

SOCIAL MEDIA IN SRI LANKA - NEED FOR REFORM IN THE CURRENT LEGAL FRAMEWORK

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1. Introduction

The need to create new laws and build upon existing legal infrastructure to regulate the use of social media in Sri Lanka has been a topic that has been discussed in great fervor and intensity in the last few months. In the light of tensions between communities erupting in increased use of hate speech on platforms such as Facebook, as well as owing to defamatory statements being circulated on social media platforms, the Government of Sri Lanka resorted to imposing temporary bans imposed on social media during several instances in the past. However, in the status quo, social media is intrinsically linked to our daily lives. Bans imposed on social media, therefore, is a significant hindrance for day-to-day activities of the community. Regulation of social media seemingly collides with free use of social media. Hence, the objective of this article is to assess the current framework governing the regulation of social media in Sri Lanka, and to explore avenues to reform and strengthen the legal structure, so that the community has free access to social media, albeit in a regulated manner.

¹ ICCPR, Article 20, 1, Any propaganda for war shall be prohibited by law; 2, Any advocacy of national, racial or religious hatred that constitutes

2. Hate Speech Online

Let us first look at Hate Speech, which is a point of great contention among many civil society organizations. The following laws are currently in place in Sri Lanka to aid in the regulation of how Hate Speech manifests on social media:

1. International Covenant on Civil and Political Rights, Act 56 of 2007
2. The Penal Code Ordinance No. 2 of 1883
3. The Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979

2.1 International Covenant on Civil and Political Rights, Act 56 of 2007

Commonly referred to as the ICCPR Act, this piece of legislation plays a major role in terms of protecting fundamental civil and political rights of the people. Article 20 of the International Covenant on Civil and Political Rights (also known as the ICCPR)¹, states that:

“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

incitement to discrimination, hostility or violence shall be prohibited by law.

The ICCPR Act of Sri Lanka² gives effect to this same principle in its section 3, which states that:

“No person shall propagate war or advocate national, racial or religious hatred that constitutes incitement or discrimination, hostility or violence.”

The ICCPR Act can be considered as the strongest existing law in Sri Lanka that can be utilized to control hate speech online. However, the great impact it can yield in this spectrum is somewhat curtailed by the fact that the Act does not incorporate some of the key provisions in the ICCPR. For instance, the article 19 of the ICCPR has not been incorporated into the ICCPR Act. Article 19 stipulates the following:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art or thought any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but

these shall only be such as are provided by law and are necessary;

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

Hence, it is evident that article 19 goes a longer way in protecting individuals' right of free speech, while also giving the Courts discretion in terms of curtailing certain types of speech in the interest of national security.

2.2 The Penal Code Ordinance, No. 2 of 1883

Section 120 of the Penal Code is a key legal provision in terms of dealing with hate speech online. One who is guilty of violating the section 120³ “shall be punished with simple imprisonment for a term which may be extended to two years”. However, the section has now become redundant given the evolving nature of social communications. While the Penal Code has been amended several times since its promulgation in 1883, section 120 remains woefully stagnant, following early British standards. Hence, it is imperative that this section is updated to

² International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007, Section 3(1)

³ The Penal Code Ordinance, No. 2 of 1883, Section 120: “Whoever by words, either spoken or intended to be read, or by signs, or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the President or to the Government of the Republic, or excites or attempts to excite hatred to or contempt of the administration of justice, or excites or attempts to

excite the People of Sri Lanka to procure, otherwise than by lawful means, the alteration of any matter by law established, or attempts to raise discontent or disaffection amongst the People of Sri Lanka, or to promote feelings of ill will and hostility between different classes of such people, shall be punished with simple imprisonment for term which may extend to two years”

duly align with recent developments in international law, especially surrounding international human rights and the rights engrained in the ICCPR.

Chapter XV of the Penal Code too demands attention in this context. This chapter is devoted to deal with “offences relating to religion”. Given the fact that Sri Lanka has experienced several civil unrests in the past owing to religion, this chapter holds crucial value. Sections 290, 290A, 291, 291A, 291B and 292 broadly focus on offences that can be committed against a religion, and punishment that may be met out in such cases. Sections 291 A⁴ and 291B⁵ is specially drafted in a manner that covers the spectrum of hate speech. Regrettably, there is a significant lack of reported judgements under these particular provisions, the reason being that these cases are heard in the Magistrate’s Court. However, since there is great similarity between these provisions and the corresponding sections in the Indian Penal Code, this article will look at how the Indian Courts have interpreted those provisions in light of the status quo.

⁴ The Penal Code Ordinance, No. 2 of 1883, Section 291A: “Whoever, with the deliberate intention of wounding the religious feelings of any person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.”

⁵ The Penal Code Ordinance, No. 2 of 1883, Section 291B: “Whoever, with the deliberate and malicious intention of outraging the religious feelings of any class of person, by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both”.

⁶ The Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979. Section 2(1)(h): “..by words either spoken or intended to be ready

2.3 The Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979

The Prevention of Terrorism Act (PTA) carries the strongest provision when it comes to regulating Hate Speech: section 2(1)(h)⁶. However, the Act has also been subject to a rising level of criticism, on the basis that the Act is largely used to oppress the minorities in Sri Lanka.⁷ This highlights the importance of ensuring that law is drafted and enforced in a manner that gains the trust of all communities.

While the legal provisions discussed above exist to regulate hate speech online, they seem to not wield enough efficacy to impactfully influence social media platforms. Hence, it is prudent to look at how other countries deal with hate speech online. In the United Kingdom, for example, criminal legislation is used as the primary measure to counter cyber abuse. This includes the Communications Act of 2003, of which the section 127⁸ makes it an offence to send a message of “grossly offensive or of an indecent, obscene or

or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill will or hostility between communities or racial or religious groups, or..”

⁷ Center for Policy Alternatives, *Confronting Accountability for Hate Speech in Sri Lanka: A Critique of the Legal Framework*, Page 9.

⁸ Communications Act 2003, Section 127(1): A person is guilty of an offence if he – (a) sends by means of a public electric communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or (b) causes any such message or matter to be so sent.

menacing character” online. Although the Communications Act is usually used to deal with abuse online, hate speech is also prohibited by several British laws.⁹

Germany too has taken great strides in combatting hate speech online. In 2018, Germany promulgated the Network Enforcement Law¹⁰, which can be considered as one of the most sophisticated legislative enactments created to counter hate speech online. Social media companies in Germany are mandated to delete or block “evidently unlawful content” within 24 hours¹¹, or during a week in more complicated/nuanced cases¹². The term “evidently unlawful content” encompasses hate speech as well as other forms of abuse that fall under the definition of criminal offences in Germany. Failure to comply on part of the social media companies can lead to a fine of up to 50 million euros¹³. With this law, Germany is holding the

social media giants accountable to fight against hate speech.

Members of the French government have also passed a landmark law to fight against online hate speech. As per this law, social media networks are obliged to remove offending content within 24 hours and create a new button to enable users to flag abuse. This bears great similarity to the German Law. Members of the Lower House of the parliament voted 434 to 33 to adopt the law.¹⁴

India too is working on similar legislation, albeit one not as powerful as that of Germany. India is currently in the process of amending section 79 of the India’s IT Act¹⁵. Under this amendment, if a request is made by an Indian Law Enforcement Agency about a certain piece of content, the internet companies are required to trace and report within 72 hours the origin of such content. Further, the companies are will be required to disable such user’s

⁹ Public Order Act 1986, Criminal Justice and Public Order Act 1994, Racial and Religious Hatred Act 2006, Criminal Justice and Immigration Act 2008, The Football Offences Act 1991 (amended by the Football Offences and Disorder Act 1999).

¹⁰ Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act)

¹¹ Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act), Section 3(2)(2), removes or blocks access to content that is manifestly unlawful within 24 hours of receiving the complaint. This shall not apply if the social network has reached agreement with the competent law enforcement authority on a longer period for deleting or blocking any manifestly unlawful content.

¹² Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act), Section 3, removes or blocks access to all unlawful content immediately, this generally being within 7 days of receiving complaint; the 7 day limit may be exceeded if, (a) the decision regarding the unlawfulness of the content is dependent on the falsity of the factual allegation or is clearly dependent on other factual circumstances; in such cases, the social network can give the user an opportunity to respond to the complaint before the

decision is rendered; (b) the social network refers the decision regarding unlawfulness to a recognized self-regulated institution pursuant to subsections (6) to (18) within 7 days of receiving the complaint and agrees to accept the decision of that institution.

¹³ Act to Improve Enforcement of the Law in Social Networks, Section (2), In cases under subsection (1) numbers 7 and 8, the regulatory offence may be sanctioned with regulatory fine of up to five hundred thousand euros, and in other cases under subsection (1) with a regulatory fine up to five million euros, Section 30(2) sentence 3 of the Act on regulatory offence shall apply.

¹⁴ “France Online Hate Speech Law to Force Social Media Sites to Act Quickly” (The Guardian, 9th July 2019),

<<https://www.theguardian.com/world/2019/jul/09/france-online-hate-speech-law-social-media>>

¹⁵“Govt in Talks To Make Amendments to Sec 79 of IT Act to Include Breaking End to End Encryption” (TECHZ, 24th December 2018), <<https://www.firstpost.com/tech/news-analysis/govt-in-talks-to-make-amendments-to-sec-79-of-it-act-to-include-breaking-end-to-end-encryption-5781971.html>>

access within 36 hours. This amendment is currently in discussion, and its implementation can provide interesting insights to our jurisdiction as well.

3. Defamation

Defamation can fall under two categories: civil defamation action and criminal defamation. However, given that Sri Lanka recognized only civil defamation action, this article will be focused on that aspect. In order to pursue a successful suit in defamation, the following factors should be established:

- i. There must be a false and defamatory statement concerning the person suing for defamation. Statements may be written, verbal, or even graphical. It is not necessary for the entire statement to be defamatory, as even a newspaper headline can be deemed to be defamatory.
- ii. There must be a “publication” to a third party; meaning the manner in which the defamatory statement was communicated to the third party.
- iii. The publication should have been made either negligently or maliciously
- iv. The person about whom the defamatory statement is made should have incurred a “damage” owing to the statement made.¹⁶

¹⁶ *Davis v. Bohein*, 110 A.D. 3d 1431 (NY 2014); *Lovinsky's Inc v. Walmart Stores Inc.*, 127 F.3d 122 (1st Cir. 1997); *The New York Times* (e.v. Sullivan, 376 US 259, 1969); Ron Hankin, “Navigating the Legal Minefield of Private Investigations: A Career Saving Guide for Private Investigators, Detectives

In a case of defamation, it is usually necessary to send a letter of demand before a claim is brought to the court. The place of publication is a vital factor when pursuing a defamation case. In the case of a newspaper, for an instance, this would be the place of printing. If a certain article published in a newspaper is established to be defamatory to an individual, the writer or that article, the editor of the newspaper, as well as the owner of the newspaper are generally assumed to be held liable.

Let us now look at how the same framework of law may apply in the case of a defamatory statement published on a social media platform, in the form of a “status” or a “comment”. Under this framework, it is technically possible to make a similar claim since the act of sharing a defamatory material has the effect of publishing it to an audience of possibly thousands of users. However, sharing such material without knowing such material to be defamatory may not yield liability under the above provisions, given that such innocuous cases (quite common in the era of social media) will be considered as innocent dissemination.

Sri Lankan legal system do not currently remain dormant with regard to criminal defamation. The Chapter 3 of the Constitution of Sri Lanka, however, can be used as a foundation to initiate a discussion on recognizing criminal defamation. Article 14(1)(a) stipulates

and Security Police”, Looseland Law Publications, 2008, P. 59; Edward Lee Homoreux, Steven L. Baron, Claire Stewart,” *Interactive Property Law and Interactive Media: Free for a Fee*”, Peter Long, 2009, P. 190

that “every citizen is entitled to the freedom of speech and expression including publication”. However, article 15(2) of the very same Chapter stipulates the limitations of the above article:

*“The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, **defamation** or incitement to an offence”.*

In furtherance of the above Article, the Penal Code of Sri Lanka¹⁷ incorporates several sections related to Criminal Defamation, in Chapter XIX from section 479 to 482A. However, the enforcement of these provisions was suspended by the Parliament on 18th June 2002, on the grounds that a lot of journalists faced criminal charges in the course of their work, which significantly impacted freedom of speech and publication. For instance, the Late Mr. Lasantha Wickramatunga was convicted for criminal defamation for an article published in 1995, defaming the incumbent President¹⁸. However, the current president, H.E. Maithripala Sirisena, has reportedly stated that he plans to bring back the application of Criminal Defamation, owing to the significant increase in defamatory statements targeting public figures via social media platforms.¹⁹

¹⁷ The Penal Code, Ordinance No. 2 of 1883

¹⁸ “SLFP Pushing Hard to Introduce Criminal Defamation” (Sunday Observer, 2nd June 2019) < <http://www.sundayobserver.lk/2019/06/02/news/slfp-pushing-hard-reintroduce-criminal-defamation>>

Comparison with other jurisdictions

The United Kingdom does not recognize criminal defamation as an offence, since the promulgation of the Coroners and Justice Act in 2009²⁰. Defamation is privately actionable in the High Court, with no limits imposed on the damages available as remedy. Apart from the UK, most common law countries including the United States, Australia and Canada recognize defamation as a civil wrong, thereby giving rise to damages payable to the aggrieved party.

India provides yet another interesting case study in this respect. Section 499, 500 and 469 of the Indian Penal Code²¹ and the section 66A of the Information Technology Act of 2000 can be considered as important legal provisions in this regard. Section 66A of the Information Technology Act (2000) defines the punishment for sending offensive messages through a computer, mobile or tablet. However, since the legislature had failed to properly define what is “offensive”, this entire section was quashed by the Supreme Court of India in 2015.

As per section 499 of the Indian Penal Code:

“Whoever by words or by visible representations makes or publishes any imputation concerning any person intending to harm or knowing or having

¹⁹ “Plans to bring in Criminal Defamation Law” (Sri Lanka Mirror, 27th May 2017), <https://www.srilankamirror.com/news/3249-plans-to-bring-in-criminal-defamation-law>

²⁰ Coroners and Justice Act in 2009, Part 2- Criminal Offences, Chapter 3 – Other Offences, Section 73 (B)

²¹ The Indian Penal Code, No 45 of 1860

reason to believe that such imputation will harm the reputation of such person is said, except in the cases hereinafter excepted, to defame person”.

This section bears similarity to section 499 of the Sri Lankan Penal Code. Section 500 of the Indian Penal Code²² which incorporates the punishment for the offence stipulated in section 499, bears similarity to section 480 of the Sri Lanka Penal Code, which incorporates the similar objective. As per the section 499 and 500 of the Indian Penal Code, if a person has been defamed in a cyber space he can make a complaint to the Cyber Crime Investigation Cells – units established to deal with offences relating to the computers, computer networks, computer resources, computer systems, computer devices and the internet. The Cells also have the mandate to investigate other high-tech crimes. However, these sections had met with their own criticism. Rahul Ghandi, Subramanian Swamy and Arvind Kajriwal had submitted a petition stating how these sections can violate the most basic right of free speech. The Supreme Court, however, has rejected the petition, stating the following grounds:

“One is bound to tolerate criticism, dissent and discordance, but not expected to tolerate defamatory attack”.

The Supreme Court has further reasoned that while freedom of expression is a “highly treasured right under the constitution...Notwithstanding the

expansive and sweeping ambit of freedom of speech, as all rights, right to freedom of speech and expression is not absolute. It is subject to imposition of reasonable restrictions”.

In its judgement, the Court stated that the reputation of a person is an integral part of right to life, which is also a constitutionally protected right.²³ However, in the same judgement, Judges Misra and Pant had strongly emphasized that, in terms of criminal defamation, judges should be “extremely careful” when issuing summons.²⁴

5. Conclusion

When the Parliament of Sri Lanka abolished the XIX Chapter of the Penal Code in 2002, the issue of defamation via social media platforms was not a matter in discussion. The use of social media in Sri Lanka increases only after 2008, and the giant impact of social media was only experienced as a country and a community consequent to 2014. Therefore, the decision taken in 2002 may not be valid given the status quo. It is imperative that Sri Lanka introduce legislation imbibing criminal liability to those spreading defamatory statements and hate speech on the platform. It is only then, that the community can be protected from an abuse of “freedom” of speech.

²² The Indian Penal Code, No. 45 of 1860, “Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or both”.

²³ The Constitution of India, Article 21, No Personal Shall be deprived of his life or personal

liberty except according to procedure established by law.

²⁴ For more, see *Subramaniam Swamy v. Union of India* (2016) 75 CC 221.

