Comments on

"CONSULTATION PAPER ON MEDIA LAW"

1. Introduction

The Constitution of India guarantees citizens the Right to freedom of speech and expression. However, recently there have been many instances where this freedom has been sought to be curtailed by means of defamation suits aimed at silencing criticism or by means of police action on the basis of provisions like Section 66A of the Information Technology Act. The Internet has given citizens greater power to express themselves freely and to take part in democratic discourses. As this power, which should have strengthened our democratic processes, is often sought to be curtailed, the time has come to take a relook at various statutes to ensure that the right to freedom of speech and expression of citizens is protected and strengthened.

2. Need to decriminalize defamation

Section 499 of the Indian Penal Code, read with Section 500, punishes the offense of criminal defamation with imprisonment up to two years, or fine, or both. Any imputation – written, spoken or otherwise – concerning an individual, which is intended to (or is known to be likely to) harm the reputation of said individual is said to be criminally defamatory. While Article 19(1)(a) of the Constitution of India guarantees citizens the fundamental right to freedom of speech and expression, Article 19(2) identifies defamation as a ground for reasonable restriction of this fundamental right. This means the current criminalization of defamation is technically within Constitutional mandates.

In practise however, this statutory treatment of criminal defamation is quite problematic in the

context of free speech. Fear of unintentionally triggering prosecution under Sections 499 and 500 of the IPC undeniably dampens the journalist's drive to engage in legitimate public critique, especially since allegations of criminal defamation are notoriously difficult to disprove. This could potentially cause high-level political misdeeds such as corruption to go unreported by the media and unnoticed by the public. The Internet could serve as a great medium for public discourse, but bloggers and citizen journalists could feel threatened by the criminal provisions related to defamation and this could cause a chilling effect.

The fact that fear of even groundless prosecution may prevent the media from reporting crucial information raises the question of whether the criminalization of defamation is in fact justified by the harm that stands to be done in its absence. In other words, does defamation as grounds for reasonable restriction of the fundamental right to free speech in fact allow its *criminalization*?

In the matter of *Chintaman Rao v. State of MP*[1], the Supreme Court of India had held that, *"the phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public"*. Considering then that the public interest sought to be served by criminalizing defamation would be served just as expediently by civil sanctions, there remains no perceivable justification as to why the criminalization of defamation is in any way necessary. Also considering that criminalization of defamation has the demonstrable effect of preventing the media from reporting information in legitimate public interest, such criminalization clearly goes above and beyond a *reasonable* restriction and defeats the very purpose of the constitutionally guaranteed right to free speech.

Further, the Supreme Court had said in the matter of *Bhagat Ram v. State of HP*[2] that any penalty

1 AIR 1951 SC 118
2 AIR 1983 SC 454

disproportionate to the gravity of misconduct would be considered violative of Article 14 (right to equality before law) of the Constitution of India. That being said, the current penalty for criminal defamation, which includes deprivation of the offender's personal liberty by way of incarceration for up to two years, can hardly be said to be proportional to the gravity of offense. Unlike *in rem* crimes such as murder and theft, where the collective society stands to be harmed by the offenders' state of liberty, the act of defamation poses no discernible threat to the society at large. Its scope of impact is primarily restricted to the alleged offender and his/her victim, who also has the option of responding to the defamatory allegations and setting the record straight. Thus, treating acts of defamation in a similar manner as graver offenses is patently untenable. Even under English law, to which much of Indian law may trace its origins, defamation was declassified as a criminal offense with the passing of the Coroners and Justice Act, 2009. Section 73 of this Act abolished the offenses of sedition and seditious libel, defamatory libel, and obscene libel. Further, UK's Defamation Act of 2013 introduced a new requirement that claimants must demonstrate "*serious harm*" to their reputations in order to establish a claim. This is expected to reverse the chilling effect on free speech posed by overbearing defamation laws.

The abolition of criminal defamation laws was also recommended by a Joint Declaration by the special rapporteurs on free speech and expression of the United Nations, the Organization for Security and Co-operation in Europe, the Organization of American States and the African Commission on Human and Peoples' Rights. The Declaration said, *"criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws"*.[3]

3 Joint Declarations of the representatives of intergovernmental bodies to protect free media and expression; Adeline Hulin (Ed.) - Vienna: OSCE Representative on Freedom of the Media, 2013, p. 29

3. Section 66A of the Information Technology Act, 2000

This Section has now become a weapon of choice for law enforcement agencies throughout the country to curb legitimate speech on the Internet. Recently, there have been numerous instances of this Section of the Information Technology Act being misused by enforcement authorities in order to curb and limit legitimate instances of free speech. A few instances of misuse of the provision include:

- the arrest of a professor at Jadavpur University, Mr. Ambikesh Mahapatra in April 2012 for circulating a humorous cartoon of the Chief Minister of West Bengal

- the arrest of two Air India employees for posting content on Facebook and Orkut that was critical of a trade union leader and some politicians

- the arrest of an industrialist and volunteer of the India Against Corruption movement named Ravi Srinivasan in Puducherry for posting a comment alleging that Karti Chidambaram, son of of the then Hon'ble Finance Minister was corrupt

- the arrest of two girls from Palghar in Maharashtra - Shaheen Dhandha for sharing her views on Facebook about the death of Bal Thackeray leading to shutting down of the city, and her friend Renu Srinivasan for 'liking' her views.

This provision is unconstitutional in its current form due to the following reasons and needs to be repealed.

3.1 The provision is ambiguous

The usage of words like 'annoying' and 'inconvenience' makes the provision ambiguous and subject to misuse. In the case of penal statutes what is prohibited should be clear to the public. Moreover, when the provision is ambiguous, the restrictions on freedom of expression will transcend beyond the reasonable restrictions that can be imposed under Article 19 (2) of the Constitution.

In the U.S, the doctrine “vague as void” was applied in the case of Grayned v. City of Rockford[4], and it was held that:

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing a fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

The Hon'ble Supreme Court of India has also stressed on the need to avoid vague expressions in statutes in *A.K. Roy v. Union of India*[5].

4 408 U.S. 104, 108-09 (1972)
5 (1982) 1 SCC 271

3.2 Violates the right to freedom of expression

Section 66A of the Act with its ambiguous terms like 'annoyance', 'inconvenience', 'hatred', 'ill will', 'grossly offensive' or 'menacing character' results in violation of the fundamental right to freedom of speech and expression. The terms used in this provision results in curbs on the fundamental right to freedom of expression beyond what can be imposed under Article 19(2) of the Constitution of India. The Hon'ble Supreme Court has held in *Express Newspapers (Private) Ltd. and Anr. Vs. The Union of India (UOI) and Ors.*[6], that if any limitation on the exercise of the fundamental right under Article 19(1)(a) does not fall within the four corners of Article 19(2) it cannot be upheld.

This provision results in creates a curtailment of the right to freedom of speech and expression of citizens that is beyond the boundaries prescribed by Article 19(2) of the Constitution of India. The result of such a restriction will be the creation of a chilling effect on the freedom of speech and expression

3.3 Violates the principle of proportionality

The Information Technology (Amendment) Bill, 2006 introduced in Lok Sabha on 15th December, 2006 was referred to the Parliamentary Standing Committee on Information Technology. The Standing Committee has made the following observation relating to the issue of spam in its report:

> *"35. One of the important issues that has been brought to the notice of the Committee during the course of the examination of the Bill is that 'spam' or receiving unwanted and unwarranted e-mails has not been appropriately addressed in the proposed amendments.*

6 AIR 1958 SC 578

The Department's reply that sub-Section (b) of Section 66 A and Clause (i) of Section 43 of the Act appropriately address the issue pertaining to spam does not convince the Committee as a close scrutiny of the above said two Sections reveals that the issue of spam has not been adequately dealt with. The Committee appreciate to note the Secretary, DIT's statement that it is very difficult to deal with spam as it can be generated from anywhere in the world. But in view of the irritation and agony that the recipients of unwarranted e-mails have to go through, the Committee are of the considered view that specific legislations should be incorporated in the proposed amendments to effectively deal with such mails. So far as generation of spam beyond the geographical boundary of India is concerned, the Committee feel that once the issue of jurisdiction of law, as has been broached upon elsewhere, is settled, that will automatically take care of this problem."

Thus the intention of the legislature in introducing the new section was primarily to address the problem of spam in online communications. The intention of the legislature to control the issue of spam by means of this provision as evidenced in the report of the standing committee is defeated by making the provision vague and broad.

This Hon'ble Supreme Court held in *Om Kumar v Union of India*[7] that:

"By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between

7 AIR 2000 SC 3689; JT 2000 (Suppl3) SC 92(1); 2000 (7) SCALE 524

the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'."

The instances of the use of the Section show that the legislation has resulted in adverse effects on the rights and liberties of persons and is not proportional to the purpose the provision was intended to serve.

3.4 Provision treats expression on the Internet differently from expression on other media

The provision makes an unreasonable restriction on the expression of ideas when made on the medium of the Internet. However such a restriction is not made if the same idea is expressed in a printed form or on television. Provisions in the Indian Penal Code relating to expressions that are illegal like Sections 153 A, 295 A and 499 are also applicable to content on the Internet and there is no requirement to have a separate set of provisions for expression on the Internet. The Internet is a medium which is widely used to build public opinion as evidenced in the Nirbhaya gang-rape case in Delhi. The Internet will soon become the medium of choice for delivering content in all forms, whether it be Newspaper, TV or Radio. The unequal treatment of content on this media will result in throttling innovation and preventing economic growth. Such a curb on this medium is arbitrary and unreasonable and is in violation of Article 14 of the Constitution of India.

4. Intermediary liability

Intermediaries like ISPs, web hosts, social networking sites and blogging platforms play an important role in dissemination of information by providing tools and platforms that allow users to access the Internet, host content, share files and transact business. Section 79 of the Information Technology Act, 2000 (IT Act), by way of a 2009 amendment, provides safe-harbor protection to Internet intermediaries against liability for user-generated unlawful content. As per the Section, intermediaries are exempt from such liability, provided:

- the function of the intermediary is limited to transmission, temporary storage or hosting of user-generated content
- the intermediary does not:-
  - initiate transmission
  - select the receiver of transmission
  - exercise editorial control over user-generated content
- the intermediary observes 'due diligence' in its course of operation and observes all Central Government-issued guidelines

The definition of the term 'Intermediary' as found under the IT Act is in itself problematic as it includes all intermediaries from telecom service providers to online market spaces to search engines to web hosts and even cyber cafes. As the nature of operations of these intermediaries are different, they should not be treated in the same way when it comes to deciding liability for online content. There should be a clear classification of intermediaries based on their functions and the actions that they need to take to avoid liability arising from user-generated content should also be based on this classification.

The 'due diligence' to be observed by intermediaries under Section 79 was detailed by the Information Technology (Intermediaries Guidelines) Rules (IT Rules), notified in 2011. According to these Rules, intermediaries must specify in their Terms of Service that users are prohibited from dealing in a host of content that is deemed unlawful by the Rules. Aside from content that is violative of any applicable law, the Rules also prohibit content that is *inter alia* grossly harmful, harassing, blasphemous, defamatory and hateful. Upon reception of a take-down request from any affected party, intermediaries are bound to 'initiate action' within 36 hours, and take down the requested content within 30 days, if said content is found to be unlawful. Failing this, safe-harbor protection under Section 79 of the IT Act will not be available to intermediaries.

While the provision of safe-harbor protection to intermediaries is indeed a welcome move, the IT Rules unfortunately suffer from a number of shortcomings:

- Rule 3(2)(b), while specifying prohibited content, employs several terms such as 'grossly offensive' and 'blasphemous' that are undefined by the IT Act, Rules or any other legislation. In the absence of statutory definitions, intermediaries are forced to perform adjudicatory functions that they are not equipped to handle. This amounts to private censorship.
- Rule 3(7) requires intermediaries to provide any information to authorized Government Agencies when asked to do so by lawful order. Said Rule does not specify any applicable procedure or safeguards for this purpose.
- The Rules are violative of Article 19 of the Constitution, since the prohibitions under Rule 3(2) exceed the purview of 'reasonable restrictions' on the Right to Freedom of Speech and Expression.
- The Rules do not allow users who had originally uploaded content in alleged contravention of Rule 3(2) to justify their cases before the content is to be taken down. This violates the

principles of natural justice, and is highly arbitrary.

- The Rules prohibit the posting of certain content on the Internet, while the same may be permitted on other media such as newspapers or television.

In order to address these shortcomings, and to aid in the establishment of an ideal regime of intermediary liability in India, SFLC.in had released a report in July 2014 titled "*The Information Technology (Intermediaries Guidelines) Rules, 2011 – An Analysis*"[8]. This report was the outcome of multiple Round Table Consultations, analyses of existing literature, reports and mechanisms adopted by various countries, and close interactions with industry, users, journalists, academia and other civil society organizations. We feel the basic premise of the regulation of on-line content should be that intermediaries that host user generated content should be granted protection from legal liability that arises from such content on their complying with the regulatory obligations. Such a protection is required for these media to serve as a platform for citizens to express their views openly and fearlessly and for these platforms to host such views without the fear of legal liabilities.

We propose that the following principles be considered in implementing any "notice and action" system while respecting the process established by law, free expression and privacy of the users and ability of the industry to carry out its business:

a) Restrictions should be clearly defined and only be imposed on content which is prohibited by the constitution

b) There should be a provision of counter notice mechanism to the take-down notice.

c) There should be a put-back provision to restore the content if the complainant fails to obtain a court order within a stipulated time.

d) There should be clear guidance for Intermediaries about what is considered a valid notice

8 Available at http://sflc.in/information-technology-intermediaries-guidelines-rules-2011-an-analysis/

and a standard form should be prescribed in the Rules for submitting a notice. There should be penalties for unjustified and frivolous notices.

e) The Courts should be the final authority to decide on the legality of content when the take-down request is opposed.

f) Intermediaries should not have an adjudicatory role in acting on take-down requests.

g) The intermediary should publish on their website a clear and easy to approach complaint redressal procedure.

h) There should be public disclosure by the intermediaries about notices received and actions taken.

i) Access to private information of users held by the intermediary should be provided only after complying with sufficient safeguards as mandated by the Supreme Court in *People's Union for Civil Liberties v. Union of India & Anr.*[9] on telephone tapping and statutes.

9 (1997) 1 SCC 301