

NUJS LAW REVIEW

NUJS LAW REVIEW

QUARTERLY

Vol. VIII

2015

No. 3-4

[Mode of Citation: 8 NUJS L. REV. (2015)]

July-December, 2015

Founder Editor

PROF. DR. MAHENDRA P. SINGH

*A publication of the W.B. National University of Juridical Sciences, Kolkata
Printed and Distributed by Eastern Book Company, Lucknow*

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OVER-CRIMINALISATION: AN INSIDIOUS PLACEBO

I. INTRODUCTION

The response of the Indian State to address an increasing variety of problems appears to be ‘the more the better’. New categories of crimes are being created, conduct which earlier fell under civil or administrative law is being criminalised through state and judicial complicity, and new institutions are being formed where existing ones are flailing. The vehicle of criminal law is being used to enforce majoritarian morals, regulate dietary preferences and adjudicate private disputes. The insidious trend not only overlooks the unsuitability of criminal law to address many of these matters, but also contributes to the decay of our already overburdened criminal justice system.

Over-criminalisation may cover laws that seek to penalise conduct falling within individual morality, or criminalising trivial conduct which can be adeptly tackled by civil law, “or perhaps left to the good sense of the individual”.¹ It leads to excessive discretion at the hands of enforcement authorities, disparity among similarly placed persons as it tends to punish a few defendants for what may be widespread conduct, potential for abuse by enforcement officials, potential to undermine procedural safeguards of the criminal justice process and squandering of scarce public resources.²

In this note, we will discuss two issues – criminal defamation (Part II) and the beef ban (Part III), which are part of a broader trend of ‘over-criminalisation’ in the country.

II. CRIMINAL DEFAMATION

In *Subramaniam Swamy v. Union of India*³ (‘Swamy’), a two Judge bench of the Supreme Court of India refused to strike down criminal

¹ Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalisation*, 54 AMERICAN UNIVERSITY LAW REVIEW 747 (2005); See S.H. Kadish, *The Crisis of Overcriminalisation*, January 1, 1968, available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2550&context=facpubs> (Last visited on July 30, 2016).

² *Id.*

³ (2016) 7 SCC 221.

sanctions for the offence of defamation under §§ 499 and 500 of the Indian Penal Code ('IPC'). While the judgment has been criticised on both substantive and stylistic grounds⁴, it is pertinent for the purpose of this note to examine its part in a broader socio-legal trend.

§ 499 of the IPC defines 'criminal defamation' and is intended to protect a person's reputation from harm. § 500 imposes simple imprisonment for a maximum of two years, or fine, or both. §§ 199(1) to 199(4) of the Code of Criminal Procedure, 1973 ('CrPC') lend procedural support. In *Swamy*, the petitioners argued that Article 19(2) of the Constitution does not justify § 499 as a reasonable restriction, as it is a disproportionate restriction on the fundamental right to free speech. Further, a common law remedy for defamation already exists. They invoked the 'effects doctrine'⁵ to ascertain the impact of the restriction on the right to free speech. The nature of reputation being akin to one's personal security, it was contended that it does not summon criminal prosecution as it is not an offence against society as a whole.

In opposition, the State argued in favour of criminal defamation on the ground that the right to reputation is protected under Article 21 of the Constitution. In light of the eminence of one's reputation, mere civil remedies with monetary compensation are not sufficient.

Justices Misra and Pant's conclusion in upholding criminal defamation rests on three planks. *First*, the law of defamation protects the reputation of an individual "in the perception of the public at large".⁶ The Court states that criminal prosecution is essential to keep a check on those who "deviate from... normal behavioural pattern and associate themselves with anti-social elements".⁷ In this manner, criminal sanctions are essential for the maintenance of social stability. *Second*, the right to free speech is not absolute and must make room for the individual's right to reputation under Article 21. In the balancing exercise that follows, one's reputation "cannot be allowed to be crucified at the altar of the other's right of free speech".⁸ *Third*, that the constitutional principle of fraternity and fundamental duties under clauses (e) and (j) of Article 51-A mandate mutual respect among individuals.

Adjudicating from a vantage of intimidation, fear and paternalism, the Court has not only done disservice to free speech and dissent, but also made an unfortunate contribution to the arc of over-criminalisation in India. Even though the judgment devotes scores of pages to verbatim reproductions,

⁴ The Wire, *Judgment by Thesaurus*, May 16, 2016 available at <http://thewire.in/36348/judgment-by-thesaurus/> (Last visited July 30, 2016).

⁵ The effect doctrine is a tool to gauge the impact of a restriction on the right of freedom of speech and expression. It concentrates on the consequence of the impugned law.

⁶ *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221, ¶75.

⁷ *Id.*, ¶82.

⁸ *Id.*, ¶140.

it fails to address the central issue: why should defamation, a private wrong, attract a public law remedy? Just as the breach of a contract only affects the parties involved, the loss of reputation also affects solely the parties concerned. It does not harm society as a whole and does not justify expending public resources to resolve the matter when monetary damages recoverable in a civil suit would pose sufficient deterrence. The Court's contention –that harm to one's reputation affects society at large because society is an aggregate of individuals, is unconvincing.

Other countries are recognising the potential of criminal defamation as a tool in the hands of powerful politicians and corporations to smother free speech, and proceeding to either decriminalise it or dilute it substantially. The United Kingdom government has abolished criminal defamation, the Constitutional Court of Zimbabwe⁹ has declared it unconstitutional and the offence has been diluted in the United States, South Africa and Canada.¹⁰

This decision is also reflective of the trend of 'over-constitutionalization'. The Court has contributed to the sweeping expansion of Article 21 to include reputation, an extension that does not have explicit constitutional backing. Bhatia notes that Article 21 is no longer being used as a shield to protect individual rights against the State.¹¹ Rather, it is being used as a "sword to cut down the fundamental right to freedom of speech and expression".¹² This creates an anomaly whereby the scope of one provision in Part III has the potential to subsume all other rights.

The use of the principle of fraternity to justify criminal defamation gives the sense that the Court has worked backwards in its reasoning. In other words, it has foraged for grounds to justify its pre-meditated conclusion. Fraternity, a term whose contours are nebulous at best, finds place in the Preamble to the Constitution, but not in the text of Article 19(2) or the rest of Part III. The Court's use of an abstract aspirational goal to restrict free speech is odd, when it was rather meant to be a tool to buttress free speech.

The cursory dismissal of the petitioner's argument of criminal defamation causing a chilling effect is reflective of the Court's reluctance to acknowledge the harassment wreaked by strategic lawsuits against public participation ('SLAPP'). Often, all it takes to silence free speech is not a lawsuit prosecuting for defamation, but rather a legal notice threatening a defamation

⁹ Nevanji Madanhire v. Attorney General, Const. Application No. CCZ 78/12.

¹⁰ Gautam Bhatia, *A Blow Against Free Speech*, THE HINDU May 16, 2016; Coroners and Justice Act, 2009, §73; Index on Censorship and English Pen, *A Briefing on the Abolition of Seditious Libel and Criminal Libel*, July 2009, available at https://www.englishpen.org/wp-content/uploads/2015/09/seditious_libel_july09.pdf (Last visited on July 30, 2016).

¹¹ Bhatia, *Id.*

¹² Bhatia, *Id.*

suit and the imminent possibility of arrest, detention and imprisonment.¹³ This, coupled with the fact that truth is not an absolute defence unless it also serves the public good, imposes an unreasonable and disproportionate burden on free speech. The Court has rendered a decision which not only does not explain why scarce public resources should be directed towards conduct for which an appropriate alternative civil remedy exists, but has also claimed democracy as its casualty by enforcing homogeneity of opinion.

III. BEEF BAN

The Bharatiya Janata Party ('BJP') led Maharashtra Animal Preservation (Amendment) Bill, which prohibits the slaughter of cattle – thereby prohibiting the consumption and possession of beef, got the legal recognition on March 2, 2015 and has brought to fore what has often been termed 'the saffron agenda'.¹⁴ The instances of violence, perpetrated by the defenders of the 'Hindu ideology', on 'consumers and slaughterers of beef', have not only shocked the conscience of the limited states introducing the ban, but have reinforced the sense of intolerance being felt through the nation.¹⁵ The primal aim of this ban has been, as seen by many, to suppress the claims of minorities, religious and ideological, and preserve the 'Hindu values'.¹⁶ A State sanctioned dietary intake – mirroring the beliefs of a religious majority, has been felt as a strong indicator of suppression of divergent life-style choices.¹⁷

However, in the economic sense, the ban has impacted Hindu households much more despite being a majority. Farmers, mostly Hindus, often sell their unproductive cattle to the contractors, for slaughter.¹⁸ By virtue of the blanket ban on slaughter of cattle, farmers shall be forced to spend on the upkeep of the unproductive animal, thereby adding to the existing agrarian crisis.¹⁹

In the list of affected parties, the likes of leather industry is included which shall suffer incredibly due to lack of raw material.²⁰ The Council for Leather Exports has claimed that nearly three million people, mostly belonging to the schedule caste category, employed in the industry shall be negatively

¹³ See SUBIR GHOSH & PARANJOY GUHA THAKURTA, *SUE THE MESSENGER* (2016).

¹⁴ Soumnty Kanungo, *Narendra Modi govt pursuing saffron agenda: Mamata Banerjee*, *LIVE MINT* July 22, 2016.

¹⁵ See Kunal Pradhan, Kaushik Deka, Gayatri Jayaraman, Damayanti Datta, *Beef, ban and bloodshed*, *THE INDIA TODAY* October 7, 2015.

¹⁶ Manil Suri, *A Ban on Beef in India Is Not the Answer*, April 17, 2015, available at http://www.nytimes.com/2015/04/18/opinion/sunday/manil-suri-a-ban-on-beef-in-india-is-not-the-answer.html?_r=1 (Last visited on July 31, 2016)

¹⁷ TOI Editorials, *Ban the bans: The meat of the matter is governments should not dictate citizens' personal choices*, September 14, 2015.

¹⁸ Brinda Karat, *The economics of cow slaughter*, *THE HINDU* November 16, 2015.

¹⁹ *Id.*

²⁰ *Id.*

impacted by the said ban²¹. The tannery workers have equally been intimidated by the vigilante actions of the propaganda clan,²² a recent instance in Una, Gujarat, involving flogging of Dalit men over skinning on a dead cow shows the atrocities being committed in the name of ‘*gau-raksha*’²³. The Prime Minister, Mr. Narendra Modi, in his election speeches talked of a ‘pink revolution’²⁴, highlighting the ‘dangerously high’ numbers of meat exports related to cow slaughter.²⁵ However, facts point towards a different reality – while the meat of buffaloes and unproductive cattle is being used for exports and consumption, the population of female cattle (cows) has seen an increase as compared to the last census in the year 2007.²⁶

Further, the National Commission on Cattle as put in place by the Atal Bihari Vajpayee Government in the year 2002 noted that a sizeable population of scheduled tribes, scheduled castes and other backward castes, and not solely Muslims, are consumers of beef – the said dietary preferences emanating out of the extreme poverty and customary practices.²⁷ A blanket ban on beef and the allied products thus also has a direct impact on the dietary intake of the poor, thereby impacting the nutrition availability to a major proportion of the population.²⁸

In the recent judgment passed by the Maharashtra High Court, the division bench, while upholding the constitutional validity of the Maharashtra Animal Preservation (Amendment) Act, 1976 (the ‘Act’), noted that § 5(d) (prohibiting possession of the flesh from outside the State) “infringes a person’s right to privacy” and thus struck down the provision. Thus, even when the Act *per se* was found to be constitutional, certain provisions were held to be in contravention of the Constitution of India. The Court further noted that § 9 (b) (penalising possession of beef by providing for imprisonment of up to one year and fine of Rs. 2,000) was “unconstitutional and violative of Article 21 (Right to Life) of the Indian Constitution.”²⁹ The Court noted that under Article 21 of the Constitution an individual is to be afforded protection from the unnecessary interference of the state in his/her private sphere. Thereby, a provision, such as § 9(b) of the Act, which puts the burden of proof on the individual

²¹ *Id.*

²² *Id.*

²³ Express News Service, *In the name of the cow: Murder, flogging, humiliation of Muslims, Dalits*, THE INDIAN EXPRESS August 5, 2015.

²⁴ Borrowing from the terms such as ‘green revolution’ and ‘white revolution’, Mr. Narendra Modi coined the word ‘pink revolution’, where he feared the expansion of the ‘meat industry’, more significantly – the cow slaughter houses, who were receiving subsidies from the Congress Government.

²⁵ K. Balchand, *Modi fears a ‘pink revolution’*, THE HINDU April 3, 2015.

²⁶ Karat, *supra* note 18.

²⁷ Karat, *supra* note 18.

²⁸ Karat, *supra* note 18.

²⁹ Sonam Saigal, *HC allows beef from outside Maharashtra*, THE HINDU May 7, 2016.

possessing beef – was to be categorised as being violative of Article 21 of the Constitution.³⁰

The move has been seen as a step towards acknowledging the right to possession of the said meat– thus in Maharashtra, at least theoretically, one may possess and keep beef brought from another state. It is yet to be seen how this judgment practically impacts the possession of beef in Maharashtra, given the series of violent events related to possession of beef in the nation.³¹

While stating the reasons for upholding the constitutionality of the ban, the bench quoted that “the cow progeny excreta is recognised as a source of rich organic manure which enables farmers to avoid the use of chemicals as well as inorganic manure.”³² This fact was specifically noted given the predominantly agricultural economy of the state. Even while focusing on the agricultural state of affairs, the bench and the state seem to have turned a blind eye towards the added woes of the farmers who will now have the responsibility of maintaining the unproductive cattle. The burden for such upkeep emanates from the criminal sanctions that the slaughter houses shall face in the event they accept the unproductive cattle for slaughter from the farmers.³³

The protection afforded by Article 21 of the Constitution, can well be extended to the farmers in the state who have been struggling with droughts and general inefficiency of the officials for bringing meaningful agrarian reforms in the sector.³⁴ A blanket ban on slaughter of cattle, will have the necessary impact on livelihood and sustenance of the farmers that can well be argued as being against their right to life under Article 21 of the Indian Constitution.

In the said background, a clear link can be established between the religious undertones which have motivated the ban. A restriction on the dietary intake and the related criminalization has brought to light a new form of Hinduism – where the elements of passiveness and tolerance are missing by a mile. This rather violent form, termed ‘Hindutva’, muffles the dissenting voices within the religion, now with the sanction of the criminal legal system, in a voice that is often violent and rhetorical.³⁵ The Act has only gone ahead to strengthen the efforts of the Hindutva clan to propagate an environment of intolerance in the nation. At the root of this radical narrative is the anguish and

³⁰ *Id.*

³¹ See Express Web Desk, *Beef over beef: Past instances of violence by ‘cow vigilantes’*, July 27, 2016, available at <http://indianexpress.com/article/india/india-news-india/beef-over-beef-past-incidences-of-violence-by-cow-vigilantes/> (Last visited on July 31, 2016).

³² Saigal, *supra* note 29.

³³ Devdutt Pattanaik, *Holy cow, unholy violence*, THE HINDU October 6, 2015.

³⁴ Rajendra Jadhav, *Unable to sell cattle, Indian farmers have a beef with Modi’s BJP*, March 29, 2016, available at <http://www.reuters.com/article/us-india-beef-idUSKCN0WU1IUS> (Last visited on July 31, 2016).

³⁵ Pattanaik, *supra* note 33.

neglect that this section of the population has felt by the ‘liberals’ – the beef discourse has been termed as a ‘symbolic attack on the educated Indians’.³⁶ This view sees the violence as a sort of a retaliatory mechanism where the radicals have found a way to propagate the ‘Hindu values’, using the criminal justice system, at the expense of not just other religious minorities but also the ‘average educated liberal’ Indian Hindus who have distanced themselves from the narrative that the radicals have been quoting for years.

The beef debacle is a clear creation of a new stream of crimes. In so doing the central government has violated the principles of criminal justice system. The aim of the criminal legal substructure is to bring into question the conducts that impact the society as a whole.³⁷ By no stretch of imagination can the slaughter, consumption and possession of beef, be termed as an ill against the entire society. By criminalising events associated with slaughtering of cattle, the government has overstepped its bound by criminalising the conduct of individuals associated with the acts of slaughtering.³⁸ The Court, by upholding the validity of the law, has ensured that this over-stepping remains intact and enforceable.

What this current string of bans and over-criminalisation does is, perpetration of majoritarian beliefs and creation of unemployment in former revenue-generating sectors.³⁹ Quoting religion and appeasing the religious majority in a ‘secular’ nation would necessitate a backlash and would only elevate the rising tide of *ahimsa*.

IV. CONCLUSION

As seen through the course of the note, the contemporary Indian state has opted for over-criminalisation, a trend that has dangerously transformed the country into a hub of intolerance. The Supreme Court’s judgment on criminal defamation and the string of bans imposed by the central government have provided legal recognition to this suppression of dissent. Opting for the criminal route for issues pertaining to dietary control and adjudication of private disputes is not only a misuse of the criminal justice system but is also an added pressure on the judicial framework of the nation. In the said scenario, the average citizenry only ends up getting intimidated by the strong arm tactics

³⁶ *Id.*

³⁷ See generally Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, available at <https://www.law.upenn.edu/fac/phrobins/CRIMTOR6.pdf> (Last visited on August 7, 2016).

³⁸ For instance, the Judicial Magistrate ordered the filing of an FIR against the family of the deceased who was killed by the vigilante actors on the suspicion of indulging in cow slaughter; Press Trust of India, *Dadri lynching: Court orders registration of FIR against Akhlaq’s family*, THE INDIAN EXPRESS July 14, 2016.

³⁹ Dilip Kumar Jha, *Maharashtra economy to take Rs 10,000-cr hit due to beef ban*, THE BUSINESS STANDARD March 12, 2015.

of the state and opts to not express their dissent fearing a criminal sanction for their now 'criminal' conducts. In both instances of criminalising defamation and consumption/slaughter of beef – there is a common thread of intervention of the state in a purely private matter. Using the criminal legal system to adjudicate issues that have no material adverse impact on the society, frustrates the very notions of criminal law and morality.

TABLE OF CONTENTS

ARTICLES

Private and Yet Public: The Schizophrenia of Modern Sports and Judicial Review <i>Saurabh Bhattacharjee</i>	153
Towards a Tribunal Services Agency <i>Pratik Datta</i>	181
The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Bill, 2014 and Capability Approach <i>Kritika Vohra & Srivats Shankar</i>	205
Revisiting The Shipbreaking Industry in India: Axing Out Environmental Damage, Labour Rights' Violation and Economic Myopia <i>Paridhi Poddar & Sarthak Sood</i>	245
Competition Law Regulation of Trade and Professional Associations <i>Aishwarya Gupta & Vivasvan Bansal</i>	281

