colonial era. The criminal defamation provisions, namely, Sections 499 and 500 of the Indian Penal Code, 1872, ("IPC") are comprehensive provisions, which make it punishable to communicate any imputations regarding a person, while having intent to harm or having good reason to believe will result in harm, to the reputation of the said person. Section 499 provides four explanations and nine exceptions to the definition of criminal defamation, covering the categories of persons, who can be said to be defamed, the manner in which defamation can take place, as well as the exceptions to the application of this law.[1] The crime of defamation is punishable with two years of imprisonment, or fine, or both.[2] As is known, Article 19(1)(a) of the Constitution of India, 1950 ("Indian Constitution") provides citizens of India with the right to freedom of speech and expression, circumscribed by the exceptions provided in Article 19(2) which enumerates 'defamation' as one such exception.[3]

Criminal defamation is not unique to India, and as will be discussed in this paper, it has been found on the statute books of many countries and continues to be in active use. However, the normalisation of the use of this law as a political and corporate tool in oppressive settings, as well as the principle level acceptance of imprisonment for defamation have been continually challenged.[4] India has not been an exception to this; the Supreme Court faced a challenge to the constitutionality of the criminalisation of defamation in 2016, which was rejected by a two-judge bench. [5] However, criticism of the judgment followed, based on a number of arguments put forth by scholars, lawyers, members of the political class, media professionals, and civil society alike.[6] These criticisms emerged from various conclusions of the Court, ranging from the overbreadth of the rights read into Article 21 including the right to reputation, the erosion of the public/private divide and the chilling effect on free speech. This paper will also canvas some of these criticisms but will frame them argumentatively within a framework of postcolonial transformative constitutionalism. The larger objective will be to underscore arguments and tools to be used in a future challenge to this provision before a larger bench, and therefore this paper will avoid

1 S. 499 & 500, The Indian Penal Code, 1869.
2 S. 500, The Indian Penal Code, 1869.
3 Art. 19, the Constitution of India.
4 Infra, discussion in Part III.
5 Subramanian Swamy v. Union of India, AIR 2016 SC 2728.
6 See for eg., B. Acharya,, *Criminal Defamation & the Supreme Court's Loss of Reputation*, The Wire (14/05/16) available at https://thewire.in/law/criminal-defamation-and-the-supreme-courts-loss-of-reputation, last seen on 23/05/20; V. Bhandari, *Defamation: where the Supreme Court got it wrong*, Caravan, (22/05/16), available at https://caravanmagazine.in/vantage/defamation-supreme-court-got-wrong, last seen on 23/05/20; Internet Democracy Project, *Unshackling expression: A study on laws criminalising expression online in Asia*, available at https://internetdemocracy.in/reports/unshackling-expression-a-study-on-laws-criminalising-expression-online-in-asia/, last seen on 23/05/20; Gautam Bhatia, *The Supreme Court's Criminal Defamation Judgment: Glaringly Flawed*, Indian Constitutional Law & Philosophy, available at https://indconlawphil.wordpress.com/2016/05/13/the-supreme-courts-criminal-defamation-judgment-glaringly-flawed/, last seen on 23/05/20.

reiterating earlier arguments. As argued by Pratap Bhanu Mehta,[7] the judgment upholding constitutionality of Sections 499, and 500 of the IPC and Section 199 of the Criminal Procedure Code, 1973 ("CrPC"), is indicative of larger trends and flaws in legal theory, which must be addressed comprehensively so as to challenge the prevailing culture of silencing debate and dissent.[8]

Recently, while quashing a criminal defamation suit, Justice GR Swaminathan of the Madras High Court recorded his observations on this law, stating that "it is a matter of record that criminal defamation proceedings have become a tool of intimidation [...] before corporate bodies and powerful politicians whose pockets are tunnel deep."[9] One of the infamous recent uses of this law has been the complaint filed by editor and former Minister of State for External Affairs, MJ Akbar against Priya Ramani, his former employee, for making allegations of sexual harassment against him in the context of the #MeToo movement.[10] This has been amid various other cases filed using this law, usually by the political class against other political leaders, or against the media, or those placed disadvantageously in the society, as will be discussed in this paper.

In this paper, we examine political discourse as the ultimate victim of the weaponisation of criminal defamation. The nature of legal action faced by the press is distinct from that faced by the political class, the latter is often engaged in a tussle of sorts with each other,[11] whereas almost all politicians uniformly launch attacks on the press unilaterally. Although this misuse of the law leads to persistent discourse on this 'Victorian-era law' and its colonial origins, which have no place in India, there is little discourse on its antecedents and records of its usage to indicate a pattern of misuse. This paper seeks to examine cases decided in this context by the Indian judiciary, including the Swamy judgment, and compare these with our findings from African jurisprudence.

Our arguments are framed in a liberal approach to free speech theories but will consistently approach the application of these theories with the challenges posed by a postcolonial Indian context, now in the midst of recognising its origins of transformative constitutionalism. Thus, by taking a comparative perspective, we will compare the Court's decision in Swamy with landmark decisions from the pan-African movement towards decriminalisation. The central argument, therefore, is that a constitutional challenge to this law to be situated in the postcolonial transformative origins of the Indian Constitution, requiring the Court to engage on a higher standard of review with the issue, as done also in the comparator jurisdictions. We argue, then, that the criminal provisions must be struck down for want of constitutionality, and defamation must be solely a civil offense. The tools that must be employed in a future

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7 P. B. Mehta, *Supreme Court's judgment on criminal defamation is the latest illustration of a syndrome*, Indian Express (18/05/16), https://indianexpress.com/article/opinion/columns/supreme-court-criminal-defamation-law-subramanian-swamy-2805867/, last seen on 20/05/20.

8 S. 199, Code of Criminal Procedure, 1973.

9 Sandhya Ravishankar v. V.V Minerals Pvt Ltd, Crl MP(MD) 4493 & 4494 of 2016.

10 *MJ Akbar's criminal defamation case against journalist Priya Ramani to be heard tomorrow*, Indian Express (17/10/18), available at https://indianexpress.com/article/india/metoo-mj-akbar-defamation-case-priya-ramani-5406367/, last seen on 15/05/20.

11 Arvind Kejriwal v. Arun Jaitley, Crl.M.C. 2417/2016.

challenge to the law are derived from comparative law, as well from the Constitution and its origins itself, which have been overlooked in the Swamy judgment by our estimation. The primary among these is the argument for the *correct* use of the proportionality review.

Part 2 contains two sub-chapters. The first will trace the history of the provision to its colonial origins and will provide background to these laws in the purposes it sought to meet. The second will create a history of case laws deciding criminal defamation in modern India, which can establish the aforementioned pattern of suppression of dissent. In doing so, our argument will be that the law is misused and replicates structures of oppression reminiscent of the colonial era, lending proof to the constant refrain against the law. Part 3 will entail a thorough examination of the Swamy judgment and its shortcomings, as per scholarly analysis and setting up the deficiencies, which necessitate learning from the comparison in the following parts. The first sub-chapter will address omissions whereas the second will check for consistencies in the rationale. It will also test the judgment against domestic jurisprudence and precedents, as well as the relevant constitutional provisions. Infusing a transformative constitutional approach to this issue, the analysis will be supplemented by a social analysis of reputation, one of the rights emphasised in the verdict, but not adequately defined.

Part 4 will explain the reasons for comparability among nations posed similarly in a modern post-colonial constitutional dilemma. The countries that comprise Africa have made public commitments, in addition to judicial decisions, to the move towards decriminalisation, which is unprecedented in the Indian context. By examining the pathologies of the judicial decisions so far, we hope to advocate for trans judicial influence in the answers to similar questions raised in India. However, in acknowledging that lessons must also be learnt from the errors made in the comparator jurisdictions, the following section will delve into a comparison under each prong of the structured proportionality test as enunciated by Professor Aharon Barak, in *R v. Oakes,* and other precedents. We will use the general trend of adoption of proportionality review as well as the relatively more structured approach by other Courts to shed light on the gaps in reasoning in the Swamy judgment. Finally, the paper will offer concluding remarks.

2. Historical Background of Sections 499 & 500 of the IPC

2.1. *The History & Law of Criminal Defamation*

The origin of the press and the regulatory environment policing the press can be traced back to colonial India. Legislations like the Vernacular Press Act, 1878, Press Act, The Newspaper (Incitement to Offences) Act, 1908, the particularly harsh Indian Press Act, 1910, and much later the Indian Press Emergency Powers Act, 1931 were passed with the subliminal objective of suppressing criticism of the Empire in vernacular languages, especially in the regional newspapers established by leaders of

the time.[12] A parallel method to crack down on dissenters of the government was through the sedition law, which has judicially been termed as an offence of 'defamation of the government' as well as criminal defamation.[13] These will be discussed in greater detail below.

A brief history of defamation law prior to delving into its colonial past in India is instructive in understanding how this law was and continues to be used as a tool by the political and corporate elite, and further how we may advance the case against it. Criminal libel can be traced from its origins in the Anglo-American legal context.[14] Although British and American libel jurisprudence has diverged after the mid-twentieth century, the libel law in the two nations was largely identical upto the 1960s.[15] The difference between criminal and civil libel in both nations was presented as certain kinds of libel could lead to a breach of peace, which would warrant criminal sanctions. The breach of peace itself, which was the violence emerging from the defamed seeking to avenge said libel, was considered the essence of the crime, initially rendering the defense of truth as irrelevant.[16] This crime relates back to a case in the Star Chamber, *De Libellis Famosis*,[17] wherein the Court held that any charge against an individual must be litigated in court rather than aired in public, as even the truth can be libellous if it threatened to 'disturb peace'. Almost a century ago, in 1904, Van Vechter Veeder and others argued[18] breach of peace to no longer be the rationale for criminalisation of libel. They argued that libellous truth would more likely instigate a breach of peace, but truth was being slowly allowed as a defense to criminal libel. They argued that the true unwritten basis for the law could only be assumed, then, to be the sanctity of an individual's reputation. This understanding of the underpinnings of defamation law has prevailed in the analysis of several jurisdictions thereafter and can be used to explain the disjunction between its intended use and the present deployment of the law.[19]

Despite the unending desperation of the British government in regulating the press, there was never a uniform law for governing the press and regulations were mounted relentlessly. Where the Acts should have specifically targeted the newspapers that endorsed yellow journalism, rules were imposed which discriminated against those newspapers that brought the true public opinion, with those newspapers

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12 A. Arikaka, *5 Fearless Journalists Who Rose Against the British Raj During the Freedom Struggle,* The Better India (24/01/19), available at https://www.thebetterindia.com/128932/journalists-freedom-fighters-british-raj/ last seen on 15/05/20; A.R Desai, *Social Background of Indian Nationalism***,** 217 (2015).

13 New York Times v. Sullivan, 376 U.S. 254, 276 (1964).

14 *Constitutionality of the Law of Criminal Libel*, 52(4) Columbia Law Review, 521-553 (1952).

15 V. R. Johnson, *Comparative Defamation Law: England and the United States*, 24 U. Miami Int'l & Comp. L. Rev. 1 (2017); Andrew Kenyon, *Libel, Slander, and Defamation*, The International Encyclopedia of Journalism Studies (2019); V. V. Veeder, *The History and Theory of the Law of Defamation,* Columbia Law Review, 546, 573 (1903).

16 *Constitutionality of the Law of Criminal Libel*, 52(4) Columbia Law Review, 521-553 (1952).

17 De Libellis Famosis, 77 Eng. Rep. 250 (1606).

18 V. V. Veeder, *The History and Theory of the Law of Defamation,* Columbia Law Review, 546, 573 (1903); Schroeder, *Constitutional Free Speech Defined and Defended in an Unfinished Argument in a Case of Blasphemy* (1919).

19 M. T. Moran, *Criminal Defamation and Public Insult Laws in The Republic of Poland: The Curtailing of Freedom of Expression*, Michigan State International Law Review 576-622 (2018).

that favoured the dogmas of the British.[20] There is a contradiction intrinsic to the notion of regulating what are supposed to be the free means of expression and information in a modern society. The output of blind censorship pre or post-independence has suppressed the opportunity for the press to refine its quality for the formation of public opinion.[21] It is in this context that the rise of criminal defamation as a tool for suppressing dissent emerged, particularly when the abovementioned licensing and regulatory laws were no longer available as a means to control political debate.[22]

In modern India, many argue that among the various laws criminalising speech at present, including criminal defamation, the law is employed often to keep information from the public, in a deliberate and concerted manner by the executive, contrary to its outlined historical intent.[23] Examples abound of executive power exerted to punish those who offend majoritarian sentiments, through criminal defamation, as well.[24] This is in direct collision with the role of free speech in a democratic governance model, as propounded by Alexander Meikeljohn, where the ultimate decision-making power indirectly rests with the citizens, who must deliberate upon issues and form their opinions which would reflect in their voting power.[25] Some may argue that India is bending away from deliberative democracy, particularly in the 2010s which is a long way from the level of deliberation witnessed in the previous decade which saw the rise of, for example, the Right to Information Act, 2005.[26] However, substantial analysis exists to prove that a deliberative model must remain, and still constitutes the underpinnings of the common law based Indian democracy, which has sustained itself through consistent and vibrant public debate.[27] Ramya Parthasarathy and Vijayendra Rao agree that the theory of such deliberation must be premised in equality of all citizens who participate in this process, as argued

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20 S. Kumar, *Distrust of Dissent: Underpinnings of The British Colonial Rule Vis-À-Vis Regulation of The Indian Press*, NLS Socio-Legal Review (2018).

21 I. Gujral, *The Indian Press-Challenge and Opportunity* (2004).

22 See also Mrs. Annie Besant v. The Government of Madras, 37 Ind Cas 525, an example of the manner in which licensing and registration legislations were used to quell dissident publications.

23 Infra 61.

24 For eg., *Journalist Abhijit Iyer-Mitra gets bail, Twitter trends #IStandWithAbhijit***,** NewsLaundry (20/09/18) https://www.newslaundry.com/2018/09/20/abhijit-iyer-mitra-gets-bail-he-was-arrested-over-a-video-on-konark-temple, last seen on 15/05/20.

25 A. Meikeljohn, *Free Speech And Its Relation To Self-Government* 26 (1948); C. R. Sunstein, *Democracy And The Problem Of Free Speech* (1993); R. J. Vangelisti, *Cass Sunstein's "New Deal" for Free Speech: Is It an "Un-American" Theory of Speech*?, Kentucky Law Journal 85(1) (1996).

26 *Right to Information: The Promise of Participatory Democracy and Accountability*, EPW Engage (27/08/19), available at https://www.epw.in/engage/article/right-information-promise-participatory-democracylast seen on 15/05/20; Dhruva Gandhi & Unnati Ghia, *The Erosion of Deliberative Democracy in India*, Young Bhartiya (4/11/19), available at https://www.youngbhartiya.com/article/the-erosion-of-deliberative-democracy-in-india, last seen on 15/05/20.

27 R. Parthasarathy & V. Rao, *Deliberative Democracy in India*, Policy Research Working Paper, 6, Working Paper Number WPS7995, World Bank Research Group (2017); Gautam Bhatia, *Basic Structure – VII: Deliberative Democracy and the Common Law*, Indian Constitutional Law & Philosophy, available at https://indconlawphil.wordpress.com/category/deliberative-democracy/deliberative-democracy-and-basic-structure/, last seen on 15/05/20.

by John Rawls and Jurgen Habermas.[28] We will examine the concept of a transformative, participatory democracy, and situate the role of the Supreme Court in such a democracy while discerning the examples set for the Court to follow in the form of a stricter judicial review as traced in the cases decided in Africa. We frame our discussion by stating that criminal defamation, insofar that it has a chilling effect on speech and suppresses dissent as argued, greatly hampers this equality by restricting the flow of information in India.

The cumulative effect of the views advanced above, and below, means that criminal defamation must be reviewed far more broadly than it was in the *Swamy* judgment, it must be examined for the threat it poses to Indian democracy, and the manner in which this undermines the postcolonial transformative ideals embodied in the Constitution. Before delving into theory, comparative lessons and why these are important, we must unpack criminal defamation and its presence in India briefly.

The criminal defamation provisions were drafted in 1837, and thereafter codified into the IPC in 1860.[29] Pursuant to Section 499, any imputation about an individual, be it written, spoken or otherwise, which is either intended to or is likely to affect the reputation of the individual is considered as criminally defamatory. Among the nine exceptions, the first makes absolute truth for public good an exception to defamation. Section 198 of the Criminal Procedure Code establishes an exception to the general rule that any person, aggrieved or not, may file a complaint under the IPC, to hold that only an aggrieved person can file a defamation complaint.[30] The definition of an aggrieved person is outlined in the Section and its explanations, and has been discussed extensively by the Courts.[31] The essential conclusion to be drawn from this string of judgments on locus standi as under Section 198 is that the defamatory statement must make reference to a definite individual, set of individuals, or an association for the suit to stand. This requirement in essence can be argued to be such that, as it eliminates public locus standi, it does so because there is in practicality no effect on public society when an offence of defamation takes place against an entity. Ironically, the absence of public harm in criminal defamation was one of the principal arguments in the case for its decriminalisation in *Subramanian Swamy* v. *Union of India* but was cast aside by the Court.[32]

Pursuant to Article 19(1)(a) all citizens are guaranteed the fundamental right to freedom of speech and expression while Article 19(2) provides for defamation as one of the grounds for reasonable restriction of this freedom. The Supreme Court in *Chintaman Rao* v. *State of MP*[33] had held that, "the phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right *should not*

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28 Ibid.

29 *Criminal Defamation: A 'Reasonable Restriction' on Freedom of Speech?*, Obhan & Associates, available at https://www.obhanandassociates.com/blog/criminal-defamation-a-reasonable-restriction-on-freedom-of-speech/, last seen on 15/05/20

30 S. 198, Code of Criminal Procedure, 1973; G. Narasimhan & Ors. Etc v. T. V. Chokkappa, 1972 AIR 2609.

31 G. Narasimhan & Ors. Etc vs T.V. Chokkappa, 1972 AIR 2609; Ritesh Bawri v. M/s Dalmia Bharath (Ltd.), CRL.O.P.(MD)11759 of 2017; Ratanlal and Dhirajlal, *Law of Crimes* 1317 (23rd ed., 2013) 1317; Wahid Ullah Ansari v. Emperor, AIR 1935 All 743.

32 Supra 5.

33 Chintaman Rao v. State of MP, 1951 AIR 118.

be arbitrary or of an excessive nature, beyond what is required in the interests of the public". It was in *Chintaman Rao* that the Supreme Court spoke of 'balancing' of the restriction and the fundamental right. Later, in *VG Row* v. *State of Madras*,[34] it enunciated the elements of what we know to be the proportionality review to ascertain the constitutionality of restrictions. In this paper, we will focus purely on defamation and the deference of the Supreme Court to the Legislature on this particular restriction to freedom of speech and expression. This will be explored in the next chapter.

An individual's right to criticism is intertwined in its right to freedom of speech and expression under Article 19 of the constitution.[35] The objective of defamation law is to limit this right of criticism and prevents its unfair use. However, the distinction between the practice of the right of criticism and defamation is undefined and is left for interpretation by courts. Courts have often reiterated that while addressing a criminal defamation charge under section 499, one has to keep in mind that any statement even if not true but made in good faith and in public interest is taken to be in the nature of fair comment or criticism and cannot invite criminal prosecution.[36] This threshold is not sufficient on a standalone basis and the ambiguity between the two concepts continues to persist. To some extent, the Madras HC has resolved the ambiguity in the rule of malice's earlier inapplication to the criminal provisions, but this remains open to reinterpretation by other High Courts or the Supreme Court itself. [37]

The power structure, that we argue replicates the threat posed by colonialism and perpetuates its afterlife in India, is further strengthened by the application of Section 199 of the CrPC. This protects public servants and certain officials of the Government doubly by allowing the Public Prosecutor to *suo motu* prosecute the accused even if the affected individual does not make a complaint.[38] The aspects of this power imbalance will be discussed further in light of demonstrated instances of it in the next section of this chapter. This, we argue, forms the social cost, which must form part of the Court's review of this law, while balancing the State's interest as against the freedom of speech. There exists no comprehensive report on the cases decide by the Courts on criminal defamation prior to, or post India's independence. In the pre-Constitutional era, sedition was also used in the manner that seditious libel is prosecuted in countries where such an offence is on the statute books.[39] For instance,[40] a complainant made such an argument attempting to read Section 124-A with Section 499 of the IPC. The phrase 'seditious libel' appears in other cases, defined roughly as:

> his object was to excite not merely passive disaffection, which in itself is an offence within Section 124A of the Indian Penal Code, but active disloyalty and rebellion amongst his Muhammadan fellow-subjects.

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34 VG Row v. State of Madras AIR 1952 SC 196, ¶15.

35 Government of Andhra Pradesh & Ors. v. Smt. P. Laxmi Devi, 2008 4 SCC 720.

36 Supra 5.

37 Sandhya Ravishankar v. V.V Minerals Pvt Ltd, Crl MP(MD) 4493 & 4494 of 2016.

38 S. 199, Code of Criminal Procedure, 1973.

39 Queen-Empress v. Taki Husain, (1885) ILR 7 All 205; Queen-Empress v. Jogendra Chunder Bose & Ors., (1892) ILR 19 Cal 35; Queen-Empress v. Amba Prasad, (1898) ILR 20 All 55; W.N. Srinivasa Bhat & Anr. v. The State of Madras & Anr., AIR 1951 Mad 70.

40 Queen-Empress v. Jogendra Chunder Bose & Ors., (1892) ILR 19 Cal 35.

> […]That offence he committed regardless of the ruin, misery, and punishment which would have fallen on any of his fellow-countrymen who *might have been so ignorant as to believe that the statements which be published were true, and who, acting on such belief, might have entered upon a course of active disloylaty (sic) to the Government*.[41] (Emphasis supplied)

In this case, the British Government had instituted this case against Amba Prasad who was an editor, proprietor and publisher of a newspaper called Jami-ul-Ulam, which they claimed, was being used to incite disaffection against the government. The abovementioned definition overlaps substantially with the manner in which the standard for defamation is defined, except that seditious libel appears to be defined solely in terms of the lowered reputation, in the estimation of right-thinking members of society, *of the government*.

Pre-constitutional India saw several instances of the exercise of this law. These were often public-interest sensitive cases, ranging from reportage about police violence,[42] or defamation of public officials,[43] and in newspapers famous for being critical of the press, many a time in vernacular languages.[44] In a case, the Court specifically noted that the press did not occupy a position of privilege merely because of its role in functioning of the country and must apply 'due care and attention' before publication.[45]

In these cases, public good has often been instigated as the exception to prevent criminal sanction even if the material was false or indeed, defamatory by lowering the reputation of the individual, and Courts in contemporary cases sometimes recognise public good and good faith as the precepts in which criminal defamation ought to be decided. The Court in the *C. Gopalachariar* judgment has provided some guidance on what is to be adjudicated as 'good faith', "words 'we strongly believe' and the word 'perhaps' in the passage in question clearly negative the contention that they were made as positive averments of facts."[46] Here, the Court emphasised that as long as careful language is used taking care for another's reputation, good faith must be understood to mean that material having reasonable doubt must also be published with appropriate disclaimers to fulfill the role of the media as a public function. The good faith exception is intricately linked to our central argument that decriminalisation of defamation must be founded in the role of free speech in a deliberative democracy, as this exception at the very least must be broadened to strengthen the role of free speech and to reduce criminal convictions for dissenting opinions. As stated in *New York Times* v. *Sullivan*, [47] free speech must be allowed to make errors and be given breathing space so that those who exercise it practice self-imposed good faith restrictions rather than external sanctions which may prevent any constructive debate at all. Erroneous statements were argued to be

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41 Queen-Empress v. Amba Prasad, (1898) ILR 20 All 55.
42 Emperor v. J.M. Chatterji, 145 Ind Cas 126.
43 P. Balasubramania Mudaliar v. C. Rajagopalachariar, AIR 1944 Mad 484.
44 Janardan Karandikar v. Ramchandra Tilak, (1946) 48 BOMLR 882.
45 Emperor v. J.M. Chatterji, 145 Ind Cas 126.
46 C. Gopalachariar vs Deepchand Sowcar**,** (1940) 2 MLJ 782.
47 New York Times Co. v. Sullivan, 376 U.S. 254, Brennan, J.

inevitable, and Judge Edgerton in *Sweeney* v. *Patterson*,[48] stated "errors of fact, particularly in regard to a man's mental states and processes, are inevitable […] Whatever is added to the field of libel is taken from the field of free debate." The Constitution of India was forged with the constituent power of the people, holding the State accountable to the people, envisaging a 'culture of justification' as opposed to a 'culture of authority'.[49] In such a context, the Court is empowered with judicial review, one that must not be deferential as argued below, to take cognisance of the social cost of the chilling effect, and the disproportionate impact of this law on those who dissent, while conducting the proportionality test to balance state interest against Article 19(1)(a). These foundational constitutional principles are continually challenged in criminal defamation cases in modern India, in its consistent misuse, which is inevitable given the current body of jurisprudence.

2.2. *Criminal Defamation, Dissent and Debate in Modern India*

The jurisprudence of criminal defamation is demonstrative of the nature of its use for suppression of political debate. While this is often argued anecdotally, we attempt to prove this by establishing a pattern specifically over the past decade in the absence of any reports, which have done the same. We reviewed the reported judgments of criminal defamation within 2010-2020 to indicate a pattern of cases relating to the press and the political class, i.e. private wrongs with a public good element. In doing so we found that such reported petitions have been on the rise in this decade.[50] We found a total of fifteen instances specifically relating to our argument in the past decade alone.[51] These instances may not be exhaustive as they do not include all unreported judgments, or withdrawn complaints, or stays on FIRs, all of which have nevertheless have contributed to a climate of silencing.[52] To illustrate our point, we have discussed cases having particular bearing on the political climate in India, by being sensationalised or by culminating in violence or inordinate jail

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48 Sweeney v. Patterson**,** 128 F.2d 457 (D.C. Cir. 1942).

49 V. Narayan & J. Sindhu, *A historical argument for proportionality under the Indian Constitution,* 2:1 Indian Law Review 1, 5 (2018).

50 This is based on data provided upon a case-law search on Manupatra which reports judgments from across the country's Courts, its auto-generated graph indicates an increase in cases under criminal defamation.

51 *Supreme Court asks Jay Shah, The Wire to try to settle criminal defamation case*, Scroll.in (18/04/18) available at https://scroll.in/latest/876133/supreme-court-asks-jay-shah-the-wire-to-try-to-settle-criminal-defamation-case, last seen on 15/05/20; Sandhya Ravishankar v. V.V Minerals Pvt. Ltd., Crl MP(MD)Nos. 4493 & 4494 of 2016; Smt. Minu Dey @ Mandira Dey v. The State of West Bengal, S/L.361. C.R.R. No.3927; Arvind Kejriwal v. Arun Jaitley & Ors, Crl.M.C. 2417/2016; Tathagata Satpathy v. Santilata Choudhury & Others, Criminal Revision No. 391 of 2001; Dr. Shashi Tharoor v. Arnab Goswami & Anr., CS(OS) 253/2017; Vijay Gulati v. Radhika, (2010) 119 DRJ 482; Md. Ayub Khan v. The Editor, RFA 09 of 2013; Indrajit Lankesh v. K.T. Dhanu Kumar, 2015 (3) RCR (Crl) 14; *MJ Akbar's criminal defamation case against journalist Priya Ramani to be heard tomorrow*, The Indian Express (17/10/18) available at https://indianexpress.com/article/india/metoo-mj-akbar-defamation-case-priya-ramani-5406367/, last seen on 15/05/20. See also J. Bajoria & L. Lakhdhir, *Stifling Dissent: The Criminalization of Peaceful Expression in India*, Human Rights Watch, (24/05/16), available at https://www.hrw.org/report/2016/05/24/stifling-dissent/criminalization-peaceful-expression-india, last seen on 23/05/20.

52 For eg., *Stayed by High Court, Essel Group's Defamation Case Against The Wire Now Withdrawn***,** The Wire (06/10/17) available at https://thewire.in/business/essel-groups-defamation-case-against-the-wire-now-withdrawn, last seen on 23/05/20.

terms. When wielded by the political class, this tool has been used across party lines and is hardly a partisan matter, as is demonstrated below. The Courts have, for their part, urged amicable settlements and sough to quash criminal proceedings in various instances.

For instance, it is illustrative to examine the cases of journalists such as Gauri Lankesh whose deaths were controversial, in large part because of their investigative journalistic work.[53] Two Members of Parliament had filed suits of defamation against Gauri Lankesh regarding an article published in her newspaper 'Lankesh Patrike' in 2008.[54] The allegedly defamatory article had implied that the politicians were involved in criminal activities, including cheating a businessman. Although the other journalist implicated in these proceedings was acquitted as he denied his involvement with the newspaper, Lankesh was sentenced to six years of imprisonment and a penalty fine.[55] She managed to secure release on bail, but consistently argued that defamation had not taken place because one of the alleged victims had won an election thereafter, and that therefore, his reputation had not been lowered in any tangible manner.[56] Lankesh Patrike had faced litigation prior to Gauri Lankesh's leadership as well, and was charged with criminal defamation under its former editor P. Lankesh.[57] The case was dismissed for want of jurisdiction, but is nevertheless notable for the deterrent sanctioning that resulted.

Focused litigation has been witnessed with The Wire as well, against whom Jay Shah, a prominent public figure with political capital, filed a criminal defamation case and a civil defamation case of INR 100 Crore for which the Supreme Court has not pronounced the judgment.[58]

The nature of litigation as deterring freedom of the media is inherent in the positions that the parties occupy, particularly when politicians are able to subject activists and journalists to criminal sanctions.[59] The question of power must be

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53 J. Gettleman & H. Kumar, *In India, Another Government Critic Is Silenced by Bullets*, The New York Times (06/09/17) available at https://www.nytimes.com/2017/09/06/world/asia/gauri-lankesh-india-dead.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer, last seen on 15/05/20.

54 *Gauri Lankesh convicted of defamation, sentenced to six months in jail,* The Hindu (29/11/16) available at https://www.thehindu.com/news/national/karnataka/gauri-lankesh-convicted-of-defamation-sentenced-to-six-months-in-jail/article16716016.ece, last seen on 15/05/20; Indrajit Lankesh v. K.T.Dhanu Kumar : 2015 (3) RCR (Crl) 14.

55 *Gauri Lankesh convicted of defamation, sentenced to six months in jail,* The Hindu (29/11/16) available at https://www.thehindu.com/news/national/karnataka/gauri-lankesh-convicted-of-defamation-sentenced-to-six-months-in-jail/article16716016.ece, last seen on 15/05/20.

56 Johnson TA, *What was the defamation case against slain journalist Gauri Lankesh?*, The Indian Express (07/09/17), available at https://indianexpress.com/article/explained/what-was-the-defamation-case-against-slain-journalist-gauri-lankesh-4832061/, last seen on 15/05/20.

57 P. Lankesh and Anr. v. H. Shivappa and Anr., 1994 CriLJ 3510.

58 *Jay Shah defamation case: 'The Wire' withdraws its plea from Supreme Court, says will stand trial*, Scroll, (27/08/19) available at https://scroll.in/latest/935353/jay-shah-defamation-case-the-wire-withdraws-its-plea-from-supreme-court-says-will-stand-trial, last seen on 15/05/20; Rohini Singh v. State of Gujarat, Gujarat High Court R/SCR.A/8885/2017.

59 P. Nagaraj, *Gauri Lankesh (1962-2017): Journalist who raged like a fire as she championed just causes*, Scroll.in (6/09/17), available at https://scroll.in/article/849701/gauri-lankesh-

considered while discussing the question of decriminalisation, as argued by Chinmayi Arun, in that these laws are more often used by big corporates and the political elite so the argument of protection of reputation cannot stand if such protection is disparate.[60] In 2016, the Press Council of India raised concern over the rising cases of criminal defamation against journalists as well as the emerging violence against the same journalists, and consequently ordered fact-finding reports on two recent deaths at the time.[61] In this report, the PCI noted that Ranjan Rajdeo's death was most likely on the basis of his critical political reportage, as per an independent fact-finding committee.

Narendra Dabholkar was also charged with criminal defamation by the Hindu spiritual organisation, Sanatan Sanstha.[62] As per his own account, Dabholkar was not only charged with criminal defamation for his movement against magic remedies and superstition, but that the organisation had also claimed Rupees One Crore as damages in its suit.[63] The total number of lawsuits filed by Sanatan Sanstha against Dabholkar amounted to fourteen at the time of publication of his book.[64] A similar case was filed by the Sanatan Sanstha in June, 2018 against the weekly newspaper, Goan Observer, for publishing an article titled 'Protecting Hinduism – Sanatan Sanstha'. The judgment of the Senior Civil Judge in Ponda, Goa is distinctive in that it did not grant the charge of defamation to the organisation and held that, journalists are responsible for reporting facts to the public and are entitled to discuss such matters without being served with legal notices.[65] Although judgments such as the Goan judgment are distinctive and notable, the overarching trend of filing such complaints undeterred is still contrary to a liberal approach to free debate, in conformity with our constitutional ideals.

Specific newspapers have often been the target of criminal defamation cases in a demonstrable manner, as indicated to an extent in the Lankesh Patrike example. The newspaper Karivali Ale, a regional newspaper in Karnataka has faced litigation in this realm on more than one occasion.[66] But the most significant Indian example of a

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1962-2007-journalist-who-raged-like-a-fire-as-she-championed-just-causes, last seen on 15/05/20.

60 C. Arun, *A question of power*, The Indian Express (25/05/16), available at https://indianexpress.com/article/opinion/columns/criminal-defamation-law-supreme-court-2817406/ last seen on 15/05/20.

61 Press Council of India, *Annual Report 2016-2017*, available at http://presscouncil.nic.in/WriteReadData/userfiles/file/ANNUAL%20REPORT%2016-17%20eng.pdf, last seen on 13/07/20,

62 Narendra Dabholkar, *"I Should Not Allow Myself to be Scared": Narendra Dabholkar on Facing Threats from Religious Organisations*, The Caravan (20/08/18) available at https://caravanmagazine.in/religion/narendra-dabholkar-pressure-religious-organisations, last seen on 15/05/20.

63 Ibid.

64 Ibid.

65 N. Kashyap, *Journalists Are Not Liable For Defamation For Bringing Facts To The Public And Commenting On These Facts: Goan Court Dismisses Sanatan Sanstha's Suit*, Live Law (06/22/18), available at https://www.livelaw.in/journalists-are-not-liable-for-defamation-for-bringing-facts-to-the-public-and-commenting-on-these-facts-goan-court-dismisses-sanatan-sansthas-suit/, last seen on 15/05/20.

66 Ashok K.M., *SC Sets Aside HC Order That Quashed Defamation Case Against Kannada Daily Newspaper Owner*, Live Law (05/12/17), available at https://www.livelaw.in/sc-sets-

newspaper facing consistent litigation from a government are the two hundred and thirteen cases filed by the All India Anna Dravida Munnetra Kazhagam (AIADMK), of which more than fifty were against the press.[67] Eventually, most of these cases were withdrawn by the State Government vide a Government Order to the Public Prosecutor which ordered the withdrawal of one hundred and twenty five petitions against the media at the trial court level.[68] This was contended by many to be in response to the respondents of these defamation suits filing a case to challenge the constitutionality of Section 499.[69] The AIADMK government had done the same with Subramanian Swamy's defamation suit, and had submitted a withdrawal affidavit for the several pending cases against him, upon his filing a case before the Supreme Court, challenging the constitutionality of the provisions.[70] Evidently, in the absence of any significant steps by the judiciary, the existence of criminal defamation provisions have served as impetus to the government, indiscriminate of parties, to use the law in this regard for their own motives. However, it is worthwhile to note that not only has this law been used, it has served as a condonation for bills such as Rajiv Gandhi's Defamation Bill in 1988.[71]

Political leaders have also engaged in filing of criminal defamation suits.[72] For instance, in *Arvind Kejriwal* v. *Arun Jaitley*, filed by Jaitley for allegations of financial irregularities in the DDCA during his tenure as its president in which Kejriwal was ultimately acquitted upon rendering an apology.[73] Further, often politicians resorted to filing cases against their rivals who flag issues of governance. For instance, over the years, the Jayalalithaa government has filed a slew of such cases against its opponents and dissidents including but not limited to union human resource development minister, Murli Manahor Joshi and leader of opposition, Vijayakanth, Tamil Nadu Communist Party of India (Marxist) leader N. Varadarajan and Dalit leader Krishnasami.[74] Additionally in 2019, there were also instances of

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aside-hc-order-quashed-defamation-case-kannada-daily-newspaper-owner-read-judgment/, last seen on 15/05/20.

67 A. Vishwanath & D. Thangavelu, *Supreme Court pulls up Jayalalithaa for misusing defamation law*, Live Mint (25/08/19) available at https://www.livemint.com/Politics/0YoIjK4oK4WXOAezvD7Q3I/Supreme-Court-pulls-up-Jayalalithaa-for-misusing-defamation.html, last seen on 15/05/20.

68 *Tamil Nadu files affidavit to withdraw 125 defamation cases against media*, The Hindu (21/09/04), available at https://www.thehindu.com/2004/09/18/stories/2004091803051300.htm, last seen on 15/05/20.

69 Ibid.

70 S. Swamy, *Defamation litigation: a survivor's kit*, Interesting News, (21/09/04) available at http://genworldnews.blogspot.com/2017/05/defamation-litigation-survivors-kit-by.html?m=0, last seen on 15/05/20.

71 *Defamation Bill-High Political Status*, 23(37) Economic & Political Weekly (1988) available at https://www.epw.in/journal/1988/37/uncategorised/defamation-bill-high-political-status.html, last seen on 26/07/20.

72 *Decriminalising defamation***,** The Statesman (9/04/19) available at https://www.thestatesman.com/opinion/decriminalising-defamation-1502744042.html, last seen on 15/05/20.

73 P. K Dutta, *Arvind Kejriwal: Slander man of Indian politics now has 8 defamation cases against him*, India Today, (22/05/17) available at https://www.indiatoday.in/india/story/arvind-kejriwal-indian-politics-defamation-cases-aap-978600-2017-05-22, last seen on 15/05/20.

74 *As apex court weighs idea of criminal defamation, Jaya files yet another case against media*, Scroll.in (15/07/15) available at https://scroll.in/article/741016/as-apex-court-weighs-idea-of-criminal-defamation-jaya-files-yet-another-case-against-media, last seen on 15/05/20; B.

criminal defamation filed by the ruling party BJP against the former leader of India's opposition Congress Party leader Rahul Gandhi pertaining to certain statements made during a general election campaign. [75]

The ninth and the third exceptions to Section 499 prima facie exclude matters reported in furtherance of public interest or relating to a public question from the purview of criminal defamation.[76] Nonetheless, the laws failure in defining public interest not only smears the process with uncertainty and direction but also fosters and encourages individuals to file criminal defamations lawsuits clearly protected by the ninth exception.[77] A prominent instance was the lawsuit filed by the owner of a hotel for hosting 'obscene dance' in his hotel.[78] In accordance with the material stated in the press release by the police and the FIR, various newspapers published articles to this effect. Alleging that the news was defamatory, the owner pressed charges of criminal defamation against the journalists. The Delhi HC ruled in favor of the journalists and correctly so holding that "a fair reporting pertaining to a matter of public concern, without insinuations and innuendos" is not actionable for the offence of criminal defamation.[79]

Economic Times faced litigation for an article about illegal beach sand mining of atomic minerals conducted along the southern coastline of Tamil Nadu, which in turn had exposed the local villagers to serious health hazards.[80] The private complainant argued that it was defamatory and worthy of attracting criminal sanctions. In a rather positive ruling, the court absolved the journalists of criminal defamation while acknowledging that the matter at hand involved a question of public interest and was protected by the third exception to Section 499.[81]

These instances are certainly not comprehensive but necessarily provide a distressing picture of the nature of cases filed in the past decade, clearly warranting a reconsideration of the decision in the *Swamy* judgement, when read with the several other arguments made in this regard.

Sinha, *Defamation law can't be used as political weapon: SC to Jayalalithaa govt,* Hindustan Times (07/29/16) available at https://www.hindustantimes.com/india-news/defamation-law-can-t-be-used-as-a-political-weapon-sc-to-jayalalithaa-govt/story-5P2sgPrkQ565JcRq04MrMI.html, last seen on 15/05/20.

75 *Rahul Gandhi pleads not guilty in defamation case filed by BJP legislator*, The Print (10/10/19) available at https://theprint.in/india/rahul-gandhi-pleads-not-guilty-defamation-case-filed-bjp-legislator/303876/, last seen on 13/07/20.

76 S. 499, Indian Penal Code, 1869.

77 Vineet Jain v. NCT Of Delhi & Ors., CRL.M.C.2111/2007; Grievances Redressal Officer v. S.Krishnamurthy, Crl MP(MD)Nos.4493 & 4494 of 2016; Sh. Rajinder Kumar Gupta v. Sh. Sudhakaran K. P CR No.5 3/2008; M. Nedunchezhian v. The Bar Council of Tamil Nadu, Writ Petition No.10673 of 2015.

78 Vineet Jain v. NCT Of Delhi & Ors., CRL.M.C.2111/2007.

79 Ibid, at ¶17.

80 Grievances Redressal Officer v. S. Krishnamurthy, Crl MP(MD)Nos.4493 & 4494 of 2016, ¶1.

81 Ibid, at ¶15.

3. The Shortcomings of the Subramaniam Swamy Judgement

This Part of the paper will consider the constitutional challenge to criminal defamation to discern the specific arguments contained therein, and the merits, which will be further compared in the chapter on African jurisdictions. The Swamy judgment addressed a batch of twenty-four writ petitions filed under Article 32 of the Constitution.[82] Filling the void deliberately left by *R. Rajagopal* v. *State of Tamil Nadu* (the Auto Shanker case),[83] the Swamy judgment tested the constitutionality of Sections 499 and 500 on Article 19(1)(a) and 19(2).[84] The arguments made by the Petitioners attacked the provisions substantively, as well as Section 199 of the Code of Criminal Procedure, 1974.[85]

3.1. *The Supreme Court's Omissions in Swamy*

The flaws of the Swamy judgment have been widely recorded, as part of a broader socio-legal trend of over-criminalisation,[86] as having ignored precedents of the Supreme Court itself and therefore being per incuriam,[87] simply as being detrimental to the human rights jurisprudence of the nation,[88] or merely as adding to the growing number of judgments which are curtailing free speech and media freedom in the nation.[89] However, very little substance has been lent to the socio-legal argument that the abuse of the criminal defamation provisions in India, by political parties and the influential elite, create scales of inequality between parties, although often reiterated in brief. [90] This is essential to note in context of the argument made in this paper that political dissent and debate are the inevitable victims of this branch of law, and in context of the factor of reputation that is discussed in the Swamy judgment. Reputation is one of the major planks on which the Swamy judgment rests, and the case is seminal in part due also to its reading of reputation as one of the elements of Article 21.[91] There are several flaws in its reasoning of the concept of reputation, which will be discussed in the following section. Keeping this in mind, the following part of this section will discuss the Swamy judgment to criticise its omissions, especially those which are glaringly discussed in the comparator jurisdictions in the next chapter.

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82 Supra 5.

83 R. Rajagopal v. State of Tamil Nadu, 1995 AIR 264.

84 Ibid.

85 Supra 5, at ¶9, 12-13.

86 *Over-Criminalisation: An Insidious Placebo*, 8 NUJS L. Rev. [vi] (2015).

87 G. Bhatia, *Why the Supreme Court's Criminal Defamation Judgment is Per Incuriam*, Indian Constitutional Law & Philosophy, available at https://indconlawphil.wordpress.com/2016/05/18/why-the-supreme-courts-criminal-defamation-judgment-is-per-incuriam/, last seen on 15/05/20.

88 C. Arun, *A question of power*, The Indian Express (25/05/16), available at https://indianexpress.com/article/opinion/columns/criminal-defamation-law-supreme-court-2817406/, last seen on 15/05/2020.

89 G. Bhatia, *The Supreme Court's Criminal Defamation Judgment: Glaringly Flawed*, Indian Constitutional Law & Philosophy, available at https://indconlawphil.wordpress.com/2016/05/13/the-supreme-courts-criminal-defamation-judgment-glaringly-flawed/, last seen on 15/05/20.

90 Ibid.

91 Supra 5, at ¶75.

The decriminalisation of defamation by Britain is also of note because it is the source of the law governing us today, and the rationale employed for striking it down in England is applicable in India in the absence of any contradicting context.[92]The Swamy judgment does not trace the origins of the law, or draw a nexus with the earlier British law to compare with. Along with the African Court of Humans' and Peoples' Rights case, omissions such as these are notable because under the themes of defamation and reputation, the Court delves into the 'views of the ancients', the opinions of creative thinkers and philosophers, as well as a litany of judgments from Canada, UK, USA, and South Africa.[93]

It ignored the *Issa Konate* judgment which examined the proportionality of the punishment, allowing the reading down of the law to *exclude custodial sentences* even if other civil or administrative fines are levied as a criminal sanction.[94] This would not resolve the issue of overburdening of an already crumbling criminal justice system, or over-criminalisation. However, the terror and trauma that accompanies custodial sentences for the expression of an opinion is noticeable in the accounts of journalists who fear targeting even within judicial custody, which is an issue within incarceration in general that ought to have been addressed by the Court in light of arguments made.[95] Learning from this judgment, the Court could have shed light on the role of the process as punishment in such cases, more so in a heavily backlogged justice system. The Court did not address the process of defamation litigation as stigmatising and exclusionary either, which is inherent to the social theme of the law. The mere threat of criminal defamation, specifically, or generically, has been used to quell peaceful expression of speech. This is evidenced by the cases dropped against Arvind Kejriwal when he apologised to the concerned parties in a suit,[96] or in tweets that politicians have written, about the threat of litigation based on earlier convictions, to name some examples of a common phenomenon.[97]

The threat to reputation is countered privately by individuals themselves who use means outside the law, threatening criminal action to induce apologies. These thematically build to a larger concern of the Swamy judgment as bending towards over-criminalisation, without examining the necessity of this law as against the State interest, whereas modern constitutional jurisprudence has been bending in favour of civil liberties and countering criminalising of harms.[98] This is particularly as the threat

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92 S. 73, The Coroners and Justice Act, 2009.,

93 Supra 5, at ¶21 onwards.

94 Infra discussion in Part 4.1.

95 *Karnataka journalist held in defamation case, handcuffed*, The Hindu (06/01/09), available at https://www.thehindu.com/todays-paper/Karnataka-journalist-held-in-defamation-case-handcuffed/article16346688.ece, last seen on 15/05/2020.

96 *Delhi court acquits CM Arvind Kejriwal in criminal defamation case filed by former aide of Sheila Dikshit*, The Economic Times (05/11/17), available at https://economictimes.indiatimes.com/news/politics-and-nation/delhi-court-acquits-cm-arvind-kejriwal-in-criminal-defamation-case-filed-by-former-aide-of-sheila-dikshit/articleshow/66511424.cms, last seen on 15/05/2020.

97 Amit Malviya, Twitter (29/11/16) available at https://twitter.com/malviyamit/status/803550880754647040?ref_src=twsrc%5Etfw, last seen on 15/05/202020.

98 B. R. Rubin, *The Civil Liberties Movement in India: New Approaches to the State and Social*

of over-criminalisation has been left to the wisdom of 'law-makers and experts' (a recurring theme which African jurisprudence is able to address through the proportionality review) as per the Report on the Draft National Policy on Criminal Justice, which nonetheless acknowledges this threat.[99] It has been suggested that the judiciary must discuss the threat by pitting it against constitutional morality, as done to decriminalise consensual sodomy in Section 377, rather than resting on colonial precedent and public morality.[100] Strides in this direction are clearly observable in the movement being made across Africa, discussed in the subsequent section.

The discussion on criminal defamation having been created to prevent a breach of peace, which might occur due to violence incited to protect the honour of the defamed in UK,[101] was also ignored while making this decision. In fact, Justice Misra stated "we are of the considered opinion that there is no warrant to apply the principle of noscitur a sociis to give a restricted meaning to the term "defamation" that it only includes a criminal action if it gives rise to incitement to constitute an offence." This becomes pivotal in the final determination of proportionality review, along with the Court's deference to legislative wisdom discussed below, which are arguably contrary to its role in India's Constitution.

3.2. *Its Inconsistent Reasoning in Addressing Petitioners' Arguments*

Although certain arguments were altogether dismissed and omitted in the judgment, yet other arguments and strands of reasoning were inconsistently addressed. The aspects of the decision which appear logically inconsistent, particularly pertaining to the central focus of this paper on the interplay of postcolonial transformative constitutionalism and criminalisation as a tool of oppression, are discussed below.

First, one of the core arguments of the petitioners was that the private injury of reputational damage cause by defamation could not be sanctioned criminally. In this regard, the Court argued a collectivist community based approach, arguing that speech, which derogates the reputation of an individual, is injurious to society itself.[102] The Court held that defamatory speech causes injury that can be best prevented or rather, the member themselves can be best protected as a member of a social order and that prescription of such an offence is done with certain legislative wisdom.[103]

Asian Survey, 371-392 (1987).

99 Ministry of Home Affairs, Government of India, *Report of the Committee on Draft National Policy on Criminal Justice*, 12, available at https://www.scribd.com/document/41432012/Menon-Committee-Report-on-Criminal-Justice-System last seen on 29/07/20.

100 L. Vashist, *Re-Thinking Criminalisable Harm In India: Constitutional Morality As A Restraint On Criminalisation,* 55(1) Journal of the Indian Law Institute 73, 80 (2013), available at https://pdfs.semanticscholar.org/2e3a/59434b144ad43fc59f749d0d0c2e28dff9d1.pdf, last seen on 15/05/20.

101 Supra, discussion in Part 2.

102 Supra 5, at ¶75.

103 Supra 5, at ¶90.

There are two issues with the Court's holding. On the issue of legislative wisdom, Justice Misra in the Swamy judgment acknowledged the pre-constitutional nature of the law but continued to apply the rationale of 'legislative wisdom' and the 'presumption of constitutionality', which accompanies the former. This deference is also accompanied by the burden of proof shifting procedurally to the petitioner to prove unconstitutionality. Justice Misra himself recorded "the ultimate goal of our magnificent constitution is to make right the upheaval which existed in the Indian society before the adopting of the Constitution" in Navtej Singh Johar v. Union of India ('Navtej').[104] There, he appears to be cognisant of Section 377 having been drafted by the British in a context far removed from modern India, but this same reasoning is missing in his analysis of Sections 499, 500 and 199. In Navtej, Justice Nariman too questioned deference to legislative wisdom with a pertinent holding, "where, however, a pre-constitution law is made by either a foreign legislature or body, none of these parameters obtain. It is therefore clear that no such presumption attaches to a pre-constitutional statute like Indian Penal Code."[105] In *Anuj Garg* v. *Union of India*,[106] the Court similarly did away with the presumption of constitutionality of a colonial era law, acknowledging that the law was regressive and reflected the orthodox belief systems of the time. It specifically stated that the burden would be on the State to prove constitutionality if such laws are challenged. The import of these holdings is not immediately clear due to intervening cases such as Swamy, but the treatment of the IPC with a degree of skepticism necessarily paves the way for a recall of the decision in Swamy, when read with other issues with the judgment, carved out elsewhere.[107] This also demarcates the post-colonial approach that must be taken to challenge pre-constitutional statutes as done in Africa, and moving towards transformative constitutionalism whose objective has been to challenge the social order reinforced by colonialism in the pre-independence era. This argument has been canvassed in greater detail elsewhere,[108] but the closely associated concept of proportionality review will be dealt with in greater detail below.

The second issue is that, while characterising this right to reputation as a public right, deserving of State action, the Court fails to distinguish why this private wrong can lead to an affront of the community but not other private wrongs, rendering the holding quite vague and open to misconstruction.

The right of reputation itself ought to have been examined with more gravitas. The Court, instead lent credence to ancient religious texts for a portion of the judgment's information on 'reputation' before diverting its attention to English jurisprudence.[109] It also selectively examined African jurisprudence in the form of a South African case which is one of the countries that remains in the process of decriminalisation, as well as the European Court of Human Rights.[110] It was safely

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104 Navtej Singh Johar v. Union of India, Writ Petition (Criminal) No. 121 Of 2018, ¶ 79.
105 Ibid, ¶90.
106 Anuj Garg v. Hotel Association of India, AIR 2008 SC 663, ¶20.
107 Supra 6.
108 Tarunabh Khaitan, *On the presumption of constitutionality for pre-constitutional laws,* Indian Constitutional Law & Philosophy (11/07/18) available at https://indconlawphil.wordpress.com/2018/07/11/guest-post-on-the-presumption-of-constitutionality-for-pre-constitutional-laws/, last seen on 15/05/20.
109 Subramanian Swamy v. Union of India, AIR 2016 SC 2728, ¶32.
110 Ibid, at ¶41.

neglectful of the fact that despite any prior jurisprudence on reputation, the English jurisprudence has progressed to a free speech protective regime. Similarly, it refused to acknowledge the larger political movement that South Africa was located in, wherein other countries have moved towards a free speech regime, and South Africa's ruling party has pledged to follow suit.[111] The characterisation of reputation, however, was limited to the conventional understanding of an honour that has become inseparable from Article 21, deserving of protection equally by 'the privileged and the downtrodden', ignorant of the cases, which selectively favour the former.[112]

To delve into the possible rationale, reputation has been examined academically in the context of criminal defamation earlier, and categorised in three forms, as 'property'; as 'honour'; and as 'dignity'.[113] The Indian context assumes the role of a 'deference society' as argued by Post in 1986, where reputation is in the form of 'honour' such that the reputation is not a private possession but rather, a public one.[114] This is because the deference society functions on the notion that society collectively invests its perceptions in the reputation of an individual, thus reaffirming it.[115] This theory appears most coherent with the analysis of the Swamy judgment, as it is also specific to the concept of 'public power'.

This is the argument that is core to the case, and relevant for the scope of this paper, i.e. the argument concerning Section 199 of the Criminal Procedure Code. This Section provides for the prosecution of an individual on the complaint of 'some person aggrieved', and that the Public Prosecutor is to take up such complaints when they concern the President, Vice-President or any other public servant. The argument that the Section is attacking Article 14 of the Constitution by creating a different class of citizens, i.e. the public servants, was addressed by the Court, which held that they do constitute a separate class by virtue of their public functions.[116] However, even this justification of class does not demonstrate a 'public wrong' nature as such and does not necessitate a provision for public prosecution of the accused. A primitive deference society can justify such a provision by arguing that the function of an individual as a public official is intertwined with the institution of that role itself. For instance, defamation of the President attacks the institution of presidency. However, Post argues that in our modern world replete with rational legal authority, we must distinguish between the two, in conformity with egalitarian ideals, which do not lend credence to this notion of 'honour'.[117]

Third, a most significant feature of the African cases that the Indian judiciary had earlier failed to take note of is the structure of the proportionality test. Prima facie, the argument by the petitioners was that even if reputation is read into Article 21, the fundamental rights are only enforceable against the State, and therefore any

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111 *Decriminalising defamation in Africa*, Southern Africa Litigation Centre (03/03/17), available at http://www.southernafricalitigationcentre.org/2017/03/03/decriminalising-defamation-in-africa/, last seen 15/05/20.

112 Supra 5, at ¶47 -53.

113 Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 California Law Review 691, 704 (1986).

114 Ibid.

115 Ibid.

116 Supra 5.

117 Supra 113, at 706-707.

private wrong ought to fall outside of it. The Court made a passing reference to the horizontality of enforceability of rights, but did not clarify the scope of such horizontality to any degree.[118] However, even under the assumption that this restriction can be permitted in a private wrong to yield the criminal law of defamation, the Court ought to have justified its constitutionality on the well-accepted test of proportionality, now a test that has been relied upon by the Supreme Court in *Justice Puttaswamy* v. *Union of India*.[119] The test of proportionality would, we argue, necessarily expose the costs to fundamental rights that are not otherwise visible in the Court's deferential form of review in Swamy. This will form the substance of the primary tool to be derived from the comparative analysis that follows.

It is argued that in an egalitarian democratic society, we must necessarily move towards a more marketplace understanding of reputation, distinguishing it from the concept of honour, to characterise it as something that the individual creates himself rather than as honour created by society. It is also important to make this departure from the honour-oriented concept as it necessitates criminal sanctioning which is a process disregarding the truth (as reflected in the Court's neglect of the 'actual malice' test), unlike civil proceedings. This marketplace definition treats reputation as a self-created commodity, which can be compensated for by monetary damages, eliminating the need for custodial sentences. Departure from the honorific concept is essential not just in terms of its sanctioning, but also in its emphasis on the protection of public servants' roles, as treating them not merely as a separate, but superior class. This strengthens our argument on the replication of hierarchies as under British rule in the present context where the political, and affluent elite now occupy the position of the colonisers.

4. Locating Criminal Defamation Across Africa

4.1. *Comparing Jurisdictions: India and the African Nations*

Scholars, as well as the press itself, across the African continent have written extensively about the colonial history of their criminal defamation provisions as well.[120] While Ghana specifically decriminalised defamation in 2001, many countries in Africa with similar political and legal histories as India continue to carry criminal defamation on their penal statutes.[121] In recognition of the widespread impact of such

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118 Supra, at ¶88.

119 Justice Puttaswamy v. Union of India, Writ Petition (Civil) No. 1014 Of 2017.

120 *It's time for Africa to throw off its colonial legal shackles*, DW Akademie (28/04/16) available at https://www.dw.com/en/its-time-for-africa-to-throw-off-its-colonial-legal-shackles/a-19212556, last seen on 15/05/20; Jonathan Rozen, *Colonial and Apartheid-era laws still govern press freedom in southern Africa*, Quartz Africa (07/12/18) available at https://qz.com/africa/1487311/colonial-apartheid-era-laws-hur-southern-africas-press-freedom/, last seen on 15/05/20; *Stifling Dissent, Impeding Accountability Criminal Defamation Laws In Africa*, PEN Report (22/11/12), available at https://africanlii.org/content/pen-report-criminal-defamation-used-stifle-dissent-africa, last seen on 15/05/20.

121 *It's time for Africa to throw off its colonial legal shackles*, DW Akademie (28/4/16) available at https://www.dw.com/en/its-time-for-africa-to-throw-off-its-colonial-legal-shackles/a-19212556, last seen on 15/05/20.

provisions, the African Commission on Human and Peoples' Rights passed a Resolution in 2010, calling on nations to remove criminal defamation from their penal codes.[122] In the aftermath of this Resolution, four nations of the African continent, i.e. Burkina Faso, Lesotho, Kenya, and Zimbabwe, have decriminalised defamation, as the constitutional courts have declared the provisions regarding criminal defamation unconstitutional.[123]

There are several grounds of comparison of African nations and India, in terms of their socio-historical context and their constitutional frameworks.

Much like India, Tukumbi Lumumba-Kasongo argues that the African Constitutions cannot be examined in isolation of their histories as no Constitution emerges from a 'tabula rasa'.[124] African Constitutions at large, while inseparable from colonial oppression have borrowed from colonisers' Constitutions just as India has, however, Lumumba-Kasongo argues that this does not automatically prevent Africans from embodying these constitutional values in a manner that reflects African peoples and their struggles. The persistent criticism of African Constitutions as 'Consitutions without constitutionalism' is then challenged further by H. Kwasi Prempeh,[125] who sets out the argument that there is a need to appreciate judicial review in Africa thus far while noting certain pivotal constitutional moments, and acknowledging the need for further empowerment. By turning to Africa and its experience with criminal defamation, the proportionality test and the overarching postcolonial experience, we attempt to remedy the belief that African problems are exceptionalist, and thus to be sidelined in comparative analysis. Drawing on the histories of postcolonial nations, Upendra Baxi argues, the comparative methodologies employed in constitutional law can benefit from a reorientation towards a South-South frame of reference.[126]

Constitutionalism includes, as is generally accepted by constitutional scholars, the element of rights protection, which is essential to the Constitution of any nation as the scope of rights protection defines the role of the State.[127] The comparison of South Africa and India has been made specifically in many realms of law founded on the thesis that the constitutionalism of these nations is comparable.[128] The history of

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122 The Assembly of Delegates of PEN International, meeting at its 81st World Congress in Quebec, Canada, *Resolution #19: Criminal Defamation and Insult Laws*, October 13-17, 2015 https://pen-international.org/app/uploads/Resolution-on-Criminal-Defamation-88155.pdf.

123 Lohe Issa Konate v. Burkina Faso, Application 004/2013 (The African Court on Human and Peoples' Rights); Basildon Peta v. Minister of Law, Constitutional Affairs and Human Rights and 2 Others, Constitutional Case No. 11 of 2016 (Constitutional Court of Lesotho); Jaqueline Okuta & Jackson Njeru v. Attorney General & Director of Public Prosecution, Petition no. 397 of 2016 (High Court of Kenya).

124 Lumumba-Kasongo T., *The Origin of African Constitutions, Elusive Constitutionalism, and the Crisis of Liberal Democracy* 63, 66, in *Democratic Renewal in Africa* (S. Adejumobi, 2015).

125 Kwasi Prempah, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80(4) Tulane Law Review 40-42 (2006).

126 *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa*, 23 (O. Vilhena, U. Baxi & F. Viljoen, 2013).

127 U. Baxi, *Constitutionalism as a Site of State Formative Practices*, 21 Cardozo L.Rev. 1183, 1184 (2000).

128 M. Bennun, Malyn D.D. Newitt**,** *Negotiating Justice: A New Constitution for South Africa* (1995); A. R. Picess, *Judicial Review In India And South Africa: A Comparative Study*, Journal of Legal Studies And Research 4(3) (2018); See S. Choudhry, *How to do*

both nations is rooted in colonialism, which leads to their visions of human rights, constitutional supremacy, and judicial review over rights protection to be geared towards a transformative form of constitutionalism.[129] India had a decisive influence on the liberation of South Africa as well, in its vocal opposition to the practice of apartheid, and South Africa finally adopted provisions and derived inspiration from the Indian Constitution.[130] As will be discussed below, references to South African constitutionalism have been referred to in judgments of Lesotho, Zimbabwe, and Kenya as well. Moreover, South Africa and India share several features in common with Kenya, Zimbabwe and Lesotho. First, each country follows the common law system; second, each country has a colonial history; third, each country is in the continual process of still defining the implications of judicial review. Whereas perhaps the judicial review in African nations was criticised in its early years, these cases mark indications of a departure from the understanding of judicial review under the colonial legal order.[131] The underlying reasons for this shift are outside the scope of this paper, however, we argue that India has existing rationale for such a shift, and in its legal methodology it must consider the experience of comparable nations.

It is also of note that the fundamental rights provisions guaranteeing free speech in the Constitutions of several African nations, including Lesotho, Kenya, Burkina Faso and Zimbabwe, mirror the freedom of speech provision in the Indian Constitution. The African nations' provisions also provide for restrictions on freedom of speech in the interest of national security, to prevent disorder, but most importantly, some of these provisions provide for restrictions based on protecting reputation of others.[132] The allowance of restrictions premised in the ideal of protecting 'reputations' is noteworthy, as India has fairly comparable allowance for laws of defamation in Article 19(2) of the Constitution of India.

Prof. Makau W. Mutua argues that,[133] the human rights development of African nations is greatly stunted, and that the 'postcolonial state' has failed its people. He argues vehemently that it is the political class that benefits from the control of the State, and that, a new human rights jurisprudence must be sought for, as do other contemporaries.[134] In this context, the decision of the of the regional Human Rights Court leaves interesting takeaways for how the role of the press and freedom

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Constitutional Law & Politics in South Asia in *Unstable Constitutionalism* (M. Tushnet & M. Khosla, 2015).

129 V. Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 Tul. J. Int'l & Comp. L. 49 (2007). The trend towards transformative constitutionalism, as discussed below, has been particularly emboldened in recent Supreme Court decisions; See supra 127.

130 V. Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 Tul. J. Int'l & Comp. L. 49 (2007).

131 Supra 126, Prempeh deals with a strand of criticism by human rights lawyers directed at the judiciary for its deferential review of laws, citing interestingly the example of a case of sedition in which the Nigerian Court had decided in favour of the law. The present cases present an alternate, stricter form of review.

132 Art.10(2), Constitution of Ghana, 1993; S.14, Constitution of Lesotho, 1993.

133 Makau wa Mutua, *Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State*, Proceedings of the Annual Meeting (American Society of International Law 487-490 (1995); Mahmood Mamdani, *Citizen and subject: decentralized despotism and the legacy of late colonialism* (1996).

134 Supra 29.

of speech can be reimagine in human rights to propel the development of the 'postcolonial state'.[135] It is also notable for having initiated the movement in Africa, providing the bedrock for the domestic judgments, as well as for its application of the *Oakes* test. However, we do not delve into this decision, as it does not share the same role that the Courts in Kenya, Lesotho and Zimbabwe occupy, that of a constitutional role. We distinguish it for its reliance on regional rights instruments, which fall beyond the scope of this paper, which rests on the constitutional mode of comparison.

The following sections of this Part will delve into an in-depth analysis of the law in these African nations, in the context of the 2010 Resolution, to characterise a pan-African Movement towards decriminalisation of defamation. Whereas, the Indian judiciary has rejected many arguments or simply neglected them,[136] the following judgments lend interesting lessons as they address these and incorporate the proportionality review as they address most of them. It is most pertinent that all these landmark precedent-setting judgments involve the political class or the corporate elite. It is to be noted that we do not claim that this is likely to reflect the pattern of liberal approach in the described domestic jurisdictions, but that these cases individually offer constitutionally relevant lessons.

4.2. *Deriving Proportionality Review from Comparator Jurisdictions*

In the context of Swamy, we briefly canvassed observations made in *Navtej* and *Anuj Garg* regarding the judiciary's deference to legislative wisdom, particularly in pre-constitutional statutes. The criticism directed at the judiciary for its deference ties into a broader theme of the practice of judicial review in the judgment.

Constitutional rights adjudication, comprises, not exclusively, the interest analysis and the nexus analysis stages. In the interest analysis, the Court is intended to determine the precise state interest in restricting the right in question, and the Court may even conduct a legitimacy analysis wherein it will examine the veracity of the state interest.[137] Khaitan states that interest analysis does include legitimacy analysis, although some judgments have not done so. Here, this would involve the question of whether the State has claimed a *constitutionally legitimate* interest in criminalising defamation. This would be in addition to the test itself, be it manifest arbitrariness, procedure established by law, reasonableness, any other tests or combinations of these.[138] The next step would depend upon the test advocated. We argue in favour of a proportionality review to comprise the elements as we will list them from the comparative analysis. We will root our understanding in Tarunabh Khaitan's articulation of the test as – suitability, necessity and balancing, while acknowledging that the precise composition of this test is contested but that the objective of this paper is not to settle that debate.[139]

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135 Lohe Issa Konate v. Burkina Faso, Application 004/2013.

136 See discussion in Part 4.

137 Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement*, 50 (II) JILI (2008).

138 Ibid.

139 Supra 137.

There has been lament in India over the ambiguous and opaque manner in which the judiciary applies standards of review in rights litigation, and moreover that standards applied are deferential.[140] In answer to these questions, the approach of the African movement indicates answers not much different from the reading of the Indian Constitution.[141] It is that, the role of judicial review in a robust Constitution such as ours is to examine the legitimacy of State interest rather than apply deferential standards of review, say the reasonableness review, which do not examine the State interest and the legislation in question, to examine its legitimacy, necessity and efficacy.[142] The answer to this would then be to adopt the stricter standard of review known to be the proportionality review, glaringly ignored in substance by the Bench in Swamy, despite citing Justice Sikri's opinion in *Modern Dental College and Research Centre v. State of Madhya Pradesh*,[143] which had held the proportionality review as the in-built mechanism for reviewing reasonable restrictions.

While we advance our argument from lessons learnt from the following postcolonial nations, the argument in favour of proportionality as the standard of review has been made previously through other means. Aditya Narayana and Jahnavi Sindhu situate their argument for the adoption of a stricter standard of review in a 'culture of justification', as articulated by Etienne Mureinik in the context of the South African Bill of Rights.[144] They argue that deferential standards of review have seeped into Article 19(1) jurisprudence as well, wherein, the only requirement has become that the offending law have a rational nexus with the explicit restrictions mentioned, without any real examination of whether it is legitimate, necessary and least restrictive in doing so.[145] Most importantly, they rely on the debates of the Framers of our Constitution to argue that the Courts were to review the soundness of the choices of the Legislature within the rights-framework set out in the Constitution. A reading of the debates lends the meaning that the Framers did not merely intend for the Government to defend laws which violate civil liberties by virtue of their 'democratic will' but rather, to actively *justify* the law. Khaitan, as well as Narayana and Sindhu argue that this would mean the State would have to approach policy making, through a lens of rights-based enquiry, requiring cogent evidence to prove legitimacy, necessity and efficiency. The debates under Article 19 and 32 reveal the Framers as discussing the constituent elements of the proportionality test, underscoring the constitutional intent for judicial review of laws in respect of restrictions such as 'defamation'.[146]

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140 Ibid; M. Satish and A. Chandra, '*Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror Related Adjudication'* 21 (1) National Law School of India Review 51 (2009); Moiz Tundawala, *Invocation of Strict Scrutiny in India: Why the Opposition*, 3 NUJS L. Rev. 465 (2010).

141 V. Narayan & J. Sindhu, *A historical argument for proportionality under the Indian Constitution,* Indian Law Review 1, 5 (2018).

142 Ibid.

143 Modern Dental College and Research Centre & Ors. v. State of Madhya Pradesh & Ors., 2016 (4) SCALE 478.

144 Supra 141.

145 Ibid; OK Ghosh v. EX Joseph, AIR 1962 SC 814.

146 Supra 141.

As Aparna Chandra argues, there is a substantive component of the proportionality review as well as the evidential.[147] The evidential components are required to assess whether the substantive prongs have been met. A strict standard of scrutiny as said in R v. Oakes,[148] requires the Court to produce cogent and clear evidence to prove its substantive arguments, rather than abstract inferences it makes in its own defense.[149] A prima facie reading as well as the analysis below reveals the Court to have relied on a lower standard of scrutiny. Arguments that are made on the substantive prongs have considerable impact on the evidential prongs as well, however this and evidential analysis itself is outside the scope of this paper.

The structure of the proportionality test itself is unclear from the judicial approach, where cases have been divergent in nomenclature, substance and analysis of this standard of review. For our purposes we will rely on the test as articulated by David Bilchitz, having received approval in various jurisdictions.[150]

4.2.1 *Analysis of State Interest*

In Swamy, the Court briefly (while examining the nexus between the law and public good to justify the element of criminality) discusses reputation as a fundamental right, but more immediately delves into the definition of crime and the manner in which "crimes cause a dent in society."[151] In doing so, the Court absolutely steps over the question of the legitimacy of the State's interest in protecting an individual's reputation which was submitted as a private wrong. Beyond abstract statements of the individuals constituting the collective, as well as rejecting that 'incitement of offence' ought to be read into the restriction of defamation, it is unclear how the Court has established State interest. While arguing that defamation of a private individual is a public wrong as well, the Court further blurs the line between private and public wrongs.[152]

The analysis of legitimacy of state interest is blurry in several judgments, and particularly the ones that follow which are, much like India, still evolving towards the proportionality review and a befitting judicial review. However, observations of the Courts have been analysed where we have found them to question the State interest, even if under the prong of necessity or balancing of State interest and rights.

In *Jaqueline Okuta v. Attorney General*,[153] interestingly relied on India's understanding of noscitur a sociis to hold that the restriction on freedom of speech must be in *public interest*, as was argued in the Constituent Assembly of India as well.[154] In doing so, it simultaneously held that the law of criminal defamation is

147 A. Chandra, *Proportionality in India: A Bridge to Nowhere*, University of Oxford Human Rights Hub Journal, Vol 3(2) (2020).

148 R v. Oakes, [1986] 1 SCR 103.

149 Supra 147.

150 D. Bilchitz, *'Necessity and Proportionality: Towards a Balanced Approach?'* 49, in *Reasoning Rights: Comparative Judicial Engagement* (Liora Lazarus et al., 2014).

151 Supra 5, at ¶76-89.

152 Ibid.

153 Jaqueline Okuta & Jackson Njeru v. Attorney General & Director of Public Prosecution, Petition no. 397 of 2016, ¶2.

154 Constituent Assembly of India Deb 2 December 1948, vol VII http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C02121948.html.

directed at protecting the individual and not the public. In order to do so, the Court reasoned that the restricting clause must be construed narrowly, and not the rights-giving clause, as is the scheme of the Constitution. By holding that the criminal defamation provision is thus directed at the individual, the Court was able to reason that the clause restricting freedom of speech cannot be the authority for this law, and thus the legitimacy of the objective is not established. In *Madanhire v. Attorney General* ('Madanhire'),[155] the Constitutional Court of Zimbabwe confirmed that the objective of the criminal defamation provision to protect individuals and their reputations is important, and the provision shares a rational connection to this law. Here, much like in Swamy, the Court does not delve into the legitimacy of 'reputation' as a *State* interest, only briefly articulating that this is a laudable goal.[156] In *Basildon Peta v. Minister of Law* ('Basildon Peta'),[157] the Court similarly held that the Government was constitutionally ordained to fulfill the objective of protecting reputations owing to a specific provision to this effect in their Constitution.[158] It is clear from the foregoing discussion that the task of establishing an objective which is legitimate and sufficiently important is not quite as straightforward as it appears in Swamy, and there is sufficient confusion on the State's interest in choosing to protect individuals deriving authority from a restriction intended to protect the public as a collective.

Having completed the interest analysis, the Courts proceeded to apply the proportionality test itself. The test, as noted above comprises the stages of suitability, necessity and balancing.

4.2.2 *Suitability*

In this prong of the test, a Court is tasked with determining how far the impugned law is able to, efficiently, further the legitimate objective it claims to be following. The role of an evidentiary review is crucial in this prong, as discussed by Chandra in context of the Aadhar case.[159] As we have shown above, there are severe consequences to the law, in the manner exercised by governments at times as well, where such complaints are filed in pursuance of seeking to subdue debate and information relevant to the public.[160]

Despite arguments made in this regard, particularly regarding the chilling effect on speech, the Court simply cited several cases, which had isolatedly spoken about the right to reputation and held this right to prevail. Without delving into the substantive benefits of a criminal defamation law in furthering this objective through cogent evidence, it is doubtful whether this prong can be said to be fulfilled.

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155 Madanhire v. Attorney General, Judgement No. CCZ 2/14.
156 Ibid at 10.
157 Basildon Peta v. Minister of Law, Constitutional Affairs and Human Rights and 2 Others, Constitutional Case No. 11 of 2016.
158 Ibid; The Penal Code Act, 2010, §14(2)(b).
159 Supra 147.
160 Supra 62.

In *Jacqueline Okuta*, the Kenyan Court again glossed over this prong despite its articulation of the test in very clear terms, but seemed to imply that while the law may very well be in pursuance of this objective, several deleterious consequences cannot be ignored.[161] Its analysis in this prong appeared to seep into its analysis of the necessity prong, but the approach taken by the Court was to examine the chilling effect of the law. It did so by noting the deep impacts of criminalisation, arrest and incarceration, particularly through reliance on the development of human rights law on this subject.[162] While continuing to rely on abstract arguments rather than asking the State to prove the efficiency of the law, the Court engaged in more analysis of consequences than the Bench in Swamy. In *Madanhire* as well, the Zimbabwean Court took an identical approach to that of the Kenyan Court, relying on the same arguments and sources.[163] In *Basildon Peta*, the Lesotho Court referred to this prong as the 'rational connection' prong and simply held on a prima facie abstract sense that the law is rationally connected to protecting reputations. It did not check whether evidentially, it can be said to be advancing this laudable goal.

4.2.3 *Necessity*

All Courts apart from the Bench in Swamy have focused on the necessity prong, often at the cost of the other elements of the test as demonstrated above. Here, the Court would be expected to examine whether the impugned law is necessary in the absence of any other alternatives.

In *Swamy*, the Court did not structure its analysis of the proportionality test, and therefore any analysis discussed here is that which has been inferred by the authors to be in pursuance of satisfying this element. The Court referred to the civil action for defamation, holding it to be necessary beyond a doubt as arguments had proceeded against this as well.[164] However the Court appeared to think it needless to evaluate the civil action as an alternative for the criminal provision, as it exalted the values of a reputation, which it believed would be best served by protection as a public criminal wrong.[165] Ultimately then, the Court's analysis of necessity, at best, seems to be that the protection of the right to reputation is a 'constitutional necessity'.[166] It is crucial to note that the Court deferred to the ratio of other cases, and that of legislative wisdom on the point of reputation, without delving into its own analysis of the necessity of protecting this right through this law alone.[167] In fact, by its own analysis, the civil action is crucial to protect the right to reputation, but the Court does not elucidate why it is alone insufficient.

In the Kenyan judgment (Jacqueline Okuta), so as in the Zimbabwean judgment (Madanhire), the Courts clearly stated that the less restrictive remedy of a

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161 Jaqueline Okuta & Jackson Njeru v. Attorney General & Director of Public Prosecution, Petition no. 397 of 2016.

162 It relied on the regional instrument as well as the denunciation of criminal defamation by the United Nations.

163 Madanhire v. Attorney General, Judgement No. CCZ 2/14.

164 Supra 5, at ¶ 33, 36.

165 Ibid, at ¶89.

166 Supra 5, at ¶139.

167 Supra 5, at ¶140.

civil action is available, and is directed at a private wrong for individual redress.[168] So also in the Lesotho judgment, which adjudged civil action to be sufficient, while additionally finding the criminal provision to be over-broad and vague owing to unique phrasing in their laws, incomparable to ours.[169]

4.2.4 *Balancing the State Interest and the Fundamental Right*

The analysis under the balancing prong is slightly convoluted here, as pointed out by Gautam Bhatia elsewhere,[170] because the Court analysed the right to reputation itself as against the right to freedom of speech and expression. As he rightly points out, this seems to be a an analysis that the Article 19(1)(a) right is inevitably set to lose based on the precedents of the Court having undermined it as against rights read into Article 21. Whether the Court compares the State interest in the right read into Article 21,[171] or the right itself against the right to freedom of speech is important and it is clear that the Court has engaged in the latter. In *K.S. Puttaswamy v. Union of India*,[172] the Court famously concretised the proportionality test in Indian constitutional law, and since then there seems to be growing agreement on the application of the proportionality standard itself. However, in this case, the Court held that balancing requires comparison of "importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right."[173] In Swamy, the importance of the proper purpose would be to examine reputation against speech itself, and use the analysis in the preceding prongs to arrive at a determination of which value is worth protecting. Now, the issues that are traceable in the previous prongs cumulatively challenge the analysis in this prong. First, there is absolute ambiguity on what constitutes the right to reputation or the exact scope of this right upon reading into Article 21, casting aside even the criticism of the overbreadth of Article 21 as well. To test the right to freedom of speech which textually enumerated and, thus, limited as against an expansive right to reputation is indicative of the failure in the first prong itself, of determining a precise legitimate objective with a clear scope. Second, upon balancing these two rights, however they may be defined, the Court ought to infuse its analysis with the immense social costs outlined in Part II, as *Puttaswamy* itself dictates that the social importance of the right affected must bear importance. In doing so, the Court must also be cognisant, tying back to the original criticism of private v. public wrongs, that not only is it protecting the right to reputation but so also the State's interest in it, and right to prosecute it as a criminal wrong involving the several consequences of carceration.

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168 Jaqueline Okuta & Jackson Njeru v. Attorney General & Director of Public Prosecution, Petition no. 397 of 2016; Madanhire v. Attorney General, Judgement No CCZ 2/14, p. 12.

169 Basildon Peta v. Minister of Law, Constitutional Affairs and Human Rights and 2 Others, Constitutional Case No. 11 of 2016, ¶19.

170 G. Bhatia, *The Balancing Test and its Discontents*, Indian Constitutional Law & Philosophy, available at https://indconlawphil.wordpress.com/2016/05/20/the-balancing-test-and-its-discontents/, last seen on 23/05/20.

171 Umesh Kumar v. State of A.P., (2013) 10 SCC 591

172 Justice K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1.

173 Ibid, at 369.

The comparison of two competing rights has been done in *In Central Public Information Officer* v. *Subhash Chandra Agrawal*, balancing the right of an individual to reputation and privacy under Article 21 and the right to information of third-party parties under Article 19(1)(a), under proportionality review.[174] Here, Justice Chandrachud assumed for this to imply the application of the proportionality test to both competing rights as legitimate aims. However, we argue that for criminal defamation, the Court must revisit the right to reputation as a legitimate aim in itself.

In the Kenyan and Zimbabwean Courts, the judgment unequivocally decriminalised defamation, specifying that a restriction on the freedom of speech, with criminal sanctions may be applied for only those restrictions enumerated in public interest on specified grounds.[175] The Court in Lesotho aligned itself with these decisions as well. It is worthwhile to note that several of the criticisms sustained against the Swamy judgment persist in this prong as well. As mentioned earlier, the three jurisdictions did not examine the right to reputation with sufficient gravity, apart from the Kenyan Court, which read the restrictions using nosciter a sociis, as Swamy refused to do. The pivotal difference between the African cases and Swamy appears to be that irrespective of the analysis of reputation, the Courts in Africa appear to have seen the civil remedy as sufficient to cover reputational harm without delving into the issue of it being a private wrong. In India, we argue, the Court must not make the same mistake in reasoning and arrive at the same conclusion in the manner argued in Part III.B. In doing this, it will be able to rectify the error made in determining a legitimate objective itself, following which the elements thereafter will be closed for analysis immediately.

5 Conclusion

The departure that we argue for is one that is taking place, clearly observable from our earlier analysis of the jurisdictions in Africa, and the strides made by regional human rights bodies and courts. In examining the history and political context of this law in India, and proving its misuse, we reiterate the theme and costs of this law. These considerations, shown by the history, of the lapse legislative intent, the misuse and the weaponisation of this law, must form part of the Court's analysis while reviewing this law for its constitutionality. The cost of these laws remaining on the books is consistently rising, concurrently leading to overburdening of an overwhelmed justice system.[176] Other arguments of over-criminalisation and the sheer cost of criminal trials are equally important consequences to figure into the Court's proportionality analysis, so that it may examine how the law actually works, rather than merely its intent. It is clear that such considerations did not figure in the Court's analysis in Subramanian Swamy, in 2016, which we argue was a mistake, as have many others.

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174 Central Public Information Officer v. Subhash Chandra Agrawal, CIVIL APPEAL NO. 10045 of 2010 ¶ 1.41.

175 Supra 168.

176 K. Gautam, *Judicial Delays, Mounting Arrears and Lawyers' Strikes,* 52(32) Economic and Political Weekly 23, 23-24 (2017).

Although the two judge bench in the Swamy judgment could find sufficient grounds in Part IV and notions of fraternity to justify the constitutionality of Section 499 and 500 within Art. 19(2), any future judgment must necessarily broaden the scope of its enquiry, and impose a strict proportionality review as is demonstrated in the paper. It must ask the State to show cogent reasons and evidence to prove the various elements under the proportionality test, an implementational failure in the African Courts, which deployed this test, as well. While Kenya, Zimbabwe and Lesotho have been able to utilise this test to arrive at progressive decisions, the manner of doing so has been less than the ideal proportionality test proposed by scholars and other Courts in strictness and structure. India must learn its lessons from these jurisdictions, while drawing inspiration from their underlying rationale. As outlined in this paper, it must examine the socio-historic context of these laws, the State objective of preventing reputational harm, the judicial approach of other nations to these laws, the irregularities in the 2016 judgment. Our conclusion remains that, defamation must be solely a civil offence.