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Sexual Harassment & Law of Defamation: The First Refuge of the Powerful

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ABSTRACT

Claim of sexual harassment & counter-claim of defamation has become common these days, especially under the #metoo movement. It is quite usual to see civil or criminal or both defamation suits filed by the accused against the complainant, in order to deter the complainant from proceeding further in her/his complaint. Whether it is M.J. Akbar's criminal defamation complaint against Priya Ramani or Alok Nath's criminal and civil defamation complaints against Vinta Nanda or Harvey Weinstein's defamation suit against the New York Times, the undue advantage of defamation law by the powerful public figures has clearly taken place. The purpose of defamation law is to deter and punish malicious lies, but it has become a tool to exhaust the resources of the complainant, thereby preventing the complainant to proceed further with his/her complaint. Classically, these Strategic Lawsuit Against Public Participation (SLAPP) and the abuse of legal remedies is often the reason behind why don't the women speak up when the harassment happened.

In this research paper, the first chapter will give a brief introduction about law of sexual harassment and defence of defamation. The second chapter will deal the object of defence of civil and criminal defamation, sections 499 and 500 of the Indian Penal Code, 1860 will also be discussed. Third chapter will throw light upon India's #metoo movement and the defence of defamation, where some cases and instances will be discussed. The fourth chapter will guide us through the global scenario of #metoo movement and the defence of defamation. Lastly, the concluding chapter will also contain suggestions on how to strike a balance between a claim of sexual harassment & counter-claim of defamation.

Keywords: #Metoo Movement, Sexual Harassment.

I. INTRODUCTION

The United Nations General Recommendation 19 to the Convention on the Elimination of all Forms of Discrimination Against Women defines sexual harassment of women to include:

such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is

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discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

For sexual harassment (Section 354A): If the accused, being a man, commits any of the following acts against a woman (i) physical contact and advances involving unwelcome and explicit sexual overtures; or (ii) a demand or request for sexual favours; or (iii) showing pornography against the will of a woman; or (iv) making sexually coloured remarks, he shall be guilty of the offence of sexual harassment. The punishment is imprisonment of up to 1 year, a monetary fine, or both.²

The the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 broadly defines 'sexual harassment' as follows:

Implied or explicit threat of harmful treatment in employment;

- Implied or explicit threat about the present or future employment status;
- Interference with work or creating an intimidating or offensive or hostile work environment; and,
- Humiliating treatment likely to affect health or safety.

It includes unwelcome sexually determined behaviour that compromises physical, emotional or financial safety and security of a woman worker. This includes:

- Physical contact and advances;
- A demand or request for sexual favours;
- Sexually coloured remarks;
- Showing pornography; or
- Any other unwelcome physical verbal or non-verbal conduct of sexual nature.³

Defamation is oral or written statement that hurts someone's reputation. Reputation is an integral and important part of the dignity of the individual and Right to reputation is inherent right guaranteed by Article 21 and it is also called as natural rights. While Rights of freedom of speech and expression guaranteed by Article 19(1)(a) of Constitution of India is not absolute

² *Sexual harassment* (no date) *US EEOC*. Available at: <https://www.eeoc.gov/sexual-harassment> (Accessed: 14 May 2023).

³ *#MeToo movement in India: The sexual harassment law and HR best practices* (2018) *India Briefing News*. Available at: <https://www.india-briefing.com/news/metoo-india-sexual-harassment-law-hr-best-practices-11303.html/> (Accessed: 14 May 2023).

and has imposed reasonable restrictions for exercising rights in the interest of the security of state, friendly relations with foreign states, public order, decency, morality, contempt of court, defamation.⁴

The phrase “me too” was in use as expression of survivor solidarity long before the allegations against Weinstein became public. In 2006, activist Tarana Burke heard repeated reports of sexual violence in her work with girls through a non-profit she had co-founded, Just Be Inc. She started the Me Too campaign that year⁵

With a slew of women in the entertainment, media and academic sector outing men who have sexually harassed them in the past, India has finally reached its #MeToo moment.⁶ It all began with Bollywood actress Tanushree Dutta’s allegations of sexual harassment against Nana Patekar and it led to water shed of allegations and complaints against various public figures namely M J Akbar Former Union minister accused by several women journalists, most importantly by Priya Ramani. Rahul Johri BCCI CEO, Jatin Das a famous painter, Alok Nath an old age actor, Kangana Ranaut, Sajid Khan, Kailash Kher, Chetan Bhagat and Vinod Dua, the list is endless. But the claim of sexual harassment and counter claim of defamation is what is hindering this #metoo movement.⁷

II. SEXUAL HARRASMENT AND DEFAMATION: LAWS

(A) Guidelines formulated in Vishakha v. State of Rajasthan & Ors⁸

The Supreme Court through this landmark judgment stated that every instance of sexual harassment is a violation of fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution of India. It also amounts to violation of the “Right to freedom” under Article 19.

The few of the guidelines laid down were in regards to the following:

- i. **Duty of employer** - It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment

⁴ Gohil, H. (2019) *What are the defamation laws in India*, iPleaders. Available at: <https://blog.ipleaders.in/defamation-laws-india/> (Accessed: 14 May 2023).

⁵ North, A. (2018) *The #MeToo movement and its evolution, explained*, Vox. Available at: <https://www.vox.com/identities/2018/10/9/17933746/me-too-movement-metoo-brett-kavanaugh-weinstein> (Accessed: 14 May 2023).

⁶ Bose, R. (2018) *As #MeToo India rages on, here are the legal options available to survivors*, News18. Available at: <https://www.news18.com/news/buzz/indias-metoo-what-are-the-legal-options-for-the-survivors-now-1902897.html> (Accessed: 14 May 2023).

⁷ Kirby, J. (2018) *The rise of #MeToo in India*, Vox. Available at: <https://www.vox.com/2018/10/24/17989650/me-too-india-akbar> (Accessed: 14 May 2023).

⁸ AIR 1997 SC 3011

- ii. **Preventive steps-** The steps should ensure that appropriate work conditions are provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places.
- iii. **Criminal Proceedings -** Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim.⁹

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The Act provides for the constitution of internal complaints committee. Every employer of workplace is bound to constitute in writing the internal complaints committee.¹⁰

(B) The committee shall consist of the following:

Presiding officer of the committee shall be a woman employed at a senior level at the workplace from amongst the employees. Minimum two members, male or female from amongst the employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge. One member shall be from amongst non-governmental

1. Industrial Employment (Standing Orders) Act, 1946

It is a central enactment which, inter alia, requires an employer to define and publish uniform conditions of employment in the form of standing orders which contains the Model Standing Orders defining 'sexual harassment' in line with the definition under the Vishaka Judgment.

2. Indian Penal Code, 1860(IPC)

There are various sections under IPC namely Sections 294 354 503 509 prohibiting obscene acts and obscene songs, deterring Demand of sexual favours, display of pornography, physical contact despite indication of disinterest, punishing forceful undressing of a woman, prohibiting watching, capturing or sharing images of a women engaging in a private act without her consent is voyeurism, consider stalking as an act of sexual harassment, provides punishment for insulting the modesty of a woman.

⁹ -, A.P. (2018) *Sexual harassment prevention laws in India*, iPleaders. Available at: <https://blog.ipleaders.in/sexual-harassment-prevention-laws-india/> (Accessed: 14 May 2023).

¹⁰ Saxena, N. (2018) *Understand the law relating to sexual harassment in India*, Live Law. Available at: <https://www.livelaw.in/understand-the-law-relating-to-sexual-harassment-in-india/> (Accessed: 14 May 2023).

3. The Indecent Representation of Women (Prohibition) Act, 1987

An Act to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto. If an individual harasses another with books, photographs, paintings, films, pamphlets, packages, etc. containing 'indecent representation of women' they are liable for a minimum sentence of two years.¹¹

In civil defamation a person who is defamed can move either High Court or subordinate courts and seek damages in the form of monetary compensation. There is no punishment in the form of jail sentence.¹²

In criminal defamation, the person against whom a defamation case is filed might be sentenced to two years' imprisonment or fined or both.

- According to section 499 of IPC, whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.
- Section 499 also cites exceptions. These include "imputation of truth" which is required for the "public good" and thus has to be published, on the public conduct of government officials, the conduct of any person touching any public question and merits of the public performance.
- Section 500, which is on punishment for defamation, reads: "Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both."¹³

(C) There are four essentials for the tort of Defamation.

- a. There must be a defamatory statement.

¹¹ India, legal S. (no date) *The law against sexual harassment*, *Legalservicesindia*. Available at: <http://www.legalservicesindia.com/article/2545/The-Law-Against-Sexual-Harassment.html> (Accessed: 14 May 2023).

¹² Sns (2018) *Explained: Section 499 - the defamation law in India*, *The Statesman*. Available at: <https://www.thestatesman.com/india/explained-section-499-the-defamation-law-in-india-1502696982.html> (Accessed: 14 May 2023).

¹³ Team, C. (2019) *Defamation in India - IPC section 499/500 vs freedom of speech*, *ClearIAS*. Available at: <https://www.clearias.com/defamation-freedom-speech/> (Accessed: 14 May 2023).

- b. The defamatory statement must be understood by right thinking or reasonable minded persons as referring to the plaintiff.
- c. There must be publication of the defamatory statement, that is to say, it must be communicated to some person other than the plaintiff himself.
- d. In case of slander either there must be proof of special damages or the slander must come within the serious classes of cases in which it is actionable per se.

These are the broad categories of defence under Defamation:

1. Truth

In India, truth is an absolute defence in Civil Cases however; in Criminal cases, the true statement must also be an imputation for public good.

2. Privilege

Individual may be protected from claims of defamation under tort or even criminal defamation by a privilege conferred on them by law. Absolute privilege irrespective of intention to defame is conferred upon Government officials, Judges and other such public officials in discharge of their public functions by the law. Journalists are however given Qualified privilege, valid only if made without the intention to defame.

3. Fair Comment

In case of defamatory opinions, the exception of fair comment is allowed. The publication has to be clearly expressed as an opinion and should not mixed up with facts. Also, the opinion should be one that a fair-minded person is capable of holding such opinion even if the reasoning is illogical. These are the broad categories of defence under Defamation.

III. #METOO MOVEMENT & LAW OF DEFAMATION: INDIA

The whole #MeToo movement in India was kickstarted by actor Tanushree Dutta who accused actor Nana Patekar of sexually harassing her 10 years ago. The actress, later on, went to file an FIR against Patekar. Following this many more film celebrities like Vikas Bahl, Alok Nath, and Rajat Kapoor faced the flurry of accusations of sexual misconduct¹⁴

Criminal defamation has also become the weapon of choice for Ambani, Adani to silence their critics and now for Akbar and Alok Nath too against #MeToo.

¹⁴ MJ Akbar files defamation suit against journalist: Understanding India's defamation law (no date) Latest News by Times now News. Available at: <https://www.timesnownews.com/india/article/union-minister-mj-akbar-defamation-sexual-misconduct-journalist/300779> (Accessed: 14 May 2023).

However during this #metoo movement, there has been a rise of Strategic Law Against Public Participation (SLAPP) suits pointing to a range of disturbing impacts like the threat of persecution, financial bankruptcy, trauma, shame and harassment. When the force of law is deployed by someone against women who have accused him of sexual harassment, the victims have to deal not just with their own trauma but also the prospect of persecution, trolling and financial bankruptcy.

Former Union Minister M J Akbar and film actor Alok Nath -who are caught up in the eye of '#MeToo' storm- have filed criminal complaints for defamation against women who have spoken against them. Though at least 15 women (till date) have come out against M J Akbar regarding acts of sexual harassment committed by him abusing his position as superior at work, he has chosen to go against only one of them- journalist Priya Ramani.

While the allegations against M J Akbar pertain to creation of a hostile work environment through his sexually charged behaviour targeting women subordinates, the allegations against Alok Nath raised by Vinta Nanda are far more serious, attracting ingredients of rape under Section 376 IPC. After the account by Vinta Nanda, well-known actors such as Sandhya Mridul and Amyra Dastur and singer Sona Mohapatra narrated similar experiences from Alok Nath.¹⁵

Actor Alok Nath has filed a civil defamation suit against writer-director Vinta Nanda, who accused him of sexually abusing her 19 years ago. This follows a complaint filed by his wife seeking defamation proceedings be initiated against Nanda. Akbar is seeking her persecution and conviction under Sections 499 and 500 of the IPC, accusing Ramani of tarnishing his “image”, “goodwill”, “reputation” and of fabricating facts. He is using the law of criminal defamation exactly as it is meant to be used – as a legalised weapon in the hands of the rich and powerful to silence and intimidate not just critics, but also who they violate, oppress and prey upon.

Director Vikas Bahl, who was caught at the centre of controversy following allegations of sexual harassment against him, has filed a defamation case against Anurag Kashyap, Vikramaditya Motwane and others on Thursday. Bahl filed the suit in the Bombay High Court, and has also sought compensation of Rs 10 crores from the respondents¹⁶

We need to recall how harassed and traumatised victims of sexual predation in the past were

¹⁵ Alok Nath Files Defamation case against Vinta Nanda over #MeToo allegations (no date) *The Wire*. Available at: <https://thewire.in/women/alok-nath-vinta-nanda-defamation-me-too> (Accessed: 14 May 2023).

¹⁶ NewIndianXpress (2018) *Vikas Bahl files defamation suit against Anurag Kashyap, Vikramaditya Motwane; claims they used #MeToo to settle personal scores*, *The New Indian Express*. Available at: <http://www.newindianexpress.com/entertainment/hindi/2018/oct/18/vikas-bahl-files-defamation-suit-against-anurag-kashyap-vikramaditya-motwane-claims-they-used-met-1887115.html> (Accessed: 14 May 2023).

forced to give up their fight. How a 14-year-old girl who stood up to inspector general of police S.P.S. Rathore, committed suicide; how a traumatised airhostess, Geetika Sharma, who was ruthlessly pursued by Haryana minister Gopal Kanda, ended her life; how unable to bear the relentless harassment of the police, her mother too committed suicide six months later. This is precisely the job of the defamation suit filed by Akbar. It is a legal means to achieve the kind of silence we have seen before¹⁷.

However, in 2016, the Supreme Court repelled the challenge against Sections 499 and 500 of the Indian Penal Code and upheld its constitutionality in *Subramanian Swamy v Union of India*. The judgment authored by Justice Dipak Misra (as he was then) is a laborious read, and its inscrutable reasoning fails to satisfactorily explain the basic question of the legality of defamation.¹⁸

IV. #METOO MOVEMENT & LAW OF DEFAMATION: GLOBAL ANALYSIS

In the 1960s, the American civil rights movement found itself under siege: States in the deep south not only violently reacted to the movement, but also filed defamation claims against newspapers, to stop them from covering it. Small factual errors in reports were picked up, and massive defamation suits were filed to harass and bankrupt reporters and newspapers. *The New York Times*, for example, was found liable for the crippling sum of \$50,000, for its coverage of a civil rights protest in Montgomery, Alabama. When these defamation verdicts were challenged before the Supreme Court, therefore, no less than the fate of the civil rights movement was in its hands.

The U.S. Supreme Court responded. In one of the most famous judgments in its history, *New York Times Co. v. Sullivan*¹⁹ it substantially modified defamation law to ensure that it could no longer be used as a tool of harassment and blackmail. Articulating a very high threshold of “actual malice”, the court ensured that journalists could go about their job without fear, as long as they did not intentionally or recklessly make outright false statements. Nothing less than this, the court held, was required by the constitutional right to freedom of expression, and a free press.

Founded by Tarana Burke more than a decade ago, #MeToo came to new prominence in October 2017, after women came forward publicly with allegations of sexual harassment and

¹⁷ M.J. Akbar's defamation case: From news room to court room, the game is power (no date) *The Wire*. Available at: <https://thewire.in/law/m-j-akbars-defamation-case-from-news-room-to-court-room-the-game-is-the-same> (Accessed: 14 May 2023).

¹⁸ Sebastian, M. (2018) *Criminal defamation: A tool of oppression to shut out truth*, *Live Law*. Available at: <https://www.livelaw.in/criminal-defamation-a-tool-of-oppression-to-shut-out-truth/> (Accessed: 14 May 2023).

¹⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1960).

assault by producer Harvey Weinstein. In the weeks and months that followed, the movement gained steam as more and more Americans shared their own stories of being harassed or assaulted in the workplace by people most of them men in positions of power. Over time, #MeToo became a broader conversation, not just about workplace harassment and assault, but about coercive and abusive behaviour outside of work as well.²⁰

Others, like Brett Kavanaugh and President Donald Trump, have remained in positions of power. And while some workplaces have made changes to address sexual harassment, it's not yet clear whether industries will make the larger reforms necessary to truly keep workers safe.

After Weinstein came celebrities like actor Kevin Spacey, who was accused by multiple men of sexual harassment or assault, and by some of making advances toward them when they were underage

President Trump himself has been accused of sexual misconduct by more than a dozen women, but none of those allegations stopped him from being elected president. Kavanaugh's confirmation came almost exactly two years after the publication of the *Access Hollywood* tape on which Trump could be heard bragging about his ability to grab women "by the pussy."

On stage we find Geoffrey Rush's defamation claim against the Daily Telegraph for its "King Lear" article, alleging he behaved "inappropriately" towards another actor in the Sydney Theatre Company's production of the Shakespearian play two years ago. Rush denies all claims. Sandra Muller, the creator of the French equivalent of the "MeToo" movement, says she is being sued for defamation by a man she accused of sexual harassment. Ms Muller accused former television boss Eric Brion of making a sexually inappropriate advance toward her.

In the U.S., the wave of women speaking out about sexual harassment and assault in the workplace has led so far to the downfall of more than 200 public figures including entertainment moguls, politicians, journalists and actors.²¹

Meanwhile, Oscar-winner Geoffrey Rush is bringing a libel suit against the publisher of Sydney's Daily Telegraph after it printed allegations that he had engaged in "inappropriate behaviour" while playing the title role in "King Lear." Eryn Jean Norvill, who had played Lear's daughter Cordelia in the production, told the court that Rush had stroked and sexually harassed

²⁰ North, A. (2018) *The #MeToo movement and its evolution, explained*, Vox. Available at: <https://www.vox.com/identities/2018/10/9/17933746/me-too-movement-metoo-brett-kavanaugh-weinstein> (Accessed: 14 May 2023).

²¹ Supra note 5.

her both onstage, backstage and in rehearsals.

Australia has a reputation as the defamation capital of the world, but even more cases are brought in the U.K. and Ireland. One reason for the difference is that the burden of proof in U.S. libel cases typically weighs much more heavily on the claimants than the defence. Public figures bringing lawsuits in the U.S. must prove the publishers were motivated by “actual malice,” a tough hurdle to jump. By contrast, in most other English-speaking countries the main burden is on the publishers to satisfy the courts that what they printed was true. That’s an equally challenging bar in sexual-harassment cases, which often come down to he-said she-said disputes.²²

V. CONCLUSION & SUGGESTIONS

It is not their shame anymore. What #metoo has shown India is that women are no longer on trial, for their clothes, walk, behaviour, or for who they are. Priya Ramani is not on trial. It is the men who are on trial. Our courts are now faced with a similar situation: a vitally important public movement is threatened by the heavy hand of the law of defamation. And, like the American courts at the time of the civil rights movement, our courts too have a golden opportunity. They may, for one, choose to revisit the constitutionality of criminal defamation. But even without that, there are enough ways to judicially interpret Section 499 to ensure that it no longer remains the tool of the powerful to blackmail, harass, and silence inconvenient speech. Incorporating the Sullivan standard into the law might be a start; but the interpretive possibilities are endless. All that we need is for the courts to understand what is at stake, and respond with the courage and the sensitivity that these times demand of them.

India is in the company of Pakistan, Bangladesh, Turkey, and South American dictatorships in continuing with criminal defamation. Even the United Kingdom, which gave us our penal code, had decriminalised defamation.

In other words, if there exists an alternative mechanism that can also achieve the goal without compromising on individual liberty to such a degree, the impugned law must be struck down. Criminal defamation which is targeted at punishing what is essentially a private wrong (a wrong that one person commits upon another, rather than upon society) is a stark example of a law that disproportionately affects the freedom of speech. Legislators have recognised this as well. Last year, Tathagat Satpathy introduced into Parliament the “Speech Bill”, which aimed to replace

²² Fickling, D. (2018) *Australia’s #MeToo movement is a civil rights battle*, *Bloomberg.com*. Available at: <https://www.bloomberg.com/opinion/articles/2018-12-19/australia-s-metoo-movement-is-a-civil-rights-battle> (Accessed: 14 May 2023).

criminal defamation with a detailed, statutorily codified regime of civil defamation.

(A) Suggestions:

- i. No-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;
- ii. The offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;
- iii. Public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;
- iv. Prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.
