

How the Cold Hand of the Law Falls Across Two Centuries on Our Freedoms

The Needle's Eye



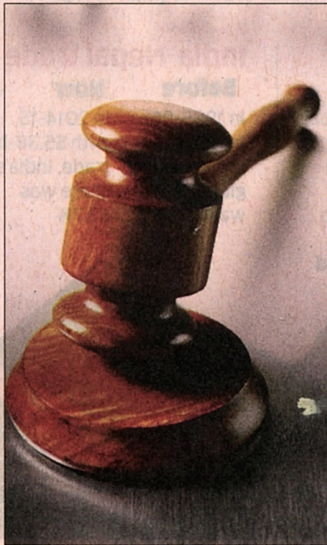
CHAITANYA KALBAG

Twice in the past two and a half years, the Supreme Court has ruled with a 19th-century mindset on vital 21st-century issues affecting personal freedom using criminal and penal codification that was enacted by India's British rulers. The Indian Penal Code of 1860 was first drafted by Thomas Babington Macaulay in 1837, and its enactment was delayed by the Sepoy Mutiny of 1857.

On December 11, 2013 a two-judge bench of the Supreme Court upheld Section 377 of the IPC which criminalises homosexuality and 'unnatural' sex. Then, on Friday the 13th of May, a two-judge bench headed by Justice Dipak Misra upheld the constitutionality of Sections 499 and 500 of the IPC which relate to the criminality of defamation. Most of the world categorises defamation as a civil offence on the grounds that it is a personal matter. Most defamation lawsuits are brought by the rich and powerful and are nearly always designed to smother any hint of criticism or exposure. Sec. 499

casts the onus of proving innocence on the person accused of defamation, whose only defence can be that he published the truth for public good. Criminal defamation suits are often filed in lower courts and drag on for years. The accused have to appear in person before the trial magistrate. The trial process itself constitutes severe harassment and has a deterrent effect on free speech.

"One can be, and frequently is, dragged to remote areas of India to personally attend to a magistrate's summons – not once, not twice, but repeatedly over long periods of time. Ultimate acquittal in the end is not half as jolly as it sounds!" eminent jurist



and constitutional Fali Nariman told me.

Former Solicitor General Gopal Subramaniam echoed him. "Why would anybody go through all this pain of going to courts, appearing, and getting lawyers merely because he held a strong view and wrote an article."

The petitioners who lost on Friday included several politicians across the spectrum – except from the ruling Bharatiya Janata Party. Government lawyers argued strongly for retention of Section 499.

"In upholding, in all its Victorian savagery, Section 377 of the IPC, the Supreme Court had at least the fig-leaf excuse of *protecting* public morals. But there can be no moral justification whatever for the State continuing to impose criminal sanctions for *protecting* the reputation of individuals – many of whom are persons prominent in public life. For them, the law of torts (civil wrongs) affords the only remedy: to sue the wrongdoer for damages in seven figures, and also to apply for injunction from repeating the offending words spoken or written," Nariman said.

Subramaniam told me a civil deterrent is sufficient for defamation. "But once it becomes a criminal remedy then it tends to curb people in expressing their views and can be used to silence dissent."

Both lawyers were very critical of the legal arguments put forth by Justice Misra in the 268-page verdict. "As for the legal justifica-

tion of the recent decision there is little to commend, except the safeguard incorporated at the end of the judgment, namely that before a magistrate issues a summons in a complaint under Section 499 'Application of mind... is imperative,'" Nariman told me.

"What may be truth may appear defamatory to the other," Subramaniam said in a conversation. What is at stake? If it is the right to reputation of certain individuals and it cannot be compensated in any other manner, then one can understand a criminal remedy. "(But) it hangs like a sword. There is no quick trial of such a complaint."

All may not be lost. One of the petitions against Section 499, filed by Greenpeace activist Priya Pillai, was transferred to another two-judge Supreme Court bench after Justice Misra recused himself. The defamation suit against Pillai was filed by the Essar Group. That petition is pending, and could hopefully form the pivot for a Constitution-bench appeal against the Friday ruling.

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