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## ANONYMITY VS ACCOUNTABILITY: THE EMERGING LAW OF ONLINE DEFAMATION

~ Mansi Gupta

### ABSTRACT

*The research paper pertains to the more than relevant contemporary issue of Publishing Defamatory Content against an individual or multiple individuals, a group or multiple groups by a person(s) or organization(s) through a social media account, webpage or any other online means, under the blanket of Anonymity. This paper discusses the way to strike a balance between one's freedom of speech and expression and other's right of living with honour and dignity while publishing online content and avoiding 'chilling effect of speech' while at the same time ensuring one's right of good reputation. Anonymous Defamation as only a tortious wrong has been dealt with. Defamation as a civil wrong is itself not well codified in Indian legal system and therefore the paper discusses the relevance and the need for codification of legislation for regulation of Defamation mainly Online Anonymous Defamation. The paper also highlights its increased occurrence in contemporary times. A few Indian and international cases highlighting the issue taken up are discussed.*

### INTRODUCTION

*“A bunch of anonymous letters were received by a woman. A mere glance through those letters is enough. Any reader can perceive the foul smell of the author's filthy intentions. The victim's modesty gets hurt, injured, outraged, and terribly insulted.”<sup>1</sup>*

This statement was made in judgement of *MM Haries vs. State of Kerala* delivered in 2005 by Justice K. Hema of Kerala High Court. “Today, letters are replaced by social media which has

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<sup>1</sup> *M M Haries v State of Kerala*, Kerala HC, 16 February 2005, CrI. MC No. 9717 of 2002, <https://indiankanoon.org/doc/622692/> accessed 2 October 2023.

made the criminal act easier to be committed and get away with. Many people from all walks of life face online abuse and they are not sure how to deal with it.”<sup>2</sup>

Defamation as a civil wrong refers to intentional publishing of a false statement(s) against a person or Persons or a group or groups, or organisation(s) of a nature that reduces their respect in the view of prudent or reasonable members of society. Online Defamation is publishing of the statements of the aforementioned nature via online means, most commonly, through a comment or a post on a website or a social media platform. The word ‘Publishing’ throughout the paper refers to the act of putting a statement in any form whatsoever under the purview or sight of a third party.

When a person publishes a post or writes a comment online, he/she/they may or may not be directly identifiable through the published content or the account of publication. If the author of the post is not directly identifiable, then the post would be anonymous. The word Anonymity throughout the paper refers to this ‘absence of identity’.<sup>3</sup> A variety of perspectives can be found on the Internet, due to the fact that most people assume their comments can never be linked to their real identities.<sup>4</sup> Although there is no such thing as total anonymity on the internet, it is the perception of anonymity that induces the use of the internet.<sup>5</sup> When a defamatory post or comment is published in a way that the author of the same, cannot be directly identified, it will constitute Anonymous Online Defamation.

## **AMBIGUITIES ON HOW TO APPROACH ANONYMOUS ONLINE DEFAMATION**

Anonymous defamation on an online platform needs to be dealt like any other ordinary case of defamation. But there remain several ambiguities in the way to seek civil remedy for suffering a legal injury through online defamation under the cloak of anonymity. Two main problems are as follows:

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<sup>2</sup> Ashok Kini, ‘Section 509 IPC: Statutory Remedy Available to Women Who Face Online Abuse’ (LiveLaw, 22 September 2020) <https://www.livelaw.in/know-the-law/section-509-ipc-as-statutory-remedy-available-to-women-who-face-online-abuse-163298> accessed 2 October 2023.

<sup>3</sup> See Infra Note 4.

<sup>4</sup> Sanette Nel, ‘Online Defamation: The Problem of Unmasking Anonymous Online Critics’ (2007) 40 *Comparative and International Law Journal of Southern Africa* 193 <https://www.jstor.org/stable/23252662> accessed 2 October 2023.

<sup>5</sup> Orit Goldring and Antonia L Hamblin, ‘Think Before You Click: Online Anonymity Does Not Make Defamation Legal’ (2003) 20 *Hofstra Labor and Employment Law Journal* 383 <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1346&context=hlelj> accessed 4 October 2023.

## **1. Determining the Appropriate Party to Sue:**

In 1955, the US Congress enacted the Communication Decency Act, which shields Internet Service Providers (ISPs) and social media companies from defamation lawsuits and liability. As a result, individuals who believe they have been defamed online often have no choice but to file a claim against the anonymous individual responsible for the defamatory statement. Outside the US, various approaches exist to handle intermediary liability, including the "actual knowledge" approach, the notice and takedown approach, and the "mere conduit" approach. These approaches are not mutually exclusive, and India, for instance, employs a combination of the actual knowledge and mere conduit approaches.<sup>6</sup>

Under India's Information Technology Act, 2008, Section 79 provides a liability shield for ISPs and social media platforms, except when they fail to expeditiously remove or disable access to defamatory content upon receiving actual knowledge.<sup>7</sup> This highlights the actual knowledge approach, while the mere conduit approach implies that online service providers are not liable for third-party content if they do not initiate, select, or modify the transmitted information. Therefore, suing ISPs and interactive social media services has become increasingly difficult, leaving defamation victims to pursue action against the anonymous individuals or entities responsible for their defamation.

## **2. Identifying Anonymous Defamers:**

Identifying anonymous individuals who engage in defamation on the internet is a daunting task. Many internet content publishers remain anonymous, posing a significant obstacle to defamation victims. Consequently, some plaintiffs resort to contacting website hosts or bloggers to request the removal of defamatory content.<sup>8</sup> However, bloggers may refuse to comply, or such contact may exacerbate the situation. At this stage, some ISPs have been willing to disclose identifying information to the defamed parties. However, concerns over internet users switching to providers that safeguard their anonymity and increased advocacy by civil liberties organizations and free speech advocates have led many ISPs to deny access to

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<sup>6</sup> Ashley Johnson and Daniel Castro, 'How Other Countries Have Dealt With Intermediary Liability' (Information Technology and Innovation Foundation, 22 February 2021) <https://itif.org/publications/2021/02/22/how-other-countries-have-dealt-intermediary-liability/> accessed 6 October 2023.

<sup>7</sup> Ibid 6.

<sup>8</sup> S Todd Neal, 'Fighting Back Against Anonymous Defamation on the Internet: A Case Study' (Procopio, 5 September 2017) <https://www.procopio.com/fighting-back-against-anonymous-defamation-on-the-internet-a-case-study/> accessed 6 October 2023.

such information without a court order.<sup>9</sup> In this context, the Indian legal system and existing procedural laws are ill-equipped to handle the intricacies and complexities of anonymous defamation cases. There is a pressing need for the proper codification of defamation laws in India, along with the establishment of specific standards for determining the identity of anonymous entities.

In the case of *Subodh Gupta v. Herdsceneand* (2020)<sup>10</sup>, Subodh Gupta, a renowned artist, filed a defamation suit against Herdsceneand, an Instagram account, following an anonymous user's claims of sexual harassment against him. The suit also included Instagram, Facebook Inc., Facebook Ireland, Google Inc., and Google India Pvt. Ltd. Gupta sought damages of Rs. 50 million (approximately 650,000 USD) and demanded the removal of the post and related references from search engines. He argued that the allegations had harmed his reputation and caused art galleries to decline his work. During the proceedings, the account holder has to be identified with court's order although they were allowed to remain anonymous publicly. but ruled in favour of Gupta, ordering the removal of the defamatory post by the account and intermediaries.

### **3. Jurisdictional Issues:**

Victims of internet abuse may unintentionally draw more attention to their plight. Furthermore, they frequently face jurisdictional issues when the victim is aware of or can determine the identity of the perpetrator, who may reside in another jurisdiction. Courts in the victim's state may struggle to establish jurisdiction over an out-of-state offender, owing to the high costs of identifying the defendant in the first place. Even when the victim establishes jurisdiction over an out-of-state perpetrator, implementing judgments for damages or injunctions can be extremely difficult. In many circumstances, it becomes practically impossible or exceedingly problematic to enforce a decision, especially when the defendant lacks the financial wherewithal to comply.<sup>11</sup>

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<sup>9</sup> Ibid 8.

<sup>10</sup> *Subodh Gupta v Herdsceneand*, Delhi HC, 18 November 2019  
<https://www.scconline.com/Members/SearchResult.aspx> accessed 4 October 2023.

<sup>11</sup> Jacqueline D Lipton, 'Combating Cyber-Victimization' (2011) 26 *Berkeley Technology Law Journal* 1103  
<https://www.jstor.org/stable/24118683> accessed 5 October 2023.

In *Geeta Shroff v. YouTube Inc, 2018*<sup>12</sup>, Geeta Shroff, a doctor, discovered a defamatory YouTube video with a deceptive title that targeted her. She asked YouTube to reveal the identity of the uploader and remove the content, but YouTube refused, stating it had no authority over user-generated content. Shroff obtained a court judgment in India to have the post removed worldwide. YouTube said that it could comply for Indian users but not globally due to technical limits and US legislation. Shroff said that the post remained available in India and worldwide via VPNs, inflicting harm. YouTube argued in the Delhi High Court that the order should only apply in India and was limited by international territoriality considerations. They highlighted US rules protecting free speech and prohibiting international defamation judgements from being enforced. Shroff requested a global takedown order.

However, YouTube claimed that without a John Doe injunction order (an order against an unnamed entity accused of wrongdoing obtained from an American Court), it was impossible to obtain information about the perpetrator's identities, given that the offending post was not uploaded from India and highlighted the jurisdictional issue and difference of laws in different jurisdictions due to which the court cannot order a global takedown of any content, they argued.<sup>13</sup> Cases of a similar nature are bound to appear in more frequency in the coming years with internet takeover of the world.

Therefore, the imperative issue of anonymous defamation is an inter-territorial issue or cross-jurisdictional issue, therefore jurisdictional disputes are bound to arise, hence, the need of the hour is to establish a standardized framework for determining when anonymity should be permitted and when it should not and to resolve the cross jurisdictional issues that come along with this new age tort of online anonymous defamation.

## **AN INTERNATIONAL PERSPECTIVE ON ANONYMOUS DEFAMATION**

In terms of leveraging the internet as tool of mass communication, the United States has a substantial advantage over India. As a result, they have several years of expertise dealing with legal concerns linked to regulating the internet environment, particularly difficulties relating to online anonymity.<sup>14</sup> As a result, we will conduct a comparative study to determine whether the

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<sup>12</sup> *YouTube LLC v. Geeta Shroff*, Delhi HC, 17 May 2018, FAO 93/2018 & CM Nos 9352 & 9354/2018 <https://www.sconline.com/Members/SearchResult.aspx> accessed 4 October 2023.

<sup>13</sup> Global Freedom of Expression, 'YouTube LLC v Geeta Shroff' (Columbia University, 17 May 2018) <https://globalfreedomofexpression.columbia.edu/cases/youtube-llc-v-geeta-shroff/> accessed 4 October 2023.

<sup>14</sup> See Supra Note 4 pg. 195.

solutions used in American jurisdiction might provide assistance for resolving the issue of balancing one's right to anonymity and other's right to good reputation in context of online anonymous defamation.<sup>15</sup> In a landmark case – *Melvin v. Doe, 2000*<sup>16</sup>, a criterion was set up to ensure a balance between one's right to anonymity and other's right to good reputation in context of revealing the identity of an anonymous defendant in a defamation trial.

*Melvin v. Doe* was a judicial case that played out in Allegheny County, Pennsylvania's Court of Common Pleas in November 2000. An anonymous individual, referred to as Doe, wrote defamatory allegations about a local judge on a website in this case. Melvin, the plaintiff, filed a defamation case and attempted to determine Doe's name during the discovery process.<sup>17</sup> Doe attempted to prevent their identity from being revealed by getting a protective order from the court, which would limit the discovery process.

The court, however, denied Doe's request for a protection order, stating various reasons:

1. State Interest in Defamation Prevention: The court considered that the state had an interest in discouraging defamatory claims, even if they were posted on the Internet, especially where they targeted public officials.
2. No Absolute Immunity for Internet Speakers: The court ruled that people who make defamatory words online can be held accountable for their acts even though they do not have absolute immunity.
3. Three-Part Test for Revealing Defendant's Identity: To evaluate whether Melvin should be permitted access to Doe's identity, the court used a three-part test. This test includes the following components:
  - Demonstrating that knowing the defendant's name was necessary, significant, and important to the case.
  - Demonstrating that there were no other options for obtaining the defendant's identity.
  - Establishing the defendant's identity was critical in Melvin's case.<sup>18</sup>

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<sup>15</sup> Ibid 14.

<sup>16</sup> *Melvin v Doe*, Superior Court of Pennsylvania, 20 November 2001 (USA) <https://casetext.com/case/melvin-v-doe-2> accessed 6 October 2023.

<sup>17</sup> Allison Stiles, 'Everyone's a Critic: Defamation and Anonymity on the Internet' (2002) 1 *Duke Law & Technology Review* <https://scholarship.law.duke.edu/dltr/vol1/iss1/46> accessed 6 October 2023.

<sup>18</sup> Ibid 17.

The court did not go into detail about how this test applied to the facts of the case, but it did determine that, in this case, Melvin's interest in revealing Doe's name exceeded Doe's request.

Such a standardised test is the need of the hour, necessary to be put in place so as to ensure that Indian judiciary can efficiently deal with cases of such a complexity. While, it is necessary to reveal the identity of the anonymous content publisher, in case that is a necessity for justice to be given to the defamed, it must be practiced cautiously keeping in mind, one's right to freedom of speech and expression. If over practiced without due caution, this can lead to the 'chilling effect of speech'.

### **THE DOCTRINE CHILLING EFFECT- THE UNEVITABLE CONSEQUENCE?**

The Chilling effect is the stifling of legitimate expression by overly broad restrictions by law.<sup>19</sup> In its essence and substance, it is the undesired restriction of one's free speech for fear of criminal prosecution. It has no direct impact on free speech but has the effect of self-censorship. When determining the legality of legislation, the court must evaluate both the direct and unavoidable consequences of the restriction imposed.

As a result, the legislation's restriction must be as narrow as feasible. The problem of chilling effect is caused by the combination of overbreadth and vagueness. Therefore, when person's right to anonymity is not respected by the courts, when their freedom of speech and expression are constantly trampled upon through the misuse of tort law, then the legitimate opinions, beliefs and ideas of people undergo self- censorship.

Therefore, law makers must be cautious of avoiding the imposition of overarching laws that can squash and undermine one's freedom of speech and expression but at the same time protects one from defamation, upholding their right to good reputation.

### **CONCLUSION**

The internet and its use get more and more relevant with passing time in the context of Defamation. While it offers a platform for free expression, it also presents opportunities for misuse and abuse. Therefore, it's crucial to establish a carefully crafted standard to safeguard

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<sup>19</sup> Frank Askin, 'Chilling Effect' (The Free Speech Center, 1 January 2009) <https://firstamendment.mtsu.edu/article/chilling-effect/> accessed 6 October 2023.,

our cherished rights and encourage the open exchange of ideas envisioned by the Framers of the Constitution.<sup>20</sup>

In the coming years, an increasing number of courts will grapple with the challenge of balancing Free Speech rights and principles with those related to defamation law. To achieve a more effective balance, courts can consider adopting the standard outlined by the Pennsylvania Court for the *Melvin v. Doe*, which is further elaborated here. This approach aims to ensure that individuals expressing themselves on the internet understand the boundaries of their protected speech, while also allowing valid defamation claims to proceed.

In cases involving anonymous defendants, often referred to as John Doe cases, consistency is essential. Both plaintiffs and defendants require clarity about the extent of their constitutional protections to make informed decisions. Therefore, it's imperative for courts to address this issue clearly and uniformly nationwide.

So, what is needed is a comprehensive and systematic codification of tort of defamation, including within its ambit online or cyber as well as anonymous cyber defamation, without which courts throughout the country will face many difficulties adjudicating the matters related to such cybercrimes.

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<sup>20</sup> Jessica L Chilson, 'Unmasking John Doe: Setting a Standard for Discovery in Anonymous Internet Defamation Cases' (2009) 95 *Virginia Law Review* 389 <https://www.jstor.org/stable/25478707> accessed 5 October 2023.