



DEFAMATION IN THE DIGITAL ERA: NOT JUST ANOTHER FORM OF LIBEL

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ABSTRACT

In the modern era, individuals can easily exercise their right to free speech and expression by voicing their opinions and concerns on platforms such as blogs and social media. Thus, it can be said that the Internet possesses the unique ability to free speech and communication. However, in recent times, the existing laws have failed to keep pace with the rapid advancement and growth of the digital world. The absence of effective laws and regulations to ensure discipline and security within cyberspace has led to a reckless and unrestrained attitude among some netizens. Hence, internet users are often exposed to potential threats, some of which may even have a deleterious impact on their reputation or privacy. One such threat that may hamper an individual's identity and thus prove to be an obstacle in India's quest to digitalization, in the long run, is Cyber defamation. In this paper, the researcher has attempted to present the legal approach towards Cyber Defamation in India and criticized the contention that it is just another form of libel.

Keywords: Defamation, Internet, cyberspace, libel, reputation.

BACKGROUND

Section 499 of the Indian Penal Code (IPC) states that "Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases

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hereinafter expected, to defame that person.”² Defamation is said to be committed when a person publishes to a third party, words consisting of a false imputation against another’s reputation. In such cases, the medium of publication is irrelevant.³ It is a deliberate violation of another’s right to his ‘good name’.⁴ Generally, defamation can be classified into two types- Libel and Slander. The written and permanent form of defamation is known as libel, whereas slander refers to the verbal and transient form of it. Cyber defamation falls under the category of libel as the content published on social media or websites is still permanent in nature. In India, libel is treated as both a civil tort as well as a crime. Section 500 of IPC provides for punishment wherein “any person held liable under section 499 will be punishable with imprisonment of two years or fine or both.”⁵

What is cyber smearing? It refers to the spreading of a disparaging or defamatory statement, remark, or rumor about a company, its executives, or shares on any internet platform. It is a desperate act to bring down the hard-earned reputation or goodwill of a firm. Some of the common examples of cyber smearing include posting fake negative reviews or spreading false defamatory content on any online platform with the intent of harming an individual or company’s reputation.

One of the biggest concerns when it comes to combating cyber defamation is the anonymity of the wrongdoer. Due to the rapid technological advancement, there are several devices available that enable the author to conceal and disguise his true or original identity. Furthermore, the ubiquitous and extensive nature of the Internet enables the wrongdoer to operate from any nook or corner of the world. This makes the ascertainment of the jurisdiction an intricate task. Therefore, law enforcement agencies across the globe may have to work together and formulate a legal mechanism to ensure speedy trials. Also, the existing laws in our country lack flexibility and don’t specifically deal with defamation in cyberspace.

Research Questions

1. Which rule of publication has been adopted in the case of Cyber defamation in India?
2. Do defamation laws in India infringe the right to freedom of speech and expression?

² Section 499, the Indian Penal Code, 1860

³ Francine Derby, Defamation in the Digital Age, (Jan. 31, 2019) DunnCox, LEXOLOGY

⁴ Amit K. Kashyap & Dr. Takesh Molia, Defamation in Internet Age: Law & Issues in India, 1 IJEMT 17, at 19 (2016).

⁵ Section 500, the Indian Penal Code, 1860

3. Are there any exceptions to Section 79 of the Information and Technology Act, 2000?

Research Objectives

1. Examine the statute of limitation and its applicability under the Single Publication rule.
2. Examine the grounds on which Section 66(a) of the IT Act was invalidated.
3. Determine whether Internet Service Providers or intermediaries should be held liable under Cyber defamation suits or not.

Literature Review

The researcher has relied on numerous sources of data including books, journal articles, and case laws. The research article titled; ‘Defamation in the Cyberspace’ written by Preñçe MIRGEN provides a detailed analysis of defamation in cyberspace. It helped understand the various causes of online defamation and jurisdictional issues that arise, especially in those scenarios wherein the perpetrator and the victim are located in different places falling under separate jurisdictions. The author has made use of relevant case laws such as *Griffis v. Luban*⁶ and *Dow Jons & Co. v. Guntick*⁷ to present his views.⁸ In the research article titled, ‘Defamation on social media: An Adoption of Single Publication Rule, the author, Manjeet Kumar Sahu, has elaborated on the statute of limitation in case of online defamation. Forging ahead, the research article also throws light on the origin of the single publication rule and an exception to it in the form of ‘Doctrine of Republication’. The author has concluded by stating that when compared to the continuous publication rule, this rule is far more reliable as it prevents multiplicity of actions and probable harassment.⁹ The journal article authored by Sanette Nel, titled, ‘Online Defamation: the problem of unmasking anonymous online critics’ discusses the legal challenges faced by the Plaintiff while attempting to bring a suit against an anonymous poster of a defamatory message on the Internet by undertaking a comparative analysis of litigation in the UK, USA, and South Africa. It also emphasizes the extent to which internet service providers can be forced to disclose the user’s identity and provides effective measures to unmask anonymous offenders in cyberspace.¹⁰ The journal article titled

⁶ *Griffis v. Luban*, 646 N.W. 2d 527 (Minn. 2002)

⁷ *Dow Jons & Co. v. Guntick*, (2002) 210 CLR 575

⁸ Preñçe MIRGEN, Defamation in the Cyberspace, 49 Curentul Juridic, The Juridical Current 97, 97-102 (2002).

⁹ Manjeet Kumar Sahu, Defamation on social media: An Adoption of Single Publication Rule, SSRN, Jun. 2016, 1-5.

¹⁰ Sanette Nel, Online defamation: the problem of unmasking anonymous online critics, 40 CILSA 193, 194-214 (2007).

“Defamation in Cyberspace” written by Avantika Nandy for Pen Acclaims Journal helped understand the exact meaning of cyberspace. It further elaborates on the 3 types of cybercrimes- 1) Against individuals 2) Against government 3) Against property. The existing cyber defamation laws in India have also been discussed it.¹¹ Finally, the journal article titled, ‘Cybersmears: Dealing with defamation on the Net’ written by Jeffrey R. Elkin discusses in length, the concept of cyber-smearing. These days, companies tend to become easy targets to cyber smearing as internet users try to bring down the reputation of the firm intentionally by posting inflammable and false information about a particular firm. Thus, the common law tort of defamation is no longer limited to an individual’s right to reputation. False and misleading postings can hurt the company’s market shareholdings and business relations. Towards the end, the author points out that with the ever-changing and fast-growing technology at hand, it may become difficult for companies to protect themselves from rumors, innuendos, and falsehoods that occur within cyberspace.¹²

Chapterization

The research paper has been divided into the following chapters:

- I. Introduction:** In this chapter, the researcher has given a brief introduction to the topic of cyber defamation. It also includes the research objectives, research questions, and chapterization. Under the subheading, ‘literature review’, various articles related to the given topic have been analyzed.

Online defamation and the Single Publication rule: This chapter deals with the judgment given in the case of *Khawar Butt v. Asif Nazir Mir and Ors.* It was the first case dealing with cyber defamation in India. It also explains the rule of Single Publication that was adopted in the judgment.

- II. Cyber defamation & Right to Free Speech and Expression:** This chapter discusses the balance between cyber defamation and the right to freedom of speech and expression in India. It also deals with the significance of censorship in the digital era.

- III. Liability of Intermediaries and ISPS in India:** In this chapter, the provisions under

¹¹ Avantika Nandy, “Defamation in the Cyber Space”, 10 Pen Acclaims 1, 1-9 (2020).

¹² Jeffrey R. Elkin, *Cybersmears: Dealing with defamation on the Net*, 9 Bus. Law Today, Feb. 2000, 22-26.

Section 79 of the IT Act, have been discussed. Furthermore, the liability of intermediaries and its extent in cases of cyberdefamation has also been explained.

IV. Conclusion & Suggestions: This chapter aims to provide a summary of the research paper. It also provides suggestions as to how to deal with cyber defamation and secure the right to reputation of an individual within cyberspace.

ONLINE DEFAMATION AND THE SINGLE PUBLICATION RULE

In the modern era, social networking sites have amassed immense popularity, especially among the youth. It is a great platform for the internet users popularly termed as ‘netizens’ to interact and socialize digitally, without having to face any location-based barriers. However, cyberspace is not free from potential threats such as online defamation. At times, social media users may share their thoughts and opinion, a piece of information, or any such content, believing it to be true and in good faith. However, these social media platforms do not provide any mechanism for scrutinizing the authenticity and credibility of this circulated content. In addition to that, information travels at a lightning speed on social networking sites and covers a larger audience, when compared to print media.

As of today, there aren’t any specific laws that govern online defamation in India. Hence, online defamation is treated as just another form of libel. Thus, it is quite evident that one of the crucial elements of defamation is publication. Publication in this context refers to the communication of defamatory material to a third party. Defamation causes a cause of action to emerge on the date of publication. The statute of limitations for defamation is one year, and it begins when the libel was first published.

In the case of *Khawar Butt v. Asif Nazir Mir and Ors.*,¹³ Plaintiff filed a suit for defamation to claim for mandatory injunction and damages. The Defendants were alleged to have committed libel by publishing defamatory content on Facebook, a social networking site. Pamphlets containing derogatory material had also been published. It claimed that Plaintiff was indulged in an outside-marriage or illicit sexual relationship with the defendant’s wife. The major

¹³ *Khawar Butt v. Asif Nazir Mir and Ors.*, (2013) CS(OS) 290/2010.

concern, in this case, was whether the suit was barred by limitation or not as the suit was initiated in the year 2010, two years after the content was originally published. According to Entry 75 of the Schedule to the Limitation Act, 1963, the limitation period for claiming compensation in a suit for libel is one year from the date of its publication. However, Plaintiff contended that the Facebook post gave rise to a continuous cause of action as it would amount to the fresh publication every time the defamatory content appeared on the website. He further asked for exemption from the law of limitation owing to the particular nature of digital media, where a publication cannot be withdrawn voluntarily unlike print media.

The Delhi High Court in its judgment held that if the publication of defamatory content on social media would be warranted owing to its continuous nature, then the purpose of the law of limitation would be lost. Hence, the single publication rule was adopted.

Any kind of mass communication or aggregate publication is considered a single publication under the single publication rule, giving rise to a single cause of action for libel. This rule can be applied where communication is simultaneously available to a large number of people. According to this criterion, the statement is considered published, and the statute of limitations begins when the communication enters the commercial stream. However, under the multiple publication rule, a fresh cause of action arises every time derogatory material appears on the webpage. Thus, the statute of limitation for the offence of libel is insignificant as this rule can lead to limitless retriggering of the statute of limitations and multiplicity of suits. Before the judgment was passed in the case of *Khawar Butt v. Asif Nazir Mir* in 2013, the multiple publication rule was applied to the Cyber defamation cases by the Indian courts.

CYBER DEFAMATION & RIGHT TO FREE SPEECH AND EXPRESSION

“Article 19(1)(a) of the constitution of India guarantees every citizen of our country the fundamental right to freedom of speech and expression.” The basic idea behind this right was to ensure that the citizens of our country can express their convictions and opinions freely, without having any fear in their minds, by words of writing, mouth, pictures, printing, or any other mode. However, the introduction of digital interfaces has changed the whole scenario. The content uploaded on digital media can be copied, altered, and annotated by anyone. Thus, it often ends up becoming the source of fake and misleading news. Hence, a mechanism is

required to be developed to organize, sort, filter, and limit the overflowing information.¹⁴

However, this right is not unconstrained. Article 19(2) imposes reasonable restrictions on this right. The state may impose such restrictions under the circumstances concerning national security, maintaining public order, defamation, or in contempt of court. Thus, any false remark or comment passed or circulated in order to bring disgrace to a person's reputation would invite liability under the defamation law.¹⁵

Internet embraces all the subjects under the sun. It owes its widespread popularity and usage to its extensive and interactive nature. People browsing through a website can read, comment, and share its contents. Does anyone have control over the data getting accumulated on the Internet? No. Internet is pervasive and here, everyone is a publisher. Even though it exemplifies the freedom of speech, it may even result in the misuse of it. A majority of the content available on the web pages is graphical in nature and therefore, capable of creating a lasting impression on the viewers' minds. Since the internet is considered to be a pictorial medium and the contents can easily be printed into a permanent form, cyber defamation can be categorized as just another form of libel. As discussed earlier, the laws applicable to libel shall also be applied to online defamation. However, the degree of damage in case of online defamation is much more than that through print media owing to its ability to carry words afar and with more impact.

In the digital era, censorship plays a pivotal role in monitoring the plethora of information accessible on the internet and preventing its misuse. Censorship ensures that the internet is free from stuff that has the potential to hurt the religious sentiments of readers or can become a cause for hatred among societies or is grossly obscene. Section 66(A) of the Information and Technology Act, 2000 (hereinafter referred to as '**IT Act**') provided for the criminalization of the practice of sending offensive messages through a computer or any other communication device. However, this section was struck down by a two-judge bench in the case of *Shreya Singhal v. Union of India*¹⁶ in the year 2005. It was held by the Supreme Court that the terms of this section were vague making it vulnerable to abuse of power at the hands

¹⁴ INDIA CONST. art. 19, cl. 1, sub. cl. a.

¹⁵ INDIA CONST. art. 19, cl. 2.

¹⁶ *Shreya Singhal v. Union of India*, (2013) 12 S.C.C. 73.

of the government. It posed a serious threat to the freedom of speech and expression, a fundamental right guaranteed by the constitution. In one such instance, a cartoonist was detained for making a cartoon of the Bengal chief minister. Thus, striking down Section 66(A) was a groundbreaking judgment as this act earlier provided the government unfettered power to suppress and curtail people's freedom of speech and expression.

The case of *SMC Pneumatics (India) Private Ltd. v. Jogesh Kwatra*¹⁷ is regarded as the first-ever case of Cyber defamation in India. In this case, the defendant was an employee working for the company belonging to the plaintiff. He sent pejorative, obscene, and defamatory emails to his employers and several subsidiaries of the firm around the world with the sole intention of defaming the Managing director of the firm and jeopardizing the company's brand image. In its decision, the Delhi High Court issued an ex-parte Ad-Interim Injunction, prohibiting the defendant from sending any further insulting or harmful emails. In another case of *Swami Ramdev & Anr. v. Facebook Inc. & Ors.*,¹⁸ videos containing the summary of the book titled – 'Godman to Tycoon- The Untold Story of Baba Ramdev' written by Priyanka Pathak Narain were made available on various Internet intermediaries such as Facebook, YouTube, and Twitter. This book had been barred from publication under a judgment passed by the Delhi High Court in the case of *Swami Ramdev v. Juggernaut Books Pvt. Ltd. & Ors.*²⁴⁶ as it was observed that the book contained *prima-facie* defamatory content on Baba Ramdev. Thus, the petitioners, in this case, demanded a global blocking order to be passed as the content in question could still be accessed from different global platforms which could cause serious damage to the petitioner's reputation. None of the intermediaries objected to the defamatory content from being removed from India-specific domains but contested against removing it from their international services. In the final judgment, an order was passed by Justice Pratibha Singh to remove the defamatory content available on the Internet without any territorial limit, asserting that if the content has been posted through a computer resource located in India, then the Indian courts should have international jurisdiction to pass global injunctions.¹⁹

Even though there are laws to prevent people from posting defamatory content on the Internet,

¹⁷ *SMC Pneumatics (India) Private Ltd. v. Jogesh Kwatra*, (2016) RFA 268/2014.

¹⁸ *Swami Ramdev & Anr. v. Facebook Inc. & Ors.*, (2019), CS (OS) 27/2019.

¹⁹ Meril Mathew Joy & Shubham Raj, India: Defamation on Social Media- What Can You Do About It?, MONDAQ, (Jan. 7, 2020), <https://www.mondaq.com/india/libel-defamation/880758/defamation-on-social-media-what-can-you-do-about-it>

most people are simply unaware of the same or are too negligent to realize whether the content posted by them can cause harm to someone's reputation. Thus, at times, it becomes a necessity for the state to draw a clear line of distinction between the right to free speech and the right to the reputation of an individual.

LIABILITY OF INTERMEDIARIES AND ISPS IN INDIA

According to Section 79 of the IT Act, Internet service providers and social media intermediaries cannot be held accountable for any third-party information, data, or communication link made available or housed by them as long as:

- 1) "Their function is restricted to only granting admittance to communication systems;
- 2) They do not-
 - (a) Commence transmission
 - (b) Choose the receiver of the transmission
 - (c) Choose or alter the data being transmitted
- 3) They practice due diligence in their duties and stick to any guidelines which may be prescribed.

However, the intermediaries can be held liable: -

- a) Where the ISP has abetted, conspired, or induced the unlawful act.
- b) If the ISP fails to remove or disable the information, data, or communication link in question upon receiving the knowledge or on being informed by appropriate government agencies that such information, data, or communication link has been used to commit an offence without meddling with the evidence."²⁰

However, in most cases, the intermediaries are joined in as Defendants owing to their deeper pockets even if they are practically not liable for posting or transmitting defamatory content. In the case of *Vyakti Vikas Kendra, India Public Charitable Trust & Ors. v. Jitender Bagga & Anr.*,²¹ the Plaintiffs filed a suit against the Defendants, for indiscriminately sending e-mails and publishing blogs that were derogatory and insulting in nature. The defendants were accused of making rude and derogatory remarks about Sri Sri Ravi Shankar, the founder of the Art of Living Foundation. The Delhi High Court in its judgment held Defendant No. 2,

²⁰ The Information and Technology Act, 2000, §79.

²¹ *Vyakti Vikas Kendra, India Public Charitable Trust & Ors. v. Jitender Bagga & Anr.*, (2012) Cs (Os) No.1340/2012.

Google to be an “intermediary” under Sections 2 (1)(w) and 79 of the IT Act, 2000. Thus, the court ordered Defendant No. 2 to remove all defamatory content about the Plaintiff posted by Defendant No. 1, as it was under the obligation imposed by Section 79(3)(b) of the IT Act, within 36 hours from the date of knowledge of the court’s order. The court further barred Defendant no. 1 from sending any such e-mails or publishing anything on the Internet that may directly or indirectly implicate Plaintiff.

In the digital era, Internet Service Providers often find themselves in a much stronger position as compared to print media publishers since they possess unimaginable amounts of information. A defamatory material circulated on the internet would be read by millions of people across the globe. Hence, the author strongly contends that the liability of the ISP must be equivalent to that of the originator. His liability should not merely depend on whether he was aware of its publication or he had exercised due diligence in order to prevent it. Furthermore, the Internet Service Providers taking the plea of ‘no knowledge’ concerning the published defamatory content while having access to technological scanning gadgets to scrutinize and monitor the same would be irrational. Thus, Internet Service Providers should be brought within the liability of the publisher.²²

CONCLUSION & SUGGESTIONS

Unlike the traditional forms of media including print and broadcast media, social networking sites possess the potential and means to carry an intense volume of information, making it a critical source of defamation. It is quite evident from this research paper that the approach undertaken by the existing laws in our country towards cyber defamation is rather inadequate. There is a need for the enactment of separate laws as it is nearly impossible to apply the principles of 18th and 19th-century cases to the issue arising on the internet in the 21st century. Furthermore, it is imbecile to treat defamation occurring on the internet as just another form of libel as the nature of both these offences is quite different. One of the major challenges being faced by defamation laws worldwide is with respect to the ascertainment of jurisdiction. Crimes such as online defamation have known no geographical boundaries and can be committed from any nook or corner of the world. Thus, a legislative framework that covers

²² Talat Fatima, LIABILITY OF ONLINE INTERMEDIARIES: EMERGING TRENDS, 49 JILI 155, 164-178 (2007).

all the lacunae in the existing laws needs to be developed.

Freedom of speech and expression is one of the fundamental rights guaranteed by the constitution. With the advent of digital technologies, this right often ends up becoming a weapon in the hands of the wrong people. Thus, the state must ensure a balance between the right to free speech and a person's reputation. This can be done by implementing a code of conduct that governs the behavior of individuals within cyberspace and by the way of censorship.

Lastly, the amendment of Section 79 of the IT Act, 2000 guarantees the intermediaries comprehensive protection from any liability arising from third-party information and communication links. The primary objective behind this was to ensure that the intermediaries can work without any interventions. However, it leaves the door open for misuse as they can escape liability by contending that they had observed due diligence or weren't aware of the publication of the defamatory content.
