STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION IN INDIA – AN ANALYSIS IN THE CONTEXT OF INDIAN DEFAMATION LAWS

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ABSTRACT

Free speech and expression are the lifeblood of a democracy. However, this right is under constant threat. In recent times, state institutions have become a tool to silence and intimidate citizens into submitting to a particular course of action, or rather inaction. Strategic Lawsuits Against Public Participation are meritless suits solely used to drag the opposing party through protracted litigation to dry up their resources. While common in the United States of America, such lawsuits have become ubiquitous in India as well. For instance, the Adani Group in 2019filed six defamation cases against The Wire worth INR 300 Crores. RK Pachauri, former TERI Chief, made an INR 1 Crore claim against a lawyer for publishing her client's statements accusing the former of sexual harassment. This method of silencing stops democracy in its tracks and is exacerbated by

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India's judicial backlog and archaic laws. This especially targets minorities and women who wish to speak up against perpetrators. They are,stifled and worn down by the imminent threat of a lawsuit against them. This hampers not only one's right to free speech but also threatens public participation throughout the country.In this paper,we have demarcated the modus operandi of how these suits are filed, how they proceed and their chilling effect on free speech.We have also examined the various legislations promulgated by other nations to curb such lawsuits and the effect they have had on increasing public participation. Lastly, we proceed to analyse India's defamation laws and suggest policy changes to deter such lawsuits in their tracks.

I. INTRODUCTION

Strategic Lawsuits Against Public Participation, otherwise known as SLAPPs, are 'meritless' lawsuits. These lawsuits are filed to intimidate and silence petitioners from indulging in their right to free speech.[1] The term 'SLAPP' was coined by two professors, George W. Pring and Penelope Canon, at the University of Denver, United States.[2] The professors defined SLAPPs as, "*a civil claim for money damages, filed against a non-governmental individual or organisation having their foundation on a substantive issue of some public or societal significance*."[3] New York Supreme Court Justice Nicholas Colabella

[1]Penelope Canan and George W Pring, 'Strategic Lawsuits Against Public Participation' (1988) 35 Social Problems 506, 506.
[2]Ibid 508.
[3]Ibid 506.

has cited SLAPPs as lawsuits, "*without any legitimate cause that solely served private interests to stop citizens from exercising their political rights or to punish them for having done so*."[4]

The term originated after a detailed study wherein the professors recognised a set pattern of cases frequently occurring in the United States. The first aspect of this pattern is that the rulings in such lawsuits are staggeringly in favour of the SLAPP target (a person or organisation against whom a SLAPP has been filed).[5] The second aspect is that the burden of the lawsuit is almost exclusively borne by the SLAPP target, despite his or her eventual victory. Finally, Pring observed that the SLAPP target endured the agony of legal costs piling in addition to the mental suffering of the judicial proceedings.[6]

The third aspect; a SLAPP filer (a person or organisation who files a SLAPP) does not file the lawsuit with the objective of obtaining a favourable award. The lawsuit is not a means to an end but rather the end itself wherein the SLAPP filer's true aim was to stifle, burden and intimidate the SLAPP target. Thus, the SLAPP is ordinarily a spiteful act against the SLAPP target who possibly spoke out or protested against the SLAPP filer's activities or undermined the SLAPP filer's reputation or image they built. The fourth aspect of a SLAPP is that it serves as a notice to others as well of the potential consequences of locking horns against the SLAPP filer.[7] Canan and Pring coined the silencing of the public at large as the 'Chilling Effect'.[8] The term embodies the process wherein SLAPPs stifle the public and ensure that their willingness to participate in the democratic process or pursue their rights is suppressed.

[4]*Gordon v Marrone* [1992] 590 NYS 2d 649.
[5]Canan and Pring (n 1) 514.
[6]Canan and Pring (n 1) 510.
[7]George W Pring, 'SLAPPs: Strategic Lawsuits Against Public Participation' (1989) 7 Pace Environ Law Rev 1, 6.
[8]Canan and Pring (n 1) 514.

SLAPPs, also known as 'Deep Pockets v. Free Expression'[9], are dominantly filed by wealthy industrialists, entrepreneurs, government officials and politicians.[10] On the other side, the frequent targets of SLAPPs are reporters, NGOs, newspapers, environmental activists and bloggers.[11] SLAPPs are omnipresent, from the United States[12] to Canada to the majority of Europe,[13] and they have gained prevalence in India as well in the past few years. Large corporations find it remarkably painless to drag smaller organisations through India's tedious litigation process. From Tata Sons Ltd.[14] to the Reliance Group,[15] India's largest corporations are notoriously known to use their excessive litigious teams to subdue proponents of free speech. Such lawsuits interrupt the democratic process, citizens' freedom of speech, and the right to petition availed under Articles 32 and 226 of the Constitution of India, 1949 ('Indian Constitution).

Thus, in this paper, we have dismantled SLAPPs into their core components and effects for easy recognition, action and prevention. In part II, the methods through which SLAPPs are filed and how they proceed are detailed. In part III, the fourth aspect of SLAPPs: the Chilling Effect's impact on the public is noted. In part IV, anti-SLAPP legislation in the USA, Canada and the United Kingdom has been

[9]Ujwala Uppaluri, 'SLAPP Suits as Intimidation' (*Law and Policy*, 2020) <http://asu.thehoot.org/story_popup/slapp-suits-as-intimidation-6811> accessed 28 January 2022.
[10]Andrew L Roth, 'Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet' (2016) BYU Law Rev 741, 742.
[11]Ibid 745.
[12]Canan and Pring (n 1) 510.
[13]'SLAPPs Against Journalists Across Europe', (*Media Free Rapid Response*, March 2022) <https://www.article19.org/wp-content/uploads/2022/03/A19-SLAPPs-against-journalists-across-Europe-Regional-Report.pdf> accessed 14 February 2022.
[14]Ujwala Uppaluri, 'On the Unfortunate Rise of the Indian SLAPP Suit', (*The Centre for Internet and Society*, 27 May 2013) <https://cis-india.org/a2k/blogs/unfortunate-rise-of-india-slapp-suit> accessed 20 June 2022.
[15]Aditya AK, 'Another SLAPP in the Face? Anil Ambani's Reliance Group now has The Wire in its Crosshairs', (*Bar and Bench*, 26 November 2018) <https://www.barandbench.com/news/another-slapp-in-the-face-anil-ambanis-reliance-group-now-has-the-wire-in-its-crosshairs> accessed 20 June 2022.

examined. In part V, we have analysed India's current defamation laws, and in part VI, we have proposed recommendations to curb SLAPPs. Lastly, in part VII, we have concluded.

II. ANALYSING THE VARIOUS ROUTES FOR FILING SLAPPS AND HOW THEY PROCEED

In this part of the paper, we will analyse the predominant paths through which SLAPPs are filed in India, examine the process of such lawsuits, and detail how the threat of a SLAPP is a SLAPP in itself.

A. The Prevalent Paths to File SLAPPS in India

The prevalent route for filing a SLAPP in India is defamation, amongst other avenues, including trademark violations and obtaining injunctions. India's libel and slander laws are a relic of English colonial laws, which were particularly convenient for suppressing and stifling free speech to curb any notions of a revolt. As a result, India continues to uphold both civil and criminal defamation. In contrast, the United Kingdom ("**UK**"), which propagated such laws, have themselves abolished criminal defamation.[16] Criminal libel was repealed in the UK in 2010, and The Coroners and Justice Act 2009 came into effect and further abolished the offences of seditious libel, defamatory libel, obscene libel and sedition.[17]

a. Defamation as the Modus Operandi for Filing SLAPPs

§499 of the Indian Penal Code, 1860 ('IPC') lays down the elements of criminal defamation,[18] while §500 IPC stipulates the punishment– imprisonment for up to two years or a fine or both.[19] In addition to

[16]Coroners and Justice Act 2009, s 73.
[17]Coroners and Justice Act 2009, s 73.
[18]The Indian Penal Code 1860 (45 of 1860), s 499.
[19]The Indian Penal Code 1860 (45 of 1860), s 500.

criminal defamation, SLAPP filers opt for civil defamation as well so as to intimidate the party. Tortuous in nature, civil defamation allows petitioners to claim hefty sums as damages. A key example where defamation was used to silence free speech was the case of *Tata Sons Ltd. v Greenpeace International & Anr.*[20] ("**Tata Sons**"). In Tata Sons, the NGO Greenpeace International was sued for raising awareness about Tata Sons' industrial activity at the Dharma Port, which adversely impacted Olive Ridley Sea Turtles. For such, they had created a game, 'Turtles v. Tata', where the turtles had to escape the Tata Logo (similar to Pacman). Herein, the SLAPP filer sued for defamation as well as a permanent injunction.[21] While the case prolonged for a long period, this case was ruled in favour of the defendants. It was held they were well within their right of freedom of speech to criticize the work of Tata sons.[22]

The Crop Care Federation as well used this prevalent *modus operandi* in the case, *Crop Care Federation v Rajasthan Patrika*.[23] In that case, Rajasthan Patrika published a report on the alleged level of pesticides used by corporations and the harmful effect they had on both flora and fauna. Assuming the role of a parental figure to all insecticide and pesticide manufacturers, the Crop Care Federation sued the newspaper for allegedly defaming the association. However, the Federation was never named in the report, nor was there any indirect or direct reference to them,[24] an essential requirement of defamation.[25] Thus, the action failed to contain a key averment for defamation.

[20]*Tata Sons Ltd v Greenpeace International & Anr* 178 (2011) DLT 705.
[21]*Tata Sons Ltd v Greenpeace International & Anr* 178 (2011) DLT 705, para 16.
[22]*Tata Sons Ltd v Greenpeace International & Anr* 178 (2011) DLT 705, para 29.
[23]*Crop Care Federation of India v Rajasthan Patrika (Pvt) Ltd & Ors* MANU/DE/3251/2009.
[24]*Crop Care Federation of India v Rajasthan Patrika (Pvt) Ltd & Ors* MANU/DE/3251/2009, para 15.
[25]*Union Benefit Guarantee Company Ltd v Thakorlal P Thakor & Ors* AIR 1936 Bom 114, para 25; *Eastwood v Holmes* [1858] 1 F&F 34, 37.

Order VII Rule 11 of the Code of Civil Procedure, 1908 ("**CPC**") requires the cause of action to be disclosed; thus, there must be averments.[26] A maintainable action of civil defamation must contain averments that satisfy the core essentials of defamation and, therefore, completely disclose the cause of action. The Hon'ble Supreme Court has previously held that a plaint that fails to disclose a right to sue is a vexatious and meritless plaint.[27] Judges have the authority to exercise their powers under Order VII Rule 11 CPC if the necessary averments are not fulfilled.[28] Thus, the Delhi High Court itself declared the lawsuit as a SLAPP[29] wherein the SLAPP filers had utilised civil defamation to intimidate and silence their critics.

b. Other Avenues Used to File SLAPPs

In the case of Tata Sons, the SLAPP filers, in addition to defamation, claimed a decree for damages to the extent of INR 10 crores along with a decree for a permanent injunction against Greenpeace, the SLAPP target.[30] In addition to suing for defamation, the lawsuit also claimed trademark violation on behalf of Greenpeace for using their logo 'T' in their online games. It was alleged that s 29(4) of the Trademarks Act, 1999, had been violated by the SLAPP targets. Trademark violation requires a commercial benefit to the violator; however, herein, the logo was solely used to raise awareness about the impact Tata's project had on Olive Ridley Turtles in Odisha.[31] Hence, there was no exploitation, as the plaintiffs alleged, because there was no commercial advantage.

Thus, apart from defamation herein, a trademark violation was another path availed by the SLAPP filer. However, it is well settled that

[26]Code of Civil Procedure 1908 (5 of 1908), Order 7 Rule 11.
[27]*Dahiben v Arvindbhai Kalyanji Bhanusali* (2020) 7 SCC 366.
[28]*T Arivanandam v T Satyapal* AIR 1977 SC 2421, para 5.
[29]*Crop Care Federation of India v Rajasthan Patrika (Pvt) Ltd & Ors* MANU/DE/3251/2009, para 23.
[30]Tata Sons Ltd (n 21).
[31]*Tata Sons Ltd v Greenpeace International & Anr* 178 (2011) DLT 705, para 1.

Trademark parodies and satire do not amount to trademark violation.[32] Therefore, the Court found no trademark violation or defamation as it was a parody simply used to raise awareness.

In the case, *M/S Menaka & Co. v M/S Arappor Iyakkam*,[33] Menaka & Co, the SLAPP filer sought an ad-interim injunction against Arappor Iyakkam, the SLAPP target.[34] The SLAPP target continued to publish information about the SLAPP filer despite the continuance of a defamation lawsuit. Order XXXIX CPC, Rule 2 provided the SLAPP filer with the power to apply to the Court for an ad-interim injunction to restrain the SLAPP target from committing the breach of contract or injury complained of.[35] Rule 1 of Order XXXIX is mainly concerned with property suits; Rule 2, however, has attained a wider ambit due to judicial precedents.[36] Nevertheless, ad-interim injunctions cannot be attained in defamation suits unless malice is proven.

Moreover, the willingness to 'justify' one's comments denies any motion for a temporary injunction.[37] The sole claim to justify is sufficient under English law, and the same precedent has been followed in India.[38] In this case, the willingness to justify their comments was made preliminarily. However, the case continued till a complete judgment was provided. Hence, although the judgment was in favour

[32]*Civic Chandran and Ors v C Ammini Amma and Ors* (1996) 1 KLJ 454, para 6: "*the purpose of reproduction of artistic work i.e. counter drama was not misappropriation, to produce a play similar to the original. Rather, the purpose was to criticise the idea propagated by the original drama, and to expose to the public that it had failed to achieve its real object. Since copying was for the purpose of criticism, it amounted to fair dealing and did not constitute infringement of the copyright*."; *M/s Blackwood and Sons Ltd & Ors v AN Parasuraman and Ors* AIR 1959 Mad 410, para 86.
[33]*M/S Menaka & Co v M/S Arappor Iyakkam* 2019 SCC OnLine Mad 39165.
[34]*M/S Menaka & Co v M/S Arappor Iyakkam* 2019 SCC OnLine Mad 39165, para 1.
[35]The Code of Civil Procedure 1908, Order 39, Rule 2.
[36]Menaka & Co (n 34).
[37]*Fraser v Evans* [1969] I All ER 8; Alastair Mullis, Richard Parkes, Godwin Busuttil, *Gatley on Libel and Slander* (Sweet and Maxwell 2013) 641.
[38]*Green v Associated Newspapers Ltd* [2004] EWCA Civ 1462; *Taseko Mines Limited v Western Canada Wilderness Committee* [2017] BCCA 431.

of the SLAPP target, the SLAPP filers had already achieved their objective by then. By then, the SLAPP filers had already succeeded.

The abovementioned cases are the dominant course of action to file SLAPPs. We have delineated each in detail because it is challenging to recognise SLAPPs until the case concludes. However, by demarcating the various paths used, we hope to increase identification at an earlier stage so the required steps can be made without the SLAPP target suffering through a protracted lawsuit.

B. Analysing How SLAPPs Proceed in India

In February 2011, *The Caravan* Magazine published a piece on Arindam Chaudhary titled, "*Sweet smell of success – How Arindam Chaudhuri made a fortune of the aspirations and insecurities of India's middle classes*."[39] Arindam Chaudhuri, the then director of the Indian Institute of Planning and Management, immediately sued the magazine for defamation.[40] However, he also included in his plaint the publishing house, Penguin, for publishing a book which contained the article (Siddhartha Deb's The Beautiful and the Damned) as well as Google India, which Mr Chaudhary felt was "distributing and giving coverage to the defamatory article".[41] The SLAPP filer additionally filed a defamation lawsuit worth INR 50 Crores via the Indian Institute of Planning and Management.[42]

Insidiously, the SLAPP targets were sued in Silchar Assam, although both the SLAPP filer and SLAPP target majorly operated in New Delhi.[43] In Silchar, the civil court granted an injunction against the

[39]Siddhartha Deb, 'Sweet Smell of Success' (*The Caravan*, 31 January 2011) <https://caravanmagazine.in/reportage/sweet-smell-success-republished> accessed 26 June 2022.
[40]*The Indian Institute of Planning and Management v Delhi Press Patra Prakashan P Ltd Ors* CS (OS) No. 3354 of 2015, para 2.
[41]Ibid, para 16.
[42]Deb (n 39).
[43]Kian Ganz, 'SC Orders IIPM "bogus litigation" vs Caravan Transferred from Silchar to Delhi HC', (*Legally India*, 12 August 2015)

article published by The Caravan.[44] A single judge vacated this injunction in the Delhi High Court ('DHC') in February 2018. However, on IIPM's appeal, the injunction was further restored by a division bench in the DHC in April in an ex-parte order.[45] The order for injunction was finally dismissed in November 2018 by DHC, which upheld the single judge's order to vacate the injunction. This process continued for seven years[46] till; finally, the Caravan Magazine received an amenable order, but till then, the SLAPP filers had achieved their objective of continuing the case and draining the SLAPP target's resources through unnecessary and onerous litigation.

Similarly, in the case of *M/S Menaka & Co. M/S Arappor Iyakkam*,[47] the SLAPP targets had published material on certain connections between the Local Administration Minister of Tamil Nadu and contractors and builders belonging to the same village as the minister.[48] The SLAPP targets, on this pretext, had also filed various complaints before the Directorate of Vigilance and Anti-corruption, Chennai. In furtherance, a writ Petition had also been filed, seeking a writ of Mandamus to direct the Vigilance and Anti-Corruption Department to register an FIR based on the aforementioned report.[49] The SLAPP targets had further sought the constitution of a Special Investigation Team to conduct a time-bound enquiry.

<https://www.legallyindia.com/the-bench-and-the-bar/sc-orders-iipm-bogus-litigation-vs-caravan-transferred-from-silchar-to-delhi-hc-20150812-6424> accessed 18 June 2022.

[44]Siddhartha Deb, 'Delhi High Court Vacates Injunction Against the Caravan's IIPM Cover Story; The Magazine Re-Publishes It', (The Caravan, 20 February, 2018) <https://caravanmagazine.in/vantage/delhi-high-court-vacates-injunction-caravans-iipm-cover-story> accessed 20 June 2022.

[45]Ganz (n 43).

[46]Deb (n 39).

[47]*M/S Menaka & Co v M/S Arappor Iyakkam* 2019 SCC OnLine Mad 39165, para 5.1.

[48]Ibid.

[49]*M/S Menaka & Co v M/S Arappor Iyakkam* 2019 SCC OnLine Mad 39165, para 5.3.

In this case, the SLAPP filers filed a plaint for Order XXXIX Rule 1 and 2 to cease the SLAPP targets from holding any press conferences or distributing any defamatory material against the petitioners. The SLAPP filers claimed that the SLAPP target's repeated publication of such allegations amounted to an interference with the judicial process, and therefore a pre-trial injunction should be granted. The SLAPP targets argued that they had sourced their comments from multiple Right to Information ("**RTI**") documents collected by them and, in furtherance, agreed to justify their statements.[50] The sole claim to justify one's comments is sufficient to withhold any temporary injunctions.[51] Additionally, the SLAPP filer was a governmental agency; thus, the Court recognised its need to be 'thick-skinned' and disallowed a temporary injunction.[52]

Herein, the judge accepted the SLAPP target's defence and further agreed that the suit matched the SLAPP ingredients. Albeit, no orders as to costs were passed. Hence, the case turned in favour of the SLAPP targets. However, in practicality, they had suffered as they still had to bear the cost of defending themselves in a frivolous suit. This was the original intention of the SLAPP filers, and although the Court recognised it, its hands were tied because the Court wished to refrain from entertaining any such proposition.

These episodes not only portrayed how frivolous lawsuits can exist for extended periods, but they also demonstrated how the slightest interaction with a SLAPP target could potentially make one a SLAPP

[50]*M/S Menaka & Co v M/S Arappor Iyakkam* 2019 SCC OnLine Mad 39165, para 6.2.
[51]*Fraser v Evans* [1969] I All ER 8; *Gatley on Libel and Slander* (Sweet and Maxwell 1981) 641.
[52]*M/S Menaka & Co v M/S Arappor Iyakkam* 2019 SCC OnLine Mad 39165, para 27; *Kartar Singh & Ors v State of Punjab* AIR 1956 SC 541: "*Those who fill a public position must not be too thin skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they know from the bottom of their hearts were undeserved and unjust; yet they must bear with them and submit to be misunderstood for a time*."

target as well. This fear of an impending lawsuit can potentially fragment society, wherein multiple proponents of free speech will lose the much-required support of the public. This lowered participation of the media and public alike in the democratic process is known as the 'chilling effect'.

III. THE CHILLING EFFECT

Once a SLAPP is filed, the dispute essentially transforms in three distinct ways between the SLAPP filer and the SLAPP target. *First*, the issue changes in nature; it turns from a political one to that of a judicial one once the SLAPP proceeds. *Second*, the forum of the issue transforms as well. The controversy, earlier in public purview, is now limited to the confines of the Court and becomes a private issue that concerns two parties. This is a significant transformation because the rules applied to the parties' interactions are completely altered when entering formal legal proceedings. SLAPP filers rely on this transition; multiple SLAPP filers believe they have a significant advantage in the courtroom in comparison to the political forum.[53] The reputation of the SLAPP target will not precede himself or herself in the courtrooms as it did in the public eye. Further, the SLAPP filer has the better ability to channel his or her resources in the courtroom through expensive lawyers and ensure the case is burdensome.[54] *Lastly*, the roles transform as well once a SLAPP is filed. The SLAPP target, before the SLAPP, fulfilled the role of a complainant in the public forum but now is in a defendant's role. This ensures his or her resources are diverted from the public forum towards the lawsuit. This limits the SLAPP target's public participation and is essentially the first front of the 'chilling effect' SLAPPs have. The SLAPP does not solely deter the defendants of a SLAPP from freely participating in political debates

[53]Roth (n 10) 748.
[54]Roth (n 10) 748.

afterwards, but it also ensures that other conscientious citizens do not utilise their right to speak up against injustices in front of them.[55]

Dixie Sefchek, a defendant in a SLAPP and the leader of Supporters To Oppose Pollution ("**STOP**"), claimed that the chilling effect is "*like a death threat to your organisation. People, organisations, and churches stop giving money. Individuals resigned their memberships*."[56] The organisation was fighting against the opening of a landfill when Mrs. Sefchek was SLAPPed. The SLAPP was later dropped, and the landfill was ordered to be shut down after a few years of operation because it contaminated the groundwater.[57] However, the effect of the SLAPP was pervasive enough in that the organisation barely survived. Legal costs piling and the loss of public support drove the organisation to near bankruptcy.

Studies by Canan and Pring further illustrate that individuals aware of SLAPPs are more cautious about exercising their freedom of speech than those who have never heard of such suits.[58] Hence, the mere knowledge of a SLAPP can act as a deterrent towards voicing one's concerns.[59] This phenomenon has only been exacerbated over the years due to our increased connectivity via the web.

A. The Internet's Effect on the Chilling Effect

Pring and Canan sprung the idea of SLAPPS and the chilling effect in the 1980s. Since then, internet connectivity has skyrocketed, and along with this, the age of information dissemination has bloomed. A tremendous technological advancement, however, in relation to

[55]Timothy D Biche, 'Thawing Public Participation: Modeling the Chilling Effect of Strategic Lawsuits Against Public Partipation and Minimizing its Impact*'* (2013) 436 Southern Cal Interdisc Law J 22, 24.
[56]Sharon Beder, 'The SLAPP Chill Effect' (*Herinst*, 2017) <https://www.herinst.org/BusinessManagedDemocracy/environment/SLAPPs/chill.html> accessed 26 June 2022.
[57]Ibid.
[58]Canan and Pring (n 1) 514.
[59]Roth (n 10) 752.

SLAPPs, has meant that all netizens are instantly aware of any litigious activities. Therefore, the news of implicit tactics to discourage public participation, such as coercive litigation, reaches the public significantly. Hence, the chilling effect has certainly been amplified because of the internet.

Furthermore, Internet audiences throughout the world certainly have considerable persuasive power. Thus, the news presented and the opinions formed are correlated to the real world. Therefore, when the more significant population notices that they can be arbitrarily sued for online views, their participation drops.[60]

The chilling effect can be equated to the aftermath of a nuclear blast. The blast kills and harms those in the immediate impact zone. In terms of a SLAPP, these are the SLAPP targets that are directly affected. However, the deadlier impact is felt later. The bombs dropped in Hiroshima, and Nagasaki destroyed generations to come. The people were left in shambles. The radiation created various deformities and abnormalities and ensured the residents could not establish a routine for years to come. Thus, multiple people left the area, no new businesses joined, and the area remained lifeless for years to come.

Similarly, the chilling effect of a SLAPP impacts public participation and stifles the democratic process. The public's keenness to join political discourses impacting society languishes. A lack of a concerted opposition kills any engaging public debate and leaves a power vacuum that further empowers the SLAPP filers.[61] Thus, it is pertinent to prevent the nuclear blast before any damage can be done, especially considering the internet's domino effect.

[60]Roth (n 10) 752.
[61]Tessa L Dysart and Marc A Hearron, 'Strategic Lawsuits Against Public Participation: An Analysis of SLAPP Suits in the United States' (2003) 37 Loy LA L Rev 79, 81.

To curb such gross abuse of power, various nations have introduced anti-SLAPP laws.

IV. ANALYSING OTHER NATION'S ANTI-SLAPP LAWS

Anti-SLAPP laws largely follow a straightforward narrative that is majorly drawn from the work of Canan and Pring and their theoretical framework of SLAPPs. Canan and Pring's research was primarily limited to the freedom of speech under the petition clause of the United States Amendments.[62] This, however, has not limited legislators as many existing laws have expanded the definition of a SLAPP to include any suit based on "speech on an issue of public interest or concern."[63]

Anti-SLAPP laws have the larger objective of reversing the burden on the SLAPP target to the SLAPP filer in the initial stages of the lawsuit. With this in mind, multiple anti-SLAPP legislations have been enacted. A few states in the United States of America ("**US**A") have successfully reversed the burden by providing a mechanism that bestowed an expedited review of potential SLAPPs, by way of a motion named 'Special Motion to Strike'.[64] In California, the anti-SLAPP statute awards attorney costs to the SLAPP targets if they are successful in their motion to strike.[65] These statutes also allow for the quick and costless disposal of a suit if deemed meritless and frivolous.

To further understand anti-SLAPP legislation and how it can be utilised in India's context, in this part, we have analysed the anti-SLAPP laws enacted by the USA, Canada and the United Kingdom.

[62]George W Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Temple University Press 1996).
[63]*Palazzo v Alves* [2008] 944 A2d 144, 150, para 11.
[64]Society of Professional Journalists, 'A Uniform Act Limiting Strategic Litigation Against Public Participation: Getting it Passed' (*Society of Professional Journalists*, 2004) <https://www.spj.org/pdf/antislapp.pdf> accessed 28 June 2022.
[65]California Civil Procedure Code 2015, s 425.16.

A. Anti-SLAPP Laws in the USA

The United States is the foreground for SLAPPs; the ease of filing lawsuits and the amalgamation of the wealthy in the US gave rise to the birth of SLAPPs in the country.[66] Hence, due to SLAPPs prolonged history and the USA's federal nature, the nation has complex anti-SLAPP laws. At the national level, apart from Supreme Court cases, there is a lacuna of legislation against SLAPPs. However, out of fifty, twenty-nine states and Guam have some variant of anti-SLAPP laws.[67] At the federal level, the Supreme Court of the United States has applied the New York Times Doctrine to deal with SLAPPs effectively and efficiently.[68] Whereas at the state level, California represents the best anti-SLAPP measure.

a) The New York Times Doctrine

The New York Times doctrine was propounded specifically for defamation cases. The doctrine ensures that the burden of proof in defamation cases shifts onto the SLAPP filer if the case is of public interest.[69] USA's defamation laws place a significant burden on the SLAPP target. For example, suppose the SLAPP filer can establish that the SLAPP target's comments were in some way derogating the plaintiff's reputation; in that case, the Court operates under the presumption that the statements of the SLAPP target were false and that there was malice on his or her behalf.[70] The defences of truth and qualified privilege are available to the defendant, but the onus of proof and discovery is greater on the SLAPP target than the plaintiff.[71]

[66]Canan and Pring (n 1) 507.
[67]Roth (n 10) 752.
[68]*New York Times Co v Sullivan* [1964] 376 US 254.
[69]Ibid, para 267.
[70]*Tavoulareas v Piro* 817 F 2d 762 (DC Cir 1987), para 767.
[71]Rodney Wilts, Oliver Brandes & Bram Rogachevsk, 'The West Coast Environmental Law SLAPP Handbook' (2002) WCE Law 1, 33.

Hence, even if the defendant succeeds, the taxing procedure, coupled with litigation costs, profoundly impacts the defendant.

In the case, *New York Times v Sullivan*, four preachers had placed an advertisement in the New York Times stating that the reason behind arresting Reverend Martin Luther King was solely to discredit him and tarnish his reputation.[72] The city commissioner sued the preachers on the grounds of defamation and initially won. When appealed to the Supreme Court, the Court held that comments made with regards to public officials required the necessary prerequisite of 'actual malic for it to be considered defamatory.[73] The Court famously quoted, "public officials can only be defamed in their official capacity if the offending statement was made with knowledge that it was false or with reckless disregard of whether it was false or not."[74] Hence, in the case of public officials, the Court significantly decreased the burden of proof on the defendants. The Court also laid down that the plaintiff would have to prove such knowledge with "the convincing clarity which the constitutional standard demands."[75]

The Court noted that the primary reason for increasing the burden on the plaintiff to prove his or her case was keeping the chilling effect in mind. A strong democracy, they remarked, needed to be protected against "the pall of fear and timidity imposed upon those who would give voice to public criticism."[76] This doctrine, initially only applicable to public media and public officials' cases, subsequently increased its application.[77]

[72]New York Times Co (n 68), para 254.
[73]New York Times Co (n 68), para 14.
[74]New York Times Co (n 68).
[75]New York Times Co (n 68), para 285.
[76]Ibid.
[77]*Gertz v Robert Welch Inc* [1974] 418 US 323, para 19; *Curtis Publishing C. v Butts* [1967] 388 US 130, para 9; *Hustler Magazine Inc v Falwell* [1988] 485 US 46, para 15.

Further, in the case *Philadelphia Newspapers v Hepps*,[78] three standards were specified for ascertaining defamation cases. *First*, if the case involved a public official or was of public concern, the New York Times standard would be employed. *Second*, if the concern involved a private individual but was nevertheless of public concern, the burden of proof would remain with the plaintiff. However, the standards would drop to a 'less forbidding' stance. Lastly, if the issue is of private concern and involves a private individual, the common law principle of solely proving any harm to reputation stands.

Thus, following these judgements, there was a shift in the burden for public nature cases. SLAPPs predominantly involve issues of public concern and defamation. Hence, the requirement of 'actual malice' and shifting the burden of proof was a significant step towards thwarting SLAPPS.

b) California's Anti-SLAPP Legislation

California's anti-SLAPP legislation was the first measure taken against SLAPPs across the world. It was enacted in 1992 and has since then become the model statute for other states in the US and common law nations.[79] The statute ensures that a "*cause of action against a person arising from any act of that person in furtherance of the person's right to petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike*."[80] This special motion to strike contains a twofold test. The first test places the burden on the defendant to make a prima facie case that the cause of action arose from his or her utilisation of their right to petition or freedom of speech in nexus to a public issue.[81] If the defendant can qualify the test, the burden shifts on

[78]*Philadelphia Newspapers v Hepps* [1986] 475 US 767, para 767.
[79]Roth (n 10) 748.
[80]California Civil Procedure Code 2015, s 425.16(b)(1).
[81]California Civil Procedure Code 2015, s 425.16(b)(1); *Birkner v Lam* [2007] 156 Cal App 4th 275, 280–81.

the plaintiff to demonstrate the probability of his or her claim prevailing.[82] If the plaintiff is unable to discharge his or her burden, he or she must provide the defendant with reasonable attorney costs.[83]

The Court, during this special motion, takes into account both the parties' pleadings, affidavits and submitted evidence. Hence, if the Court has accepted the plaintiff's evidence as accurate, the defendant must submit evidence to show that the activity is in public interest to encourage public participation. The special motion before the trial has two key advantages. *First*, this legislation effectively harps the chilling effect that would otherwise affect the SLAPP target and community by acting at an early stage and providing reasonable attorney costs. *Second*, this special motion effectively handles the double-edged challenge which SLAPPs present. The constitutional right to access the courts when an individual feels they have been wronged, in addition to the right to freedom of speech, especially in cases of public concern, are effectively balanced by this legislation.

B. Canada's Anti-SLAPP Legislation

In 2015, the province of Ontario enacted Canada's first anti-SLAPP legislation, The Protection of Public Participation Act.[84] The Act introduced Section 137.1 to 137.5 to Ontario's Courts of Justice Act. The Act, along with specific revisions made by the Supreme Court of Canada, has led to a multi-fold test to hinder any SLAPPs.[85] The Act first mandates that any motion to dismiss a defamation suit be heard within 60 days from the date it is filed.[86] However, the notice of motion must be on the basis that the comments made were of public interest. This expedited summary mechanism is laid down under S.137.1 of the Act. For the motion to be dismissed, the defendant has the onus to

[82]*Birkner v Lam* [2007] 156 Cal App 4th 275, 280–81.
[83]California Civil Procedure Code 2015, s 425.16(b)(1)(c).
[84]The Protection of Public Participation Act 2015.
[85]*Bent v Platnick* (2020) SCC 23, para 8.
[86]Courts of Justice Act RSO 1990, c C43 s 137.2(2).

"satisfy the judge that the proceedings arose from an expression relating to a matter of public interest." This onus is known as the "threshold burden."[87]

If the defendant proves his claim to the Court on a balance of probabilities, then the burden shifts to the plaintiff. The plaintiff needs to show to the Court *first* that his or her claims are legally sound and are supported by evidence that has a probability of winning the suit. *Second*, after the plaintiff has established the claim, he or she must also prove to the Court that the defences presented by the defendant are meritless. *Third*, the plaintiff must prove to the Court that he has or is highly likely to suffer harm because of such comments. *Last*, the plaintiff has the additional burden to prove to the Court that the public interest in letting the lawsuit continue outweighs the defendant's rights to freedom of speech and public participation.[88]

Thus, the Ontario government substantially increased the burden on the plaintiff. As a result, the plaintiff could only sustain the suit if it was legitimate, in addition to accelerating the court proceedings through a summary mechanism. However, it is pertinent to note that the increased burden on the plaintiff does not hinder legitimate cases.

C. The UK's Anti-SLAPP Legislation

The UK, in 2013 introduced the Defamation Act 2013. It has substantially altered the *modus operandi* of filing libel lawsuits in the UK. Before 2013, the UK was the hub for libel lawsuits because UK's laws made it decidedly easier to win defamation lawsuits than the home countries of the SLAPP filer.[89] SLAPP filers used to come solely to the UK for Libel Tourism, also known as forum shopping, even if their

[87] *1704604 Ontario Ltd v Pointes Protection Association* (2020) SCC 22, para 5.
[88] Ibid.
[89] David Carnes, 'Libel Law: Past, Present and Future' (*All About Law*, 17 December 2019) <https://www.allaboutlaw.co.uk/commercial-awareness/legal-spotlight/libel-law-past-present-and-future-> accessed 30 June 2022.

claims had a minimal presence in the UK.[90] This is, however, no longer possible because of the new Act, which also implicitly targets SLAPPs.

The Act requires proof of special damage. Known as the 'serious harm' test, the plaintiff must prove before the Court that the comments made have or are likely to cause serious harm to the plaintiff's reputation.[91] Further, businesses' right to sue has been limited only to cases where they have or are likely to suffer "serious financial loss" due to the defendant's public participation. The Defamation Act has also further increased the ambit of "privilege" under libel to include scientific papers, conferences, website operators for the comments on the website (if they have a report and remove policy), articles containing information collected from public companies or press conferences, government proceedings reports and international government and court proceedings.[92] Finally, the Act also includes a 'public interest defence', which can be availed by the defendant if he or she can prove that the statement was regarding a matter of public interest or believed that it was in the interest of the public to make that statement.[93]

Thus, this Act has *first* effectively altered the route of SLAPPs by allowing multiple defences and privileges to the defendant. *Second*, the Act's plain and unequivocal laws have clarified the previously ambiguous libel laws. *Third*, the clarification of the law promotes freedom of speech because those engaging in their freedom are provided with a roadmap of the information they can disseminate. *Finally*, the obscureness of laws frequently results in many erring on the side of caution.[94]

[90]Trevor C Hartley, 'Libel Law' and Conflict of Laws' (2010) 59 The Int Comp Law Q 26, 28.
[91]The Defamation Act 2013, s 1(1).
[92]The Defamation Act 2013, s 1(2).
[93]The Defamation Act 2013, s 4(1).
[94]Carnes (n 89).

Unfortunately, this Act does not effectively hamper the chilling effect as there is no expedited process in defamation cases. The SLAPP target still has to bear the burden of litigation along with its expenses.

All nations, while dealing with SLAPPs, have mainly targeted their defamation laws. It is the most frequented avenue to file SLAPPs. Thus, in the next part of this paper, we have analysed India's defamation laws to find a better redressal for SLAPPs filed through India's defamation laws.

V. ANALYSING INDIA'S DEFAMATION LAWS

In India, the Constitution under Article 19(1) grants various freedoms to its citizens.[95] Article 19(2), however, imposes multiple restraints on the freedom of speech and expression granted under Article 19(1)(a), inclusive of defamation, criminal contempt and incitement of an offence.[96] Defamation is punishable under both civil and criminal law. Under the ambit of civil law, defamation is punishable under the law of torts, whereby the punishment is in the form of damages. Under criminal law, on the other hand, defamation is an offence under the Indian Penal Code and is a bailable, non-cognisable and compoundable offence.[97]

Civil defamation requires the statement to be only false and without the consent of the party allegedly defamed.[98] In a criminal suit, the statement must intend to defame and have malicious intent on the party publishing the statement.[99] Criminal defamation has a higher onus with various exceptions available to the defendant, such as truth for the public good, the opinion in good faith regarding the discharge of public

[95]The Constitution of India 1950, art 19(1).
[96]The Constitution of India 1950, art 19(2).
[97]The Indian Penal Code 1860 (45 of 1860), ss 499 and 500.
[98]*Alexander v North Eastern Railway Co* (1885) 6 B & S 340.
[99]The Indian Penal Code 1860 (45 of 1860), s 499.

functions by a public servant, opinions about a criminal or civil case in good faith, etcetera.[100] The issue, although, is that such defences are applicable only at the trial stage; till then, the case has already been prolonged for years amidst the backlog of cases in the courts of India.[101] In this part of the paper, we have analysed the development of defamation in India through various case laws.

A. The Development of Defamation Through Case Laws

In the landmark case of *R. Rajagopal v State of Tamil Nadu* ('R. Rajagopal'),[102] India applied the New Tork Times Sullivan test for civil defamation cases.[103] The Supreme Court held that

> "*In the case of public officials, it is obvious right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth*."[104]

Subsequently, the Delhi High Court has also affirmed this test and extended its application from "public officials" to other entities who perform "public functions.[105] However, the way defamation cases are decided in the lower judiciary continues to be the same.[106] Internal

[100]Ibid.
[101]Roshni Sinha, 'Examining Pendency of Cases in the Judiciary (*PRS Legislative Research*, 2019) <https://www.prsindia.org/theprsblog/examining-pendency-cases-judiciary> accessed 30 June 2022.
[102]*R Rajagopal v Tamil Nadu* (1994) SCC (6) 632.
[103]Ibid, para 11.
[104]Ibid, para 26.
[105]*Petronet Lng Ltd v Indian Petro Group and Anr* (2009) 158 DLT 759, para 69.
[106]Gaurav Mishra & Nidhi Singh, 'Defamation and Free Speech in India: A Comparative Analysis with US Law' (2018) 5 Intl J of Res & Analysis 18, 22.

contradictions with *R. Rajagopal* and the Supreme Court's failure to build upon the case subsequently are part of the reason.

Further, in *Subramaniam Swamy v Union of India,*[107] the petitioner's attempt to revoke criminal defamation was rejected by Justice Dipak Misra.[108] The Court upheld the avenue of criminal law to protect one's reputation. It held that the right to one's reputation is protected under Article 21 of the Indian Constitution and further could not be equated to have an undue chilling effect on the right to freedom of speech and expression.[109] The Court also held that defamation as a penal code provision was not disproportionate to the crime. The reasoning provided was that the reasonability and proportionality of a restriction are examined from the perspective and interest of the general public and not from the standpoint of the individual upon whom the restrictions have been placed.[110] Thus, in this case, SLAPPs were further provided with additional arsenal under the ambit of the 'right to reputation.'

However, recently, the Madras High Court has provided a small victory against SLAPPs through its judgment in *Grievances Redressal Officer, Economics Times Internet Ltd. v VV Mineral Pvt. Ltd.*[111] In this case, the single-bench judge quashed all proceedings against the appellant (earlier the respondent). The Court *first* applied the doctrine of 'actual malice' to criminal defamation, taken from the New York Times doctrine.[112] The doctrine states that liability can be imposed on speech only if the speaker was aware that his or her statements were false or made with reckless disregard for the truth. *Second*, the Court also held that the exceptions available under Section 499 could be availed at the

[107]*Subramaniam Swami v Union of India* (2016) 7 SCC 221, para 8.
[108]Ibid, para 47.
[109]Ibid, para 94.
[110]Ibid, para 142.
[111]*Grievance Redressal Officer, M/S Economic Times Internet Ltd and Ors v M/S VV Minerals Pvt Ltd* (2020) SCC Mad 978.
[112]Ibid, para 10.

preliminary stage, and if proved, the proceedings need not move to the trial stage.[113]

This judgment can reduce the effectiveness of SLAPPs by linking the New York Times doctrine in criminal cases and allowing exceptions at the preliminary stage, potentially reducing the duration of a lawsuit. However, the chilling effect persists. To further encourage public participation, India needs to implement various other policies to ensure those who wish to speak out are not at the mercy of the rich and powerful.

VI. CURBING SLAPPS IN INDIA

India's response to SLAPPs to date has been imitative and evasive. India continues to follow British traditions, which hampers and impairs the activist or journalistic voice. These judicial decisions predominantly revolve around nineteenth-century notions and ignore the impetus to not pre-censor people by various 'gagging writs' before the trial has even taken place. Most decisions at the lower levels get distracted by quirky facts of cases without taking a holistic view of the matter and doing justice in a larger realm.[114] A broader understanding of the issue is revealed to yield some incomplete insights once a matter reaches the Supreme Court.

Hence, although Indian Courts are notorious for their approach to activist litigation, the broader requirements of speech and activist voice elude India's judicial exposition. Thus, in this part of the paper, we have analysed three key amendments required to curb SLAPPs. The *first*, repeal criminal defamation provisions, the *second*, codify civil defamation; and *last*, India needs a 'special motion to strike'.

[113]Ibid, para 20.
[114]Tanuj Kalia, 'Defamation Law in India: An Overview' (2018) 14 Ind. JL & Tech 1, 3.

A. Repealing Criminal Defamation

The burden of proof is on the state to establish defamation, but once established, the burden shifts on the accused to prove before the Court that the comments published are both true and made for the public good. The question then arises of what is 'public good'. The Supreme Court has held that whether a statement has been made for the public good is to be assessed from situation to situation.[115]

If found guilty, criminal defamation entails imprisonment for up to two years or a fine.[116] The law is open to misuse, and as previous examples have shown, it frequently has been employed to intimidate and silence. These lawsuits take years on end, and it is not uncommon for the defendants to be kept in detention before the trial.[117] Further, any sort of remedy for unlawful or wrongful arrests is infrequent. Hence, the threat of arrest and detention, in addition to facing tedious criminal trials, has created a situation where "the process is the punishment."[118] This has gone hand-in-hand with SLAPPs, where solely entangling the SLAPP target in a lawsuit ensures the SLAPP filer is victorious; hence an archaic law with a gruesome process has only provided SLAPP filers with a cherry on the top.

In addition, the International Covenant on Civil and Political Rights ("**ICCPR**"), ratified by India, requires states to ensure freedom of speech and expression to everyone.[119] Therefore, restrictions are allowed, although they must be clear, have an objective and be

[115]Subramaniam Swami (n 107), para 173.
[116]The Indian Penal Code 1860 (45 of 1860), s 500.
[117]*Subramanian Swamy v Union of India*, Writ Petition (Criminal) No 184 of 2014; *Tarun Tejpal v State of Goa*, Criminal Appeal No 411 of 2018.
[118]'Hasty Arrests, Difficulty in Obtaining Bail: CJI Says "Process is Punishment" (*Live Law*, 16 July 2022) <https://www.livelaw.in/top-stories/hasty-arrests-difficulty-in-obtaining-bail-cji-says-process-is-punishment-in-our-criminal-justice-system-203962> accessed 15 February 2022.
[119]International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 19(2).

proportionate to that objective. Further, these restrictions should be drafted in a manner such that they do not violate or have a 'chilling effect' on the freedom of speech and expression.[120] The UN Human Rights Committee ("**HRC**"), the body monitoring a state's conformity with the covenants of ICCPR, has further requested member states to decriminalise defamation because criminal law's applicability should be restricted to the "most serious of cases" for which defamation does not meet the standards.[121]

The UN Special Rapporteur on Freedom of Expression has also urged states to decriminalise criminal defamation. The Rapporteur, in recognition of the chilling effect of criminal defamation poses, stated, "*frivolous litigation, if misused, can become a form of judicial harassment against the press or anyone exercising freedom of expression*."[122] Even if the claim is dismissed, the economic impact of the expenses incurred for defence can seriously limit the exercise of freedom of expression. It can have a paralysing effect on the journalist or the media concerned and others engaged in investigative journalism.[123]

Thus, criminal defamation's impact has been exacerbated through the onset of SLAPPs. An archaic law, criminal defamation now has a greater detrimental effect on freedom of speech. Further, criminal defamation law is a disproportionate response to the harm caused by defamation. The threat of being arrested, pre-trial detention and the possibility of imprisonment can potentially thwart the general public from speaking up. Further, in India, filing a suit of criminal defamation barely has costs associated with it.

[120]ICCPR 1996, art 19(3).
[121]Human Rights Committee, General Comment No. 34: Article 19: Freedoms of Opinion and expression (12 September 2011) UN Doc. CCPR/C/GC/34.
[122]Ibid.
[123]Ibid.

Hence, at the very least criminal defamation needs to be revoked to create a healthy democracy that consists of strong public participation. Those aggrieved have the option to avail remedies under civil defamation. Criminal defamation involves punishment through prison and criminalizes a civil dispute which is further created an enormous threat to public participation.

B. Codifying Civil Defamation

Civil defamation is not codified in India.[124] However, a common-law recourse is provided through Section 9 of the CPC.[125] The injured party can file a civil suit before a civil court and seek damages via monetary compensation, covered under the law of torts.[126] Due to its non-codification, civil defamation derives its rules from common law principles. Government agencies and institutions cannot file civil defamation suits or recover any damages in relation to the discharge of their public duties.[127] Unfortunately, however, civil defamation is still a route frequently used by wealthy conglomerates to intimidate and silence their critics, authentic reporting and newspapers.

Unwritten laws ensure that journalists, reporters and public voices will err on the side of caution, fearing SLAPPs. This leads to self-censorship, which was the SLAPP filers' objective in the first case. Further, the wealthy SLAPP filer who has resources on his or her side can avail multiple resources to suffocate the one defending the SLAPP. They will have to deploy various resources and time due to the vagueness and ambiguity of the law. This ambiguity also makes it exceptionally hard to defend oneself when even trivial incidents can lead to a lawsuit at the remotest of jurisdictions.[128]

[124]*Atul Kumar Pandey v Kumar Avinash* (2020) SCC OnLine Cal 994, para 4.
[125]The Code of Civil Procedure 1908 (5 of 1908), s 9.
[126]Ibid.
[127]*R Rajagopal v Tamil Nadu* (1994) SCC (6) 632, para 26.
[128]*The Indian Institute of Planning and Management v Delhi Press Patra Prakashan P Ltd Ors*, 2018 SCC OnLine Del 7313.

The Special Rapporteur to the UN on Freedom of Expression, in a joint statement with the Organization for Security and Co-operation in Europe, Representative of the Media and the Council of the Europe Commissioner for Human Rights arguing against the hefty weight of civil defamation, noted,

> "*Civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritise the use of a range of non-pecuniary remedies*."[129]

This points to the fact that an unpredictable, hazy and vague law can easily dissuade the democratic process by harming potential persons from exercising their freedom of speech.

Thus, another step to help curb SLAPPs is to codify civil defamation. Knowing where to draw the line will help journalists and critics be more belligerent in their publishing, which is essential for a robust democracy. The codification should include a limit to the monetary damages the plaintiff can pray for. Vast sums of money serve only the purpose of intimidation because they are rarely realised in actuality.[130] But by that time, the story has broken out, and the focus is solely on the amount demanded, instilling fear in public. Therefore, it is pertinent to initially halt the number of damages the applicant can file to curb the chilling effect.

[129]Organization for Security and Co-operation in Europe, Paris Declaration 2001; Thomas Hammarberg, 'Council of Europe Commissioner for Human Rights, in Human Rights and a Changing Media Landscape' (*Council of Europe*, 2011).

[130]Vijayta Lalwani, 'Anil Ambani's Defamation Blitz: 28 Cases Filed by Reliance Group in Ahmedabad Court this Year' (*Scroll*, 25 November 2018) <https://scroll.in/article/903119/anil-ambanis-defamation-blitz-28-cases-filed-by-reliance-group-in-ahmedabad-courts-this-year> accessed 28 June 2022.

C. A Special Motion to Strike Against Defamation Lawsuits

Currently, the closest version to such a counter mechanism is Order 7 Rule 11 of the CPC. The Rule concerns the rejection of plaints, whereupon the courts have the authority to reject plaints for a failure to entail any cause of action.[131] The jurisprudential stance, although on this provision, is unable to dismiss any SLAPPs. The provision only requires a 'meaningful' reading of the plaint. If it is manifest that the plaint is vexatious and, in any sense, does not disclose any right to sue, the Rule provides the judges with the option to dismiss the suit without recording evidence or conducting a trial.[132] This Section, however, rarely succeeds against SLAPP filers and their savvy lawyers.[133]

India requires an anti-SLAPP legislation. This legislation, although, needs to be artfully crafted; an overbearing legislation can potentially deprive many of their rightful right to petition. Hence, a dialectical approach is required, which hinders SLAPPs in addition to not obstructing the accessibility of India's judiciary. Hence, a two-pronged approach that balances both rights is required.

California's anti-SLAPP legislation best served both grounds, and it was highly effective in thwarting SLAPPs. Thus, to prevent SLAPPs, a "Special Motion to Strike" should be inserted into India's Code for Civil Procedure, 1908, for civil defamation cases. Once the motion is filed before the commencement of the trial, the initial burden would be on the defendant to make a prima facie case that his or her statement is connected to a public issue of which he or she felt the public should be aware. If the defendant's claim were successful, the burden would then shift on the plaintiff to illustrate the probability of his or her claim succeeding. In this special motion, the Court could incorporate both parties' pleadings, evidence and affidavits.

[131]The Code of Civil Procedure 1908 (5 of 1908), Order 7 Rule 1.1.
[132]*T Arivanandam v T Satyapal* AIR 1977 SC 2421, para 6.
[133]*Shri Yogendra Yadav v Sheetal Singh* 2017 SCC OnLine Del 11857; *Ramanbhai Ashabhai Patel v State of Gujarat* (2000) 1 SCC 358.

This motion would take place before any trial proceeding. If the plaintiff failed to prove his or her probability of succeeding, the Court would have the option before it to order the plaintiff to award the defendant reasonable attorney costs. Thus, the payment discourages frivolous suits and provides an appropriate remedy to the SLAPP target.

Thus, the Special Motion to Strike fulfils the requirements to curb SLAPPs. It *first,* does not hinder a person's right to petition by placing the initial burden on the defendant. This ensures the defendant would not employ the motion solely to burden the plaintiff. *Second,* by shifting the burden on the plaintiff once the defendant has proved his onus, this approach ensures that the case filed needs to be legitimate. Although many SLAPPs are decided before they commence, the SLAPP filers continue to vex the SLAPP target. To prove one's probability to succeed before the trial begins, in addition to the extra costs if one is not able to prove their case, will undoubtedly filter out illegitimate causes. The approach will also disrupt the 'chilling effect' SLAPPs pose due to the availability of recovering one's attorney fees in addition to the quick disposal of cases due to the motion because if the SLAPP target succeeds, the Court does not proceed to trial. The costs and mental agony associated with a lawsuit are the two causal factors of lessened public participation.[134]

Therefore, the burden on the SLAPP filer, in addition to the costs which may entail, will inevitably discourage SLAPPs and, in turn, increase public participation.

VII. CONCLUSION

SLAPPs pose a massive threat to India's democracy. The burden and threat of SLAPPs ensure that people censor themselves and show a

[134]Canan and Pring (n 1) 510.

blind eye to the injustices of society. The vexatious procedure of the Indian judicial system hinders individuals who do not possess the necessary resources to fight long-drawn legal battles from acting against big corporations or prominent individuals. The chilling effect of SLAPPs allows corporations to be unhindered by any opposition and free to act howsoever without any fear of the law in many areas of operation. Thus, it is pertinent to halt SLAPPs.

SLAPP filers currently have multiple avenues before them to file SLAPPs. However, the main avenues continue to be civil and criminal defamation. Therefore, it is paramount to codify civil defamation to ensure citizens do not self-censor themselves out of fear of a lawsuit. It is also necessary to repeal criminal defamation from India's laws. Criminal liability for exercising one's right to speech is not commensurate and acts as a tool to silence critics. Aggrieved complainants have the avenue of civil defamation if they believe they have been wronged.

To further discourage SLAPP filers, India also needs anti-SLAPP legislation. This legislation, as proposed above, has to intricately balance an individual's right to petition along with protecting the ordinary citizen against meritless and vexatious lawsuits. The special motion to strike happens before trial to ensure the defendant is not burdened by the tiresome litigation process and also bears an additional cost on the plaintiff if they are unable to show their probability of succeeding. Hence, this proposed legislation discourages illegitimate causes, lessens the chilling effect due to the briefness of the procedure and further provides one with the opportunity to regain the resources spent on defending oneself before the Court.

It is essential to understand that the judicial system should provide a platform where a common individual can redress his wrongs and speak against anyone, no matter how powerful they are. The system at no point should operate as another tool for corporations and eminent

personalities to silence and intimidate the average person. If so, the system has failed.