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INDIAN DEFAMATION LAW AND REGULATION OF ONLINE CONTENT

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While the internet's ubiquitous attributes support free speech and encourages public debate, they increase the potential to harm another's reputation through widely circulated unsubstantiated claims. This issue of the Law & Policy Brief examines the effect of Indian defamation laws on online speech and the interpretative concerns that arise from their application to the Internet. It argues that the current framework jeopardizes free speech in India by adopting a strict liability approach to the publication of defamatory statements, and allowing for criminal prosecution.

Recent news reports mention that India ranks first amongst countries to have restricted maximum online content in the first half of 2015 from the popular social networking website known as Facebook.[1] Approximately 15,155 pieces of online content, alleged to be violating local laws, has been taken down upon government request, which is said to be triple the amount in the second half of 2014.[2] As the role of the Internet as a medium of communication increases, governments have begun to engage in online content management. In doing so they are faced with the unique question of how to regulate a borderless jurisdiction. In the context of defamation, regulation may be approached, on a case by case basis, by extending pre-existing libel laws to the Internet or definitively by enacting specific cyber laws that treat the Internet as distinct from other conventional forms of media.

In 2001, the Delhi High Court assumed jurisdiction over cyber defamation for the first time in the case of *SMC Pneumatics v. Jogesh Kwatra*. The defendant was restrained from sending obscene, vulgar, abusive, intimidating, humiliating and defamatory emails to the plaintiffs and its subsidiaries. This has paved the way for the application of traditional civil and criminal defamation laws to the Internet. While the Internet doesn't foreclose the application of pre-existing laws, we must note that such laws were not drafted keeping the Internet in mind and therefore may not always be adequate.

The provisions of the Information Technology Act, 2000 specifically Section 66A which punished the sending of offensive or menacing information intended to cause annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, [and] hatred or ill will, was vague and overbroad. In *Shreya Singhal v. Union of India*, the Supreme Court recognized that the section had been wrongly used to secure convictions under defamation law. It held that the section was never meant to address defamation because it makes no mention of injury to reputation. Finally, it recognized that although special speech laws may be created for the Internet, they would have to abide by the Constitutional limitation of reasonable restrictions contained in Article 19(2) of the Constitution of India. Until such a law is enacted, the traditional civil and criminal law of defamation in India continue to regulate the Internet.

The modern times have seen the amended Information Technology Act, which was to provide legal recognition for transactions carried out by means of electronic commerce and to amend criminal and evidence laws to admit electronic transactions, to have been utilised for regulating defamation on the Internet. This is partially the result of misapplication of certain sections to apprehend individuals for the crime of defamation. It also provides for content liability of online intermediaries in India. The Information

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Technology (Intermediaries Guidelines) Rules, 2011 *(hereinafter referred to as 'the Intermediary Guidelines')*, issued by the Government prescribe that intermediaries are to conduct due diligence of the nature of content which flows through their websites, also requiring them to publish all terms and conditions for using its services online, so as to avail of the 'safe harbor' provided by the Act. Therefore, users of intermediary services are to be made aware of the "broad" legal consequences of content generated by them, which vicariously regulates user conduct and could lead to self-censorhip. Given the volume of user-generated content over the Internet, the extent to which the intermediary should be held accountable for the legality of the content that it hosts also requires analysis.

Defamation law in India.

India's civil law of defamation is not codified and owes its origins to English common law that has subsequently evolved through the jurisprudence of courts. Under such law, the offence of defamation is *prima facie* made out by the publication of a statement that identifies the plaintiff and tends to lower her reputation in the minds of reasonable people. The burden then falls on the defendant to demonstrate a justification, such as truth, fair comment, or privileged communication in order to absolve herself of liability. In this form, defamation acts as a strict liability offence. This means that an author cannot save herself even if she has taken due care in publishing her content (unless it relates to a public figure, in which case this is sufficient to avoid liability according to *R. Rajagopal* v. *State of Tamil Nadu*). Therefore, the legal standard of defamation places almost the entire burden on the defendant.

In the context of the Internet, this has a chilling effect on speech and expression posted online because individual users do not have the resources or wherewithal to conduct detailed fact-findings. It would be unreasonable to forbid expression unless it satisfies such an onerous burden. The situation is worsened by the fact that the law does not require actual proof of harm to the plaintiff and does not limit the claimable damages. This promotes opportunism amongst powerful personalities and corporations who often institute suits simply for the purpose of intimidating defendants and roping them into the slow and costly process of adjudication, regardless of whether a legal victory is likely. Such suits are called strategic lawsuits against public participation (SLAPPs) because they are aimed to silence dissent or inconvenient voices.

Criminal punishment for speech offences are considered incompatible with democratic ideals and have been increasingly abandoned in favour of civil remedies across jurisdictions. Notably, even the English offence of seditious libel, from which our criminal defamation law evolved has been repealed in the UK by the House of Lords in 2009. It is worrisome to note that an international body, Amnesty International, in its submission to the Law Commission of India in 2014, has stated that India's criminal defamation laws breach its obligations under international law. The report alleges that this can have a chilling effect on speech and discourage legitimate expression generally. The Indian Penal Code, 1860 by virtue of Sections 499, 500 and 501 together constitute the criminal law of defamation. These provisions have been invoked to arrest web-bloggers and journalists for political content disseminated via electronic mail and short messaging service applications such as the *Whatsapp*. Like civil defamation, the IPC does not require proof of actual harm. Although it constitutes a higher standard of culpability than civil defamation, it doesn't afford truth as an absolute defence. Predictably, even where claims may be factually correct, these provisions can and have been used to obtain gagging writs on the Internet.

Concerns while addressing online defamation in India

Aside from the problems inherent in the civil and criminal defamation law in India, there exist complications in applying these laws to the Internet. Foremost amongst these, is the basis on which a court may exercise jurisdiction over content that is available across borders. Since India does not currently have any guidelines on the maintainability of defamation cases on the Internet, Courts must base their jurisdiction on Section 19 of the Civil Procedure Code, 1908. This provision affords the plaintiff double actionability whereby she may sue in the jurisdiction where the wrong was done or within the local jurisdiction where the defendant “resides, or carries on business, or personally works for gain.”

In *Frank Finn Management Consultants v. Subhash Motwani and Another*, the Delhi High Court invoked Section 19 to assume jurisdiction over a defendant for publishing defamatory material in a magazine outside Delhi, on grounds that its availability online implied publication all over India. Theoretically, this would mean that an author may be asked to defend herself in any jurisdiction where her material has been made available, without her being acquainted with the law of such a land or intending to defame someone in that land. If this is the case, most Internet users across the world will be compelled to tailor their content to the standards of the least tolerant regulator to avoid liability. This race to the bottom will constrain free speech in jurisdictions that may otherwise be amenable to such speech.

Therefore, it is imperative that parties be compelled to demonstrate substantial harm within the jurisdiction owing either to the author's presence or the content being uploaded or directed to that jurisdiction. Otherwise plaintiffs will be able to harass defendants by approaching any court. A necessary requirement to establish the offence of defamation is ‘publication’. In cyber defamation cases, it is important to determine what constitutes publication as the period of limitation begins from the time of publication. Usually, publication is deemed to have occurred when the defamatory content is accessed. However, on the Internet this may

endlessly trigger the statute of limitations, because a fresh cause of action would arise for every moment the content is left online or re-posted. This would result in a multiplicity of suits and harassment to the defendants. Recognizing this, the Delhi High Court in *Khawar Butt v. Asif Nazir Mir* has ruled that the mere continued presence of the defamatory material or article on a website should not give rise to a continuous cause of action. The adoption of this "single publication" rule by the Court represents a creative way to overcome the limitations of traditional defamation law. The extension of traditional defamation laws to the Internet implies that cyber defamation plaintiffs may also avail of injunctive relief under Order 39, Rule 2 of the CPC. It has been argued in the case of *Tata Sons Ltd* v. *Greenpeace International and Anr*., that in considering the likelihood of irreparable harm to the plaintiff for statements made on the Internet, the Court should consider the amplified damage resulting from the reach and widespread accessibility of the Internet. This was rejected by the Delhi High Court, which stated that the Internet's wider viewership does not alter its essential function as a medium of communication and so it would be anomalous for the Court to discriminate between mediums for the purposes of granting relief. It clarified that features of the Internet that impact its reach and effectiveness in defaming could perhaps be a ground for assessing the degree of damages.

Role of Intermediaries in online defamation

The Information Technology (Amendment) Act, 2008 (*hereinafter referred to as 'the IT Act'*) has come to regulate defamation on the Internet. This is partially the result of misapplication of certain sections to apprehend individuals for the crime of defamation.[1] However more importantly, it lays down the content liability of online intermediaries in India. As mentioned earlier, online intermediaries which host defamatory content also bear content liability. In a year when the Supreme Court has passed its seminal judgement in the matter of *Shreya Singhal v Union of India,* there exist several unanswered questions regarding the online content liability on intermediaries; until the Central Government promulgates a new set of Intermediary Guidelines. Section 79 (Cl.1) of the IT Act allows online intermediaries such as Facebook and Google to be immune from prosecution for defamatory content on their websites. However it makes such immunity conditional on either; (1) the intermediary merely providing a technical, mechanical role, or, (2) the intermediary not interfering with the content in any manner, e.g. initiating, modifying or selecting the receiver. However, the problem arises when private intermediaries "receive complaints regarding content" and are required to make judicial determinations as to the legality of content and to *take down* defamatory content upon receiving "actual knowledge" of such content existing on their websites. This is mandated by Cl.3 of Section 79 as well as Rule 3 (4) of the Information Technology (Intermediary Guidelines) Rules of 2011. A study conducted by the Centre for Internet and Society in concluded that intermediaries are ill equipped to make determinations on the legality of content and will *err on the side of caution*, often removing perfectly legal content.[3] Additionally, the standard of "actual knowledge" was neither tested nor defined in the IT Act and led to uncertainty as to when intermediaries were under duty to remove such allegedly defamatory content. For example, were they required to remove content if a single private individual complained against it? The Supreme Court in *Shreya Singhal* categorically stated that "actual notice" amounted to nothing short of a court order, thus removing this burden from intermediaries. They also noted that Rule 3 (2) the Intermediary Guidelines should not be read to restrict speech to a greater extent than what is provided for in Article 19 (2) of the Constitution.

The Central Government is empowered to promulgate a new set of Intermediary Guidelines by virtue of Cl.2 (c) of Section 79 read with Section 87 Cl. 2 (zg) of the IT Act. In light of the *Shreya Singhal* decision, a new set of guidelines can; (**a**) create a "notice and notice" regime for defamation cases, (**b**) bring the language of Rule 3 (2) in line with Article 19 (2) and, (**c**) add additional safeguards to ensure the transparency and accountability of all content which is taken down. There is a trend of shifting away from the traditional "Notice and Takedown" to a "Notice and Notice" regime. The original regime prescribed by Cl. 3 of Section 79 and Rule 3 (4) of the Intermediary Guidelines required intermediaries to *takedown* content upon notice, creating what is known as a "notice and takedown" regime. Given the unique nature of defamation where the harm is caused to an individual by another, a "notice and notice" regime would be better suited to such disputes. Under a "notice and notice" regime, the intermediary is required to forward any complaints regarding content to the creator / poster of such content. Firstly, this allows the content creator and the aggrieved party to resolve the dispute directly in cases where the content creator is identifiable, and secondly allows the content creator to contest the legality of the content if the complaint is frivolous. Intermediaries would of course still be required to taken down content if faced with a court order and such orders still provide respite in cases where the content creator is not identifiable or is unresponsive. Thus, such a requirement in newly notified Intermediary Guidelines would not affect the court order requirement mandated by the *Shreya Singhal* judgement, but would significantly increase the transparency of future takedowns.

The Supreme Court in *Shreya Singhal* repeatedly clarified that no restriction imposed, either by court order, or by government notification, must be broader than the reasonable restrictions provided for in Article 19 (2) of the Constitution. Rule 3 (2) of the Intermediary Guidelines vicariously censors users beyond what Article 19 (2) of the Constitution permits by requiring intermediaries to publish agreements that make it unlawful for users to upload, modify, transmit or publish content that, among other things;

- *is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever* (Rule 3 (2) (b))

Rule 3 (2) of the Intermediary Guidelines has been severely criticised by several groups including, but not limited to; the Centre for Internet and Society, Software Freedom Law Centre and the Centre for Communication Governance, for being excessively wide and exceeding the ambit of Article 19 (2).[4] In light of the discussion in *Shreya Singhal* on Section 66 of the IT Act, and the brief discussion on Section 79, it is clear that any newly promulgated Intermediary Guidelines will have to be limit the scope of Rule 3 (2) to the existing framework provided by Article 19 (2) of the Constitution.

Given the substantial changes that need to be incorporated in Rule 3 (2) and Rule 3 (4) in order to bring them in line with *Shreya Singhal*, the goal of new guidelines should be to increase the transparency of the entire takedown process. Across the world there is a developing consensus over principles of intermediary liability in the form of the Manila Principles, recently endorsed by the U.N. Special Rapporteur on the Freedom of Expression. Any re-promulgation of the Intermediary Guidelines should draw on these and allow for the content creator / poster an effective right to be heard before content is taken down. Additionally, court orders requiring takedown should clearly state how long content should be taken down for, and intermediaries should clearly indicate when content has been taken down when users try and access such content.

Conclusion

It is evident that Indian courts are inclined toward applying the laws of civil and criminal defamation to the Internet. Firstly, this calls for a close scrutiny of the chilling effect that strict liability offences or the threat of criminal prosecution may have on speech on the Internet. In this regard, the repeal of Sections 499, 500 and 501 of the IPC would be consistent with international practice. Secondly, although courts have been progressive in their understanding of what constitutes publication and the extent of relief to be granted, they have failed to engage with the question of jurisdiction and have in fact implied that the availability of defamatory material on the Internet opens the gates to litigation in any court. Until this position is clarified, it offers dangerous precedent for opportunistic plaintiffs. A coherent principle on jurisdiction for cyber defamation is required. In the context of intermediaries, the idea certainly is not to allow absolute immunity from all defamatory content that they host. Intermediaries often engage in varying forms of self-censorship and editorial control and can be held guilty in certain defamation actions. Similarly, when faced with a court order, there is no question that an intermediary must comply and takedown defamatory content where they have both knowledge of and control over the content in question. However, there is no doubt that *Shreya Singhal* has moved India's intermediary liability regime forward by removing the burden of identifying defamatory content from intermediaries.

In establishing an information society based on corrective justice, the normative understanding of the traditional defamation laws alongwith the modern role of online intermediaries decidedly needs careful implementation. Doing away with a strict liability approach which paves way for criminal prosecution is more in compliance with the constitutional guarantee of the fundamental right to freedom of speech and expression. A fairer system of liability in the digital space calls for a balance between the strict outcome-based approach to a clarified and normative agreement of what constitutes responsible communication in cases of online defamation. What the new guidelines should seek to do is to ensure that the intermediary liability regime put forth in the judgement is enforced in a transparent and accountable manner, within the scope of the Constitution of India.

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[1] *See* Hindustan Times, "India had maximum content taken down on Facebook in 2015" (November 12, 2015) available online at http://www.hindustantimes.com/world/india-had-maximum-content-t aken-down-on-facebook-in-2015/story-TLB5x0xJnn5F1KGxiC2ioL.html (last accessed on November 12, 2015).

[2] *Ibid*. ("Government requests for account data globally jumped 18% in the first half of 2015 to 41,214 accounts, up from 35,051 requests in the second half of 2014.")

[3] Rishabh Dara, *Intermediary Liability in India: Chilling Effects on Free Expression on the Internet,* Centre for Internet & Society, Bangalore (2011) http://cis-india.org/internet-governance/intermediary-liability-in-india.pdf. (last accessed on November 3, 2015).

[4] The Software Freedom Law Center's report (SFLC Report) available online at http://sflc.in/wp-content/uploads/2014/07/Information-Technology-Intermediaries-Guidelines-Rules-2011-An-Analysis.pdf (last accessed on November 3,2015); Centre for Communication Governance's study authored by Chinmayi Arun and Sarvjeet Singh, *NOC Online Intermediaries Case Studies Series: Online Intermediaries in India*, National Law University, Delhi (2015).

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