

## Online defamation and its regulations at international and national level

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### Abstract

As a vehicle for expression, the Internet serves various functions. It is simultaneously a publishing tool and a communications tool, allowing millions around the world to communicate instantaneously at the cost of a local call. It brings the ability to broadcast to an audience of millions within the reach of everyone with access to a computer and a telephone line; it serves as a huge multi-media library of information on topics ranging from human rights to deep-sea exploration and it is being used as an important educational tool, with Universities offering courses over the Internet. Governments use it to make information available and even public health services have gone on-line to provide self-help information. Increasingly, traditional media such as newspapers and radio stations are also going 'online', thus enriching Internet content, providing a bridge between the 'paper-world' and cyberspace and ensuring world-wide access to local papers. It has also developed a crucial commercial function, with more and more businesses trading over the Internet, selling everything from computers to holidays to flowers. As has been noted, the Internet is as diverse as human thought.

However, it is precisely because of its diversity of content and ease of use that the Internet has become controversial. As with any other tool, it can be used for different purposes. On the one hand, for example, it allows up-to-date news about current events to emerge from countries where other communication means are heavily censored. On the other hand, the Internet can be used to facilitate crime. In addition, because of the global nature of the Internet there are problems with regard to content. Material that is perfectly legal in the country where it is 'uploaded' may be illegal in the country where it is 'downloaded', for example because it is considered to be obscene or politically subversive. Increasingly, therefore, the case is put for stronger Internet regulation. This raises important issues with regard to the online defamation.

These Principles set out an appropriate balance between the human right to freedom of expression, guaranteed in UN and regional human rights instruments as well as nearly every national constitution, and the need to protect individual reputations, widely recognized by international human rights instruments and the law in countries around the world. The Principles are based on the premise that in a democratic society, freedom of expression must be guaranteed and may be subject only to narrowly drawn restrictions which are necessary to protect legitimate interests, including reputations. In particular, they set out standards of respect for freedom of expression to which legal provisions designed to protect reputations should, at a minimum, conform.

**Keywords:** UNHR, ICCPR, ICERT, ACHR, IT Act 2000, EHRR

### Introduction

#### The tort of defamation on the internet

Liability on the ground of defamation: defamation is a publication of a false statement injurious to the reputation of another. Statements as used in the laws on defamation have been defined widely to include words, visual images, gestures, and any other method of signifying meaning. The plaintiff only needs to prove:

- There is a false statement about him/her;
- That the statement is published;
- Intentionally or with reckless disregard for the truth; and
- Causes damages to his/her reputation.

Defamation is of particular significance to publications made via the Internet. The Internet comprises a worldwide web, so issues involving multi-state defamation arise, and it may not be clear which court have jurisdiction and which law applies.

There are numerous opportunities for defamation on the Internet: many long-time users of bulletin boards and chat rooms see the Internet as a place where one can take on any

identity and say almost anything. Examples include user messages sent to all members of a particular Internet group or posted on a web site, defamatory material contained in a database, posting on a bulletin board or in a chat session, or specific e-mail messages sent and forwarded to one or more recipients.

#### The tension between free expression and defamation laws

There is a robust body of international law protecting the right to freedom of expression. However, most of the international human rights instruments recognize that free expression may be restricted when necessary and proportionate in the interest of protecting reputation and privacy<sup>[1]</sup>.

Human rights instruments do not prohibit defamation laws. To the contrary, they implicitly endorse them by recognizing the

<sup>1</sup> See CDT, "regardless of Frontiers: The International Right to Freedom of Expression in the Digital Age" ("Regardless of Frontiers"), p. 2. Available at <https://www.cdt.org/report/regardlessfrontiers-international-right-freedom-expression-digital-age>.

rights to reputation and privacy<sup>[2]</sup>. However, if not carefully applied, defamation laws can have a chilling effect on speech, hampering the free expression right of both those expressing themselves and those entitled to receive information, opinions, and ideas<sup>[3]</sup>. Moreover, if speakers are subject to the laws of any country in which their remarks can be accessed, local defamation laws can pose a risk to free expression globally. The central purpose of defamation law is the protection of reputation. A defamation law should be limited to protecting people against “false statements of fact that cause damage to their reputation.” The elements of a defamation claim should be (1) a false statement of a (2) factual nature that does (3) damage to (4) a person’s reputation through (5) publication to a third party.

Defamation laws should be found to violate free expression rights if they seek to protect feelings rather than reputation or to protect public order rather than private reputation, if they fail to provide for adequate defenses, and if they are applied with disproportionate damage awards. The tension between defamation law and free expression predates the Internet. As freedom of expression includes the right to share “views and opinions that offend, shock, or disturb<sup>[4]</sup>, crafting a defamation law and applying it in a way that does not violate the principles of free expression are difficult but essential. Even if law’s standards are reasonable, the mere threat of a defamation suit can be enough to quiet speech on controversial issues. Defamation claims are often used by the powerful to protect political or economic interests and to silence dissenting voices.

International and regional human rights officials have called for caution in the application of defamation laws. The UN Human Rights Committee has stressed that defamation laws must be crafted with care to ensure that they do not stifle freedom of expression. All such laws, the Committee has said, should include the defense of truth and should not be applied to opinion or other forms of expression that are not, by their nature, subject to verification. The law should provide that government officials and other public figures must tolerate a higher level of criticism, and “in any event, a public interest in the subject matter of the criticism should be recognized as a defense.” The United Nations Special Rapporteur on Freedom of Opinion and Expression (“UN Special Rapporteur”), along with many other human rights institutions, has called for the decriminalization of defamation. National and regional courts have begun to respond to the threat posed by overbroad application of defamation laws, including in cases involving online speech. For example, the European Court of Human Rights in 2010 overturned a French case where a man was convicted of defaming the Mayor of Sens on an Internet site. The Court determined that punishment for criminal defamation and “insulting a citizen discharging a public mandate” was “disproportionate to the legitimate aim of protecting the reputation and rights of others.”

<sup>2</sup> See, for example, European Convention on Human Rights, 312 U.N.T.S. 221, Articles 8 & 10, and Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

<sup>3</sup> See Article 19, “Civil Defamation: Undermining Free Expression.”

<sup>4</sup> *Handyside v. the United Kingdom*, Series A, no. 24, 1 EHRR 737 (1979).

## Online defamation at international level

### A. International

#### 1. UN universal declaration of human rights

The 1948, the United Nations enshrined the right to free expression in Article 19 of the Universal Declaration of Human Rights. At the same time, Article 12 of the Universal Declaration conditioned the right to freedom of expression by also providing that “no one shall be subjected to arbitrary... attacks upon his honour or reputation”<sup>[5]</sup>.

#### 2. International covenant on civil and political rights

In the International Covenant on Civil and Political Rights, a document binding among ratifying countries, the right to freedom of expression is found in Article 19<sup>[6]</sup>. Article 19(3) allows a narrow restriction to the right of free expression for the protection of the reputation of others. The text defines when a restriction will be permissible:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a. For respect of the rights or reputations of others;
- b. For the protection of national security or of public order (order public), or of public health or morals.

These criteria should be strictly applied. The UN Human Rights Committee has spelled out various principles for applying paragraph 3 in its “General Comment No. 34:” The requirement that a restriction on free speech must be “provided by law” means that the relevant statute or other source of defamation law must clearly define what is prohibited so that the restriction’s scope and application are foreseeable. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. The principle of necessity includes the concept of proportionality, which means that restrictive measures must be appropriate to achieve their protective function, they must be the least intrusive instrument available to achieve that purpose, and they must be proportionate to the interest to be protected.

### B. Europe

#### 1. European Convention

The European Convention for the Protection of Human Rights and Fundamental Freedoms binds the 47 Member States of the Council of Europe<sup>[7]</sup>. Article 10.1 protects freedom of expression while 10.2 states that this right may be subject to such restrictions “as are prescribed by law and are necessary in a democratic society...for the protection of the reputation or

<sup>5</sup> See U.N.G.A. Res. 217 (Dec. 10, 1948), Available at <http://www.un.org/en/documents/udhr/index.shtml>.

<sup>6</sup> ICCPR Art 19 states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

<sup>7</sup> Council of Europe, “European Convention for the Protection of Human Rights and Fundamental Freedoms” (“European Convention”), 312 U.N.T.S. 221, Nov. 4, 1950, Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

rights of others”<sup>[8]</sup>.

The European Convention is enforced by the European Court of Human Rights. The Court applies a three-part test in determining whether a law or action infringes on the rights provided in Article 10. To be upheld, a restriction on the freedom of expression must (1) be prescribed by law; (2) have as its aim a goal that is legitimate under paragraph 10.2; and (3) “be necessary in a democratic society” to achieve that goal. Recognizing national differences, the Court allows states a “margin of appreciation,” which means it will consider local norms in determining whether a restriction is “necessary.”

Generally, when the Court examines whether an imposition of liability for defamation is “necessary in a democratic society,” it will consider the subject matter of the publication, the wording used by the speaker, the position of the speaker, the position of the person against whom the statement was directed, the characterization of the contested statements by the domestic courts, and the penalty imposed by them<sup>[9]</sup>.

## 2. EU charter of fundamental rights

As part of the Treaty of Lisbon in 2009, the European Union ratified the Charter of Fundamental Rights. The Charter protects persons from infringements of human rights by EU institutions or by EU Member States when they are implementing EU laws<sup>[10]</sup>. Article 11 recognizes the right to freedom of expression. It is noteworthy that the free expression Article of the EU Charter, unlike similar provisions in other human rights instruments, does not expressly admit of any exceptions or restrictions. However, Article 1 of the Charter protects human dignity and Article 7 recognizes the right to respect for private and family life. Article 52 sets forth general rules for any limitation on the exercise of the rights and freedoms recognized in the Charter.

The European Court of Justice has been charged with enforcing this document. The Court is only beginning to develop its substantive and procedural jurisprudence, so the ultimate effect of the Charter on human rights enforcement in Europe still remains to be seen.

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<sup>8</sup> Articles 10.1 and 10.2 read in full:

“Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

<sup>9</sup> *Romanenko and Others v. Russia*, no. 11751/03, Oct. 8, 2009, the applicants had published articles alleging mismanagement of public resources, and the state agency and public official in question sued for defamation. The Russian court found that the information was disseminated without verification of its truth. The European Court found that, since those criticized were officials working in their official capacity, the limits of allowed criticism were wider. The court held there was no acceptable justification for the interference with freedom of expression.

<sup>10</sup> “The Treaty of Lisbon and the Court of Justice of the European Union” (“Treaty of Lisbon”), Nov. 30, 2009.

## C. Americas

The 1978 American Convention on Human Rights protects free expression and also provides a carve-out for laws “necessary to ensure respect for the rights or reputations of others”<sup>[11]</sup>. The Convention requires that a restriction on free expression must: (1) be defined in a precise and clear manner; (2) serve a compelling government objective authorized by the Convention; and (3) be necessary and proportionate<sup>[12]</sup>. In order to satisfy the last requirement, a government must both demonstrate a pressing social need and show that the measure is the least restrictive means by which to address the problem. The Convention prohibits the restriction of freedom of expression by both direct and indirect means by government or private actors. The Convention is enforced by the Inter-American Court of Human Rights.

## D. Africa

The African Charter on Human and Peoples Rights protects freedom of expression<sup>[13]</sup>. It provides no explicit protection of reputation or honor, but Article 27 does provide that rights should be exercised “with due regard to the rights of others, collective security, morality and the common interest.” The Charter’s Protocol 1, which entered into force in 2004, established the African Court on Human and Peoples Rights, which first became ready to receive cases in 2008. The court’s decisions are binding on the 26 signatories to the protocol.

## E. Middle East

Article 32 of the Arab Charter on Human Rights, which entered into force in 2008, “guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium regardless of geographical boundaries.” Article 21 protects the reputation and honor of individuals<sup>[14]</sup>.

## F. Asia

At this time, Asia has no human rights document.

## Online defamation at national level

India is the world’s largest democracy and protects free speech in its laws and constitution<sup>[15]</sup>. Yet, freedom of expression in the online sphere is increasingly being restricted

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<sup>11</sup> American Convention on Human Rights, 9 I.L.M. 673 (1970) (Nov. 22, 1969).

<sup>12</sup> Article 13 reads:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputations of others; or  
b. the protection of national security, public order, or public health or morals.

<sup>13</sup> African Charter on Human and Peoples’ Rights, 21 I.L.M. 59 (signed June 27, 1981).

<sup>14</sup> League of Arab States, Arab Charter on Human Rights, May 22, 2004, entered into force March 15, 2008.

<sup>15</sup> Article 19 of the Indian Constitution protects freedom of speech and expression. Government of India, ‘The Constitution of India,’ as modified up to the 1st December 2007, Article 19. (1)(a) ‘All citizens shall have the right to freedom of speech and expression.’

in India for a number of reasons— including defamation, the maintenance of national security and communal harmony, which are chilling the free flow of information and ideas. Many of the most restrictive laws and technical means used to enforce these restrictions are recent developments that have undermined India's record on freedom of expression. A mix of social and political pressure, alongside the terrorist attacks in Mumbai in 2008, has led to this decline, but civil society is beginning to push back.

Constraints on digital freedom have caused much controversy and debate in India, and some of the biggest web host companies, such as Google, Yahoo and Face book, have faced court cases and criminal charges for failing to remove what is deemed "objectionable" content. The main threat to free expression online in India stems from specific laws: most notorious among them the 2000 Information Technology Act (IT Act 2000) and its post-Mumbai attack amendments in 2008 that introduced new regulations around offence and national security.

New regulations introduced in 2011 oblige internet service providers to take down content within 36 hours of a complaint, whether made by an individual, organization or government body, or face prosecution. This is problematic in many ways: it makes intermediaries liable for content which they did not author on websites and platforms which they may not control and encourages them to monitor and pre-emptively censor online content, which leads to the excessive censorship of content.

Meanwhile, the arrest and prosecution of citizens who have posted content deemed "grossly harmful", "harassing", or "blasphemous" has multiplied. Censorship through the criminalization of online speech and social media usage is troubling, especially when it affects legitimate political comment or harmless content.

### Online Censorship

Since 2003, the institutional structure of internet censorship and filtering has centered on the Indian Computer Emergency Response Team (ICERT), a department of the Ministry of Communication and Information Technology that serves as a nodal agency for accepting and reviewing requests from a designated pool of government officials to block access to specific websites<sup>[16]</sup>.

Along with filtering and blocking policies, these procedures are inconsistent and often threaten freedom of expression in India. With so many methods being used to restrict online speech, there is lively debate in India around how censorship affects fundamental freedoms and society<sup>[17]</sup>.

"There is no definition of what 'obscenity' and 'incitement' constitutes. Because of the vagueness of the law on the one hand, and the obligations of the law on the other hand [taking down offensive content], the door is opened to interpretation and subjectiveness," says Rajeev Chandrasekhar, a member of the upper house of the Indian Parliament. The vagueness of

the law has led to people being arrested and charged for innocuous posts and tweets. The Information Technology Act (IT Act) and its 2008 amendments do not provide a clear legal definition of what is offensive and there is no common view in society of what can or cannot be said online and offline, leading to uncertainty. This has resulted in a growing tendency to report content deemed "offensive" and demand its removal<sup>[18]</sup>.

Intermediaries - web companies that host content but do not produce it – tend to over-comply with takedown notices out of fear of being liable for offensive content and then prosecuted. The over compliance of internet intermediaries with takedown notices is concerning as it removes from the internet content which is entirely legitimate.

Compounding this problem is the lack of an appeal process. Intermediaries in India are neither required to notify people when their posts or photos are censored nor give them an opportunity to appeal the decision. In practice, this situation creates an indirect form of censorship when not the government but intermediaries become censors.

### "MouthShut.com"

On 29 April 2013, MouthShut.com, India's leading online consumer review website, filed a petition in the Supreme Court of India to nullify the 2011 IT Rules. The petition pleads that the 2011 IT Rules be declared illegal, null and void as they are ultra virus of the Constitution. Faisal Farooqui, founder of MouthShut.com, has said that the company has "been threatened with hundreds of legal notices, cybercrime complaints and defamation cases. At other times, officers from various police stations call our office, demanding deletion of various reviews or face dire consequences under the IT rules". Under the IT rules, MouthShut is required to remove content within 36 hours of receiving a request (a request does not necessary need to be issued by a court order but can be filed by any individual). The problem is that MouthShut.com receive requests under IT Rules "to remove any negative review about a company or brand simply because they don't like it, irrespective of the facts stated in the review."

"It is submitted that the impugned Rules impose significant burden on it forcing it to screen content and exercise online censorship, which in turn impacts the freedom of speech and expression of its customers, thereby risking a loss of its large consumer base or incurring legal costs and facing criminal action for third party user-generated content," Farooqui said.

### Criminalization of online speech

The criminalization of online speech in India is of concern as the authorities have prosecuted legitimate political comment online and personal views expressed on social media. New free speech opportunities offered by social media usage in India have been diminished after the introduction of provision 66A of the IT Act and the arrest of a number of Indian citizens for posting harmless content.

Section 66A of the IT Act is both overly broad and also carries a disproportionate punishment. The section punishes

<sup>16</sup> Freedom House, 'Freedom on the Net 2012: India', Available at <http://www.freedomhouse.org/report/freedom-net/2012/india>.

<sup>17</sup> MINNY NARANG AND GUNJAN JAIN, CYBER CRIMES: PROBLEM OF INVESTIGATION AND SOLUTION, INDIAN JOURNAL OF APPLIED RESEARCH 74 (2013)

<sup>18</sup> Cybercrime Challenges in the GCC, ITP.net, May 6, 2010 as cited in CYBER CRIME – A GROWING CHALLENGE FOR GOVERNMENTS (2011)

the sending of “any information that is grossly offensive or has menacing character” or any information meant to cause annoyance, inconvenience, obstruction, insult, enmity, hatred or ill will, among other potential grievances. The provision carries a penalty of up to three years imprisonment and a fine.

#### **IT (Amendment) Act 2008**

66A: Any person who sends, by means of a computer resource or a communication device,

- a. Any information that is grossly offensive or has a menacing character; or
- b. (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; or
- 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.

#### **“Face book arrests”**

On Sunday 18 November 2012, a 21-year-old Mumbai woman, Shaheen Dhada, shared her views on Face book on the shutdown of the city as Shiv Sena chief Bal Thackeray’s funeral was being held. Her friend Renu Srinivasan “liked” her post. At 10.30 am the following day, they were both arrested and were ordered by a court to serve 14 days in jail. Hours later, they were eventually allowed out on bail after paying two bonds of Rs. 15,000 (£145) each.

Dhada had posted, “Respect is earned, not given and definitely not forced. Today Mumbai shuts down due to fear and not due to respect”. A local Shiv Sena leader filed a police complaint and Dhada and Srinivasan were booked under Section 295 A of the Indian Penal Code (IPC) for “deliberate and malicious acts, intended to outrage religious feelings or any class by insulting its religion or religious beliefs.” Subsequently they were also charged under Section 505 (2) of the IPC for making “statements creating or promoting enmity, hatred or ill-will between classes”, and the police added Section 66A of the IT Act to the list of charges.

After a significant public outcry, charges were finally dropped. Other recent examples include a 19-year-old, Sunil Vishwakarma, who was detained for a derogatory Face book post against a politician.<sup>1</sup> “We have received a complaint that he posted some objectionable comments against Raj Thackeray”, said an officer at Palghar police station. The police did not charge the teenager. He was questioned and later taken to a special cyber-crime cell before being released. In October 2012, Ravi Srinivasan, a 46-year-old businessman in the southern Indian city of Pondicherry, was arrested for a tweet criticizing Karti Chidambaram, the son of Indian Finance Minister P Chidambaram. He was later released on bail.

#### **Conclusion and Suggestions**

This has shown that despite its lively democracy, strong tradition of press freedom and political debates, India is in

many ways struggling to find the right balance between freedom of expression online and other concerns such as security. While civil society is becoming increasingly vocal in attempting to push this balance towards freedom of expression, the government seems unwilling or unable to reform the law at the speed required to keep pace with new technologies, in particular the explosion in social media use. We have found the main problems that need to be tackled are online censorship through takedown requests, filtering and blocking and the criminalization of online speech.

The Internet offers great potential for the exercise of the right to freedom of expression and freedom of information. However, like any tool for expression, it can be used in good and in bad ways. Attempts over the last few years to regulate Internet content as well as access to the Internet have tended to focus on restricting the availability of certain content and, in some cases, restricting access to the Internet altogether. While it is acknowledged that freedom of expression is not an absolute right, this briefing paper has identified a number of areas where regulation has been too heavy-handed. The Internet should not be used by governments as an excuse for introducing new technologies of control or for curtailing existing liberties.

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