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Defamation Reforms: Going beyond Decriminalisation

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Executive Summary

The law for defamation in India impedes free speech more than it protects reputations. While it is vital to protect an individual's right to reputation, this must not come at the cost of the right to criticise as the ability to freely criticise is indispensable for democratic accountability. The scope of criminal defamation is conceptually flawed and provides for punishments that are grossly disproportionate. Civil defamation is also fraught with issues as it falls under an area of law that is exceptionally underdeveloped - Torts. The fact that the relatively lengthy duration of a typical lawsuit is a drain on time, money and resources only compounds these issues as it is exploited by the wealthy and powerful.

The first and most obvious reform, decriminalisation, should be undertaken immediately. The law that repeals criminal defamation should replace existing laws on civil defamation as well. This would enable a new and more robust definition of defamation and also give the right to reputation the clarity of a statutory law. Provision could also be made to make potential litigants compulsorily send legal notices prior to filing a defamation suit so that the matter can be settled before it reaches courts. Restrictions should also be placed on damages claimed: they must have some rational relationship to the harm caused to the person's reputation and not be exorbitant. Courts should be empowered to impose exemplary costs to deter frivolous and malicious litigation. Measures should also be made to prevent malicious lawsuits like limitations on jurisdiction or the number of suits (if there is more than one statement). Care must also be taken to ensure that the new law is cognisant of New Media and is not archaic at birth.

The onus of protecting free criticism (and therefore democratic accountability) should not fall solely on laws. Media houses and publishers should indemnify writers from defamation suits that result from their work. Journalists and writers may also feel it worthwhile to pay a regular premium towards defamation insurance that can be claimed in the event of a defamation lawsuit.

These are but a few of the potential measures that could reform defamation so that the right to reputation can be protected without unduly compromising the right to free speech.

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THE GLOBAL CONTEXT

The right to free speech is often treated as a fundamental part of a democratic republic. It was one of the Four Freedoms that Franklin D. Roosevelt stated as being important enough to break the USA's then long-standing tradition of non-interventionism in global affairs[2]. But upon seeing the mass oppression and atrocities committed in Nazi Germany, it was felt that the Four Freedoms were not adequate, thus giving birth to the Universal Declaration of Human Rights (UDHR). Freedom of speech is granted an exalted status in the UDHR – it is granted a specific mention in the Preamble over and on top of the actual right the UDHR provides under Article 19 which reads as follows - "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[3]

However, freedom of speech is obviously not the only human right included in the UDHR; one of the others is the right to reputation. Article 12 states that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[4] Given that attacks upon honour and reputation will likely take place via the medium of expression, the question as to how these two rights are reconciled is one of paramount importance.

WHY ARE FREE SPEECH AND REPUTATION IMPORTANT?

On a fundamental level the right to freedom of speech and expression is granted because the fear of facing repercussions for your statements and opinions can be crippling on a daily basis and freedom from fear itself was one of the other original Four Freedoms. The fear of speaking freely is one of the more crippling hallmarks of totalitarianism but this fear is inescapable in any community that has mores – there will always be outliers reluctant to express views contrary to the majority. This leads to the odd situation where people expect the State to defend their right to speak freely from attacks by fellow members of society when the State itself is one of the biggest transgressors, which leads to the next reason why free speech is so important.

On a more macro level, the right to free speech is also one of the foundations of a functioning democratic republic. A key principle of modern democracies is accountability or the idea, whether it manifests through elections or the rule of law, that people who abuse power to impose themselves on others unreasonably will face the consequences. Dissent and criticism combat State arbitrariness and inform opinions amongst the public.

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[2] "Let us say to the democracies: 'We Americans are vitally concerned in your defence of freedom. We are putting forth our energies, our resources and our organising powers to give you the strength to regain and maintain a free world. We shall send you, in ever-increasing numbers, ships, planes, tanks, guns. This is our purpose and our pledge'" - Text of Four Freedoms speech, accessed on November 16, 2016

[3] Universal Declaration of Human Rights, accessed on November 16, 2016

[4] ibid

Without them, voters would not know which candidates have a history of being involved in illicit activities, which are more efficient administrators, or which are more closely linked with their ideology. Free speech is not intended to hold just politicians and the government accountable, but also businesses and individuals, or anyone who wields significant amounts of power or influence over others. This ability to hold people accountable is contingent on the free flow of information. In fact in many countries, the freedom of press is part of the wording on the freedom of speech.

The right to a reputation on the other hand is much more individualistic, though not completely so. Very few people live truly hermetic lives, so most people live within a community of some form. Once communities grow past a certain size, it becomes impossible for each person to know everyone, so social trust is built on the basis of a person's reputation. Many people utilise this reputation by making a career out of it (politicians and celebrities), while others simply enjoy the status they occupy in their community. Given the premium placed on individualism in most democratic economies, this reputation deserves to be protected against unwarranted attacks; if your name could unjustly be dragged into mud, many people would not put in as much effort into improving their lives. The right to reputation is therefore essential in any country that, even partially, uses a economic model built upon self-interest.

THE INDIAN CONTEXT

Coming to India, international conventions like the UDHR are not automatically enforceable in Indian courts, even if India is a signatory to the document; the Indian Parliament must pass laws that implement the provisions of the convention and until it does so, the convention is not enforceable. However, human rights differ on this count as they were implemented using the Constitution instead of ordinary laws, and were enacted by the Constituent Assembly, not the Parliament. Human rights are secured for Indians under Part III of the Constitution of India[5] (Articles 12-35), where they are called "Fundamental Rights". It should be added that human rights violations by the State are are more worrisome than violations by private individuals. This is because the State is supposed to be the protector of human rights and when the State itself becomes the violator, the rule of law is undermined. This prioritisation is reflected in the beginning of the Fundamental Rights section – Article 12, which specifically expands the definition of State with respect to Fundamental Rights.

The right to free speech is found in Article 19 of the Constitution. Clause (1) of this Article guarantees that Indian citizens will have the freedoms listed from (a) to (g), with (a) being the right to freedom of speech and expression. However, no human right is unqualified or absolute; they are always limited in some capacity; India takes the added step of including the limitations in the Constitution itself. Clause (2) of Article 19 empowers the State to pass "reasonable restrictions" on this freedom if it is "in the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

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[5] The Constitution of India, accessed on November 16, 2016

The presence of "defamation" in Article 19(2) shows that the Constitution values the protection of reputation but is not equitable to granting Indians a right to reputation. However, the Supreme Court recently confirmed that the right to reputation was a part of the right to life under Article 21 in *Subramanian Swamy v. Union of India*[6]. The case involved an unsuccessful challenge (by multiple politicians from various political parties) against Sections 499 and 500 of the Indian Penal Code (IPC), which make defamation a criminal offence.

DEFAMATION IN INDIA

Anyone who feels that a statement or imputation made by another person has irretrievably damaged their reputation has two available remedies: filing a criminal suit for defamation or a civil one. A brief description of the two is necessary before discussing the issues with defamation.

Criminal Suit

Such a suit would be filed using Sections 499 and 500 of the IPC[7] and must require the order of a magistrate before the police can begin investigations. Section 499 defines defamation while Section 500 provides the punishment. Defamation is defined as an imputation, that may use words, gestures or signs, which is made by one person who knows that it will harm the reputation of another person. Like many other Sections in the IPC, it is accompanied by many "explanations" that give it specific meaning, "illustrations" to show how it may be applied to a specific set of circumstances and "exceptions". According to Section 499, both deceased persons and body corporates (businesses and trusts) are capable of being defamed, and ironical statements are not protected from defamation. The primary test of whether the person's reputation is harmed is whether, in the "estimation of others", the imputation has "directly or indirectly" detrimentally affected their reputation in the ways enumerated under the section. The punishment for defamation is a prison sentence up to 2 years or a fine, or both.

Civil Suit

There is no law like the IPC that specifically lists defamation as a civil wrong. Parties will have to file a suit under Section 19 of the Code of Civil Procedure, 1908 (CPC)[8], which only talks about suits for "for compensation for wrongs done to persons" and does not specifically mention defamation. Defamation thus falls under an area of civil law known as tort law, which does not rely on legislations but instead defines the limits of civil wrongs through an extensive body of cases. Every time a judge decides on a matter, all subsequent cases involving similar facts are guided by that judgment. Unfortunately, Indian tort law is conspicuously underdeveloped as most people prefer to let the State fight their battles for them. For example, most people would prefer to call the police on unruly neighbours rather than file a suit for nuisance.

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[6] Subramanian Swamy v. Union of India

[7] Indian Penal Code, 1860

[8] Code of Civil Procedure, 1908

This is because it is a well known fact that fighting a case in Indian courts is generally a tedious and expensive affair that only gets resolved after many years. The end result is that there are not enough tort cases in India to give Indian tort law the robustness and depth that its counterparts in the United Kingdom or the United States have.

CURRENT ISSUES WITH DEFAMATION

Criminal Defamation

Before going into the specific issues that criminalising defamation brings up, it is necessary to first re-examine the language of Article 19 of the Constitution, specifically the words "reasonable restrictions". The word 'reasonable' was specifically added to the wording of the Constitution to act as a limitation on the government. The Constituent Assembly felt it would be meaningless to guarantee fundamental rights yet simultaneously allow them to be diluted to the point of inefficacy.9 The Supreme Court has held that restrictions on fundamental rights must be as narrowly constructed as possible to restrict only what is absolutely necessary and should not be arbitrary or excessive.10 Another way of phrasing this would be that restrictions need to pass two tests; one on necessity and and another on proportionality.

1) **Archaic**

   The Indian Penal Code was drafted by Thomas Macaulay and was enacted in 1860. Society was not as media saturated at the time and reputation was also still considered a matter worth duelling over. Criminal defamation was thus intended to place loss of reputation on par with other crimes so as to prevent the loss of life. Moreover, the IPC was passed by a government with completely different intentions. Having just overthrown a rebellion, it was looking to silence any criticism of itself or British influence, and criminal defamation was a potent weapon to attack such criticism.

   But the situation is drastically different now. The government is committed to the principles of democratic representation rather than opposed to them. The extent to which people live their lives publicly has increased exponentially, especially with the advent of social media. Mass media and the internet also make questions of jurisdiction tricky – which police station has the capacity and duty to investigate? And finally people no longer issue formal duels to protect their honour. Given the changing times, the test of necessity should relocate criminal defamation to the dustbin of antiquity.

2) **Excessive**

   Section 499 is overly broad in its construction and fails on both proportionality and necessity. The section does not obey a common practice in defamation and make truth a complete defence; in order for someone to escape a charge of criminal defamation, it is not only necessary that he prove the statement to be true, he also has the additional

[9] The Constituent Assembly Debates, October 17, 1949

[10] Om Kumar v. Union of India, 2000 Supp(4) SCR 693

burden of proving that publishing such a statement was for the public good. This is very obviously an excessive restriction on free speech, 'reputation' should not be placed on such a high pedestal that even completely legitimate criticisms are outlawed.

The extension of criminal defamation to protect the reputation of deceased persons is also excessive. The right to reputation is intended to motivate people to act in their self-interest, it is unnecessary to extend this protection to people who are already deceased as it cannot impact their behaviour.

3) **The process is the punishment**
It is no secret that cases in India take a lot of time to progress, let alone get completed; cases often languish at a certain stage, stuck in a perpetual limbo. While solving judicial delays and processes is outside the scope of a discussion on criminal defamation, it must nevertheless be factored. The standards which have to be met to initiate proceedings for criminal defamation are weak. A magistrate is not required to record reasons when issuing summons to an accused and the accused cannot provide his defence until the trial itself. As long as the complainant has a prima facie case (a case that appears to have merits upon a superficial examination) against the accused, he can initiate full criminal proceedings against him. This is not a hard test to pass as mere criticism of the complainant by the accused should prove sufficient. The bar for an innocent person to unnecessarily be subject to a long and arduous trial is thus too low, once again rendering criminal defamation an excessive provision.

4) **The burdens of criminality**
Criminal charges can be extremely taxing on the accused as they result in the possibility of arrest and subsequent bail of the accused, after which they will be required to attend multiple hearings and pay legal fees only to possibly face a conviction at the end. Aside from the burden it places on the accused in terms of finances and time, a criminal trial - even a baseless one - invariably damages the reputation of the accused. He may be subject to a humiliating arrest, and will have to deal with, at the very least, the stigma of being formally accused of a crime for the rest of his life. The damage to the reputation of the accused is another instance of how criminal defamation is unreasonably disproportional a measure to protect reputation. It must be remembered that the presumption of innocence requires a court to conclusively rule on guilt before a person is punished; criminal defamation sullies the reputation of the accused in order to protect the reputation of the defamed, which is unnecessary and disproportional to the point of absurdity.

5) **No-fault liability**
In 1994, the Supreme Court delivered a landmark judgment on free speech in *R. Rajagopal v. State of Tamil Nadu*, or the *Auto Shankar* case[11]. The case had many angles to it, such as the fundamental rights of prisoners and privacy, but it was also where the Court

[11] R. Rajagopal v. State of Tamil Nadu, 1995 AIR SC 264

abolished no-fault liability in instances of civil defamation. Until then, saying that you had taken all reasonable steps to verify the defamatory information would not protect you if such information was false. The Court, following precedent in the United States and Europe, applied the "Sullivan Test" to statements about public figures. It said that it is necessary to prove that there was "actual malice" behind the statement – that it was known to be false, or that there was a reckless disregard for the truth (and reasonable steps were not taken to verify the information).

However, the *Auto Shankar* case does not have any bearing on Sections 499 and 500, and no-fault liability is still very much a part of criminal defamation. Given that truth itself is not a complete defence, it is hardly surprising that demonstrating that reasonable attempts were made to catch falsity would not be one either. No-fault liability hampers freedom of the press more than anyone else as verification of sources to the point of certainty can cripple the ability of media houses to regularly produce critical pieces. No-fault liability is but another example of how criminal defamation is a completely disproportional measure.

6) **The chilling effect**

All the above measures form a very potent combination that most people find extremely intimidating. When writing a critical article, biography or book that may be controversial, authors will do so in the full knowledge that the entire weight of an imperfect criminal justice system could be brought down upon them. The fear of such a violent reaction will invariably play upon their minds. There will be some brave souls who will plough on no matter the cost, others who will be more circumspect in their criticism12 and those who will remain silent altogether. The point of criminalisation is generally deterrence; the punishment is meant to deter other people from committing the offence. However, with defamation the scope of deterrence extends beyond a person committing actual defamation and deters people from making critical statements that are likely to be eventually found legal. This chilling effect that criminal defamation has on free speech shows the extent to which its overreach fails the constitutional test of reasonableness.

7) **An alternative exists**

There is perhaps no greater proof of how criminal defamation fails the tests of proportionality and necessity than the fact that it exists with all its current flaws when there is a perfectly viable alternate remedy in the form of a civil suit. This is probably why defamation has been decriminalised in many democratic countries, including the United Kingdom. A civil suit with high damages is just as capable of punishing and deterring defamatory statements.

Furthermore, decriminalising defamation yields many benefits to the justice system. The backlog of old cases is already a big burden on the judiciary; limiting new defamation

[12] Sudhir Gosh and Paranjoy Guha Thakurta, Sue the Messenger, AuthorsUpFront 2016

trials to only civil cases will ensure that the Judiciary will only have to deal with the same set of litigants and facts once. Decriminalising defamation (or any other offence for that matter) will also ease the burden on other government bodies involved with criminal justice like the police and prisons.

Civil Defamation

1) **Weak Tort Law**
   As Indian tort law is conspicuously underdeveloped, civil defamation has not proved to be a completely effective remedy. For starters, the long delay between filing a civil suit and receiving a final judgment makes criminal cases a lot more attractive as an interim option - arrests give you a lot more immediate bang for your buck. The lack of a large body of cases has also led to weak precedents; for example, there is no established trend of courts penalising frivolous or malicious lawsuits with exemplary costs, i.e. fines that are large enough to deter similar suits being filed in the future.

2) **Strategic Lawsuits against Public Participation (SLAPPs)**
   'SLAPPs' is a term used to describe litigation (that may be criminal as well) that is intended to silence critics by burdening them with the costs of a legal defence so that they recant their position. SLAPPs are often used by wealthy and powerful individuals and corporations against comparatively smaller individuals or media houses as the mismatch in resources is what makes them so effective. Knowing that they can easily burn resources to pay expenses for premium lawyers, witnesses and travel, they are willing to pursue cases that are likely to be dismissed at the final stage. However, their opponents often have neither the resources nor the inclination to fight a long legal battle and are thus intimidated into recanting their positions.[13]

   There is, of course, nothing that can be done to remove this inevitable mismatch in resources. What can instead be targeted, are the procedures and tactics used in SLAPPs. For example, forum shopping is a frequent manoeuvre – complaints are filed in a court that is more likely to provide a favourable verdict or is extremely remote (to increase travel costs) or both. Another tactic is claiming damages that are so exorbitant that even the possibility that the trial will end with such a penalty is sufficient to silence opponents.

Legal Notices: Defamation without Adjudication

It is necessary to acknowledge that defamation may be used to silence statements without a case ever reaching the court. Often, before a case is even filed, a legal notice is sent by the lawyers of the defamed to the authors of the statement, informing them of their intention to sue for defamation. Such notices are not legally required to be sent prior to filing a suit but many people do so anyway. Typically, these notices will demand an immediate retraction and/or an apology and promise legal action if such demands are not met.

[13] Supra Note 11

These promises are generally to file criminal and civil suits for defamation where they will ask the court to grant exorbitant damages (often in hundreds or thousands of crores).

This distinction is necessary since the only measures to deter frivolous or obviously weak defamation cases are currently in the hands of judges (e.g. exemplary costs). But these measures have no bearing on legal notices. Sometimes, the threat of legal action is sufficient to silence criticism as many people do not think it is worth the effort, time and finances to fight a long trial. As such, they may bow down to their critics' demands by silencing or dampening their criticisms, even if the case is likely to be decided in their favour.[14]

DECRIMINALISATION IS THE WAY FORWARD

The academic and legal opinion is fairly clear on the topic of criminal defamation; the points listed above are just a snapshot of the criticisms levied against Sections 499 and 500. The sooner that the Parliament passes a law repealing it the better. As long as the provisions remain they will continue to have a chilling effect on journalists and authors to the detriment of democracy. Decriminalisation may not be as difficult as expected; Subramanian Swamy was joined in his quest to battle criminal defamation by Rahul Gandhi and Arvind Kejriwal in a rare example of political consensus. However, appearing together on a case is no guarantee that they will appear together in public.

But if such a law could be passed it would be foolish to stop there. Removing criminal defamation may be of utmost necessity, but civil defamation is not faultless in balancing the rights to free speech and reputation either. Rather than just repealing criminal defamation, the opportunity to usher in a new framework of legislation should not be missed.

Ideal features of a new framework for defamation

1. **A new definition of defamation**

   There is no definition of defamation under Indian civil law, and the definition found in Section 499 is not suitable for a new law. Firstly, because it contains multiple defects as already discussed. Secondly, and more importantly, a new definition is needed because the IPC is a completely different kind of law; it contains a list of all criminal offences, so the definition of each offence has to cover every angle and possible exceptions to defamation. However, given that the new law will target defamation specifically a lot of these exceptions and explanations can be distributed across the various sections of the law. But unnecessary provisions like protecting the reputation of a deceased person should not be transported.

   Ideally, this new definition should have two primary components. The first is that falsity should be built into the definition of defamation itself. It is absurd, that true and accurate statements are not protected under the right to free speech.

[14] Supra Note 11

The second component should limit the application of defamation to only serious or grave harm to the reputation of a person. Furthermore, anyone claiming serious or grave harm should provide proof of the same, and to the greatest extent possible, ensure that there is a quantifiable and rational link between the serious harm and the damages claimed.

2. **The right to reputation**
   Currently, the right to reputation is only a right that has been read into the Constitution by the Supreme Court and is not specifically mentioned in any law. Given that it has only been recently confirmed as a part of Article 21 of the Constitution, the terms and limits of this right are unclear. As such, it would be extremely beneficial to give this right a statutory status so that it is more easily understood and applied.

   Given that the right to privacy is another Constitutional right that has not been clarified in any law, it is proposed that any factual information about the sexual identity or orientation of a person not be revealed without that person's consent. This is a necessary exception to truth being a viable defence against defamation. The choice to reveal such personal information should remain with that person; if it is rudely taken from them, it has the ability to detrimentally affect both their reputation and mental well being.

3. **Mandatory notices**
   Currently, an aggrieved person is not required to send a notice before instituting a suit for defamation. The new law should not only make such notices compulsory but contain some provisions regarding their content. One such provision should be that the notice must present a clear and specific argument about how the defamatory statement is false. If the authors are satisfied with the argument, they could choose to retract the statement and/or issue an apology. This would ensure that less defamation cases actually reach courts, which is an ideal state of affairs.

   More importantly, a provision should be made to prevent legal notices that threaten unreasonably exorbitant damages. One possible solution could be to make it compulsory for the aggrieved person to fulfil on a threat to sue and actually file a suit within 30 days after the authors have rejected the arguments contained in the notice. If they fail to do so, the authors should be able to claim ¼ or ½ of the damages claimed. This will ensure that the aggrieved persons will do their due diligence and ensure that the quantum of damages claimed are honest and reasonable. There will, of course, be many people more than willing to fulfil on this threat to sue, which is where the next point comes in.

4. **A clear policy on exemplary costs**
   As mentioned before, there is no strong precedent of imposing penalties on people who file frivolous and baseless suits. The new law should contain a specific provision empowering the courts to impose exemplary costs when the suit is only meant to harass the authors. This should at least be twice the damages claimed in the suit, with a portion going to the court (as they have unreasonably monopolised a public resource).

However, the provision should not specify a maximum amount as this will unnecessarily constrain judges.

5. **Differentiation between authors, editors, publishers, and intermediaries**
   Mass media has penetrated society to an extent that would have been unfathomable in 1860 or 1908, which are when the Indian Penal Code and Civil Procedure Code were passed respectively. A vast majority of defamatory statements are published on a medium, whether it be in print, television or online. There are two reasons why editors and publishers should be differentiated: the first is that they often have final creative control over the statement published and as such should be made responsible for it. But more importantly, the publisher is often far capable of financing legal expenses for a trial; making them a party to the suit may incentivise them to indemnify contracted journalists or create a system of defamation insurance as is discussed later.

   But intermediaries, especially online ones like Facebook and Google, should not be made liable for defamation as they have no creative control over the statements made. However, they should nevertheless be made parties to the suit as they may have to provide information about anonymous authors or remove the statement if directed.

6. **Defence of opinion or inference**
   If democratic accountability is to be protected, it is vital that opinions or factual inferences are protected. In many cases, the complete information required to conclusively prove the truth may not be available, but there may be enough data upon which to make reasonable conclusions. If such conclusions are reasonable and made without malice and the bases upon which they are drawn are clearly spelt out in the statement, it should be a viable defence against a charge of defamation.

7. **Anti-SLAPP measures**
   The new law should prevent many of the tactics typically used in SLAPPs such as forum shopping – all suits must be filed in a place where the author, editor or publisher is resident. Another provision could be to ensure that there is only one cause of action for multiple statements, i.e. they should all be clubbed into one case.

Non-statutory recommendations

The entire onus of protecting free speech of the press need not be on laws alone. These are some of the possible measures that would significantly contribute to good journalism:

1. **Defamation Indemnity**
   If the author and editor have written the statements in the course of their employment with a publisher, they should be protected from facing financial consequences for these statements. Contracts between journalists and media houses, or between authors and publishers, should include a specific clause indemnifying the author from any legal expenses.

2. **Defamation Insurance**
   However, only extremely popular authors and altruistic publishers will be in a position to opt for defamation indemnity. Until then, journalists and writers could pay an insurance premium to guarantee that there will be a corpus of funds that could be used to cover legal fees for defamation suits in the interim. Such an insurance scheme will benefit independent writers who do not use a publisher the most as fighting SLAPPs is truly a David v. Goliath battle for them.

CONCLUSION

Ultimately, some kind of reform is necessary, the law currently places the right to reputation on a higher pedestal than the right to free speech. This is an absurd state of affairs as the right to the reputation affects individuals while the right to free speech affects the health of Indian democracy. The right to free speech is meaningless without the right to criticise. And without the ability to legitimately criticise, voices throwing light on important issues will continue to be silenced by the rich and powerful and without those voices, the Indian state could be dramatically altered or compromised while Indians are kept in the dark.