

DEFAMATION AND SOCIAL MEDIA: THE PARCEL THAT KEEPS ON BEING PASSED

Written by Rohit Ray

*2nd Year BA.LLB student, The West Bengal National University of Juridical Sciences,
Kolkata, India*

ABSTRACT

Reputation is an aspect of human existence that is given great importance and value. People spend their lives tirelessly striving to build a reputation that can do their perseverance justice and give their legacy strength. It only takes one moment, one comment, or one person to destroy it all. This becomes especially troublesome and unjust when the words being used to attack one's reputation are false and malicious. In legal parlance, this phenomenon is called defamation and is a popular topic of study in both civil and criminal law. When we place the already menacing nature of defamation in today's world, it becomes clear how the internet makes it exceedingly easy for it to occur, by virtue of the scope and swiftness of the digital realm. This transcendence of defamation from the physical world to the virtual one also raises many legal questions regarding the specific nature and evolution of the phenomenon, the present laws surrounding the issue and any possible adaptation it might have to undertake, to cope with modern developments. Hence, in its attempt to truly understand defamation in today's digital world, this paper will, rather than studying the tort of defamation as a legal principle, look at how defamation takes place in an online context, specifically in relation to social media and networking platforms. It will shed light on the hazards associated with this form of defamation, and how these dangers are even more potent now than ever before. Lastly, but importantly, this paper will investigate the laws that govern cyber defamation and delve into the ever-important question that arises when investigating the issue: "who is liable?"

CYBER DEFAMATION: AN INTRODUCTION

Change is a fundamental aspect of human existence. It has presented itself in various forms, frequencies, and magnitudes. And as human society has seen numerous changes over time, so has the law that governs it. Legal concepts and structures have evolved as per the needs of evolving human societies and practices. Today, we find in front of ourselves one such change, catalysed by the increasing digitisation and networking in the world at present.

The law on defamation has existed for centuries. Although the current laws concerning defamation were first formally indoctrinated in Britain, similar laws and rules existed long before it. Such instances were seen in the early Roman, Germanic, and Saxon societies, where punishments were given for statements that would cause insult.ⁱ

Over the past few decades however, with the advent and expansion of the internet, a prominent new development has emerged in the law on defamation: cyber defamation. It falls under the definition and scope of the concept of defamation in the ordinary sense, differing from it in terms of the medium of communicating or publishing the defamatory material. Cyber defamation takes place over the internet, due to which it is also called online defamation. Hence, if someone posts, publishes, or communicates defamatory matter online, it qualifies as cyber defamation.ⁱⁱ

DEFAMATION OVER SOCIAL MEDIA AND ITS DANGERS

For the purpose of this paper, we will focus largely on the online platform of social media and how defamation occurs through these platforms.

Online social networking began as a natural reaction to the human desire to communicate in an easier, faster, and more diverse manner.ⁱⁱⁱ It was seen as a tool to help fulfil the fundamental human need for companionship and social interaction.^{iv} It meant going beyond mere telephonic communication into a more detailed and accessible socialisation process, where multiple people from various regions and backgrounds could connect, share views and ideas, get a glimpse of one-another's lives, and create their own social and cultural spheres using the internet.^v This phenomenon took the world by storm towards the end of the twentieth century as the world became more of a global village through such a revolutionary form of social

communication. And decades into its existence, its influence on people's lives is stronger than ever and growing with each passing day.

However, with most good things, there comes the negative side. And such was the case with social media, especially with regard to the tort of defamation. Defamation evolved as a legal principle due to the scale of the harm it can cause to the victims. It has even been criminalised in many countries including India, where it is seen as a wrong committed not only against an individual, but also society at large. The harm referred to here is a harm caused to one's reputation and dignity through false and often malicious statements. It is crucial to note that the Indian constitution guarantees the fundamental right to life and dignity through article 21^{vi}, and the right to reputation is considered a part of this right.^{vii} Hence, defaming someone in India would mean violating their fundamental right.

This threat to one's reputation and dignity is amplified and compounded when it comes to cyber or online defamation, where the internet, especially social media, provides the platform for circulating and publishing the defamatory material. This has given rise to a situation where false or defamatory statements or remarks can reach an enormous audience in a short span.^{viii} Social Media posts and publications have the potential of becoming 'viral' i.e., shared and circulated by people at a rapid rate and rising to popularity as a result.^{ix} This process of quick and widespread popularisation often shapes public mindset to a large extent through a psychological phenomenon called the 'bandwagon effect', where people take up certain forms of behaviour or beliefs without much thought or rational analysis, just because other people do so as well.^x In many cases, this leads to a public perception not dissimilar to that of a mob, in the sense that it overflows with strong emotions and lacks a logical foundation. Although this effect is not limited to social media, it is certainly amplified and catalysed by it. When translated to the real world, this often has disastrous repercussions. For instance, a seemingly insignificant false narrative regarding a service provider or a business can completely destroy the reputation and social standing of the victim, ruining the livelihood of all those depending on those businesses or services. Apart from significant financial wounds and damage to the reputation of one's person or business, such cases of cyber defamation also cause tremendous psychological distress to not only those who bear the brunt of the false statements, but also their families, friends, and other associated individuals or groups.

Social networking websites in most cases make it very straightforward and simple to post false or defamatory matter online. This is largely due to its poor regulatory mechanisms, which arose out of a desire to make social media a way for people to freely express their views and opinions. Hence, in most cases matter uploaded on social media is not checked for whether it is false or defamatory.^{xi} This frequently incentivises people into publishing something they would not in a more traditional or formal platform.^{xii} Added to this is the ability to share such content and the tendency to repeat views and perspectives similar to popular public perceptions by joining the bandwagon, which makes it very difficult to pinpoint a single perpetrator or wrongdoer.^{xiii}

WHAT DOES THE LAW HAVE TO SAY ON SOCIAL MEDIA DEFAMATION?

As pointed out previously, when looking at defamation that occurs over social media, one must carefully examine the domain of cyber or online defamation, which itself is a subset of the tort of defamation. Due to this structure, the laws under which suits for cyber defamation can be filed coincide with those of defamation, as cyber defamation must still possess the elements of defamatory matter to be punishable; the only difference between the two is that cyber defamation is a more exclusive term used when the platform for the defamatory content is the internet.

In India, defamation is actionable as a tort as well as a crime, through civil and criminal claims respectively. Criminal claims for the same would have to be filed on the basis of Section 499 and 500 of the Indian Penal Code, which define and illustrate defamation, its elements, and its exceptions in detail.^{xiv xv} However, we will not delve any further into that as the subject of study of this paper is cyber defamation as a tort, not a crime.

Civil Claims for defamation are dealt with under the law of torts and must be filed in accordance with the directions of the Code of Civil Procedure.^{xvi} The definition and elements of, and the exceptions and defences to defamation used here would be those that have evolved in the law of torts in common law. Hence, the victims in civil suits of defamation can claim damages for the same and have to show that all the elements of defamation have been fulfilled. These elements are a harm to one's reputation, publication, or conveyance of the matter to a

third party, and reference to the victim in the published matter, either directly or in implied terms through innuendos.^{xvii, xviii}

Apart from the general rules and exceptions that apply to defamation, there exist specific set of guidelines that governs defamation over social media and the cyber realm. For instance, individuals who wish to seek recourse for cyber defamation have, apart from the choice of initiating civil or criminal proceedings as mentioned above, may also approach the cyber-crime investigation cell, which acts under the authority of the CID or Crime Investigation Department.^{xix} Indian laws also have separate rules under Section 64A and 65A of the Indian Evidence Act which determine what forms of published media are admissible as documents under cyber defamation.^{xx} These include electronic messages or e-mails, chats made on online platforms and electronic records that have been recorded or replicated through magnetic or optical media.^{xxi}

Although all the provisions illustrated so far play a crucial role in the judicial and administrative process vis-à-vis internet defamation, the discussion would be incomplete without analysing one of the most important additions to modern Indian legislation: the Information Technology (IT) Act, implemented in the year 2000. Section 2(1)(h) specifies what qualifies as a communication device, on which content published or communicated can fall under the category of cybercrime and cyber defamation.^{xxii, xxiii} Another important section of the Act with respect to defamation is Section 66(A).^{xxiv} This section criminalised and made cognizable the offence of publishing offensive content online.^{xxv} This would include defamatory matter as well. However, due to its highly controversial nature and susceptibility to being misused, it was widely criticised and finally taken down by the Supreme Court in 2015 through the case *Shreya Singhal v. Union of India*.^{xxvi, xxvii} In its judgment, the Supreme Court labelled the section unconstitutional, as it unreasonably put arbitrary restrictions on the right to freedom of expression and speech, as guaranteed by Article 19(1)(a) of the constitution.^{xxviii}

In 2011, another set of guidelines came into play which dealt with the question of liability and accountability on the part of digital intermediaries and social media companies when it comes to cyber defamation. These guidelines will be looked at in detail in the next section of this paper, which deals specifically with the question of who should be held liable in cases of online defamation, specifically when it concerns social networking websites.

THE QUESTION OF LIABILITY

One of the most important questions that arises when it comes to defamation over social media is regarding whom the liability falls on. In cases of defamation, the entities that publish or circulate the defamatory matter can be held accountable and liable for the same.^{xxix} In other words, the parties that can be sued in civil cases of defamation, whether slander or libel include the authors of the information, the publishing corporations, and editors, and in certain cases, individuals or companies that distribute the defamatory matter.^{xxx}

However, the task of pin-pointing a responsible party becomes a little more complicated over the internet and social media specifically, because of a unique stakeholder involved in the scenario: the social networking company or network provider, also called the online intermediary. What makes this stakeholder unique is the continuing debate surrounding its role in putting out information and matter online, and whether it acts as an active contributor or publisher in those circumstances, or a passive element that only provides a platform. Direct contrasts can be drawn between social media intermediaries and newspaper companies. In the case of newspaper articles and publications, the newspaper company is considered an active participant in the scenario and hence held liable for defamation as a publisher. The pertinent question here is whether social networking companies, which merely act as intermediaries and facilitate the transmission of information from creator to consumer, should be held liable for defamatory content transmitted over these platforms.^{xxxi}

To understand this dilemma better, we must focus on the reason social media became so popular in the first place. It was meant to be a platform for free interaction between people from across the globe where they could share ideas, connect with others, and socialise in the realm of the internet, in an easy and accessible manner. Keeping this goal in mind, various social networking companies evolved in order to provide such a platform, where content creators can easily disseminate their content. Owing to this passive role played by intermediaries, safe harbour provisions were developed for them in many countries.

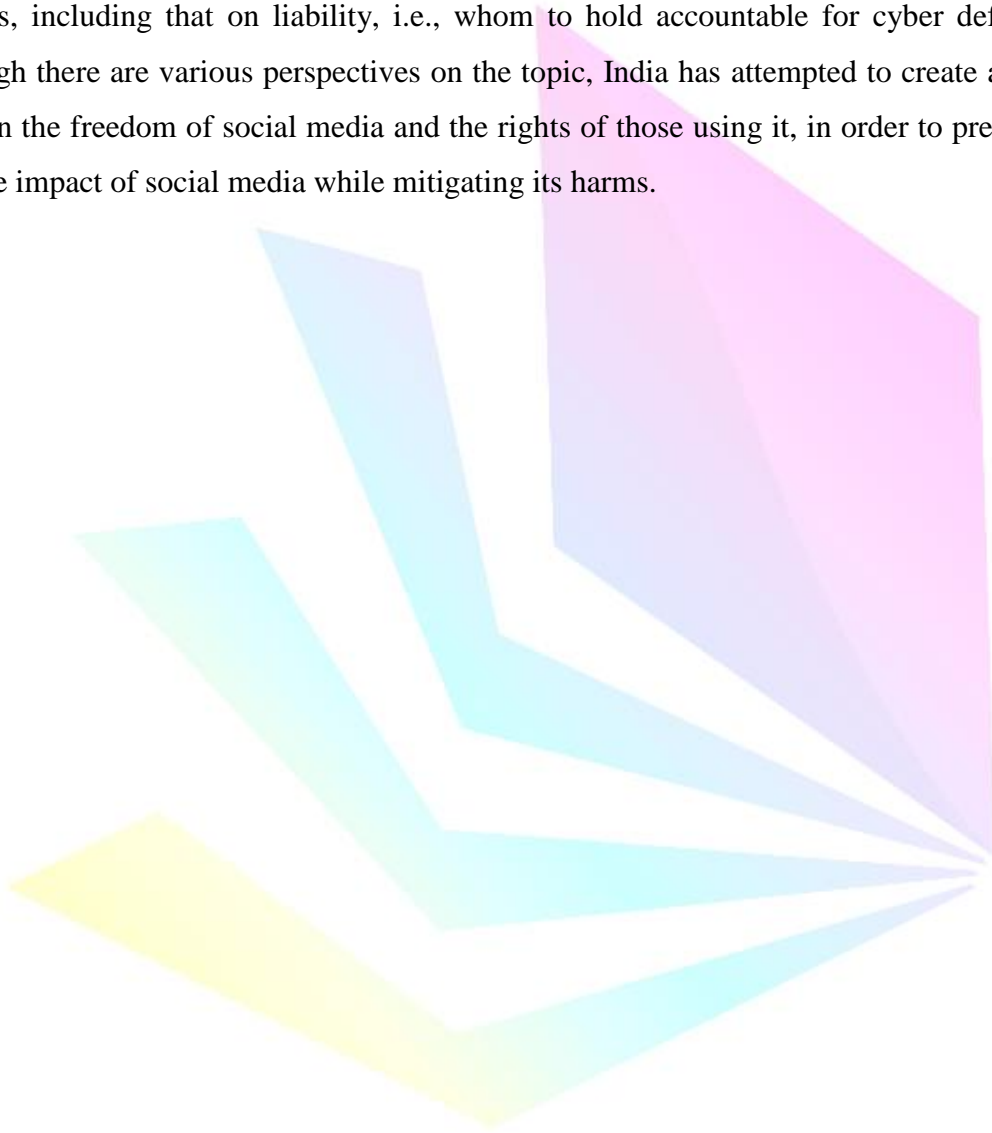
According to this safe harbour, they would be absolved of liability to a great extent for content published on their platforms. Such provisions were deemed paramount because social media companies cannot possibly know every detail regarding the tremendous volume of content posted every moment.^{xxxii} Expecting this would be unreasonable and go against the very

principles on which these platforms were developed: free expression, global reach, and ease of accessibility. However, the other side of the argument says that giving a completely clean chit to intermediaries would create a structure completely devoid of regulation, open to misuse in the form of hate speech, sexually exploitative content and other harmful matter.^{xxxiii} Hence, various governments across the world started altering their safe harbour provisions and inserting regulatory requirements in order to make the intermediaries' role a more active one, where they hold greater accountability.^{xxxiv} This marks a distinct shift in global attitudes regarding social media intermediaries and a greater demand for accountability and liability on their part. This shift was also reflected in Indian laws surrounding intermediary liability.

In India, Section 79 of the Information Technology (IT) Act of 2000 provided safe harbour for digital intermediaries, on the condition that they abide by certain due diligence requirements.^{xxxv, xxxvi} These due diligence conditions were laid down in 2011 through the IT (Intermediary Guidelines) Rules, which were a part of the IT Act of 2000.^{xxxvii} The IT rules of 2011 were then updated in 2021. According to these rules, the intermediaries are not completely ridden of liability. The immunity provided them is subject to the condition that they take down unlawful material upon receiving complaints from consumers, governments, courts or other such officially authorised bodies.^{xxxviii} The 2021 rules state that social media companies that wish to benefit from safe harbour provisions must also establish a three-tier grievance redressal mechanism which attends to real-time complaints and regulates published matter accordingly.^{xxxix} In enforcing such a mandate, the aim was to increase accountability on the part of the social media company and introduce an alternate form of liability, where the intermediary would be held liable for failing to take down the content appropriately after receiving complaints, instead of being liable as a publisher or creator of the defamatory matter itself. This was seen by the Indian government as a satisfactory solution to the problem of intermediary liability, as now, free speech and intermediary safe harbour provisions would exist, but the grievances and rights of individuals affected by the same would also be considered.

CONCLUSION

Social media has evolved to hold a significant influence on our lives. However, it also possesses threats we must be wary of. One such threat is cyber defamation, where online platforms are used to harm the reputation of others, causing financial and psychological damage. With time, various laws have evolved to tackle the problem of online defamation and the various questions it raises, including that on liability, i.e., whom to hold accountable for cyber defamation. Although there are various perspectives on the topic, India has attempted to create a balance between the freedom of social media and the rights of those using it, in order to preserve the positive impact of social media while mitigating its harms.



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