

**UNDERSTANDING THE RECENT DEVELOPMENTS IN THE LAW  
REGULATING CYBER DEFAMATION AND THE ROLE OF THE ONLINE  
INTERMEDIARY IN INDIA**

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**ABSTRACT**

*The Internet is a powerful platform for expression of all kinds, as it allows users to communicate globally in an instantaneous and fairly inexpensive manner. However, these characteristics which appear to support free speech and encourage public debate stand to be jeopardized by the imposition of excessive liability on intermediaries and Internet users. Currently, cyber defamation is not recognized as a separate crime in India. Therefore, authors who post defamatory content online are held liable in much the same way as they would be offline. This raises multiple interpretative concerns in relation to jurisdiction, publication, and the grant of interim injunctions. Furthermore, new amendments to the Information Technology Intermediary Liability rules have expanded the safe harbour provisions for intermediaries. These indicate an attempt to formalise the extent of liability that is to be borne by online intermediaries while hosting user-generated content. Following the Supreme Court of India's decision on the issue of intermediary liability in the matter of Shreya Singhal v Union of India, this Country Report examines the recent developments in defamation law in India as applicable to users and intermediaries in cyberspace. It finds that a strict liability approach to civil defamation and the use of criminal provisions to punish cyber defamation do not hold merit and that the*

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*Supreme Court's decision to strengthen the safe harbour for online intermediaries is a welcome step that requires active implementation to allow legal certainty and effective regulation of cyber defamation.*

## **1. INTRODUCTION**

The Internet is a powerful platform for all kinds of expression, as it allows users to post content to a global audience in an instantaneous and fairly inexpensive manner. This means that practically anyone who enables the use of the Internet can assume the role of a publisher, without adhering to the traditional restrictions imposed on media houses. While this enhances users' freedom of speech and expression by facilitating the unhindered flow of information, it also increases the potential to harm another's reputation through widely circulated, unsubstantiated claims. For this reason, the Government and judiciary of India have sought new ways to regulate publication on the Internet.

In the context of the Internet, the regulation of defamatory content may be approached cautiously by extending pre-existing libel laws to the Internet or definitively by enacting cyber-specific laws that treat the Internet as distinct from other forms of media. Currently, in India the offence of cyber defamation is not separately recognized as a crime. Therefore, plaintiffs must rely on the traditional common law tort of defamation or Section 499 of the Indian Penal Code, 1860 in order to prosecute the publication of defamatory statements.<sup>2</sup> The civil law of defamation requires Internet defendants to conclusively prove the truth of their statements regardless of whether they took due care to ensure truthfulness at the time of publishing. At the same time, the criminal law provides for imprisonment even in the absence of demonstrable harm to reputation. Since a plaintiff may simultaneously resort to civil and criminal remedies,<sup>3</sup> it is important to determine the combined effect of a strict liability approach and criminal punishment on speech online.

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<sup>2</sup> Indian Penal Code, No. 45 of 1860, at § 499 (whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person).

<sup>3</sup> Amarlal Yadav vs Smt. Narmada Yadav, 2005 (4) MPHT 46 (India) at ¶ 5.

In defence of the criminal law of defamation,<sup>4</sup> the Government of India has recently articulated its concern over the creation of new offences owing to the advent of the Internet.<sup>5</sup> Through an affidavit filed by the Ministry of Home Affairs in *Subramanian Swamy v. Union of India*,<sup>6</sup> it has argued that civil remedies are not sufficient for dealing with the offence of defamation because they are more time-consuming than criminal remedies, and they are only effective if the plaintiff is financially capable of fully compensating the victim.<sup>7</sup>

While this may be true, the extension of the current defamation framework to the Internet raises multiple interpretative concerns. In the absence of Internet-specific guidelines, Indian courts have ruled on jurisdictional concerns, the meaning of publication on the Internet, and the grant of interim injunctions due to the possibility of irreversible harm to reputations. Since these questions have been dealt with by the courts on a case by case basis, there is a lack of legal certainty for users. Additionally, the lack of legislative attention to the application of defamation law to the internet has led to the emergence of undesirable trends, such as Strategic Lawsuits Against Public Participation (SLAPPs).<sup>8</sup>

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<sup>4</sup> *Subramanian Swamy v. Union of India*, W. P. (crl) 184 of 2014 (Subramaniam Swamy, a politician from the State of Tamil Nadu, has challenged the Constitutional validity of the criminal law of defamation, namely the Indian Penal Code § 499 and §500 which define and punish defamation, and Section 199(2) of the Criminal Procedure Code, No. 2 of 1974 which provides that a Court may take cognizance of an offense relating to defamation on a mere complaint made by a public prosecutor when an offense is alleged to have been committed against the President of India, the Vice- President of India, the Governor of a State, the Administrator of a Union Territory or a Minister of the Union or of a State or of a Union Territory, or any public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharged of his public functions).

<sup>5</sup> CNN-IBN, *Criminal Defamation Must be Retained as a Criminal Offense: Centre to SC*, INB LIVE (Jul. 13, 2015), available at <http://www.ibnlive.com/news/india/criminal-defamation-must-be-retained-as-a-penal-offence-centre-to-sc-1019573.html> (last visited Dec 4, 2015).

<sup>6</sup> *Subramanian Swamy*, W. P. (crl) 184 of 2014.

<sup>7</sup> Prabhati Nayak Mishra, *Online Defamation Cannot be Countered by Civil Remedies, Centre Tells Supreme Court*, DNA INDIA (Jul. 12, 2015), available at <http://www.dnaindia.com/india/report-online-defamation-cannot-be-countered-by-civil-remedies-centre-tells-supreme-court-2103811> (last visited Sept. 12, 2015).

<sup>8</sup> See, e.g., Ujjwala Uppaluri, *On the Unfortunate Rise of the Indian SLAPP Suit*, FREE SPEECH INITIATIVE (May 24, 2013), available at <https://thefsiindia.wordpress.com/2013/05/24/on-the-unfortunate-rise-of-the-indian-slapp-suit/> (last visited April 22, 2015) (an account of defamation related Strategic Law suits Against Public Participation (SLAPP) in India); Sauray Datta, *Browbeating Free Speech*, ECONOMIC & POLITICAL WEEKLY (Jun. 1, 2013), available at <http://www.epw.in/web-exclusives/browbeating-free-speech.html> (last visited Aug. 12, 2015); Lawrence Liang, *Bloggers and Defamation*, KAFILA (Feb. 25, 2009), available at <http://kafila.org/2009/02/25/bloggers-and-defamation/> (last visited Aug. 12, 2015); Manish Raj, *Minister Files Defamation Case Against Tamil*

As a result, a close examination of the law is necessary to conclusively answer questions about the extent of liability for defamatory content published on the Internet, challenges to jurisdiction, and the potential for abuse of defamation laws to suppress inconvenient or undesirable speech.

While, the Information Technology Act, 2000, (hereinafter “IT Act”) was originally enacted to provide legal recognition for transactions carried out through electronic commerce and amend criminal and evidence laws to accommodate for electronic transactions the Act has recently been amended to regulate online intermediaries in situations of cyber defamation.<sup>9</sup> Provisions of the Act, as recently amended in 2008, have thus been used in India to hold both users and intermediaries liable for defamation on the Internet.<sup>10</sup>

Given the crucial role that online intermediaries play in facilitating the freedom of expression,<sup>11</sup> the IT Act provides a safe harbor exempting them from any liability for defamatory material posted by third parties on their platforms.<sup>12</sup> However, this

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*Magazine*, THE TIMES OF INDIA (Jan. 20, 2015), available at <http://timesofindia.indiatimes.com/city/chennai/Minister-files-defamation-case-against-Tamil-magazine/articleshow/45955969.cms> (last visited Apr. 22, 2015) (other reported examples of defamation suits by State officials include a vernacular magazine (*Naveena Netrikan*) being charged for publishing a defamatory article on one Mr. K.C Veeramani, a Minister for school education from the State of Tamil Nadu. The impugned article alleged that the Minister was involved in corruption. The Minister claims that the statements were untrue and defamatory *per se*); Express Mail Service, *BJP Leaders Held for Putting Up “Missing” Mulayam Posters*, THE INDIAN EXPRESS (Dec. 30, 2014), available at <http://indianexpress.com/article/cities/lucknow/bjp-leaders-held-for-putting-up-missing-mulayam-posters/> (last visited Apr. 22, 2015) (Also in December 2014, four leaders of a political party (‘Bharatiya Janta Party’) were charged for engaging in a poster campaign that depicted one Mr. Mulayam Singh Yadav, member of Parliament as missing from his constituency. The posters were indicative of the alleged absenteeism and inaction on the part of the politician. The petition described the posters as being objectionable and defamatory of the politician. The accused were held in custody until they were released by a judge on personal bonds of Rs. 50,000/- each for such campaign).

<sup>9</sup> Sunita Tripathy, Bani Brar & Vasudev Devadasan, *Indian Defamation Law and Regulation of Online Content*, JINDAL GLOBAL UNIVERSITY LAW & POLICY BRIEF, Vol. 1 Issue. 11 (Nov. 2015).

<sup>10</sup> HT Correspondent, *Professor Arrested for Poking Fun at Mamata*, HINDUSTAN TIMES (Apr. 14, 2012) available at <http://www.hindustantimes.com/india/professor-arrested-for-poking-fun-at-mamata/story-OmV4FhEop4XaRP13gZdI1H.html> (last accessed Dec 4 2015); Akansha Prasad, *SC Hearing on Google Appeal in Defamation Suit Today*, THE ECONOMIC TIMES (Jan 27, 2014), available at [http://articles.economicstimes.indiatimes.com/2014-01-27/news/46684842\\_1\\_google-search-engine-visaka-industries](http://articles.economicstimes.indiatimes.com/2014-01-27/news/46684842_1_google-search-engine-visaka-industries) (last visited Dec 1, 2015) (decision holding Google liable for hosting defamatory content on its blogging service is currently under appeal before the Indian Supreme Court.).

<sup>11</sup> Frank La Rue (Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *17th Session of the Human Rights Council*, ¶44 U.N. Doc. A/HRC/17/27 (May 16, 2011).

<sup>12</sup> Information Technology Act, No. 21 of 2000 at § 79, amended by The Information Technology (Amendment) Act, 2008.

immunity is conditional on the intermediary not having “actual knowledge” of the content in question, or at least complying with the due diligence requirements as notified by the Central Government.<sup>13</sup> These requirements, found in the Intermediary Guidelines, along with the IT Act itself, require intermediaries to take down the content posted by any user upon receiving knowledge of such content being defamatory.<sup>14</sup> Such knowledge may even be in the form of a private complaint.<sup>15</sup> The ambit and scope of these guidelines have been severely criticized by academics and civil society activists for violating India’s constitutional framework and restricting free speech on the internet.<sup>16</sup> This has led to serious public debate and deliberation, seeking clarification on the role of online intermediaries, the extent of their liability, and the precise nature of safe harbours provided to them in India by the IT Act.

In 2015 the Supreme Court of India transformed the intermediary liability regime through its landmark decision in *Shreya Singhal v Union of India*.<sup>17</sup> The court ruled that intermediaries should not take down content unless required to by a judicial order, and that any determination regarding the unlawful nature of content should be within India’s constitutional framework. Thus, the requirements online intermediaries must satisfy to avail the safe harbour provided in India is in an evolutionary phase, with several questions regarding the implementation of the court’s verdict waiting to be addressed.

For the sake of brevity, this Report is divided into six Parts. Part 1 introduces the current Indian approach towards the evolving liability of users and intermediaries, Part 2 gives an overview of the law of defamation in India, and Part 3 focuses on the

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<sup>13</sup> Information Technology Act § 79 (2).

<sup>14</sup> *Id.*

<sup>15</sup> Information Technology Act § 79 (3)(b); Information Technology (Intermediary Guidelines) Rules, 2011 Part II-Section 3 (i) Gen. S.R. 314 (E) (India) [hereinafter Intermediary Guidelines] (defining due diligence standards intermediaries must meet to benefit from “safe harbor” provided under IT Act); see also Rishabh Dara, *Intermediary Liability in India: Chilling Effects on Free Expression on the Internet*, CENTRE FOR INTERNET & SOCIETY – BANGALORE (2011), available at <http://cis-india.org/internet-governance/intermediary-liability-in-india.pdf> (last visited Aug. 10, 2015).

<sup>16</sup> Lawrence Liang, *Chilling Effects and Frozen Words*, THE HINDU (Apr. 30, 2012) available at <http://www.thehindu.com/opinion/lead/chilling-effects-and-frozen-words/article3367917.ece> (last visited Dec. 1, 2015); Ujwala Uppaluri, *Constitutional Analysis of the Information Technology (Intermediaries’ Guidelines) Rules, 2011* (Jun. 16, 2012), available at <http://cis-india.org/internet-governance/constitutional-analysis-of-intermediaries-guidelines-rules>.

<sup>17</sup> *Shreya Singhal v. Union of India*, (2013) 12 S.C.C. 73 (India).

liability of intermediaries for cyber defamation posted or uploaded to their online forums. Parts 4 and 5 examine the key issues arising out of cyber defamation law in India and analyse the intermediary liability regime following the landmark Supreme Court case of *Shreya Singhal*. The Report concludes in Part 6 by highlighting the importance of providing clear guidelines as to the applicability of defamation laws to the internet which will create legal certainty for both users as well as intermediaries.

## **2. LIABILITY FOR DEFAMATION ON THE INTERNET IN INDIA**

Since cyber defamation is not laid down as a separate crime in India, the plaintiffs must rely on the traditional common law tort of defamation or Section 499 of the Indian Penal Code, 1860 for redressal. The Supreme Court has recently clarified the position of laws that seek to restrict speech in light of several attempts to extend the application of the Information Technology Act, 2000 to cyber defamation.<sup>18</sup> In the matter of *Shreya Singhal v. Union of India*, the Court recognized that certain features of the Internet, such as its improved access, low cost, possibility of anonymity, invasion of privacy and potential for abuse, set it apart from conventional forms of media.<sup>19</sup> Therefore, separate speech offences may be created for the Internet, but these must adhere to the constitutional framework of ordinary speech-restricting laws.<sup>20</sup> Until such Internet-specific legislation is enacted, India's traditional laws of defamation will continue to apply to content on the Internet.

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<sup>18</sup> Information Technology Act § 66A (punished persons for sending information that was “grossly offensive or has a menacing character,” intended to cause “annoyance or inconvenience,” and/or was known to be false, but sent for the purpose of “causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, [and] hatred or ill will...” The punishment under Section 66A was imprisonment for up to three years and with fine. The breadth of this provision has resulted in its misapplication for conducting arrests and granting remedies for the offence of defamation); see Madabhushi Sridhar, *Andhra FB Case Underscores 66A Misuse*, THE HOOT (MAY 18, 2015), available at <http://www.thehoot.org/free-speech/media-freedom/andhra-fb-case-underscores-66a-misuse-6796> (last visited Apr. 4, 2015); *E2 Labs v. Zone-H* (CS) (OS) 2305/2009; HT Correspondent, *Professor Arrested for Poking Fun at Mamata*, HINDUSTAN TIMES (Apr. 14 2012) available at <http://www.hindustantimes.com/india/professor-arrested-for-poking-fun-at-mamata/story-OmV4FhEop4XaRP13gZdI1H.html> (last visited Dec. 4 2015); see also *Shreya Singhal*, (2013) 12 S.C.C. 73 ¶ 43 (the Supreme Court declared that Section 66A was never meant to apply to defamatory statements because it dealt with the *sending of messages* rather than the publication of content and the causing of annoyance and inconvenience, rather than injury to reputation which is an essential ingredient of the offence).

<sup>19</sup> *Shreya Singhal*, (2013) 12 S.C.C. 73.

<sup>20</sup> *Id.* at ¶ 28.

This part of the Report provides a brief overview of the traditional defamation regime in India to evaluate its potential impact on online speech. It then examines how courts have modified the law in relation to jurisdiction, publication, and the granting of interim injunctions for the purpose of better regulating the Internet. In its entirety, this Section establishes the extent of liability currently faced by authors of defamatory statements on the Internet.

### 2.1.1 Defamation as Conceived Within the Constitution of India

Article 19(1)(a) of the Indian Constitution guarantees the freedom of speech and expression as a fundamental right. It states:

“All citizens shall have the right (a) to freedom of speech and expression...”

By its very nature, the imposition of liability for defamation prohibits certain types of speech and therefore underscores the need to strike a balance between the private right to protect one’s reputation and the public right to enjoy a free flow of information.<sup>21</sup> This balance is provided for by way of permissible restrictions on the right to free speech and expression contained in Article 19(2).<sup>22</sup> Article 19(2) states that the freedom of expression is subject to:

“reasonable restrictions....in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, **defamation** or incitement to an offence.”<sup>23</sup>

*(emphasis added)*

Since Article 19(2) specifically mentions defamation as one of the grounds on which speech may be restricted, any challenge to defamation laws would have to impugn

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<sup>21</sup> *Id.* (guarantees to all citizens a fundamental right to freedom of speech and expression); *Menaka Gandhi v. Union of India*, 1978 AIR 597 (India) (fundamental rights differ from ordinary rights in the sense that the former are considered inviolable).

<sup>22</sup> INDIA CONST. art 19, § 1, cl. (a); INDIA CONST. art 19, § (2).

<sup>23</sup> *Id.* at art 19, § (2).

their reasonableness- either procedurally or substantially or both.<sup>24</sup> In order to be reasonable, a restrictive law must bear a proximate relationship to the object it seeks to achieve, which in the case of defamation laws is the protection of the right to reputation of others.<sup>25</sup> Courts have indicated that in order to satisfy Article 19(2), restrictions must not be arbitrary or excessive, beyond what is required in the interest of the public.<sup>26</sup> Further, the test of reasonableness must be conducted on a case-by-case basis,<sup>27</sup> and it must account for the practical consequences of the law by looking to factors such as the duration and the extent of the restrictions, as well as the attendant circumstances at the time the restriction was imposed.<sup>28</sup>

India's civil and criminal laws of defamation have evolved under this broad constitutional framework. In August 2015, the Supreme Court reserved its verdict on a batch of petitions challenging the constitutional validity of criminal defamation in India. These petitions argued that the restrictions imposed by Section 499 and 500 of the Indian Penal Code, 1860 are beyond those permitted by Article 19(2). The nature of restrictions imposed by the Indian Penal Code has been discussed in sub-part 2.1.3 below.

### **2.1.2. Civil Defamation**

In India, civil liability for defamation is not governed by statute. Rather, it originates from English common law and has been subsequently adopted and developed by Indian courts through case law.<sup>29</sup> In order to sustain an action for defamation, it must be proved that the statement complained of is false, in writing, defamatory (it must

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<sup>24</sup> N. B. Khare v. State of Delhi, A.I.R. 1950 S.C. 211 (India)

<sup>25</sup> The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia, (1960) 2 S.C.R. 821 (India).

<sup>26</sup> Chintaman Rao v. State of Madhya Pradesh, A.I.R. 1951 S.C. 118 (India).

<sup>27</sup> Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305 (India).

<sup>28</sup> State of Madras v. VG Row, A.I.R. 1952 S.C. 196 (India).

<sup>29</sup> SETALVAD, THE COMMON LAW IN INDIA, 110 (1960). (Sir Frederick Pollock prepared a draft code of torts for India but it was never enacted into law); *see* 5 LQR 362; *see also* Vidya Devi v. M. P. State Road Transport Corporation, A.I.R. 1975 M.P. 89 (India) (stating that the Indian Law of Torts is based on English Law is evident from Article 372 of the Constitution which has been interpreted to continue the Common Law Principles applied in India); *see also* SETALVAD, pp. 225, 226; Building Supply Corporation v. Union of India, A.I.R. 1965 S.C. 1068 (India).

identify the plaintiff) and is published. Currently, a defamatory statement is one that tends to lower the plaintiff's reputation in the minds of reasonable people.<sup>30</sup>

In a civil suit for defamation the falsity of the charge is presumed in the plaintiff's favor.<sup>31</sup> Therefore, once a *prima facie* case of defamation is made out, the burden to raise a defence shifts on to the defendant who must plead truth, fair comment, or privileged communication in order to absolve himself or herself of liability.<sup>32</sup> The only case in which a defendant may absolve himself of this burden is if the statement is made with regard to a public figure. In this case, it would be sufficient for the defendant to prove that he or she acted after a reasonable verification of the person's status. However, if the publication regarding a public figure is proven to be false and motivated by malice or personal animosity, the defendant would have no defense and would be liable for damages. This position was established in *R. Rajagopal v. State of Tamil Nadu*, where the court held that the right to privacy or a cause of action for defamation is not available to public figures when the challenged statement relates to the discharge of their official duties.<sup>33</sup>

To secure a remedy, a plaintiff may bring a suit for damages or seek an injunction from the court. Indian courts are expected to apply rules of equity, justice, and good

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<sup>30</sup> *Sim v. Stretch*, (1936) 2 All E.R. 1237, cited by *Ashok Kumar v. Radha Kishan Vij and Ors.*, 1983 Crim LJ 48 (India).

<sup>31</sup> *Belt v. Lawes*, [1882] 51 LJ QB 359.

<sup>32</sup> The Evidence Act, No. 1 of 1872 at § 105 (when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, No. 45 of 1860, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances). See also WILLIAM L. PROSSER ET AL., *PROSSER AND KEETON ON TORTS* 853 (5<sup>th</sup> ed. 1984) (acknowledging strict liability as the original standard at common law); *Weaver v. Lloyd*, (1824) 4 D & R 230 & *Khair-ud-Din v. Tara Singh*, (1926) I.L.R. 7 Lah 49 (on the responsibility of the defendant in proving the truth of an imputation); *Digby v. Financial News*, (1907) 1 KB 502, (507); *Subhas Chandra Bose v. R. Knight & Sons*, (1928) ILR 55 Cal 1121 (on the responsibility of the defendant in showing misstatements of facts in order to claim the defense of fair comment).

<sup>33</sup> *R. Rajagopal v. State of Tamil Nadu*, 1995 A.I.R. 264 (India) (the Inspector General of Prisons tried, on the basis of privacy and defamation law, to prevent publication of an autobiography of a prisoner that implicated a number of senior prison officers in crimes that were committed while on duty. The Court recognized that no prior restraint or prohibition could be imposed on the publication of material defamatory of the State or of its officials with respect to the discharge of their official duties and that no claim for damages lay in such cases. This is so even where the publication is based upon facts and statements, which are not true, unless the official can establish that the publication was made with a reckless disregard for truth).

conscience to determine the amount recoverable.<sup>34</sup> This determination depends upon the nature and character of the libel,<sup>35</sup> the extent of its circulation,<sup>36</sup> and the surrounding circumstances of the case.<sup>37</sup> Courts also have the jurisdiction to rule on an interlocutory application to restrain the further publication of defamatory content. This may be done under Sections 38 or 39 of the Specific Relief Act, 1963. This jurisdiction is not generally exercised unless the applicant satisfies the Court that the statements complained of are untrue.<sup>38</sup>

### 2.1.3 Criminal Defamation Law

Under common law, libel is a criminal offence as well as a civil wrong, while slander is only considered a civil wrong. However, criminal defamation law in India does not recognize this distinction. Section 499 of the Indian Penal Code defines defamation as the making or publishing of an imputation through “words either spoken or intended to be read, or by signs or by visible representations” concerning any person “intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person.”<sup>39</sup> It is also evident that Section 499 does not require proof of actual harm, but merely an intention to cause harm. Explanation 4 to Section 499 clarifies the meaning of “harm” to a person’s reputation. It includes lowering the moral, intellectual character or credit of a person with respect to his or her caste or calling, or stating that a person’s body is loathsome or disgraceful.<sup>40</sup>

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<sup>34</sup> *Waghela Rajsanji v. Shekh Masluddin*, 1887 L.R. 14 I.A. 89 (India) (upheld in *Miss Kamalini Manmade v. Union of India*, 1967 69 BOMLR 512 (India), which laid down that in the absence of statutory rules, civil defamation suits are governed by the principles of justice, equity and good conscience, which according to a large preponderance of judicial opinion, are identical with the corresponding relevant rules of English Common Law).

<sup>35</sup> RATAN LAL AND DHIRAJ LAL, *THE LAW OF TORTS*, 256 (22 ed. 1992).

<sup>36</sup> *Lajpat Rai v. “The Englishman,”* (1909) ILR 36 Cal 883.

<sup>37</sup> *Dina Nath v. Sayad Habib*, (1929) ILR 10 Lah 816.

<sup>38</sup> *Bonnard v. Perryman*, [1891] 2 Ch 269.

<sup>39</sup> Indian Penal Code § 499 (Defamation.—Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to **harm**, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person (*emphasis added*)).

<sup>40</sup> *Id.* at Explanation 4 (No imputation is said to harm a person’s reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful).

Section 499 provides ten broad exceptions to the offence of defamation. These are; (1) truth published for the public good, (2) good faith opinions about public servants, (3) good faith opinions on conduct “touching any public question”, (4) substantially true reports of proceedings in a court, (5) good faith opinions on the merits of any case, (6) good faith opinions on the merits of a public performance, (7) good faith censure by a person “having lawful authority over another”, (8) good faith accusations to authorized people, (9) good faith imputations made for the protection of the person’s own interest, and, (10) good faith imputations intended for the good of the person to whom it is conveyed or the general public.<sup>41</sup>

Section 500 makes defamation punishable with imprisonment for a maximum of two years, with a fine, or both.<sup>42</sup> Section 501 further provides that printing or engraving matter known to be defamatory is punishable with imprisonment for a maximum of two years, with a fine, or both.<sup>43</sup>

## **2.2. Important Case Law Concerning Defamation Liability on the Internet**

### 2.2.1. SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra<sup>44</sup>

This was the first instance where an Indian court assumed jurisdiction over a claim of defamation on the internet. The defendant was an employee of the plaintiff company and began sending derogatory and defamatory emails to his employers and other subsidiaries of the company all over the world. This was allegedly done to defame the company and its Managing Director. The plaintiff filed a suit for a permanent injunction restraining the defendant from sending such emails.

The Delhi High Court found that it had jurisdiction over the case, and ruled that the defendant was restrained from sending further emails to the plaintiffs or their subsidiaries, and from publishing any derogatory information about the plaintiffs

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<sup>41</sup> *Id.*

<sup>42</sup> Indian Penal Code § 500.

<sup>43</sup> *Id.* at § 501.

<sup>44</sup> SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra, CS(OS) No. 1279/2001 (Delhi High Court, 2001) (India).

online or offline.<sup>45</sup> This order assumes tremendous significance because it establishes precedent for Indian Courts to exercise jurisdiction over cases of defamation on the Internet.

2.2.2. Frank Finn Management Consultants v. Subhash Motwani and Another<sup>46</sup>

In this case, the plaintiff company was engaged in the business of providing basic cabin crew training and job assistance to its trainees. It alleged that the defendants started similar training courses and wrote and published an article in their capacity as Editors of an in-house journal called “Opportunities Today.” In a September 2001 issue titled “Flight of Fancy Crash Courses of Crashing Hopes,” the defendants allegedly published incorrect and defamatory content implying that the Plaintiff was extracting money from its students without disclosing the odds of their recruitment as flight pursers, air hostesses, and cabin crew. Although the article nowhere named the plaintiff, it provided sufficient information for readers to be able to identify it. Thereafter, the plaintiff filed a suit for the recovery of Rs. 25, 00,000 as damages in the Delhi High Court. It argued that the article was published with a *mala fide* intent to cause unlawful gain to the defendants.

Central to the defendant’s argument was the contention that the magazine in which the allegedly defamatory article was published in the same city where the defendants were residents and carried on business; i.e. Mumbai, and therefore the suit could only have been lawfully instituted in a Mumbai court. On the other hand, the plaintiffs invoked the jurisdiction of the Delhi High Court on grounds that a cause of action arose in Delhi because the impugned article had been published on the defendants’ website and was contained in a magazine, which was circulated all over India, including Delhi.

The court relied on Section 19 of the Civil Procedure Code (hereinafter CPC), which states that a suit for compensation for a wrong done to a person may be brought either in the court within the local jurisdiction of which the wrong was done or within the

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<sup>45</sup> *Id.*

<sup>46</sup> Frank Finn Management Consultants v. Subhash Motwani and Another, CS (OS) 367/2002 (India).

jurisdiction where the defendant resides or carries on business.<sup>47</sup> The court held that publication involves more than the act of printing and includes the communication of defamatory material to at least one person other than the plaintiff. Since the magazine was put on the internet, it concluded that the plaintiffs had circulated the material throughout India, including Delhi. Therefore the courts in Delhi would have jurisdiction under Section 19 of the CPC.<sup>48</sup>

### 2.2.3. *Khawar Butt v. Asif Nazir Mir*<sup>49</sup>

The plaintiff preferred this suit to claim damages of Rs. 1 crore and a mandatory injunction on the publication of material defamatory to him. He argued that the defendants; i.e. his wife, and Asif Nazir Mir, were involved in an adulterous relationship. In the complaint, the plaintiff alleged that this was done to harm his reputation, and to bring about a divorce between him and his wife. Further, the plaintiff claimed that false allegations of his being involved with the wife of the defendant were posted on her Facebook page. This was done on either October 25, 2008 or October 27, 2008. A pamphlet to the same effect was published on December 25, 2008. The suit was brought on February 11, 2010.

According to Entry 75 of the Schedule to the Indian Limitation Act, 1963, the limitation period in a suit to claim compensation for defamation is one year from the date of publication of the material. Publication is usually considered to have taken place when the material in question is communicated to a person other than the plaintiff.<sup>50</sup> In the context of the Internet, such an understanding of publication could potentially give rise to a new cause of action for each day that the content remains online.<sup>51</sup> This was the argument of the plaintiff who claimed that a fresh publication occurred in every new instance that the content was viewed online. Such an approach

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<sup>47</sup> The Civil Procedure Code, No. 5 of 1908 at § 19.

<sup>48</sup> *Frank Finn Management Consultants*, CS (OS) 367/2002 ¶ 16.

<sup>49</sup> *Khawar Butt v. Asif Nazir Mir*, CS (OS) 290/2010 (India).

<sup>50</sup> See *Pullman v. Hill & Co.* (1891) 1 QB 524 (527); *Duke of Brunswick v. Harmer* [1849] 14 QB 185 (any (re)communication is considered a new publication).

<sup>51</sup> *Manoj Oswal v. The State of Maharashtra and Anr* Criminal, Writ Petition No. 314 of 2012 (India) *relying on* *Godfrey v. Demon Internet Ltd.*, 4 All E.R. 342 (holding that every time one of the defendant's customers accessed the domain name and saw the defamatory content, it amounted to publishing); see also *George Firth v. State of New York*, 4 N.Y.3d 709 (N.Y. Ct. App. 2005); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

has been considered problematic in the past because it could repeatedly trigger the statute of limitations, thereby causing a multiplicity of suits and harassment of the defendants.<sup>52</sup>

In answering the question of whether the period of limitation had lapsed, the Court traced the development of the multiple publication rule from its origins in the case of *Duke of Brunswick v. Harmer* to modern times.<sup>53</sup> It relied on American jurisprudence to conclude that the rule long antedated the modern process of mass publication and would defeat the legislative policy of limitation (which is to bar the bringing of a suit beyond a prescribed period).<sup>54</sup> It therefore adopted the “Single Publication Rule,” which means that posts on the Internet will give rise to a single cause of action beginning on the date of their first publication regardless of its continued presence on the Internet. The Court qualified its decision by stating that re-publication by the defendant with a view to reach a different or larger audience would give rise to a fresh cause of action.

#### 2.2.4 Tata Sons Ltd v. Greenpeace International and Anr.<sup>55</sup>

This case began with a suit filed by the plaintiff, TATA Sons claiming a decree for permanent injunction and damages to the tune of of Rs. 10,00,00,000 against Greenpeace India. TATA Sons is India’s oldest and largest private sector employer, and had entered into a joint venture with Larsen and Toubro Limited for the purposes of creating the “most cost-effective and efficient port on the Eastern Coast of India” under a concession granted by the Government. The plaintiff’s suit arose as a result of the allegedly unauthorized use of its logo and loss of reputation to the company resulting from the launch of an online game by the defendants. The game was titled “Turtle v. Tata” and was part of a larger awareness campaign to protect the nesting and breeding of Olive Ridley Sea Turtles at the proposed port site. to the game invited internet users to indulge in a Pacman-style game, where they were required to save

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<sup>52</sup> *George Firth*, 4 N.Y.3d 709 (N.Y. Ct. App. 2005); *Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

<sup>53</sup> [1849] 14 QB 185.

<sup>54</sup> *Khawar Butt v. Asif Nazir Mir*, CS(OS) 290/2010 (India), at para. 38

<sup>55</sup> *Tata Sons Ltd v. Greenpeace International and Anr.*, No.9089/2010 in CS (OS) 1407/2010 (India).

turtles from being hit by the TATA logo. The Plaintiff's main arguments dealt with trademark dilution by way of tarnishment, defamation, and damage to reputation.

As a matter of practice, defamation cases usually result in an award of damages after a full trial. However, if the words or alleged facts that were used by the defendant in the challenged statement are false, the court will grant an injunction against the material in order to prevent further harm.<sup>56</sup> In this regard, the plaintiff argued that while considering the balance between convenience and the likelihood of irreparable harm to the plaintiff, the Court should consider the amplified damage resulting from the reach and widespread accessibility of the Internet.<sup>57</sup>

The Delhi High Court rejected this argument. It held that the Internet's wider audience does not alter its essential function as a medium of communication, and therefore it would be anomalous for the Court to discriminate between mediums in that respect.<sup>58</sup> However, the Court clarified that certain features of the Internet that impact its reach and effectiveness in spreading defamatory content may be a viable ground for assessing damages.<sup>59</sup>

From a reading of the above cases, it would appear that in the absence of Internet-specific regulation, Indian courts have not hesitated in extending conventional principles of defamation to the Internet. However, they have modified them with a view to increasing effective and reasonable enforcement. Therefore currently, in order to avoid liability, an author of content on the Internet must be wary of the jurisdictions in which the material may appear or be accessed. He or she may expect to be sued within a period of one year commencing from the date of initial publication, and may be restrained from publication if a likelihood of irreparable harm

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<sup>56</sup> *Bonnard v. Perryman*, [1891] 2 Ch. 269 (the Court has jurisdiction to restrain by injunction, and even by an interlocutory injunction, the publication of a libel. But the exercise of the jurisdiction is discretionary, and an interlocutory injunction ought not to be granted except in the clearest cases – in cases in which, if a jury did not find the matter complained of to be libelous, the Court would set aside the verdict as unreasonable. An interlocutory injunction ought not to be granted when the Defendant swears that he will be able to justify the libel, and the Court is not satisfied that he may not be able to do so.); *see also* *Khushwant Singh v. Maneka Gandhi*. AIR 2002 Delhi 58 (India) (upholding the reasoning of *Bonnard v. Perryman*).

<sup>57</sup> *Tata Sons Ltd v. Greenpeace International and Anr*, No.9089/2010 in CS (OS) 1407/2010 (India) ¶ 14.

<sup>58</sup> *Id.* ¶ 39.

<sup>59</sup> *Id.*

to the plaintiff is demonstrated. However, an injunction or damages will not be granted simply on the grounds of wide access offered by the Internet.

### **3. INTERMEDIARY LIABILITY FOR CYBER DEFAMATION IN INDIA**

There is no separate law that punishes intermediaries for hosting defamatory content in India. However, because defamation is a well-established offence in both civil and criminal law, India, like many other States,<sup>60</sup> has held intermediaries liable for hosting defamatory content produced by users of their services.<sup>61</sup> In order to comply with international standards for regulating electronic commerce, India included various safe-harbour provisions for intermediaries in the IT Act.<sup>62</sup> Given the fact that intermediaries usually do not author the defamatory content and that they play a unique role in ensuring the “free flow of information through society,”<sup>63</sup> India has imitated other States<sup>64</sup> by slowly expanding this immunity, or safe-harbour, provided to intermediaries for hosting defamatory content.<sup>65</sup>

The following Part of the Report will first examine recent developments in Indian law regarding intermediary liability, and then take a detailed look at the requirements intermediaries must fulfil to receive the above-mentioned immunity. Subsequent sections will examine noteworthy cases and the contribution of other actors to the changing intermediary regime in India. This will present a holistic picture of the evolution of the law, actual implementation and enforcement, as well as the debates in India over the direction of intermediary liability for cyber defamation.

#### **3.1 Recent developments in the law**

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<sup>60</sup> La Rue, *supra* note 11, at ¶ 39.

<sup>61</sup> Avnish Bajaj v. State (NCT) of Delhi, (2008) Delhi Law Times 769 (India) (Avnish Bajaj, the CEO of Baze.com was held liable when an anonymous user attempted to sell a pornographic video clip through his site); Prasad, *supra* note 10 (a decision holding Google liable for hosting defamatory content on its blogging service is currently under appeal before the Indian Supreme Court).

<sup>62</sup> Information Technology Act § 79.

<sup>63</sup> La Rue, *supra* note 11, at ¶ 46.

<sup>64</sup> See, Communication Decency Act, 47 U.S.C. § 230 (2011); Directive 2000/31 of the European Parliament and the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce in the Internal Market (“Directive on Electronic Commerce”), 2000 O.J. (L 178) 1.

<sup>65</sup> Information Technology Act § 79; *see also* Shreya Singhal v. Union of India, (2013) 12 S.C.C. 73 (India) (raising similar arguments).

Since the turn of the millennium, India has provided varying degrees of immunity to intermediaries for hosting defamatory content by creating safe harbour provisions in the IT Act. The scope of this immunity was significantly expanded with a substantial amendment to the IT Act in 2008.<sup>66</sup> Currently, Section 79 of the IT Act provides intermediaries with a qualified immunity from liability in both civil and criminal matters.<sup>67</sup> Whether intermediaries might be exposed to secondary liability in the context of online defamation depends on whether or not they qualify for immunity under the IT Act.

### 3.1.1 Information Technology Act, 2000

The original IT Act created a safe harbour for intermediaries from liability arising out of third party defamatory content. Essentially, the term “intermediary” was defined under the Act as “any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message.”<sup>68</sup> This definition appeared to limit the safe harbour provisions solely to “network service providers,”<sup>69</sup> and was widely criticized for not providing clarity as to which entities could claim to be intermediaries.<sup>70</sup> More importantly, the immunity as provided under the Act was limited only to offences specified by the IT Act, which resulted in intermediaries being subjected to tortious liability and having to face prosecution under Section 499 of the IPC for hosting the defamatory content.<sup>71</sup> The Government of India recognized the need to address these issues with the original IT Act, and appointed an expert committee to recommend amendments to the Act.<sup>72</sup> The expert

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<sup>66</sup> Information Technology Act § 79 (the amendment in 2008 provided immunity for intermediaries who did not initiate or interfere with the transmission, stipulated that the government will provide guidelines that will apply to intermediaries as well as required intermediaries to expeditiously take down content once they receive “actual knowledge).

<sup>67</sup> Information Technology Act § 79.

<sup>68</sup> *Id.* at § 2(1)(w).

<sup>69</sup> Chinmayi Arun and Sarvjeet Singh, *NOC Online Intermediaries Case Studies Series*, GLOBAL NETWORK OF INTERNET AND SOCIETY RESEARCH CENTERS (Feb. 18, 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2566952](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566952) [hereinafter *CCG Case Studies*] (providing a case study reference).

<sup>70</sup> *Id.*

<sup>71</sup> Avnish Bajaj v. State (NCT) of Delhi, (2008) Delhi Law Times 769 (India) (the CEO of Bazazee.com was held liable under Indian Penal Code § 292 for distributing obscene material, but this illustrates how despite the Information Technology Act providing immunity intermediaries were still prosecuted under the other penal laws.); see also *CCG Case Studies*, *supra* note 69 at 9.

<sup>72</sup> MINISTRY OF COMMUNICATIONS & IT, REPORT OF THE EXPERT COMMITTEE ON AMENDMENTS TO IT ACT 2000 (Aug. 2005), available at <http://deity.gov.in/content/report-expert-committee-amendments-it-act-2000-3> (last visited Aug. 12, 2015) [hereinafter EXPERT COMMITTEE REPORT].

committee's recommendations resulted in the implementation of a substantially modified intermediary liability regime in 2008.<sup>73</sup>

Inspired by the European E-Commerce Directive, the amended IT Act expands the definition of "intermediary" to include online intermediaries, and extended intermediary immunity to laws and offences beyond the IT Act.<sup>74</sup> Thus, both the definition of an "intermediary" and the immunity provided to them have been expanded by the 2008 amendment, which is the law that is currently in effect.<sup>75</sup>

As discussed earlier, the current definition of "intermediary" is expansive, and includes "telecom service providers, network service providers, Internet Service Providers, web hosting service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes."<sup>76</sup> In addition, Section 81 ensures that the IT Act overrides conflicting provisions in other laws, thereby extending the protections that intermediaries enjoy to offences beyond the IT Act, except those provided for in the Copyright Act, 1957 and Patents Act, 1970.<sup>77</sup>

Under Section 79 of the IT Act, as amended in 2008, intermediaries could avail themselves of safe harbour as long as they did not have "actual knowledge" of the third-party content, and they complied with the various due diligence requirements promulgated by the government.<sup>78</sup> At the time, the government had not yet notified guidelines that outlined what this due diligence would comprise of. The exact requirements that intermediaries must satisfy to receive immunity are discussed in detail below.

### 3.1.2 Information Technology (Intermediary Guidelines) Rules, 2011

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<sup>73</sup> Information Technology Act § 79 (the amendment in 2008 provided immunity for intermediaries who did not initiate or interfere with the transmission, stipulated that the government will provide guidelines that will apply to intermediaries as well as required intermediaries to expeditiously take down content once they receive "actual knowledge).

<sup>74</sup> The Information Technology (Amendment Act), 2008, Not 10, Acts of Parliament, 2009 (India) at Section 79 (contains a *non-obstante* clause that overrides other laws in force in India).

<sup>75</sup> See *CCG Case Studies*, *supra* note 69 at 9.

<sup>76</sup> Information Technology Act § 2(2)(w).

<sup>77</sup> *Id.* § 81

<sup>78</sup> *Id.* § 79

In 2011, the Government of India notified the enactment of the Information Technology (Intermediary Guidelines) Rules, 2011 (hereinafter “Intermediary Guidelines”).<sup>79</sup> The Intermediary Guidelines were enacted through Section 87(2)(zg), read with Section 79 of the IT Act.<sup>80</sup> The Guidelines specify a list of categories of unlawful content, including material that is blasphemous, defamatory, obscene, pornographic, libellous, invasive of another’s privacy, hateful, racially or ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatsoever.<sup>81</sup> Intermediaries are required to take down such content within 36 hours of receiving “actual knowledge” (including a complaint from a user),<sup>82</sup> effectively creating a privately-administered “notice and takedown” regime.<sup>83</sup> In the landmark judgement of *Shreya Singhal*, the Supreme Court interpreted the requirement of “actual knowledge” to mean the receipt of a court order by the intermediary.<sup>84</sup> The court clearly stated that intermediaries should not be made to take down content until they receive a judicial order requiring them to do so.<sup>85</sup>

### 3.1.3 Regulation for Internet Service Providers and Online Intermediaries

Indian law distinguishes between Internet Service Providers (“ISPs”) and online intermediaries. This is largely because ISPs such as telecommunication service providers and network service providers require a license from the Government to operate in India.<sup>86</sup> Thus, the Government can make these licenses contingent on ISPs preventing the transmission of objectionable, defamatory, obscene, or intellectual property infringing materials, and may hold them liable when such material is

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<sup>79</sup> Intermediary Guidelines, *supra* note 15 (defining due diligence standards intermediaries must meet to benefit from “safe harbor” provided under IT Act.).

<sup>80</sup> Information Technology Act § 87(2)(zg), read with Information Technology Act § 79; Uppaluri, *supra* note 16.

<sup>81</sup> Intermediary Guidelines, *supra* note 15 r. 3 (2).

<sup>82</sup> *Id.* at 18 r. 3 (4)

<sup>83</sup> See Dara, *supra* note 15; see also SOFTWARE FREEDOM LAW CENTER, INFORMATION TECHNOLOGY (INTERMEDIARIES GUIDELINES) RULES, 2011: AN ANALYSIS (2014) available at <http://sflc.in/wp-content/uploads/2014/07/Information-Technology-Intermediaries-Guidelines-Rules-2011-An-Analysis.pdf> (hereinafter SFLC ANALYSIS).

<sup>84</sup> *Shreya Singhal v. Union of India*, (2013) 12 S.C.C. 73 (India) ¶ 117.

<sup>85</sup> *Id.*; see also Chinmayi Arun, *Gatekeeper Liability and Article 19(1)(A) of the Constitution of India*, 7 NUJS L. REV 73 (2014).

<sup>86</sup> See *CCG Case Studies*, *supra* note 69, at 6.

transmitted.<sup>87</sup> Additionally, ISPs are obligated to monitor such communications and trace and block those that are malicious or constitute a nuisance.<sup>88</sup> Online intermediaries, such as websites on the other hand, rarely have offices in India and cannot be subjected to the same licensing and regulation scheme.<sup>89</sup> Although online intermediaries are free from such constraints, they must still satisfy the requirements of Section 79 to avail themselves of immunity from hosting defamatory content.

#### 3.1.4 Requirements for immunity from intermediary liability

After its amendment in 2008, Cl.1 of Section 79 ensures that intermediary immunity overrides any other law in force. Such immunity, however, is conditioned upon the entity satisfying the requirements laid out in Cl.2 and Cl.3 of Section 79.<sup>90</sup> Thus, to avoid secondary liability for online defamation cases, an intermediary must *either*:

- 1) Limit its function solely to providing access to the relevant communication system over which the relevant content is transmitted or temporarily hosted;<sup>91</sup>

*or*

- 2) The intermediary must not initiate the transmission, select the receiver of the transmission, and select or modify the information contained in the transmission.<sup>92</sup>

In addition to satisfying one of these elements, an intermediary claiming immunity must comply with the due diligence and Intermediary Guidelines requirements issued by the Central Government.<sup>93</sup> These affirmative duties are outlined in the next section. However, it is important to note that the IT Act no longer places the burden of proof on the intermediary, which instead receives immunity until it contravenes the provisions of Section 79.<sup>94</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Information Technology Act § 79.

<sup>91</sup> *Id.* § 79(2)(a).

<sup>92</sup> *Id.* § 79(2)(b).

<sup>93</sup> *Id.* § 79(2)(c).

<sup>94</sup> See Arun, *supra* note 85 at 81.

Clearly drawing from the E-Commerce Directive in the European Union, the amended IT Act differentiates between intermediaries based on the role they play. Intermediaries that provide functionality akin to that of a “mere conduit” are provided blanket immunity.<sup>95</sup> Thus, services that represent the infrastructure of the Internet, such as ISPs and telecommunication services, are largely exempt from liability.<sup>96</sup> Because Section 79 extends immunity to intermediaries who host information, it has been suggested that this exemption extends to caching services.<sup>97</sup> The Intermediary Guidelines state that the use of human editorial control disqualifies an intermediary from claiming immunity.<sup>98</sup> This is because the selection of information is an intrinsic aspect of editorial control, and thus would cause an entity to fail the test of “not select or modify the information” provided in Section 79(2).<sup>99</sup>

Under Section 79 Cl. 3, an intermediary is also disqualified from claiming immunity if they (1) conspire, aid, abet, induce, or in any way commission the unlawful material, or (2) fail to remove or disable access to the unlawful material after receiving *actual knowledge* or being notified by an appropriate Government agency.<sup>100</sup> The standard for “actual knowledge” is not defined in the Act<sup>101</sup> and was not judicially determined until the case of *Shreya Singhal*.<sup>102</sup>

### 3.1.5 Due Diligence and the Affirmative Duties Necessary to claim Immunity

Section 79(2)(c) of the IT Act requires intermediaries to observe due diligence and comply with relevant guidelines issued by the Central Government.<sup>103</sup> The Intermediary Guidelines impose several affirmative duties on intermediaries. The most notable of these is found in Rule 3(1), which requires intermediaries to publish user agreements and regulations that prohibit users from publishing, transmitting,

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<sup>95</sup> EXPERT COMMITTEE REPORT, *supra* note 72.

<sup>96</sup> See CCG Case Studies, *supra* note 69 at 11.

<sup>97</sup> Information Technology Act § 79(2)(a); see also CCG Case Studies, *supra* note 69 at 11.

<sup>98</sup> See SFLC ANALYSIS, *supra* note 83 (providing an expanded discussion).

<sup>99</sup> See Aditya Gupta, *The Scope of Online Service Providers' Liability for Copyright Infringing Third Party Content Under the Indian Laws – The Road Ahead*, 15 J.I.P.R. 35, 38 (2010).

<sup>100</sup> Information Technology Act § 79.

<sup>101</sup> See CCG Case Studies, *supra* note 69, at 12.

<sup>102</sup> *Shreya Singhal v. Union of India*, (2013) 12 S.C.C. 73 (India) ¶ 117.

<sup>103</sup> Information Technology Act § 79 (2)(c).

displaying, or sharing any unlawful information.<sup>104</sup> This effectively results in intermediaries placing restrictions on the content that users can upload.<sup>105</sup>

“Unlawful information” is defined in Rule 3(2), which naturally encompasses defamatory and libellous material but also extends to information that is blasphemous, obscene, pornographic, paedophilic, invasive of another’s privacy, hateful, racially or ethnically objectionable, or relating to or encouraging money laundering or gambling.<sup>106</sup> The differentiation between “defamatory” and “libellous” content may be redundant, as Indian criminal law does not differentiate between the two.<sup>107</sup> More importantly, in the landmark decision of *Shreya Singhal*, the Supreme Court stated that no part of the Intermediary Guidelines can restrict speech to a greater degree than what is provided for in Article 19(2) of the Constitution.<sup>108</sup> However, as the Supreme Court did not delve into the terminology of the Intermediary Guidelines, it is unclear as to how the Intermediary Guidelines have been interpreted to be in consonance with the Constitution.

Two notable requirements in Rule 3(3) and 3(4) of the Intermediary Guidelines are closely interlinked. Firstly, an intermediary must not *knowingly* publish, transmit, host, or modify material that is prohibited.<sup>109</sup> Secondly, upon receiving “actual knowledge” of unlawful material on its system, an intermediary must act within 36 hours.<sup>110</sup> The Government has clarified that this requires an intermediary to acknowledge the complaint within 36 hours, while the maximum time for redress is one month following receipt of the complaint.<sup>111</sup> Originally, the content’s creator was not able to contest the legality of the challenged speech.<sup>112</sup> However, the Rule

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<sup>104</sup> Intermediary Guidelines, *supra* note 15, at r. 3(2).

<sup>105</sup> See SFLC ANALYSIS, *supra* note 83.

<sup>106</sup> Intermediary Guidelines, *supra* note 15, at r. 3(2).

<sup>107</sup> See *Dara*, *supra* note 15.

<sup>108</sup> *Shreya Singhal v. Union of India*, (2013) 12 S.C.C. 73 (India) ¶ 117.

<sup>109</sup> Intermediary Guidelines, *supra* note 15, at r. 3(3).

<sup>110</sup> *Id.* at r. 3(4).

<sup>111</sup> MINISTRY OF COMMUNICATIONS AND INFORMATION TECHNOLOGY, DEPARTMENT OF ELECTRONICS AND INFORMATION TECHNOLOGY, CLARIFICATION ON THE INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES) RULES, 2011 (Mar. 18, 2013), *available at* [http://deity.gov.in/sites/upload\\_files/dit/files/Clarification%2079rules%281%29.pdf](http://deity.gov.in/sites/upload_files/dit/files/Clarification%2079rules%281%29.pdf); Intermediary Guidelines, *supra* note 15, at r. 3 (11).

<sup>112</sup> Information Technology Act § 79 (merely requires intermediaries to take down the content in question upon receipt of actual knowledge and the Act contains no provision that allows authors to challenge the take down of content. similarly, while Intermediary Guidelines r. 3(5) require a

regarding takedown has been substantially altered following the *Shreya Singhal* decision, where the Supreme Court held that an intermediary is only required to take down content upon “receiving actual knowledge from a court order or on being notified by the appropriate government or its agency” regarding the unlawful content.<sup>113</sup> Due to the recentness of the judgement, it is unclear how effective this new mechanism will be in practice.

Rule 3(5) requires an intermediary to inform users when they are not complying with the intermediary’s rules and regulations published pursuant to Rule 3(1).<sup>114</sup> This extends to the intermediary’s privacy policy and the use of an intermediary’s computer resources.<sup>115</sup> The Rule allows intermediaries to deny services to a user who posts unlawful content.<sup>116</sup> Previously, this was occurred after the intermediary made a determination regarding the lawfulness of the content.<sup>117</sup> However, after *Shreya Singhal*, the court stated that this Rule should only operate after a court order classifying content as unlawful has been issued.<sup>118</sup>

Rule 3(11) requires intermediaries to publish the name and contact of a designated Grievance Officer, along with describing the mechanism by which an individual can lodge a complaint for content that violates Rule 3. The Grievance Officer is required to redress the complaint within a month after the filing of the complaint.

Having examined the substantive law regulating intermediaries, the Report will provide a discussion on important case law concerning intermediaries. This discussion will enable one to understand the developments in the intermediary liability regime, as well as how actual enforcement often occurs in India.

### **3.2 Important case law concerning Intermediary liability in India**

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notification to be sent to the author, they do not allow the author to challenge the determination of the speech as unlawful.).

<sup>113</sup> *Shreya Singhal*, (2013) 12 S.C.C. 73 ¶ 117.

<sup>114</sup> Intermediary Guidelines, *supra* note 15, at r. 3(5).

<sup>115</sup> See SFLC ANALYSIS, *supra* note 83.

<sup>116</sup> Intermediary Guidelines, *supra* note 15 r. 3(5).

<sup>117</sup> *Id.*

<sup>118</sup> *Shreya Singhal*, (2013) 12 S.C.C. 73 ¶ 117.

### 3.2.1 Avnish Bajaj v. State<sup>119</sup>

This case was decided prior to the 2008 amendment of the IT Act, when the immunity provided to intermediaries was limited to offences contained in the IT Act itself. However, the case is still representative of the development of intermediary liability in India, and highlights the problems with the imposition of strict liability on intermediaries.

Baazee.com was a wholly-owned subsidiary of EBay India that facilitated the online sale of goods between buyers and sellers. On November 27, 2004, Ravi Raj, an undergraduate student, created a listing for sale titled “*Item 27877408 – DPS Girls having fun!!! Full video + Baazee points.*”<sup>120</sup> Despite the actual video not being available for viewing on Baazee.com and the post being taken down within 3 days, criminal charges were filed against Ravi Raj, Mr. Avnish Bajaj, the Managing Director of baazee.com at the time, and Mr. Sharat Digumarti, the individual responsible for handling content at Baazee.com.<sup>121</sup>

As the immunity provided to intermediaries did not extend to offences under the IPC at the time, Avnish Bajaj was tried under Section 292 of the IPC for the publication and circulation of obscene content. The court applied the IPC to impose strict liability on Baazee.com for selling obscene content.<sup>122</sup> The court specifically noted:

“[b]y not having appropriate filters that could have detected the words in the listing or the pornographic content of what was being offered for sale, the website ran the risk of having *imputed to it the knowledge* that such an object was in fact obscene”<sup>123</sup> (*emphasis added*).

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<sup>119</sup> Avnish Bajaj v. State, (2008) Delhi Law Times 769 (India).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See Arun, *supra* note 85, at 82.

<sup>123</sup> Avnish Bajaj, (2008) Delhi Law Times 769 (India).

Given the lack of immunity provided to intermediaries and the strict liability standard, the Delhi High Court had no choice but to pronounce Avnish Bajaj guilty. He was later acquitted on procedural grounds by the Supreme Court.

Although the content in the case was challenged on grounds of obscenity and not defamation, given the shortcomings in the laws regulating intermediary liability in India at the time, the liability of Baazee.com and Avnish Bajaj would have been identical had the material been defamatory. It should be remembered, however, that the IT Act was substantially modified after 2008. Following the 2008 amendment, intermediary immunity would apply to offences under the IPC and there would be no application of strict liability.<sup>124</sup> Instead, the prosecution would have to prove the intermediary's actual knowledge of the unlawful content.<sup>125</sup>

### 3.2.2 Google India v. Visaka Industries<sup>126</sup>

Visaka Industries was engaged in the manufacture of asbestos cement sheets and other related products. On November 21, 2008, Gopala Krishnan published an article titled "Poisoning the System; Hindustan Times" on a website hosted by Google.<sup>127</sup> The article mentioned several politicians who were later found not to be connected with the management of Visaka Industries. Another article published in July of 2008, titled "Visaka Asbestos Industries Making Gains," contained defamatory comments against the company that were made available to a worldwide audience through Google.<sup>128</sup> Google was charged for hosting these articles as an intermediary under Sections 120-B,<sup>129</sup> 500,<sup>130</sup> and 501<sup>131</sup> of the IPC.

Google contended that it acted solely as an intermediary by providing a platform for end users to upload content, and therefore had not published the articles as required for defamation liability. It argued that Section 79 of the amended IT Act was the

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<sup>124</sup> See Arun, *supra* note 85, at 82.

<sup>125</sup> *Id.* at 83.

<sup>126</sup> Google India Pvt. Ltd. v. Visaka Industries 2009 Criminal Petition 7207 of 2009 (India).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Indian Penal Code § 120-B (punishment for criminal conspiracy.).

<sup>130</sup> *Id.* at § 500 (punishment for defamation.).

<sup>131</sup> *Id.* § 501 (printing or engraving matters known to be defamatory).

embodiment of this principle, and therefore there was no liability on the part of Google. While the State High Court of Andhra Pradesh acknowledged that the amended IT Act extended the immunity of intermediaries to offences under the IPC, the court held that Google could not claim protection under Section 79 because it did not expeditiously remove the content once it received notice of it, as required by Section 79(3). Google is currently appealing this case to the Supreme Court.<sup>132</sup> This case, like *Avnish Bajaj*, must be analysed in the context of the rapidly-changing landscape of intermediary liability in India. After the *Shreya Singhal* decision, Google would have only been liable if they had not taken down the defamatory statements after being served with a court order.

### 3.2.3 *Vyakti Vikas Kendra & Others v. Jitender Bagga & Google*<sup>133</sup>

The Vyakti Vikas Kendra, India Public Charitable Trust was created to encourage and work towards the spiritual, educational, and developmental activities of the Art of Living Foundation of India. It is a volunteer-based humanitarian and educational organisation. A suit for defamation was brought by the Trust against Mr. Jitender Bagga for publishing blogs that were allegedly vulgar and abusive toward Sri Sri Ravi Shanker, the owner of the Art of Living Foundation, and against Google for hosting the challenged content on its site [www.blogger.com](http://www.blogger.com).<sup>134</sup> The Trust sought damages of Rs. 5,09,00,000, as well as permanent and mandatory injunctions against the website.

The court applied Section 79(3)(b), which requires intermediaries to remove unlawful content after receiving actual knowledge.<sup>135</sup> Rule 3(4) of the Intermediary Guidelines further requires that defamatory content be removed within 36 hours. Rule 3(3) and Rule 3(2) also require that an intermediary observe due diligence with regard to information that is grossly harmful, defamatory, libellous, or otherwise unlawful.<sup>136</sup> On these grounds, the court ordered the removal of the content from [www.blogger.com](http://www.blogger.com).

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<sup>132</sup>Prasad, *supra* note 10.

<sup>133</sup> *Vyakti Vikas Kendra & Others v. Jitender Bagga & Google*, CS (OS) No. 1340/2012, (2012) Delhi High Court (India).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

The IT Act has been met with criticism and serious opposition by civil society groups and free speech activists since its enactment, but these critiques significantly increased after the *Avnish Bajaj* verdict. The imposition of strict liability on Bazeed.com for a sale listing posted by a third party and the use of criminal sanctions against an intermediary sparked a discussion on the immunity intermediaries should receive. The contributions of other actors towards the redesigning of the legal regime for online intermediary liability in India are described below.

### **3.3 Other Actors Influencing Policy Deliberation on Online Intermediary liability**

The 2008 amendment of the IT Act, which reformed the law governing intermediary liability, owes much to the support of several think tanks throughout India. This trend has continued well into the second decade of the twenty-first century, with studies and reports being published by civil society groups examining the impact of India's intermediary liability regime on the freedom of expression, right to privacy, and right to equality.<sup>137</sup> Indian civil society groups, think tanks, and University Research centres that have contributed to this area include the Centre for Internet and Society (CIS), the Software Freedom Law Centre (SFLC) and the Center for Communication Governance (CCG) at National Law University Delhi.

After the notification of the Intermediary Guidelines, CIS conducted a study to determine whether the notice and takedown regime prescribed by the Intermediary Guidelines chilled the freedom of expression on the Internet.<sup>138</sup> False takedown notices were sent by researchers to seven different intermediaries, and six intermediaries over-complied with the notices by taking down lawful content.<sup>139</sup> “Where subjective determinations had to be made in the limited timeframe prescribed

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<sup>137</sup> Siddharth Narrain, *The Death of 66A and the Dawn of a New Era of Free Speech Jurisprudence: Siddharth Narrain*, Kafila (Mar. 24. 2015), available at <http://kafila.org/2015/03/24/the-death-of-66a-and-the-dawn-of-a-new-era-of-free-speech-jurisprudence-siddharth-narrain/> (last visited Aug. 10, 2015) (discussion of civil society participation in landmark case of Shreya Singhal as petitioners, including Common Cause, the Peoples Union for Civil Liberties, and the Internet and Mobile Association of India.).

<sup>138</sup> Dara, *supra* note 15.

<sup>139</sup> *Id.*

by the rules (36 hours), intermediaries complied with the notices by default.”<sup>140</sup> The study also highlighted that the third-party creator of the challenged content was not notified by the intermediary or given a chance to contest the takedown.<sup>141</sup> The study concluded that the Rules, as notified in 2011, have a chilling effect on free speech and almost always favour the complainant.<sup>142</sup>

Another analytical study of the Intermediary Guidelines, conducted by SFLC, argued that because intermediaries risked losing their immunity by failing to remove content following a complaint, they will tend to err on the side of caution and end up removing lawful content as well.<sup>143</sup> It also pointed out the arbitrary nature of the restrictions in Rule 3(2), which extend beyond the reasonable restrictions permitted by Article 19(2) of the Constitution. SFLC also noted that the law may be unconstitutional because Rule 3(2) and (4) are *ultra vires* of the parent Act by legislating on the content that can be uploaded by a user and in determining what constitutes lawful speech. It is argued that these Rules go beyond regulating intermediaries and effectively regulate actual user content.

The CCG, along with the Global Network of Internet and Society Research Centres and the Berkman Centre for Internet & Society at Harvard University, released a report in 2015 including a case study on the changing landscape of the online intermediary liability regime in India.<sup>144</sup> The impact assessment conducted in the report stated that the unclear standards created by the Intermediary Guidelines made compliance for intermediaries difficult. Terms such as “defamatory” and “obscene” are not defined in the Guidelines, which causes intermediaries to struggle to distinguish between lawful and unlawful content. This effect is amplified in the case of small start-ups who cannot afford the legal counsel required to analyse these issues. The study highlights three primary problems that existed in the intermediary liability regime prior to the *Shreya Singhal* verdict: (1) forcing intermediaries to respond quickly to complaints by private citizens; (2) requiring private intermediaries to

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> SFLC ANALYSIS, *supra* note 83.

<sup>144</sup> See CCG Case Studies, *supra* note 69.

determine the lawfulness of speech; and (3) the lack of transparency surrounding the actual removal of content, especially the lack of notice provided to the creators of such content.<sup>145</sup> While the *Shreya Singhal* verdict addresses the first two issues highlighted in the study, the law regulating intermediary liability in India is still in a transformative phase.

#### **4. KEY ISSUES IN RELATION TO ENFORCING LAW REGULATING CYBER DEFAMATION**

##### **4.1 Resolving Jurisdictional Concerns**

Since material posted on the Internet can be accessed in multiple jurisdictions, courts are frequently faced with the dilemma of whether or not to rule on material that is available within their jurisdiction but originally published elsewhere. As a result, countries have increasingly begun to punish speakers beyond their borders.<sup>146</sup> India does not currently have any guidelines that allow its courts to exercise jurisdiction over foreign publications. However, in the context of domestic publications, it has favored a liberal approach to jurisdiction based on access to the defamatory material.<sup>147</sup> In the *Frank Finn* Case, the Delhi High Court found that a cause of action had arisen in Delhi although technically publication only took place in Mumbai, by virtue of the fact that the material was available on the Internet. Section 19 of the CPC permits such an interpretation because it allows plaintiffs to sue either where the wrong was done or within the jurisdiction where the defendant “resides, or carries on business, or personally works for gain”. If the wrong is considered to be done in any jurisdiction where online content can be accessed, this will lead to uncertainty for defendants as to the jurisdictions in which they may be called upon to defend themselves.

In the international context, these concerns are automatically magnified. This is because courts will be able to prosecute defendants practically anywhere in the world, even though the defendant may not know that his or her content was available in a

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<sup>145</sup> *Id.*

<sup>146</sup> KURT WIMMER & EVE R. POGORILER, INTERNATIONAL JURISDICTION AND THE INTERNET (Covington & Burling, 2006).

<sup>147</sup> *Frank Finn Management Consultants v. Subhash Motwani and Another*, CS (OS) 367/2002 (India).

particular jurisdiction or have any knowledge of the law of that jurisdiction. There is a fear that if this is the case, publishers will err on the side of caution and comply with the standards of the least-tolerant regulator in order to avoid liability.<sup>148</sup> This would chill speech that may otherwise be legal within a jurisdiction.

For this reason, it has been suggested that the scope of defamation liability be limited to more practical legal standards.<sup>149</sup> The representatives of intergovernmental bodies have said that “jurisdiction in legal cases relating to Internet content should be restricted to States in which the author is resident or to which the content is specifically directed; jurisdiction should not be established simply because the content has been downloaded in certain locations.”<sup>150</sup>

A fragmented approach to jurisdiction between countries allows plaintiffs to indulge in forum shopping. The site of the suit can be determinative in a lawsuit, especially in defamation cases where liability and protection of the press vary greatly between jurisdictions. Plaintiffs may use claimant-friendly judgments, even those from jurisdictions bearing little or no connection to the author of the allegedly defamatory material, to chill the exercise of free speech in their own jurisdiction. In the absence of an overarching framework, it is imperative that parties be required to demonstrate that substantial harm occurred within the jurisdiction in which the suit is brought, due to either the author’s presence or the content being uploaded in or directed toward that jurisdiction.<sup>151</sup>

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<sup>148</sup> Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade*, delivered to the Human Rights Council, U.N. Doc. A/HRC/14/23/Add.2 (Mar. 25, 2010). See ARTICLE 19, LAW IN INTERNET: PROS OR CONS FOR THE FREEDOM OF EXPRESSION? (2009) available [at](http://www.hfhrpol.waw.pl/obserwatorium/images/dokumenty/freedom%20of%20expression%20and%20internet%20regulation_new.doc) [http://www.hfhrpol.waw.pl/obserwatorium/images/dokumenty/freedom%20of%20expression%20and%20internet%20regulation\\_new.doc](http://www.hfhrpol.waw.pl/obserwatorium/images/dokumenty/freedom%20of%20expression%20and%20internet%20regulation_new.doc).

<sup>149</sup> UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression, *Joint Declaration* (Dec. 21, 2005) [hereinafter *Joint Declaration 2005*].

<sup>150</sup> *Id.*

<sup>151</sup> Peter Pammer v. Reederei Karl Schluter GmbH & Co KG (C-585/08), Hotel Alpenhof GesmbH v. Oliver Heller (C-144/09) App No. C-585/08 & C-144/09 (In the European Union, the so-called Brussels Regulation I addresses jurisdictional issues); see also U.N. Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe, Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and the Internet* (Jun. 1, 2011).

## 4.2. Strict Liability Approach of Civil Defamation

As mentioned above, the civil law of defamation in India is a strict liability offence. This means that a false defamatory statement results in liability for the defendant regardless of whether or not he or she can convince the court that he or she exercised due care in establishing its veracity. Even an inadvertent factual error may give rise to liability. In part, the advantage of the Internet is that users may publish information of a whistle-blowing nature without being subject to the restrictions of verification imposed on traditional media houses. However, with a burden of proof that's heavily in favor of plaintiffs, users may question the decision to post contentious information on the Internet and therefore be discouraged from public debate. Furthermore, most reporting on the Internet, particularly politically-relevant reporting, straddles the barrier between fact and opinion. To expect the average user to make complicated legal determinations regarding the content he wishes to post on the Internet necessarily chills speech.

### 4.2.1 SLAPP Suits

It has been argued that when defamation suits are characterized by an obvious power imbalance between the plaintiff and defendant and the cause of action is frivolous, the purpose of the suit may be to harass and intimidate dissenting speakers as opposed to actually securing a legal victory. Such suits provide a way to threaten the “politics of exposé” and whistleblower participants.<sup>152</sup> They are called Strategic Lawsuit Against Public Participation (“SLAPP”) suits, and as the name suggests are usually brought by private interests to stop citizens from exercising their political rights or to punish them for having done so.<sup>153</sup> In India, these suits are able to capitalize on the slow and costly process of adjudication to delay or stifle unfavorable speech.

This raises substantial concerns because India's free speech jurisprudence is chequered with instances of powerful corporations procuring gagging orders against

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<sup>152</sup> Rajeev Dhavan, *Whistles, Stings and SLAPPs*, THE HINDU (Dec. 12, 2013), available at <http://www.thehindu.com/2003/12/12/stories/2003121201851200.htm> (last visited Aug. 12, 2015).

<sup>153</sup> *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (App. Div. 1992).

journalists.<sup>154</sup> In 1982, the Madhya Pradesh High Court enjoined the Weekly Gwarlior Reporter from publishing defamatory and insulting material<sup>155</sup>; in 1984, Campa Cola obtained a 'gagging order' on India Today;<sup>156</sup> in 2003, the S. Kumar corporate conglomerate building the Mahabaleshwar dam successfully enjoined the Narmada Bachao Andolan from exposing financial dealings from public records.<sup>157</sup> More recently, the case of *Tata Sons* is thought to be a prominent example of such abuse.<sup>158</sup> Since ordinary individuals usually do not have the resources or political backing to fight corporations and defend themselves against such suits, SLAPP suits are quite successful in obtaining a withdrawal of statements from the public domain.

#### 4.2.2 Criminal Defamation

As mentioned earlier, Section 499 and 500 of the IPC collectively punish defamation with imprisonment, which may extend to two years, with a fine, or with both. It must be remembered that Section 499 does not require proof of actual harm, and therefore the reasonableness of this Section is automatically impugned.<sup>159</sup> Further, it criminalizes slander, which represents a considerable deviation from the common law. Finally, Section 499 does not afford truth as an absolute defense. In order to successfully avail of the defence of justification, a plaintiff must also show that his imputation was made in the public interest.

Each of the other defenses available to a defendant under Section 499 requires proof of good faith.<sup>160</sup> Under the IPC, proving good faith is more onerous than in the General Clauses Act by requiring an honest belief of truth, due care, and taking steps

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<sup>154</sup> Liang, *supra* note 8.

<sup>155</sup> Han Shanker v. Kailash Narayan, AIR 1982 MP 47 (India).

<sup>156</sup> S. Charanjit Singh v. Aroon Purie, (1983) 4 DRJ 86 (India).

<sup>157</sup> Rajeev Dhavan, *Harassing Hussain: Uses and Abuses of the Law of Hate Speech in SOCIAL SCIENTIST* (2007). See also, Rajeev Dhavan, *Whistles, Stings and Slapps*, THE HINDU, December 12<sup>th</sup> 2003 available at <http://www.thehindu.com/2003/12/12/stories/2003121201851200.htm> last accessed on 13/12/2015.

<sup>158</sup> *Tata Sons Ltd v. Greenpeace International and Anr*, No.9089/2010 in CS (OS) 1407/2010 (India).

<sup>159</sup> Amy Tang, Evan Rankin, Brendan de Caires & Drew Beesley, *Imposing Silence: The Use of India's Laws to Suppress Free Speech*, PEN INTERNATIONAL available at <http://www.pen-international.org/wp-content/uploads/2015/05/Imposing-Silence-4-WEB.pdf> last accessed on 13.12.2015.

<sup>160</sup> Indian Penal Code § 499.

toward ensuring truth.<sup>161</sup> Predictably, these attributes have led to the frequent use of this provision to silence political speech against public figures and obtain gagging writs to suppress inconvenient stories.<sup>162</sup>

Owing to the cost and time consuming nature of criminal prosecutions in India, there is a tendency for plaintiffs to transform civil defamation disputes into criminal cases.<sup>163</sup> The Supreme Court has condemned this practice, but acknowledged “a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of [claimants].”<sup>164</sup> The Court further noted “an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement.”<sup>165</sup>

The use of criminal sanctions for speech crimes is condemned internationally, because it impermissibly chills speech and may be abused by the government and powerful private actors to silence dissent.<sup>166</sup> Sections 499 and 500 of the IPC are currently being challenged on constitutional grounds before the Supreme Court.<sup>167</sup> The challenge is based on the argument, *inter alia*, that imprisonment is not a reasonable restriction under Article 19(2). The Court will likely consider the potential for abuse of such a provision when evaluating its validity.

#### 4.2.3. Protection of Government Officials

Section 499 of the IPC read with Section 199 of the Code of Criminal Procedure, 1973 (hereinafter “the CrPC”), which discusses the procedural aspects of prosecuting

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<sup>161</sup> General Clauses Act, No. 10 of 1897, Acts of Parliament, 1897 (India), at § 3.

<sup>162</sup> S. Charanjit Singh v. Aroon Purie, (1983) 4 DRJ 86 (India); Han Shanker v. Kailash Narayan, AIR 1982 MP 47 (India); *see also* Raj, *supra* note 8; Express Mail Service, *supra* note 8; Raj Kapoor v. Narendra, (1974) 15 GLR 125 (India); Asha Parekh and Ors. v. State of Bihar, 1977 Crim LJ 21 (India); Rajeev Dhavan & Aparna Ray, *Hate Speech revisited: The “toon” Controversy*, 2 SOCIO-LEGAL REVIEW, NLSIU 9-45 (2006); Dhavan, *Harassing Hussain*, *supra* note 157; Dhavan, *slapss*, *supra* note 157.

<sup>163</sup> Indian Oil Corporation v. NEPC India Ltd. and Ors., (2006) 6 SCC 736, ¶ 10 (India).

<sup>164</sup> *Id.* ¶ 10.

<sup>165</sup> *Id.* ¶ 10.

<sup>166</sup> La Rue, *supra* note 11; *Joint Declaration 2005*, *supra* note 149; *see also* Amnesty International, Amnesty International India Submission to the Law Commission of India (Jun. 20, 2014) (recommending that, given the existence of civil law remedies for defamation, criminalization is unnecessary for the protection of reputations).

<sup>167</sup> Subramanian Swamy v. Union of India, W. P. (cr) 184 of 2014.

defamation,<sup>168</sup> is considered to protect public servants from criticism. Although usually courts may only take cognizance of the offence of defamation if the complaint is brought by an aggrieved person,<sup>169</sup> Section 199(2) of the CrPC allows Sessions Courts to take cognizance of a claim of defamation when the offence is alleged to have been committed against “the President of India, the Vice-President of India, the Governor of a State, the Administrator of a Union territory or a Minister of the Union or of a State of a Union Territory, or any other public servant employed in connection with the affairs of the Union or of a State in respect of his public functions...without the case being committed to it.”<sup>170</sup> This provision grants a procedural advantage to plaintiffs who are public officials, and contradicts the principle that a government, owing to its dominant position, should display restraint in resorting to criminal proceedings. It is also anomalous that while India’s civil defamation law accounts for a lower threshold of protection to public figures<sup>171</sup>, its criminal law does not. Section 199 of the CrPC is also currently subject to a constitutional challenge before the Supreme Court.<sup>172</sup>

## **5. ANALYSING INTERMEDIARY LIABILITY FOR CYBER DEFAMATION AFTER *SHREYA SINGHAL***

Although India does not have an all-encompassing legislation that regulates online content, intermediaries may face liability for hosting defamatory content because of its characterization as unlawful speech.<sup>173</sup> In its landmark *Shreya Singhal* decision, India’s Supreme Court provided crucial interpretations of the IT Act and thus drastically reduced the uncertainty faced by online intermediaries regarding defamatory content or other unlawful speech posted to their sites.<sup>174</sup> However, the understanding that content will only be removed pursuant to a court order and the need for transparency articulated in *Shreya Singhal* is currently contained only in the judicial ruling itself. This legislative vacuum can be filled by updated regulations that codify this reasoning and provide a sufficient degree of clarity as to how the

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<sup>168</sup> Code of Criminal Procedure, No. 2 of 1974 § 199.

<sup>169</sup> *Id.* at § 199(2).

<sup>170</sup> *Id.*

<sup>171</sup> *R. Rajagopal v. State of Tamil Nadu*, 1995 A.I.R. 264 (India).

<sup>172</sup> *Subramanian Swamy*, W. P. (crl) 184 of 2014.

<sup>173</sup> Prasad, *supra* note 10.

<sup>174</sup> *Shreya Singhal v. Union of India*, (2013) 12 S.C.C. 73 (India) ¶ 117.

interpretations outlined in the judgement will be implemented. While the judgement is limited to preventing intermediaries from being required to determine whether challenged speech is actually unlawful, updated guidelines can implement other procedural safeguards which may increase the transparency of takedowns and enable faster dispute resolution. This part of the Report analyses both Section 79 and the Intermediary Guidelines in light of the *Shreya Singhal* decision, and other possible areas for improvement.

## 5.1 Private Notice to Judicial Orders

By making the immunity of intermediaries conditional on the expeditious removal of content, the “notice and takedown” regime created by Section 79(3)(b) of the Act and Rule 3(4) of the Intermediary Guidelines forces intermediaries to choose between taking down content once they receive a complaint against it and the possible risk of liability.<sup>175</sup> This approach caused intermediaries to err on the side of caution and lead to “over-broad private censorship, often without transparency and the due process of the law.”<sup>176</sup> Additionally, as highlighted by the CCG, smaller intermediaries often cannot implement screening procedures, nor can they effectively determine the legality of the content.<sup>177</sup> Recognizing these concerns, the Supreme Court in *Shreya Singhal* interpreted Section 79(3)(b) of the IT Act to require “actual knowledge that a court order has been passed.”<sup>178</sup> This interpretation was extended to the requirement in Rule 3(4) of the Intermediary Guidelines.<sup>179</sup> Thus, the Supreme Court removed the burden on intermediaries to determine the legality of the content. This practice has received widespread approval from U.N. Special Rapporteurs, the Manila Principles and is practiced across jurisdictions.<sup>180</sup>

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<sup>175</sup> Dara, *supra* note 15.

<sup>176</sup> La Rue, *supra* note 11, at ¶ 40; Dara, *supra* note 15.

<sup>177</sup> CCG Case Studies, *supra* note 69, at 23.

<sup>178</sup> *Shreya Singhal*, (2013) 12 S.C.C. 73 (India) ¶ 117.

<sup>179</sup> *Id.*

<sup>180</sup> La Rue, *supra* note 11 ¶ 40; *see also* MANILA PRINCIPLES ON INTERMEDIARY LIABILITY (Mar. 22, 2015), Article 2(b)(1), *available at* [https://www.eff.org/files/2015/10/31/manila\\_principles\\_1.0.pdf](https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf) (hereinafter MANILA PRINCIPLES); MANILA PRINCIPLES ON INTERMEDIARY LIABILITY BACKGROUND PAPER (Mar. 22, 2015) *available at* <https://www.eff.org/sites/default/files/manila-principles-background-paper-0.99.pdf> (hereinafter MANILA PRINCIPLES BACKGROUND PAPER) (describes various intermediary liability practices from across the world.).

## 5.2 Codifying the Changes Brought About by *Shreya Singhal*

While the Supreme Court has limited the scope of the law governing intermediary liability in *Shreya Singhal*, its decision can be codified in new guidelines to create additional legal certainty. Section 79(2)(c) and Section 87(2)(zg) of the IT Act allow the Government to promulgate new Guidelines; exercising this power would allow the Government to reinforce the Supreme Court’s new interpretation of the “actual knowledge” standard.<sup>181</sup> Secondly, Rule 3(2) of the Guidelines must be amended to reflect the Supreme Court’s emphasis that reasonable restrictions allowed under Article 19(2) of the Constitution are the only limitations that can be placed on free speech, even on the Internet.<sup>182</sup> Although defamation will still be prohibited by Rule 3(2), intermediaries no longer need to concern themselves with overbroad terms such as “grossly harmful” and “blasphemous,” which have been criticised for being vague.<sup>183</sup> Most importantly, the notification of new guidelines would provide various other safeguards against unlawful speech online, for both users and intermediaries. By stipulating new procedures to be followed by intermediaries, new guidelines could reduce the possibility of legal action and allow intermediaries to make informed decisions that balance the rights of the public with private rights.

### 5.3 A “Notice and Notice Regime”

The situation with online defamation cases is unique because it largely infringes private rights, as opposed to other forms of unlawful speech (e.g., hate speech) which are perceived to cause public harm. Under a “notice and notice” regime, the primary obligation on the intermediary that receives a complaint of allegedly unlawful content is forwarding the notification to the original poster or content creator where they are clearly identifiable.<sup>184</sup> This approach allows disputes to be resolved directly between complainants and content creators, without content necessarily being taken down. Such a method would be harmonious with the Indian Court’s reading of the IT Act in *Shreya Singhal*. Intermediaries would still be required to take down content if the

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<sup>181</sup> Information Technology Act § 79 (2)(c), read with Information Technology Act § 87 (2)(zg).

<sup>182</sup> *Shreya Singhal*, (2013) 12 S.C.C. 73 (India) ¶ 117.

<sup>183</sup> See SFLC ANALYSIS, *supra* note 83.

<sup>184</sup> MANILA PRINCIPLES, *supra* note 180.

content was found to be defamatory by a court. New guidelines or a modification to Rule 3(4) could stipulate that a notice must be sent to the content creator. This also ensures that the content creator will be aware of any subsequent takedown, and will therefore have an increased chance to contest the legality of the speech.<sup>185</sup>

#### 5.4 Functional Differences between Intermediaries

The definition of an intermediary under Section 2(w) of the IT Act includes “any person who on behalf of another person receives, stores, or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, Internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online marketplaces, and cyber cafes.”<sup>186</sup> While this broad definition has the benefit of bringing a large number of intermediaries under the protection of Section 79, it also fails to appreciate the functional differences between intermediaries.<sup>187</sup> Similarly, neither the Act nor the Intermediary Guidelines differentiate between defamation and any other form of unlawful speech. Thus, intermediaries seeking immunity under Section 79 are unable to raise arguments regarding their specific role or nature, or know the specific type of the speech for which they may be liable. It has been argued that this may adversely affect the immunity of intermediaries.<sup>188</sup>

The European Union, by virtue of Electronic Commerce Directive, has an intermediary liability regime that successfully differentiates between classes of intermediaries depending on the different functions they carry out.<sup>189</sup> By categorizing

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<sup>185</sup> See MANILA PRINCIPLES, *supra* note 180, at Art. 5(a); see also Hogan Lovells, *UK: Defamation (Operators of Websites) Regulations 2013* (Nov. 5, 2013), available at <http://www.lexology.com/library/detail.aspx?g=e194fb66-8c23-4908-866d-5923038f37fa> (the regulations on the UK’s defamation Act require operators of sites to notify the authors of content within 2 days; the content creator can either consent to the material being taken down or consents to his/her identity being revealed to the complainant. In the event that the content creator cannot be notified, or fails to respond, the intermediary must take down the content.).

<sup>186</sup> Information Technology Act § 2(w).

<sup>187</sup> See *CCG Case Studies*, *supra* note 69, at 9.

<sup>188</sup> *CCG Case Studies*, *supra* note 69, at 12, citing Pritika Rai Advani, *Intermediary Liability in India*, XLVIII (50) EPW 120, 122 (Dec. 2013) (arguing that such broad categorization of immunity might go both ways).

<sup>189</sup> Pablo Baistrocchi, *Liability of Intermediary Service Providers in the EU Directive of Electronic Commerce*, 19 SANTA CLARA HIGH TECH. L.J. 111 (2012).

intermediaries as “mere conduits,” “caching information,” and “hosting information,” the Directive imposes different burdens on intermediaries *depending on their function*.<sup>190</sup> Mere conduits, whose roles are limited to “automatic” and “passive” functions, are awarded almost blanket immunity, while those exercising editorial control must expeditiously remove content once notice of allegedly unlawful content is provided.<sup>191</sup> The implementation of such a regime in India would require substantial amendments to the IT Act, including Section 2(w) and Section 79. However, given how heavily the European Directive has influenced the codification of the existing intermediary liability regime in India,<sup>192</sup> incorporation of these differentiations may be a possibility in the near future.

## 5.5 Additional Safeguards

There are several additional safeguards provided in other jurisdictions and outlined in the Manila Principles that could reinforce India’s intermediary liability regime through largely procedural requirements. Notably:

- i. The time period for which content must be taken down should be specified in court orders.<sup>193</sup> And if the content is removed, it should not be taken down for longer than the duration specified.<sup>194</sup>
- ii. The content creator or poster must be provided with meaningful right to defend the content.<sup>195</sup>
- iii. Where access to unlawful content has been restricted and an attempt to access the content is made, the intermediary must display a notice explaining the grounds on which the content was censored.<sup>196</sup>

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<sup>190</sup> *Id.*

<sup>191</sup> Directive 2000/31 of the European Parliament and the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce in the Internal Market (“Directive on Electronic Commerce”), Article 12 and Article 14, 2000 O.J. (L 178) 1

<sup>192</sup> EXPERT COMMITTEE REPORT, *supra* note 72.

<sup>193</sup> MANILA PRINCIPLES, *supra* note 180, at Art. 2(b)(4).

<sup>194</sup> *Id.* at Art. 4(d).

<sup>195</sup> *Id.* at Art. 5(a).

<sup>196</sup> *Id.* at Art. 5 (f).

## 6. CONCLUSION

Although courts in India have significantly modified traditional principles of defamation to better suit defamation on the Internet, they are yet to determine whether they have jurisdiction over material that is published outside India but widely accessed within the country. In the absence of comprehensive guidelines which explain the application of Section 19 of the CPC to the Internet, defendants are likely to face uncertainty as to jurisdiction.

India's civil law of defamation has a strict liability approach which may be unreasonable to everyday users who will be required to conclusively prove the truth of any statements made on the Internet. In its current form the criminal law of defamation imposes disproportionate restrictions on the exercise of free speech without requiring proof of actual harm. It must be remembered that individual Internet users may not have the resources or legal backing to defend SLAPP suits and arduous criminal proceedings. In this respect, a clearer articulation of defamation rules on the Internet, as distinct from those that apply to the Press, in the form of legislation or otherwise would benefit users.

Following the amendment of the IT Act in 2008, enactment of the Intermediary Guidelines, and the Supreme Court's decision in *Shreya Singhal*, the role of online intermediaries in the regulation of cyber defamation has become clearer. However, there is still a need for codification of updated regulations to provide continuing legitimacy to the holding of *Shreya Singhal*. Additionally, in light of the Supreme Court's reasoning, new guidelines that include the Court's interpretation of the "actual knowledge" standard and the promulgation of a "notice and notice" regime would ensure that there are procedural safeguards that can protect intermediaries and provide complainants with faster dispute resolution.

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