The judiciary's #MeToo moment

It is an opportunity to ensure that the defamation law is no longer used as a tool for harassment

In Isaac Asimov's famous Foundation novels, one of the protagonists often explains that "violence is the last refuge of the incompetent". In India, the fallout of the #MeToo movement has recently re-emphasised what was already well-known: defamation is the first refuge of the powerful. 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, accusations of sexual harassment have seen a predictable response: the leveraging of criminal defamation law as a way of striking back.

Impinging on freedom

It is trite to say that there must exist a balance between the freedom of expression and the right to reputation. No legal system can allow false and slanderous statements to be made publicly, with impunity. Defamation law is the tool that is used to strike the balance. But it is the shape and the form of defamation law that often determines whether the balance has been struck appropriately, or whether, in the guise of protecting reputation, the freedom of speech and expression has been effectively stifled.

India's criminal defamation law undoubtedly belongs to the latter category. A colonial relic that was introduced by the British regime to suffocate political criticism, Section 499 of the Indian Penal Code provides an ideal weapon for powerful individuals to silence critical or inconvenient speech. First, unlike many other countries, defamation in India is a criminal offence (and not just a civil wrong), and a conviction entails both social stigma and potential jail time. Second, there is a very low threshold for a *prima facie* case of defamation to be established by a complainant. Simply put, he must only show that an "imputation" has been made that could reasonably be interpreted as harming his reputation. This is enough to set the wheels of the law in motion. While an accused has multiple defences open to her — such as demonstrating that her statement was true and in public interest, or that it was an opinion made in good faith, and concerning a public question — these defences are effectively available only after the trial commences. By this time, an accused individual has already been dragged to court multiple times, and must also then go through a long-drawn-out trial process, where the procedure is the punishment.

And third, even the defences open to an accused are insufficiently protective of speech, to an extent that is even less than what civil defamation allows. For example, while in a civil defamation case, a defendant need only show that her statement was true in order to escape liability, in a criminal defamation proceeding, an accused must show that her statement was true and in the public interest. This leads to the paradoxical situation where our legal system is more advantageous towards those at the receiving end of civil defamation proceedings, and harsher towards those who have to go through the criminal process!

All these — and more — arguments were made as recently as 2016, when the constitutionality of criminal defamation was challenged before a two-judge bench of the Supreme Court. Unfortunately, however, they were largely ignored by (the then) Justice Dipak Misra, who simply held that Section 499 was constitutional, as it protected individual reputation. The disproportionality of criminalising what is essentially a civil wrong, and the numerous ways in which the specific structure of Indian criminal defamation law chills and suffocates free expression, was not considered by the court.

The #MeToo movement

It is important to remember, however, that the 2016 challenge to criminal defamation was driven by politicians who — at the best of times — do not make for the most sympathetic of petitioners before a court. Much has changed in the last two years. And perhaps the most significant change has been brought by the #MeToo movement.

It has seen women articulate their experiences of sexual harassment, often at the hands of powerful and well-established men. What is striking about the movement is how it has compelled all of us to confront systematic male behaviour that may sometimes be difficult to define as a legal offence, but which is nonetheless sexually predatory and abusive. Issues involving hierarchies in the workplace, differences in age and influence, the power exercised by men who are highly regarded in their professions and the abuse of that influence — issues that were long suppressed and simply not talked about — have, at last, found public utterance. It is a time of upheaval, when old pieties have been exposed as morally and ethically bankrupt, and old codes of behaviour shown to be exploitative and unacceptable. The #MeToo movement has brought submerged experiences to the surface, and given individuals a fresh vocabulary with which to express what, for all these years, seemed simply inexpressible. With the filing of the criminal defamation cases, therefore, the stakes have been made clear. Will powerful men be allowed to use the law to silence this new mode of public expression? Will criminal defamation be weaponised to restore the old status quo, and preserve and perpetuate the hierarchies that the #MeToo movement has challenged?

An opportunity for change

It is the courts that must now confront these questions. And the courts now have a fresh opportunity: this is no longer about an abstract challenging to the constitutionality of criminal defamation, but a live issue about the relationship between our legal system and a social movement aimed at publicly redressing long-standing injustices. More than 50 years ago, courts in another country were faced with this challenge. 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* (1964), 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. In 2018, 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.