
DEFAMATION ON ANONYMOUS SOCIAL MEDIA PLATFORMS

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INTRODUCTION:

The reputation is the social esteem of a person held by the society forming the fundamental asset which is invaluable than any other property and the advancement in technology has completely changed the nature and pattern of communication driving the way to a world driven by anonymous social media platforms which triggers the dissemination of defamatory statements that fabricates a peril that looms over a person's identity with a mala-fide intention to lower down the reputation of an individual in the right thinking members of the society. The widespread audience and the immediacy of digital communication makes it conducive for the people to operate behind the social media platforms with an anonymous identity and escape the legal consequences causing an irreparable damage which transcends borders and is not confined by geography and access. Anonymity is a vital tool in protecting the free speech and expression on internet, but online anonymity has created significant problems within the tort of defamation by amplifying the potential damage by acknowledging the evolving scope for public discourse. Defamation is a felonious tort offering concurrent avenues for judicial redressal but in an era where a post can go viral in seconds and a tweet can reach millions in milliseconds, it is imperative to comprehend the intricate rationality in the tortious liability under defamation laws and the legal recourse to integrally protect the reputational dignity on an individual.

ISSUE:

The legal question that revolves around defamation under law of torts in coherence with the anonymous social media platforms is regarding the extent of liability of the people reacting to the anonymous posts along with the publisher of the defamatory statements on the social media platforms. Another legal doctrine that holds a prominent position in this matter is the **Norwich Order**. An analysis of this legal tool along with the product liability of the custom authorities to disclose the anonymous identity of the wrongdoer who passively facilitate the wrongdoing. Also, the judicial take of the courts over the misuse of generative artificial intelligence

platforms by the anonymous users to disseminate defamatory statements and complexities associated with the tortious liability on the creator and user of the chatbot is another area of conflict.

RULES:

Defamation is a felonious tort in India which offers concurrent action under criminal as well as civil law. **Indian Penal Code, 1860** was the pioneer that acknowledged the preservation of the dignity and reputational integrity of a person by penalising the publication of defamatory statements regulated by **Section 499 and 500** shaped by the common law principles. **Section 356 of Bharatiya Nyaya Sanhita (BNS), 2023** is the fundamental law governing defamation in India by adjudicating the wrongdoer with punitive prospect to stimulate deterrence in the society. The legal provisions dealing with defamation also has its roots in the liability for ‘**torts against persons and personal relationships**’ constituting a ‘**tort against the reputation of a person**’ under ‘**law of torts**’. The Supreme Court of India in its landmark ruling *Subramanian Swamy v Union of India* [2016] 3 SCR 865 recognised the **Right to Reputation** as a part of **Right to life and personal liberty under Article 21 of the Indian Constitution** acknowledging the constitutional validity of defamation laws in India. Cyber defamation is dealt by the **Information Technology (IT) Act, 2000** where **Section 66A** used to deal with cyber defamation and corresponding punishment for it but was declared unconstitutional by the Supreme Court of India in *Shreya Singhal v Union of India* [2015] 12 SCC 73¹ while **Section 79** provides safe harbour of the intermediaries against defamation claims for third party information hosted by them on their social media platforms subject to any unauthorised use and alteration. The ‘**Cyber Crime Investigation Cells**’ are also established as a unit of ‘**Crime Investigation Department**’ are also established to deal with cyber defamations.

ANALYSIS:

Internet has been the greatest technological breakthrough in revolutionising a unique way of communication constituting a vast range of social media platforms in which a person can use a screen name (anonymous) to conceal his/her true identity to address a wider audience. Anonymity has the social benefit of encouraging inhibited speech, but it becomes problematic in the cases of cyber defamation where the anonymous poster’s right of freedom of speech and

¹ *Shreya Singhal v Union of India* [2015] 12 SCC 73

expression conflicts against the victim's right to dignity and reputational integrity under right to life and personal liberty. The Supreme Court of India in its landmark judgement *Subramanian Swamy v Union of India* [2016] 3 SCR 865² held that right to reputation is a part of right to life and personal liberty under Article 21 of the Indian Constitution. The constitutional validity of article 499 and 500 of Indian Penal Code was contested by the petitioners in this case under Article 32 arguing that it violated their fundamental right to free speech and expression under Article 19(1)(a). The court upheld the sanctity of right to freedom of speech and expression but emphasized that the fundamental rights are not absolute and are subject to reasonable restrictions which should serve public interest. When one fundamental right comes in conflict with the other, a balance that facilitates the societal interest should be achieved.

In *Arvind Kejriwal v State & Anr* [2024] DHC 6347³, Dhruv Rathee, an Indian YouTuber and blogger uploaded a YouTube video alleging BJP's IT cell of bribing a third party to defame him and Arvind Kejriwal, then Chief Minister of Delhi retweeted this post without verifying its authenticity. The Delhi High court held that retweeting of the content which was originally created by some other person represented to the public at large which the general public would ordinarily believe to be originally posted from his own account would amount to publication constituting defamation under Section 356 of Bharatiya Nyaya Sanhita. The freedom of speech and expression is essential in a democratic country, but it cannot extend to the right of the people not to be defamed. However, the court drew a distinction between endorsement and reacting to a post and underscores that every reaction to a post on anonymous social media platforms is not an endorsement which would always amount to defamation as the liability would depend upon the amplification of the dissemination of the alleged defamatory content like in the case of a public figure having a political standing which would escalate the potential of extensively injuring the credit of the victim having pervasive and enduring implications on the society⁴.

In order to institute an action for defamation against the wrongdoer, the plaintiff needs to establish the identity of the alleged anonymous users in defamatory communication. Litigations seeking the identity of the anonymous users and the liability of the Internet service provider (ISP) is the new arena of conflict. The biggest problem in the cybercrimes is the accountability

² *Subramanian Swamy v Union of India* [2016] 3 SCR 865

³ *Arvind Kejriwal v State & Anr* [2024] DHC 6347

⁴ Matthew Collins, *The Law of Defamation and the Internet* (3rd edn, Oxford University Press 2010)

of the intermediaries in the defamation committed on the anonymous social media platforms. The courts delivered strong precedents emphasizing that the publishers of the print media are held to be liable as the author of the libellous publication as they retain some kind of control over it. The network service providers furnish an interactive world serving a crucial connection in transmitting, distributing and publishing the defamatory statements on social media platforms⁵. The interpretation of the court acknowledging a third party as a publisher, distributor or carrier would determine the liability of an intermediary in cyber defamation. There are two responsibilities of a service provider in defamation which are publisher liability and distributor liability where a distributor usually has no control over the information it disseminates because of which they are exempt from the liability for the alleged information they distribute and a publisher who reviews and edits the content to be published is responsible for damaging someone's reputation. A judicial pronouncement of New York Supreme Court in *Stratton Oakmont, Inc. v Prodigy Services Co.* [1995] N.Y. 229⁶ takes into consideration the roles and liabilities of an intermediary. The Stratton is a banking firm which brought an action for defamation against Prodigy, a network service provider on which the defamatory statements were posted. Prodigy exercised control over the editorial powers and thus assumed the role of a publisher and thus became liable for the defamation. The liability of a network service provider in India is dealt by section 79 of information Technology Act, 2000 which provides a safe-harbour protection to the intermediaries against the third-party content in the absence of any unauthorized inconsistent act and consistent application of authorised instructions to prevent the commission of the alleged act. The identity of the anonymous user of the social media platform is of vital importance to establish an actionable claim under law of torts in which **Norwich Order** plays a prominent role. Norwich order is furnished by the courts as a mechanism to demand the unknown information about the wrongdoer which is critical for the victim to file a lawsuit where the identity of the wrongdoer is anonymous and unidentifiable. Deriving its name from the House of Lords judgement in *Norwich Pharmacal Co. v Commissioners of Customs & Excise* [1974] H.L. 173⁷ in which the original Norwich order granted a pharmaceutical company to disclose the identity of a party latently importing company's patent protected drug from the customs authorities. The court held that the third party or the service provider which facilitates the wrongdoing incurs no personal liability but is under a duty to assist in disclosing the information and identity of the anonymous wrongdoers.

⁵ Sanette Nel, 'Online defamation: the problem of unmasking anonymous online critics' [2007] CILJ 193

⁶ *Stratton Oakmont, Inc. v Prodigy Services Co.* [1995] N.Y. 229

⁷ *Norwich Pharmacal Co. v Commissioners of Customs & Excise* [1974] H.L. 173

The jurisdiction of Norwich Order extends in United Kingdom, Ireland, Australia and Canada. In India, such order of the court that seeks to disclose the identity of an anonymous internet user engaged in the unlawful infringements of the rights of the other person are called '**Ashok Kumar Orders**' adopted from a common law concept of '**John Doe Orders**' owing to the fact that the defendant is anonymous and the time is transient.

Generative Artificial Intelligence ('AI') detonated into the human consciousness with the pervasive use of **Language Processing Models ('LPM')** which assimilate and analyse the latent cognitive patterns of the human psychology and relationships and envision the progressive outcome. But these models can generate false and defamatory content which would have the potential of injuring the reputational integrity of a person. AI is neither a human nor a legal entity making it nearly impossible for the plaintiff to bring on successful defamation claims. The role of humans in creating and publishing the false AI content sustains a likelihood of successful defamation claims against AI. The first AI defamation case filed against a generative AI company is *Walters v Open AI, LLC* [2024] 11th Cir. 23-13843⁸ in which Mark Walters who is the founder of Armed America Radio and loudest voice in America fighting for gun rights filed a complaint against ChatGPT and OpenAI LLC for defamation. The complaint stemmed from the incorporation of a false story generated by an AI platform by a reporter in an article published on Ammo Land, a pro-gun website. The journalist used ChatGPT for a summary of the accusation in the case against Walter which wrongly identified Walter as the treasurer and chief financial officer of **The Second Amendment foundation ('SAF')** and accused Walter of defrauding and embezzling funds from SAF. Walter sued OpenAI, the founder of ChatGPT and the reporter as a third-party publisher for defamation under law of torts. The case highlights AI's liability to hallucinate and harbinger many future defamatory causes of action. The plaintiff has the burden of proof in proving all the elements of defamation where an individual who republishes the defamatory statement, i.e. the user can be held liable as the original publisher by proving that the third party was negligent or acted with malice which adversely affects the association of the people with the plaintiff in business and other activities. In common law, libel is actionable per se so if the plaintiff proves that the defamatory statement was communicated to someone else other than the defamed person, the statement would be considered to be published regardless of the form and liability of the original publisher. The intent of the republished can be implied if the defendant acted without exercising

⁸ *Walters v Open AI, LLC* [2024] 11th Cir. 23-13843

a reasonable standard of care and did not verify the authenticity of the AI generated information⁹. Moreover, just like Section 79 of the Information Technology Act, 2000, in the United States of America Section 230 of Communications Decency Act provided a ‘**safe harbour**’ to these Interactive Computer Services like OpenAI exempting their liability for the third-party defamatory content published on their social media platforms. However, the liability of the owner can be established by proving the defective designing and lack of necessary safeguards to prevent the generation of defamatory content which hallucinated the third party to think less of the plaintiff which caused direct damage to the reputation of the victim. Therefore, the digital landscape poses significant challenges owing to the wider access and momentum of the anonymous social media platforms amplifying the irreparable damage caused to the reputation of a person while scrutinising the defamation claims which could be addressed by navigating the intricate fraternization of specialized legislations and interpretive judicial precedents providing deep insights into the word of cyber defamation.

CONCLUSION:

The social media is the social, cultural, commercial, educational and entertainment global communication platform that facilitates the creation and distribution of anonymous content by legitimately empowering the online users to use anonymous communication to legitimise their right to free speech and privacy. This anonymity which serves human rights is often used by wrongdoers to injure the dignity and reputational integrity of a person with amplified reach and irreparable damage in a momentary span of time. The cyber defamation has escalated the adverse consequences on the social standing of a person in the mind of right-thinking members of the society unlike traditional defamation, but the current legal framework of India is redundant to acknowledge the increasing complexities of the defamation on anonymous social media platforms. The determination of right jurisdiction, lack of proper enforcement of traditional laws in digital landscape, anonymity of the users and redundancy of traditional laws and absence of definite legislation challenge the adequacy of the existing laws regulating defamation. In India, the development policies of our nation do acknowledge the need to maintain harmony between the evolution of social media and preservation of dignity recognising the balance between the free speech and reputational integrity, but cyber defamation is not determined as an integral part in the national development policy. Therefore,

⁹ Leslie Tenzer, ‘Defamation in the Age of Artificial Intelligence’ [2023] SSRN Electronic Journal 23

it has become imperative to redefine and review the nature of tortious liabilities and offences created under defamation laws and find an effective solution to mitigate the perils of defamation and protect the reputation of a person on anonymous social media platforms.

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