
MATRIX OF DEFAMATION IN THE AGE OF INFORMATION TECHNOLOGY & THE LAW: A CRITICAL ANALYSIS

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ABSTRACT

In order to understand Cyber Defamation, we need to analyze the fundamental Rights which have been enumerated in Part III of the Constitution of India, 1950. We have observed that Cyber Defamation is not limited to Libel. In the age of Information Technology, the mode of crime has been transformed. Cyber Defamation is not only considered as a subject matter of Tort, in fact, converted into criminalization. Fixing the liability of defamation has become a difficult task due to the emergence of Internet. In this paper, a modest attempt has been made to figure out the potential liability of Internet Service Providers in the context of Cyber defamation cases. The researcher has taken the reference of Criminal law i.e., the Indian Penal Code for a better understanding of Cyber Defamation. The liability of anyone for cyber defamation depends upon different kinds of publications whether it is Primary publications or Secondary Publications. The researcher has tried to find out the liability for Cyber defamation in the context of the Information Technology Act 2000 as well. The scope of cyber defamation may be determined by the nature of wrong i.e., tort or crime. The researcher has also tried to examine the defense generally taken in action against cyber defamation. Lastly, Jurisdictional Issues have also been analyzed.

Keywords: Cyber Defamation, Information Technology, Liability, Law of Torts, Internet Service Provider, Jurisdiction

1. Introduction

Being a citizen of a democratic country, we have immense privilege as compared to non-democratic countries. The basic fundamental right which has been given to each and every citizen is right to speech and expression¹ which strengthens the structure of democratic country. Since, right to speech and expression was guaranteed in the Constitution of India in those days when we had very limited exercise of this right. Now, with the advent of Information technology, appropriation of the right has become easier. At any point of time, the citizens may exercise the right in cyberspace which includes computer, computer system and computer network. Complete and absolute rights may lead to multifarious consequences. Though right to speech and expression is fundamental right rather than statutory right, still absoluteness of any fundamental right may infringe the right of any other citizen or may not be justified. Hence, freedom of speech and expression has been limited by reasonable restrictions.² According to the constitution, nothing shall prevent the state from making any law in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. In nutshell, it can be stated that right to speech and expression which may lead to the wrong of defamation may be fettered by the restrictions imposed on such freedom of speech & expression by the virtue of any law. As far as right to dignity or reputation of any citizen is concerned, we may refer to Article 21 of the Constitution.³ Article 21, itself doesn't mention about the right of reputation. Interpretation of Article 21 allow the right to reputation to bring it within the ambit of right to life. As per the decisions of Supreme Court of India, Reputation is an integral part of the life of anyone. The Supreme Court has referred to American Case⁴ in *Smt. Kiran Bedi v. Committee of Inquiry⁵ & State of Maharashtra v.*

¹ According to Article 19 of Indian Constitution, 1950

(1) All citizens shall have the right—
(a) to freedom of speech and expression;

² Article 19 of Indian Constitution, 1950

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

³ Article 21 of Indian Constitution states that “No person shall be deprived of his life or personal liberty except according to a procedure established by law.”

⁴ *D.F. Marion v. Minnie Davis* 55 American LR 171

⁵ 1989 AIR 714, 1989 SCR (1) 20

*Public Concern of Governance Trust*⁶ . It states:

“Good reputation was an element of personal security and was protected by the Constitution, equally with the right to the enjoyment of life, liberty, and property. The Court affirmed that the right to enjoyment of life, liberty, and property. The Court affirmed that the right to enjoyment of private reputation was of ancient origin and was necessary to human society.”

The Court held that right to reputation is protected during the life & after the death as well.⁷ In *State of Bihar v. Lal Krishna Advani*⁸ , Supreme Court held that everyone is entitled to have and preserve one's reputation, and everyone has the right to protect it. In addition to right to reputation, right to live with dignity also falls within the ambit of right to life.⁹ In *Francis Coralie v. Union Territory of Delhi*¹⁰ observed:

“The right to live includes the right to live with human dignity and all that goes along with it, viz., the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings and must include the right to basic necessities the basic necessities of life and also the right to carry on functions and activities as constitute the bare minimum expression of human self.”

Since, it has been established that right to reputation & right to dignity are part of our fundamental right i.e., right to life, Defamation may be considered as contrary to the fundamental right of Right to life. Hence, Defamation leads to wrong either it is criminal wrong or tortious wrong.

2. Definition of Defamation

Irrespective of the fact that defamation is crime or civil wrong, definition of defamation remains same. When someone causes harm to the reputation of the other person with the help of words either by spoken or intended to be read to defame the person, leads to defamation. No specific or exhaustive universal definition of defamation has been mentioned anywhere. The

⁶ AIR 1989 SC 714

⁷ *State of Maharashtra v. Public Concern of Governance Trust* AIR 1989 SC 714

⁸ AIR 2003 SC 3357,

⁹ *Maneka Gandhi v. Union of India* 1978 AIR 597, 1978 SCR (2) 621

¹⁰ 1981 AIR 746, 1981 SCR (2) 516

Indian Penal code has elaborated the definition of defamation.¹¹ Perusal of the definition leads to conclude that defamation requires intention & knowledge, in order to hold the wrongdoer liable for the crime of defamation. Apart from the definition in Indian Penal Code, Section 469 & Section 503 of Indian Penal Code explain about the “forgery for purpose of harming reputation”¹² & “Criminal Intimidation”¹³ respectively. The Indian Penal Code, 1860 protects the reputation of citizens by imposing punishment on the offenders. On the other hand, defamation may be considered as a civil wrong under the law of torts. Since, law of torts is uncodified, there is no codified definition of defamation. Under the law of torts, defamation may be classified as Libel & Slander. Libel is a kind of defamation in which a person defames or causes the harm to the reputation of other person with written words. On the other side, Slander is verbal way of causing harm to the reputation. Now, the scope of Slander has been enhanced due to emergence of Information technology & Broadcasting Organizations. As far as the Section 499 of Indian Penal Code, 1860 is concerned, it includes both kind of defamation. Under the law of torts, Defamation is a wider area of research with the help of judicial pronouncements in different jurisdictions. It is very dynamic & ever-growing in nature largely because of diversified decisions given by the Courts.

3. Definition of Cyber Defamation

There is no substantial difference in defamation and cyber defamation. Cyber defamation consists of two words i.e., cyber and defamation. Cyber signifies about computer, computer system, computer network, information technology & virtual world etc. Thus, wrong of defaming with the help of cyber & its tool establishes the cyber defamation. Traditional defamation may be differentiated from it on several grounds, where it is really difficult to fix the liability for the wrong. Generally, in defamation, the person who writes the defamatory

¹¹ The Indian Penal Code, 1860, Section 499: Defamation. —

“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 hereinafter expected, to defame that person.”

¹² The Indian Penal Code, 1860, Section 469: Forgery for purpose of harming reputation —

“Whoever commits forgery, shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.”

¹³ The Indian Penal Code, 1860, Section 503 — Criminal Intimidation-

“Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.”

statement in the capacity of author may be considered as culprit. Sometimes, the person who publishes the defamatory statement may be held liable. In the age of Virtual world, it become more convenient to publish the message within the short span of time. Dissemination of message or information is much speedier & wider as compared to traditional way of publication. In the cyberspace, we have many stake holders, either it is the user of the cyberspace, website owner or internet service providers etc. Just because of emergence of internet, we have many users of social networking web sites which play a very important role in the dissemination of information. Social networking web sites are the easy way to defame the reputation of any specific one. Facebook, twitter, YouTube & many such sites provide a platform to express their thought & views. These social networking sites have emerged with globalization but whole system has been infiltrated & misappropriated by the anti-social elements. By many wrongdoers, cyberspace has been mis utilized by taking the advantages of infirmities of internet system, either it is a matter of privacy or matter of anonymity. It is a matter of fact that we have never been able to recognize the person who so ever is sitting in front of the screen of computer. Impersonation could be another disadvantage/ crime of cyberspace sometime, which leads to cyber defamation as well. General perception is defamation is an outcome of written defamatory words against someone which doesn't include the mode of spoken to defame. By breaking all the barriers, cyber defamation includes spoken & written defamatory statement. If someone, caused defamation by the virtue of cinematography and uploads on the YouTube, even though no written word is appropriated in the cinematography, still it would amount to the cyber defamation.

4. Constituents of Cyber Defamation

Whether it is Defamation or Cyber Defamation, it needs to comply with certain pre- requisites to establish it as a crime or civil wrong. First of all, there should be a publication of defamatory statement. As far as publication is concerned, we need to observe wider perspective which means the action of making publicly known by spoken or written defamatory statement. Secondly, the statement must make the reference to the aggrieved. The point to say is that whatever statement has been made must be in the context of aggrieved party or plaintiff. Thirdly, the statement must be communicated to the third party. If someone send a defamatory e-mail to no another than plaintiff. It would not be considered as a cyber defamation. For cyber defamation, there should be wider circulation of the statement. Fourthly, the statement must be in the reach of plaintiff. Lastly, Plaintiff must have suffered actual or presumed damage. In the

cyber defamation, there are basically two kinds of liability. One is direct liability or Primary liability. Web site content provider, email author etc. may be considered as subject matter of direct liability. On the other hand, second is indirect liability or secondary liability. Bulletin Board Services, Internet Service Providers etc. may be illustrated for indirect liability. In direct liability, author may be held liable indirectly for defamatory statement. In Case of Internet Service Provider, determination of indirect liability depends upon various different situations.

5. Cyber Defamation & Information Technology Act

Initially, an attempt was made in order to protect the citizens from the cyber defamation by the virtue of Section 66A of the Information Technology Act, 2000.¹⁴ The constitutionality of section 66A was challenged before the supreme court on the basis of violation of fundamental right to freedom of expression.¹⁵ It was claimed that Article 19(2). leads to an exception to the Article 19(1)(a) but subsequently the Petitioners contended that Section 66A was unconstitutional because it protects against annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, or ill-will fall outside the purview of Article 19(2). Furthermore, the words “offensive” appropriated by the government was quite ambiguous in nature. Resultantly, Supreme Court of India invalidated the Section 66A of Information Technology Act, 2000 in its entirety, since it infringed the fundamental right of Freedom to expression as mentioned under Article 19(1)(a).

6. Cyber Defamation & Internet Service Provider’s Liability

The liability of Internet service providers or the intermediaries is a matter of fact. Section 79 of Information Technology Act, 2000 provides an exception to intermediaries’ liability. Interpretation of the Section 79 may be done in the context of cyber defamation. As per the provision, intermediary shall not be liable for the third-party information, data, or communication link made available or hosted by him.¹⁶ Further it has been clarified by the

¹⁴ Section 66A. Punishment for sending offensive messages through communication service, etc.—Any person who sends, by means of a computer resource or a communication device, —

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device;

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

¹⁵ *Singhal v. Union of India*, AIR 2015 SC 1523

¹⁶ Section 79. Exemption from liability of intermediary in certain cases. —

provision¹⁷ that aforementioned provision shall be applicable if internet service provider's function is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted. Section 79 states that Intermediary shall not be liable for any transmission which has been initiated by some other person. No liability shall be imposed if internet service providers neither select the receiver nor modify the information contained in the transmission.¹⁸ In addition to all, no Internet service providers shall be liable if they observe the due-diligence while discharging his duties under this Act and also observes such other guidelines¹⁹ as the Central Government may prescribe in this behalf.²⁰ Apart from providing a safe harbour to intermediaries against any act of cyber defamation, specific provision²¹ has been incorporated which held liable to ISPs for the wrong, it may be cyber defamation as well. According to the statute, Intermediary shall be liable if the intermediary conspires or abates or aides or induces in the commission of the unlawful act. That unlawful act may be the cyber defamation. Internet service providers shall be responsible if they have the actual knowledge of wrong (may be cyber defamation) and still, they fail to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.²² General perception is who so ever writes or speaks the defamatory statement, would be considered as culprit. Such culprit would be directly liable since it is a matter of authorship but in case of publication, publisher shall also be equally responsible for the publication of defamatory material whether it is written or spoken. In the age of Information technology, Internet service providers or Bulletin Board Services are considered as equivalent to the publishers. Even, they might not be directly responsible for cyber defamation but still, they may be held liable indirectly or we may say that they are responsible as contributory liability. Some time, Universities as a publisher are also held liable vicariously, just because of the act of their employees.²³ This instance is feasible in case of cyber defamation as well. Due to growth of information technology, the scope of cyber publication is much wider as compared to traditional way of publication. According to the

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by him.

¹⁷ Section 79(2)(a), Information Technology Act, 2000

¹⁸ Section 79(2)(b), Information Technology Act, 2000

¹⁹ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

²⁰ Section 79(2)(c), Information Technology Act, 2000

²¹ Section 79(3), Information Technology Act, 2000

²² Ibid

²³ Douglas W. Vick, Linda Macpherson & Sarah Cooper, Universities, Defamation and the Internet, 62 MOD. L. REV. 58 (1999).

“Single Publication Rule”, any person aggrieved of cyber defamation can give rise to one legal action rather than multiple cases.²⁴ Just because of internet, there is a possibility of multiple publications, on different internet platform, of a single defamatory publication. The basic purpose of “Single Publication Rule” is to protect the defendants from the multiple law suits. The liability of Internet service providers has been exempted on various grounds which includes “Mere conduit”²⁵, “Hosting”²⁶ etc. Briefly, we may say that Internet Service Providers are not responsible primarily. In fact, responsibility may be imposed on the basis of the fact of the case. In US case of *Cubby v. CompuServe*²⁷ court refused to apply rule of vicarious liability. Reason being, unless & until you don’t acquire all the elements which are responsible for liability, no indirect liability can be imposed. In another case, *Sega Enterprises v. Maphia*²⁸ court held that Bulletin Board Services are not directly liable for any kind of wrong done by subscriber rather they may hold liable indirectly. In *Religious Technology v. Netcom*²⁹, court held that there is no direct liability of Internet Service Provider for posting a message by a subscriber. Hence, we can say that being a *mere conduit* or as publishes, we cannot hold Internet service providers directly liable for any specific wrong which includes cyber defamation as well. The scope of holding Internet Service Providers indirect liable or secondary liability to remain open ended or quite large.

7. Jurisdiction & Cyber Defamation

One of the drawbacks of Information Technology is determination of jurisdiction in case of adjudication of disputes. In case of Cyber Defamation, it is really difficult task to figure out the jurisdiction in which adjudication would take place. The person who has given a defamatory statement resides in “X” country & the person who has been defamed by the statement resides in “Y” country. It becomes more complicated when you come to know about the location of the server which is third place. Now, the question arises that what would be the appropriate jurisdiction to bring a legal suit against the person who has allegedly infringed the right to reputation. In order to determine the jurisdiction for adjudication, there are several theories on the basis of which we may ascertain the right jurisdiction for adjudication. In order to ascertain the jurisdiction in cyber defamation, “Minimum Contact Theory”, “Effect theory” & “Sliding

²⁴ Lori A. Wood, Cyber-Defamation and the Single Publication Rule, 81 B.U. L. REV. 895 (2001)

²⁵ Article 12 of EU Directives on “E-Commerce”

²⁶ Article 14 of EU Directives on “E-Commerce”

²⁷ 776 F Supp 135 (SDNY 1991)

²⁸ 857 F Supp 679(ND Cal 1994)

²⁹ 907 F Supp 1361

Scale Theory” may be helpful. Firstly, “Minimum Contact Theory”³⁰, According to this theory, it is applicable where both or anyone party are from different territorial jurisdictions. On the basis of their quality and intensity of their contact with forum state determines the appropriate jurisdiction. *Minimum contact rule establishes that so long as a corporation had a degree of contact within the state bringing suit, they are subject to the laws of the state and can be sued by and within the forum state in court.*³¹ Subsequently, minimum contact theory was extended to individuals also.³² In addition, we have “Effect theory” which was propounded in *Calder v. Jones*³³. In this case, an editor who was residing in Florida made derogatory remark or defamatory statement in the Article, just because of large circulation of magazine in California &, it caused an injury to the person who was in California. In this case, court held that California Court has a jurisdiction over the person who was residing in Florida. It was held so because of the injury caused by libellous assertion & the effect felt in the jurisdiction. Thirdly, “Sliding Scale Theory” also known as “Zippo Test”. In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*³⁴ a federal court held that “*the likelihood that general jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale rule is consistent with well-developed general jurisdiction principles.*” On the basis of “interactivity” of a web site, this theory establishes the personal jurisdiction. There are different kinds of web sites, it may be active website or passive website. When one website constantly interacts with another party, makes it eligible to constitute the personal jurisdiction as per the “Zippo test”. No one theory is perfect or absolute in itself. Many criticisms have been raised against the “Zippo test”. According to critiques of “Zippo test”, how much interactivity & commercialism is sufficient enough to establish personal jurisdiction has not been laid down anywhere.

8. Defences against Cyber Defamation

Absoluteness of anything brings arbitrariness. As already discussed, freedom of speech and expression is not unfettered complete or absolute. It may be curtailed or abridged under certain circumstances. There are in certain situations wherein cyber defamation may not be considered

³⁰ For Detail See: *CompuServe Inc v. Patterson* 89F 3d 1257(6th Cir1996); *Int'l Shoe Co. v. State of Washington* 326 U.S. 310, 66 S. Ct. 154 (1945)

³¹ Kindly see https://udrc.lkouniv.ac.in/Content/DepartmentContent/SM_cd8441f8-76c2-495f-8ad6-e4d3d120fb0f_30.pdf

³² *Kulko v. Superior Court*, 436 US 84 (1978)

³³ 465 U.S. 783 (1984)

³⁴ 952 F. Supp 1119

as a crime or civil wrong. The defenses may be pleaded by the defendant at the time of judicial proceedings. One of the defenses is “Truth”. If defendant proves that whatever statement has been given by him is substantially true in nature than plaintiffs legal action may not survive. Secondly, nothing will be considered cyber defamation if it is a “bona fide” & “fair comment” or statement. According to Duncan and Neill defence of fair comment means a) The Statement should be in public interest; b) The statement must be based on facts; c) The comment must be recognizable as a comment. Apart from this defence, Absolute Privilege may be the strong defence against cyber defamation. Absolute Privilege itself is also strong defence with wider in scope which includes judicial process, government officials, privilege to legislators, political speeches in Parliament and conversation between spouses. Lastly, the Consent of person may also be the effective defence in a defamation case.

9. Epilogue

To sum up it can be said that cyber defamation has been dealt with by general law of Torts, but there are no specific provisions under Information Technology Act to protect the aggrieved person. We have Criminal Law which is very stringent as compared to remedies under common law. Our law makers have made a law on the liability of Internet service Providers in a peculiar manner by providing addition regulations.³⁵ We have lots of lacuna & loopholes in the system which are need to be addressed by the legislatures or appropriate competent authorities. As yet we are short of technical mechanism of censoring and filtering of defamatory content. Emerging horizons of information technology, have necessitated a strike of balance between the technology & Law. In the nutshell, we can say that due to sensitivity of cyberspace, cyber defamation requires more attention of legislators and competent authorities along with specialized expertise in this specific field to eliminate the anti-social contents. Like defamation, cyber defamation has various dimensions. For instance, *Innuendo*, latent meaning needs to be proved which leads to defamation. *Prima facie* innocent words are not actionable unless & until proved by the plaintiff. Apart from legal concerns, we are bound to work upon the technical aspect of cyber defamation. In lack of coordination between technical elements and legal framework, we would not be able to overcome the problem of cyber defamation. In the recent times, most of the people rely upon the social networking web sites which have certain privacy issues. Such social networking web sites and social media are needed to be streamlined. In the absence of data protection law, many repercussions and consequences have been faced

³⁵ *Supra* note 19.

by the users who are appropriating the such social networking & social media through the information technology. Data protection law also a demand of the current situation which will definitely influence our fundamental right including right to reputation. Though, some provisions have been incorporated in the Information technology Act which are the subject matter of Interpretation of statutes. Though specific regulation³⁶ is prescribed for the protection of data in practice. It is failing to cater & meet the needs of society. Hence, it requires more attention to create a concrete legislation in this regard. Above all, there is a dire requirement of initiating the awareness program for cybercrime among the mass. Even, Judiciary needs to appoint law officers or Judges who may have the technical knowledge to adjudicate such kind of complicated cases including cyber defamation as well.

³⁶ The Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011.