

---

# CRIMINAL DEFAMATION AND OTT CONTENT IN INDIA: A DOCTRINAL AND CASE LAW ANALYSIS OF FICTIONAL PORTRAYALS OF REAL PERSONS UNDER THE BHARATIYA NYAYA SANHITA, 2023

---

Arya De, CHRIST (Deemed to be University), Bangalore

## ABSTRACT

The accelerated growth of the Over-The-Top (OTT) platforms in India has changed the way the audio-visual stories are told, as the fictional and semi-fictional narratives have started basing on real people and current happenings. This has resulted in a new focus on the use of criminal defamation in Section 356 of the Bharatiya Nyaya Sanhita, 2023. Although the constitutional viability of criminal defamation has not been challenged, it is not the way that it is applied in dealing with fictional representations that presents unique doctrinal and procedural issues.

This paper will carry out a case law and doctrinal examination of Section 356 BNS, its components, statutory exceptions and how it functions by way of criminal process. Reviewing judicial rulings, such as *Subramanian Swamy v. Union of India*, *Ashutosh Dubey v Netflix, Inc.*, and *M.J. Akbar v. Ramani*. These examine the interpretation of expressive contents under identifiability, intent and threshold scrutiny in court. A specific focus is made on the lack of a uniform judicial test to know when fictional characters are legally attributable to the actual individuals, and on the practical consequences of bringing criminal prosecution at an early phase.

Its further positioning as a subject of criminal sanction comes into comparative analysis with analogies of Nepal and the United Kingdom. In this paper, the main argument is that it is not the retention of criminal defamation that is at stake, but there needs to be a more well-formulated articulation of the doctrine and a disciplined procedural protection in the reprise of Section 356 on fictional OTT accounts. The study aims to make a contribution through the development of systematic judicial criteria in the effort to achieve a more foreseeable and logical use of criminal defamation within present-day media settings.

**Keywords:** Criminal Defamation; Section 356 BNS; OTT Platforms; Fictional Portrayals; Identifiability; Criminal Procedure

## **INTRODUCTION**

Over-The-Top (OTT) platforms have increased, which has changed substantially the landscape in audio-visual storytelling in India. In contrast to old-fashioned cinema and television, the OTT content is often interested in modern events, actual people, and social facts being addressed with the help of fictionalised or semi-fictional series. This is a creative reversal that has created thorny legal issues, especially on the topic of criminal defamation, where reputational damages are brought into the limelight against content creators and production houses.<sup>1</sup>

The idea of criminal defamation, currently regulated by Section 356 of the Bharatiya Nyaya Sanhita, 2023<sup>2</sup>, is still interested in reputation as a legally safeguarded interest that should face a penalty in specific situations. The constitutionality of criminal defamation has been upheld,<sup>3</sup> but it poses slightly different problems as applied to fictional depiction in audio-visual media. OTT narratives usually depend upon composite characters, dramatisation, and creative treatment, which do not fit too well with legal requirements in applying to imputations that are direct and factual. Consequently, courts are often called upon to dictate on whether a fictional character or plot can reasonably be found to have an actual person on whom criminal liability will be held.<sup>4</sup>

The procedural workings of criminal defamation make the problem of legal complexity all the more difficult. Grievances are initially referred to at a more imminent level, and soon the summons and the continuation of the criminal procedure in courts are established, before the courts reinstitute a decisive review of the statutory exceptions like truth, social good or even fair commentary.<sup>5</sup> To the content creators and the production houses, this procedural exposure has a factual legal effect regardless of whether the case can be won or lost.<sup>6</sup>

It is against this backdrop that this paper will analyse the application of criminal defamation under the Bharatiya Nyaya Sanhita, 2023, by the courts in cases that involve fictional depiction of real persons in OTT content. The paper aims to evaluate whether current doctrinal and procedural responses can provide uniformity and predictability in the application of criminal

---

<sup>1</sup> See Ministry of Information & Broadcasting, *Annual Report 2022–23*, Govt. of India (noting the rapid expansion of digital streaming platforms and their impact on content production and distribution).

<sup>2</sup> The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 356.

<sup>3</sup> *Subramanian Swamy v. Union of India*, (2016) 7 S.C.C. 221.

<sup>4</sup> *Ashutosh Dubey v. Netflix, Inc.*, 2020 SCC OnLine Del 729.

<sup>5</sup> The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 356 Exceptions 1–10.

<sup>6</sup> *M.J. Akbar v. Priya Ramani*, (2019) 14 S.C.C. 1, 27–28.

defamation law to the modern expression of audio-visual communication through contemporary means.

### **JURISPRUDENTIAL ANALYSIS OF SECTION 356 BNS**

Protecting the reputation as a legally cognizable interest, the criminal law constitutes the way in which the reputation is viewed in Section 356 of the Bharatiya Nyaya Sanhita, 2023.<sup>7</sup> Jurisprudentially, the provision indicates a dignity-based understanding of reputation, and the provision does not perceive reputation as a personal referred civil interest but rather a part of an individual's personality that requires their protection by a penalty in case of severe injury.<sup>8</sup> This practice is in line with the traditional perception of reputation as part of personal dignity, as opposed to economic or social property.<sup>9</sup>

Meanwhile, Section 356 preserves the structural balance of the one before it by introducing several statutory exceptions.<sup>10</sup> These exceptions are not a fringe benefit but are part and parcel of the offence itself, which heralds a jurisprudential bid to balance the safeguarding of reputation with other assertions of expressive freedom.<sup>11</sup> The crime, thus, does not take the form of an outright ban on speech but a restricted ban, which only happens when imputations can reach a set threshold of undesirability and culpability.<sup>12</sup>

It is specifically in the area of the jurisprudential tension in the context of Section 356 that the provision becomes especially obvious when applied to fictional and semi-fictional audio-visual content on OTT platforms. The doctrine of criminal defamation conventionally assumes that the relationship between the imputation and the defended person is fairly direct.<sup>13</sup> Nevertheless, fictional narratives are based on abstraction, composite characterisation and dramatisation that make it difficult to define a legally cognisable imputation in relation to a real person. This brings an essential inquiry in defamation jurisprudence as to whether criminal liabilities are to be considered in the subjective standard of sameness or objectively identifiable as established.<sup>14</sup>

In addition, procedural jurisprudential understanding also indicates that Section 356 is

---

<sup>7</sup> The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 356.

<sup>8</sup> *Subramanian Swamy v. Union of India*, (2016) 7 S.C.C. 221, 263–64.

<sup>9</sup> *Id.*

<sup>10</sup> The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 356 Exceptions 1–10.

<sup>11</sup> *Subramanian Swamy*, (2016) 7 S.C.C. at 271–72.

<sup>12</sup> *Id.*

<sup>13</sup> K.D. Gaur, *Criminal Law: Cases and Materials* 487–90 (9th ed. 2019).

<sup>14</sup> *Ashutosh Dubey v. Netflix, Inc.*, 2020 SCC OnLine Del 729.

functioning within a criminal process that mobilises consequences at the initial phase and in a manner that courts are not substantively involved with the statutory exceptions.<sup>15</sup> Although the offence is designed doctrinally to hold competing interests in balance, its application at the procedure level can upset this balance where criminal proceedings are allowed to proceed without an initial examination on whether the material in question is reasonably seen to be falling within protected categories, including fictional expression or fair comment.<sup>16</sup> Within the framework of this paper, Section 356 is therefore a place of doctrinal tension because of the existing principles of criminal defamation in the past and the new way of storytelling in OTT platforms. The jurisprudential examination shows that it is actually the transformation of that protection into a coherent and predictable norm, rather than the acknowledgement that reputation is actually a protected interest, that arises when the criminal defamation statute is applied to fictional representations of real individuals in the contemporary audio-visual media.

### **REVIEW OF LITERATURE AND GAPS IN RESEARCH**

The available body of research on criminal defamation in India has largely been done on its constitutional legitimacy, conceptual underpinnings, and its procedural consequences. Although this literature is highly helpful in understanding the jurisprudential aspect of criminal defamation, it has not addressed well the manner in which criminal defamation has been applied to fictional depictions of real individuals in OTT material, specifically when the Bharatiya Nyaya Sanhita, 2023, is applied. The review examines the main academic literature related to the area of this study and determines the detailed gaps that the current research attempts to bridge.

Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (Oxford Univ. Press 2016).<sup>17</sup>

The work by Bhatia is a detailed constitutional analysis of the limitations on speech in India that covers defamation. According to him, Indian courts not only do not rank reputation and freedom of speech as constitutional values but, instead, consider them as equal to each other. He discusses *Subramanian Swamy v. Union of India* in detail<sup>18</sup>. In defence of criminal

---

<sup>15</sup> Aparna Chandra, *The Transformation of Criminal Defamation*, 10 NUJS L. Rev. 1, 24–26 (2018).

<sup>16</sup> *M.J. Akbar v. Priya Ramani*, (2019) 14 S.C.C. 1, 27–28.

<sup>17</sup> Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (Oxford Univ. Press 2016).

<sup>18</sup> *Subramanian Swamy v. Union of India*, (2016) 7 S.C.C. 221.

defamation, Bhatia describes the court's reasoning because of the preservation of reputation, which is a right that is associated with dignity in Article 21 of the Constitution.<sup>19</sup> Although this work is the backbone in comprehending the constitutional legitimacy of criminal defamation, it does not discuss how criminal defamation functions in the background of fictional or dramatised audio-visual content, and it does not cover the unique problems that OTTs provide.

**Aparna Chandra, The Transformation of Criminal Defamation, 10 NUJS L. Rev. 1 (2018).**<sup>20</sup>

Chandra, in this article, critically studies the procedural development of criminal defamation in India, and her attention was drawn to the way the courts treat exceptions to statutory criminal defamation, like truth and public good. According to her, the courts often delay the consideration of these exceptions until the trial is even initiated, thus proceeding with criminal proceedings despite the presence of prima facie defences.<sup>21</sup> According to the analysis of Chandra, the criminal process can be a restriction on speech on its own. Nevertheless, the article lacks audio-visual or OTT intervention, as well as fictional representations in which the identifiability of a complainant is disputed.

**A.P. Shah, Free Speech and Criminal Defamation, (2017) 4 SCC J. 1.**<sup>22</sup>

This extrajudicial ruling by Justice A.P. Shah (Retd.) denounces the mechanical way criminal defamation complaints are regularly heard by magistrates. He posits that when the degree of scrutiny is poor at the issuing process level, criminal defamation can be abused to emphasise the fact of harassment. Although he agrees that criminal defamation is a valid offence, he points out that there should be strict judicial involvement entailed in the elements of the offence and the exceptions at an early stage. Even though this work is useful in considering the procedural issues, it does not directly deal with fiction writing or the OTT medium.

**Lawrence Liang, Defamation Law and the Right to Tell Stories, 48 Econ. & Pol. Wkly. 12 (2013).**<sup>23</sup>

The article by Liang investigates a conflict between the law of defamation and storytelling or

---

<sup>19</sup> Gautam Bhatia, *supra* note 17, at 192–97.

<sup>20</sup> Aparna Chandra, *The Transformation of Criminal Defamation*, 10 NUJS L. Rev. 1 (2018).

<sup>21</sup> *Id.* at 24–26.

<sup>22</sup> A.P. Shah, *Free Speech and Criminal Defamation*, (2017) 4 SCC J. 1.

<sup>23</sup> Lawrence Liang, *Defamation Law and the Right to Tell Stories*, 48 Econ. & Pol. Wkly. 12 (2013).

narrative. He points out that the doctrine on defamation is ill-equipped to accommodate fictionalisation, metaphor, and dramatisation, because of the tendency of the court to analyse such narratives through a literal (rather than factual) prism. Liang realises that visual media create a greater depth of reputational influence, but he warns of the fallacy of storytelling into factual imputation. Although this work specifically is in direct contact with fictional storeys, it is already older than the emergence of OTT platforms and does not regard criminal defamation as a part of the Bharatiya Nyaya Sanhita, 2023.

### **K.D. Gaur, *Criminal Law: Cases and Materials* (LexisNexis 9th ed. 2019).<sup>24</sup>**

The criminal defamation is dealt with in a doctrinal manner in the text of Gaur, which focuses greatly on the fact that statutory exceptions are considered to be part of the crime itself and not considered as defences in trial. He highlights that it is important to have judicial checks in the initial stages of criminal processing to avoid mishandling of the criminal process. Although this piece of work is scholarly in terms of the doctrine of criminal law, it is also fairly neutral across media and does not concern the issues raised by fictitious imagery in audio-visual or OTT.

### **Critical Analysis of The Scopes of The Previously Published Papers**

Despite the constitutional validity of criminal defamation that the reviewed literature determines and the procedural and doctrinal issues that it identifies, it lacks a specific procedural and doctrinal analysis of how criminal defamation should be applied in OTT to fictional portrayals of real-life individuals. Precisely, the topics of identifiability, fictionalisation, and early-stage criminal process associated with contemporary audio-visual storytelling are scarcely addressed on a scholarly level. This gap is the subject of the present study, where judicial rulings and principles of criminal defamation are discussed in relation to the OTT platforms.

### **CRITICAL ANALYSIS OF SECTION 356 BNS**

As with Section 356 of the Bharatiya Nyaya Sanhita, 2023, the underlying basis of criminal defamation, as in the Indian Penal Code, remains with the location of the offence placed in the new criminal law provisions of India.<sup>25</sup> Even though the constitutional validity of criminal

---

<sup>24</sup> K.D. Gaur, *Criminal Law: Cases and Materials* (LexisNexis 9th ed. 2019).

<sup>25</sup> The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 356.

defamation is established, its modern application, especially to fictional depictions of real figures in OTT programming, begs questions of doctrinal consistency, threshold questioning and proportionalist scrutiny of procedure. The critical analysis of Section 356 should then stop at its valid formality and look at how the contents and exceptions of the same apply to contemporary storytelling through audio-visual means.

### **Reputation as a Penal Interest: Constitutional Endorsement and Its Limits**

The jurisprudential basis of Section 356 is built on the fact that reputation is one of the elements of personal dignity. In *Subramanian Swamy v. The Supreme Court in Union of India*, the protection of reputation under criminal defamation was upheld on the basis that it is a reasonable restriction as mentioned in Article 19(2) and is closely intertwined with Article 21.<sup>26</sup> This legal achievement is a constitutional support to the validity of criminal penalty, regarding serious negative reputations.

The argument in *Subramanian Swamy v. Union of India*, however, was elaborated in a general speech and it never directly focussed fiction or dramatised pieces. On the application with OTT content, the question is whether the same dignity-related rationale warrants criminal process in situations when ironic imputations are of a fictional nature, as opposed to being articulated in the form of factual allegations. The fact that no medium-specific judicial clarification exists also generates interpretive ambiguity.

### **Identifiability and the Problem of Fictional Portrayals.**

One of the key elements of criminal defamation is the statement of the imputation made on the basis of a fixed and recognisable person.<sup>27</sup> Identifiability is a complex legal issue in fictional storytelling. The Delhi High Court, in the case of *Ashutosh Dubey v. Netflix, Inc.*, presented an example of judicial unwillingness to hear criminal defamation in case the alleged victim is not clearly known.<sup>28</sup> The Court observed that indeterminate classes cannot be defamed and that satire and exaggeration are not necessarily and always actionable imputations.

But the courts have failed to define a standardised doctrine test of the identifiability of fictional narratives. There being no objective criterion, either according to reasonable viewer perception,

---

<sup>26</sup> *Subramanian Swamy v. Union of India*, (2016) 7 S.C.C. 221, 263–64.

<sup>27</sup> K.D. Gaur, *Criminal Law: Cases and Materials* 487–90 (9th ed. 2019).

<sup>28</sup> *Ashutosh Dubey v. Netflix, Inc.*, 2020 SCC OnLine Del 729.

direct reference, or contextual clarity implies that Section 356 can be successfully invoked even in the circumstances where the resemblance is not direct or disputed. This fluidity of interpretation brings uncertainty to creators of content.

### **Statutory Exceptions and Threshold Scrutiny.**

Section 356 does not eliminate any statutory exception, such as truth for the public good and fair comment.<sup>29</sup> In *M.J. Akbar v. Ramani, 2010*, the Supreme Court underlined that these exceptions are substantive protections that should be meaningfully reviewed.<sup>30</sup> The rationale provided by the Court denotes that criminal defamation is not created to punish the speech that belongs to covered groups.

Even though this was clear in the doctrine, lower courts usually make exceptions to another issue to be considered later at the trial level. This procedural position serves to avail criminal proceedings in the event that fictionalisation or contextual defence seems to be imminent on the surface of the content. This kind of deferment is dangerous to the balance of Section 356, in that the process is permitted to go ahead of substantive assessment.<sup>31</sup>

### **Procedural Operation and the Burden of Criminal Process**

The practical effect of Section 356 is influenced both by what is contained in it and the procedural construct under which complaints have been launched and within which process is granted. *Sameer Wankhede v. Netflix Entertainment Services*, in an OTT content debate, Courts procured jurisdiction and have sometimes intervened at procedure level in order to scrutinise jurisdiction and forestall forum shopping.<sup>32</sup> These rulings demonstrate the consciousness of the judges that even the criminal process can become cumbersome.

Still, the burden of meeting the requirements of summons issues in defamation complaints is comparatively low.<sup>33</sup> When the process has been submitted, content creators and production houses are obligated to go to lengthy litigation, no matter the ultimate verdict. The punishment

---

<sup>29</sup> The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 356 Exceptions 1–10.

<sup>30</sup> *M.J. Akbar v. Priya Ramani*, (2019) 14 S.C.C. 1, 27–28.

<sup>31</sup> Aparna Chandra, *The Transformation of Criminal Defamation*, 10 NUJS L. Rev. 1, 24–26 (2018).

<sup>32</sup> *Sameer Wankhede v. Netflix Ent. Servs. India LLP*, 2023 SCC OnLine Del 6917.

<sup>33</sup> See *Pepsi Foods Ltd. v. Special Judicial Magistrate*, (1998) 5 S.C.C. 749, 760 (summoning in criminal cases requires application of judicial mind).

nature of Section 356, therefore, does not work only by conviction, but also by the mere exposure to a criminal process.

### **Judicial Reluctance Toward Prior Restraint**

However, courts have been protective about the granting of blanket restraints in situations involving dramatised narratives drawn out of real cases. Courts have also refused to take broad restraining measures merely out of reputational loss in false portrayals involving OTTs, as in the cases of a series named “*SCOOP*”.<sup>34</sup> It means that they have already accepted the fact that fictional and journalistic narratives have a separate expressive space.

There is, however, a lack of a concerted judicial test within which results are unequal based on factual subtleties and judicial judgment. The interpretation of Section 356 presently depicts no predictable model that can be applied to fictional depictions, and so it poses a great degree of ad hoc determination.

### **Doctrinal Continuity and Contemporary Strain.**

On the one hand, since Section 356 marks a continuum within the criminal defamation doctrine, it is applied to OTT content, a situation that reveals a clash between the pre-modern principles of defamation and modern storytelling. The crime assumes a comparatively straightforward association between imputation and identifiable human, whereas fictional performances tend to be abstract, composite and alluded to.

The point of contention, however, does not lie in the existence of criminal defamation, but the nature with which the elements, imputation, intent, identifiability, and exceptions of criminal defamation are judicially construed in matters of fictional representations. Section 356 will be subject to unequal application in the OTT context without a more definite articulation of the applicable doctrine, having legal ambiguity but being constitutionally valid.

### **Comparative Jurisprudence on Criminal Defamation and Fictional Portrayals: India, Nepal, and the United Kingdom**

In contrast to the case of libel tourism, a comparative analysis of criminal defamation in

---

<sup>34</sup> *Chhota Rajan v. Netflix Ent. Servs. India LLP*, 2023 SCC OnLine Bom 1644.

jurisdictions shows that legislative philosophies on the protection of reputation and the treatment of fictional or dramatised expression vary in constituent jurisdictions. As India still maintains criminal defamation in Section 356 of Bharatiya Nyaya Sanhita, 2023,<sup>35</sup> other regions have stuck with comparable crime laws, or criminalised the laws altogether. The doctrinaire options informing the system of attack used in India could be measured with more clarity by reacting to the underdeveloped law system of Nepal, retaining its criminal defamation and the assisted jurisdiction of the United Kingdom, which eliminated it.<sup>36</sup>

### **India: Retention and Constitutional Endorsement of Criminal Defamation**

In India, even today, defamation is conceived as a criminal offence in Section 356 of the Bharatiya Nyaya Sanhita, 2023,<sup>37</sup> which is essentially the same as its version in the Indian Penal Code. The case of *Subramanian Swamy v. Union of India*, decided by the Supreme Court, supported the constitutionality of criminal defamation and reported that preservation of reputation is a fair limitation of freedom of speech.<sup>38</sup> The jurisprudence also focuses on dignity and individual reputation as part of the constitutional interests.<sup>39</sup>

Nevertheless, they have taken a case-by-case approach when it is applied to hypothetical fictional representations in audio-visual media by Indian courts. In *Ashutosh Dubey v. Netflix, Inc.*, the Delhi High Court pointed out that an indeterminate class could not be defamed and that satire or a fictional exaggeration did not necessarily lead to criminal liability.<sup>40</sup> Likewise, when it comes to dramatised accounts based on real-life persons, the courts have been found to be careful in giving blanket restraints.<sup>41</sup> Nevertheless, India does not have a clearly defined and sustained judicial test in the identifiability of fictional narratives, meaning that it places a lot of discretion in the hands of the trial courts.

### **Nepal: Criminal Defamation within a Transitional Legal System**

In Nepal, criminal defamation is still incorporated in its National Penal (Code), 2017 (Muluki Criminal Code).<sup>42</sup> The crime makes punishable willful conduct to maliciously damage the

---

<sup>35</sup> The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 356.

<sup>36</sup> See Coroners and Justice Act 2009, c. 25, § 73 (UK).

<sup>37</sup> The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 356.

<sup>38</sup> *Subramanian Swamy v. Union of India*, (2016) 7 S.C.C. 221.

<sup>39</sup> *Id.* at 263–64.

<sup>40</sup> *Ashutosh Dubey v. Netflix, Inc.*, 2020 SCC OnLine Del 729.

<sup>41</sup> *Chhota Rajan v. Netflix Ent. Servs. India LLP*, 2023 SCC OnLine Bom 1644, due to.

<sup>42</sup> National Penal (Code) Act, 2017 (Muluki Ain) (Nepal) §§ 306–307.

reputation of another person by way of publication or expression. Similar to India, Nepal has freedom of expression that is constitutionally accepted, but with limitations, such as protection of reputation, as stipulated in statutes.<sup>43</sup>

Nepalese legal practise has not gone much into elaborating subtle regimes with regard to fictional representation in audio-visual. Religion regarding criminal complaints based on speech can be commonly dealt with in a broad context of reputational loss unarticulated in any detailed manner by the court on identifiability limitations. This implies that although both Nepal and India share the criminal defamation, the Indian judiciary has done more in terms of weighing between freedom of expression in media. However, these two jurisdictions demonstrate that developing or underdeveloped legal systems, even nowadays, are still using criminal sanctions as a form of speech control.

### **United Kingdom: Abolition of Criminal Defamation and Reliance on Civil Remedies**

Unlike this, the common law offences of criminal libel and seditious libel were repealed under the Coroners and Justice Act 2009 in the United Kingdom.<sup>44</sup> Defamation has been the subject of civil litigation only, and the Defamation Act 2013 provides the initial law governing this area.<sup>45</sup> The UK system provides some statutory thresholds, such as serious harm, and even offers certain defences, like truth, honest opinion, and publication of a question of public interest.<sup>46</sup>

When dealing with fictional or dramatised material, courts in England pay attention to the question of whether or not a reasonable person would perceive the publication as referring to the claimant.<sup>47</sup> It focuses more on objective interpretation and provable damage as opposed to penal punishment. Through the elimination of criminal liability, the UK has limited the reputational problems to civil adjudication, thus lessening the coercive impact linked to criminal procedure.

### **Comparative Observations**

The comparison brings out three different approaches. India still has criminal defamation that

---

<sup>43</sup> Nepal Const. art. 17(2)(a).

<sup>44</sup> Coroners and Justice Act 2009, c. 25, § 73 (UK).

<sup>45</sup> Defamation Act 2013, c. 26 (UK).

<sup>46</sup> Id. §§ 1–4.

<sup>47</sup> See *Knupffer v. London Express Newspaper Ltd.*, [1944] A.C. 116 (HL).

is constitutionally approved, but there are interpretative issues of its application to fictional OTT stories. Nepal also continues with a punitive crime measure, but with less advanced jurisprudence on the issues of the media. By abandoning criminal defamation, the United Kingdom has transitioned to full use of civil cures, with reputational injury being regulated by statutory levels.

In this research, the point of comparison is that the main problem in India is not the condition of the existence of criminal defamation per se, but that of the lack of orderly doctrinal guidelines through which it is applied to fictional depictions in audio-visual narration. Although the elders of the jurisdiction have minimised the risks of penal exposure through decriminalisation, India still carries itself within a criminal legal framework, thus raising the stakes of the procedure and interpretation of OTT content creators and production houses.

### **Doctrinal Clarifications and Procedural Safeguards in the Application of Section 356 BNS**

The interpretation which has been carried out in this paper suggests that the biggest issue in relation to the existence of Section 356 of the Bharatiya Nyaya Sanhita, 2023 is not whether it exists, but how it is utilised in fictitious depiction of the audio-visual media.<sup>48</sup> Recommendations should therefore be aimed at refining the doctrines and disciplining the procedures, and not at uprooting the structures.

### **Articulation of a Clear Identifiability Standard**

In cases of fictional narrative, a structured test of identifiability may develop out of the courts. The complainant might have to provide evidence to show that the fictional character is indisputably connected to a particular real person, where the complainant depends on objective identification points and not on subject matter perception or the chance that the fictional character is accurately connected with the real individual. Elucidation of this threshold would minimise interpretive inconsistency and make content creators more predictable, without having to diminish protection over sincere reputational interests.<sup>49</sup>

### **Threshold Scrutiny of Statutory Exceptions**

Since statutory exceptions are a constituent element of the offence under Section 356 BNS, it

---

<sup>48</sup> The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 356.

<sup>49</sup> *Ashutosh Dubey v. Netflix, Inc.*, 2020 SCC OnLine Del 729is.

should be part of the primary inquiry by the magistrates to test whether the impugned content reasonably comes within the confines of the known exceptions, especially in situations where fictionalisation or commentary of the context are apparent through the face of the record.<sup>50</sup> The premature judicial intervention in those aspects would not actually allow the criminal process to continue when the ingredients on which the offence is based are questionable.<sup>51</sup>

### **Structured Application of Criminal Procedure**

In terms of the Bharatiya Nagarik Suraksha Sanhita, 2023, a court has the power to analyse whether a complaint reveals the crucial elements of an offence to grant process.<sup>52</sup> A stricter use of this procedural protection in cases of libel involving OTT content would guarantee that only when the accusations satisfy a minimum standard of evidential proof, criminal law is applied. Such a strategy would bring the practise of the procedure in line with the penal nature of the offence.<sup>53</sup>

### **Judicial Guidance on Fictional and Composite Characters**

Considering the growing popularity of dramatised accounts that are based on real life, it is possible that higher courts adopt the view in order to provide guidance to reason that composite or fictionalised characters created in the absence of any established intent to cause harm to a particular person do not, in the normal course of events, attract the imposition of criminal liability.<sup>54</sup> This would not confer immunity to works of creativity but would assist in aligning the traditional doctrine of defamation to the present-day storytelling.

### **Emphasis on Proportional Use of Criminal Sanction**

The very concept of criminal defamation has non-civil liability repercussions that are coercive in nature. Courts can thus assume a proportionality-based approach to the analysis of the reasonableness of criminal prosecution in cases about expressive content.<sup>55</sup> This does not involve any dilution of Section 356, but promotes its careful use in accordance with its penal

---

<sup>50</sup> The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 356 Exceptions 1–10.

<sup>51</sup> *M.J. Akbar v. Priya Ramani*, (2019) 14 S.C.C. 1, 27–28.

<sup>52</sup> The Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, §§ 223–226 (power of magistrate to take cognizance and issue process).

<sup>53</sup> *Pepsi Foods Ltd. v. Special Judicial Magistrate*, (1998) 5 S.C.C. 749, 760.

<sup>54</sup> *Chhota Rajan v. Netflix Ent. Servs. India LLP*, 2023 SCC OnLine Bom 1644.

<sup>55</sup> *Subramanian Swamy v. Union of India*, (2016) 7 S.C.C. 221, 272–73.

nature.

The above-proposed recommendations do not challenge the constitutional validity of criminal defamation as per Section 356 of the Bharatiya Nyaya Sanhita, 2023. Rather, they tend to enhance the clear state of doctrines and procedural uniformity in their application to fictional content found in OTT. The criminal law paradigm can be tailored through the enhancement of judicial thresholds, together with the focus on the systematic revision, so as to bear the protection of reputation as the lawful interest, but at the same time, to secure the accommodation of the modern forms of audio-visual expression.

## CONCLUSION

This paper has discussed the use of criminal defamation in Section 356 of the Bharatiya Nyaya Sanhita, 2023, in a narrow perspective of fictional representations of actual individuals in OTT content.<sup>56</sup> Criminal defamation has ceased to be a question of constitutional validity, especially after the case of *Subramanian Swamy vs. Union of India*, where the protection of reputation is recognised and asserts that free speech should be curtailed by legitimate means.<sup>57</sup> The investigation that has been conducted here has therefore not challenged the factual existence of the offence that it functions in, as to what extent it functions when used in the context of modern-day audio-visual storytelling.

As it is seen in the analysis, identifiability is the most difficult aspect of the doctrine to understand. Although courts have, in their rulings, like in *Ashutosh Dubey v. Netflix, Inc.*, understood that indefinite classes, or rather obviously fictitious constructs, cannot elicit criminal liability,<sup>58</sup> a uniform and regular test of when fictitious portrayal becomes actionable does not exist. This ambiguity in interpretation results in a large degree of discretion at the trial level and the effect of releasing unequal outcomes.

Moreover, in spite of the fact that statutory exceptions on Section 356 constitute the constituent part of the offence, they can be considered in the meaning of their consideration only, in many cases, when the criminal process has already been initiated.<sup>59</sup> As the courts have opined in cases like *M.J. Akbar v. The safeguards built into the transgression are intellectually correct, but the*

---

<sup>56</sup> The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 356.

<sup>57</sup> *Subramanian Swamy v. Union of India*, (2016) 7 S.C.C. 221, 263–64.

<sup>58</sup> *Ashutosh Dubey v. Netflix, Inc.*, 2020 SCC OnLine Del 729.

<sup>59</sup> The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 356 Exceptions 1–10.

means provided to enact them are not always in accordance with the balance that the legislature seems to have desired to represent.<sup>60</sup>

The comparative discussion highlights the fact that India has prioritised a different approach over jurisdictions like the United Kingdom that have abolished criminal defamation and have adopted the use of civil remedies only.<sup>61</sup> The Indian context, however, does not present a challenge in holding on to criminal sanction alone. Instead, it is a result of the lack of formal standards of the judiciary adapted to fictional and composite depictions in the contemporary mass media.

To sum up, the constitutionally valid and doctrinally sound in principle position of Section 356 of the Bharatiya Nyaya Sanhita, 2023, is permissible. Its difficulty is in its regular application. A more rigorous definition of the identifiability criteria and the threshold questioning of the statutory exceptions would increase predictability and would ensure that criminal libel cases keep the reputation intact and do not disrupt the lawful fictional storytelling currently found in the emerging terrain of the OTT narrative.

---

<sup>60</sup> *M.J. Akbar v. Priya Ramani*, (2019) 14 S.C.C. 1, 27–28.

<sup>61</sup> Coroners and Justice Act 2009, c. 25, § 73 (UK); Defamation Act 2013, c. 26 (UK).