

Draft for endorsement

To,

Shri Pinarayi Vijayan,
Honourable Chief Minister,
Government of Kerala.

Dated: November 1st, 2020

Respected sir,

Subject : Proposed amendment of Kerala Police Act (118–A) and its implications

This is in reference to the press release dated 21st October 2020[1] regarding the amendment to the Kerala Police Act, 2011. The said press release states that Kerala Police Act will be amended by inserting Section 118(A) aimed at curbing cyber bullying. Said amendment is worded so according to press releases – "anyone who produces content, publishes or propagates it through any means of communication with an intention to threaten, insult or harm the reputation of an individual will be punished with an imprisonment of five years or a fine of Rs 10,000 or with both". In addition, as per news reports, the proposed amendment is a cognisable offence and any person can lodge a complaint or a police officer himself can suo motu register a case against the accused.

Swathanthra Malayalam Computing (<https://smc.org.in>) is a non-profit collective empowering native language communication with technology tools for Malayalam, the official language of Kerala. As a community working primarily through the internet we witness on a regular basis the benefits and harms of unfettered access to communication and broadcasting tools that are available today. We see the need for protecting vulnerable sections of our society from those who misuse such means to the detriment of others. We also see great danger in making laws that restrict freedom of expression without adequate thought.

We wish to point out the following:

1. The availability of the amendment's full text from government channels

We notice that the only mention via the government's official website, in Malayalam, is the Kerala CM's website, as a note among many in the cabinet decisions on 21st October 2020. It is regrettable that we do not have the full text in Malayalam from an official government source.

2. The rationale behind the proposed amendment.

The primary motivation behind the proposed amendment seems to be that Section 66A of the Information Technology Act, 2000 and Section 118(d) of the Kerala Police Act can no longer be applied. These were draconian measures that were struck down as unconstitutional by the Honourable Supreme Court, on the grounds that it violated Freedom of Speech, which is a fundamental right in our country.

The proposed amendment while remaining ambiguous, seeks to criminalise defamation via speech, and potentially make it a non bailable offense. Further, it confers rights to state's police machinery for filing suo motu cases. The rationale behind these measures seem to be that defamation is easy to identify, and that it should be easy to administer justice swiftly and easily. While these are noble goals, they risk the reduction of questions such as what constitutes defamation into simple notions that are often in conflict with the idea of free speech.

3. Ambiguity in language of the proposed amendment.

The language used to construct the amendment is broad, vague and allows for multiple and sometimes conflicting interpretations. It neither set standards for the content that is deemed defamatory nor does it exhaustively specify what it means by specifying content and propagation. It is said in the cabinet meeting notes that the primary motivation is the defamation through social media, but the amendment itself is worded so that it applies to everything from writing on the walls to private communication between two people.

Further, the press release refers to the judgment of the Supreme Court in Shreya Singhal V. Union of India that held Section 66A of the Information Technology Act, 2000 and Section 118(d) of the Kerala Police Act as unconstitutional and violative of Article 19(1)(a) of the Constitution of India. The Honourable Court held that “Section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right”. Section 66A as well as Section 118(d) of the Kerala Police Act were struck down since the terms used to define them were too broad, open-ended and hence vague and open to a wide variety of interpretations. The proposed amendment suffers from the same problems, and its abuse in the same manner as Section 66A IT Act or Section 118(d) of Kerala police act is almost guaranteed.

4. Chilling effect on Freedom of speech

The wording indicates that the proposed amendment is applicable to all outlets and communication mechanisms, and even private conversations could come under its purview. Setting up a law that makes it easy for the state machinery or private institutions to punish an individual with a (potentially) non bailable offence is dangerous and seriously curtails the freedom of responsible citizens, discussion fora and news media. Since the act is too broad to define what constitutes defamation, even something as trivial as a restaurant or book review leaves the possibility that the author of such a review will get slapped with fines and a non bailable offence.

5. Effects on economy and society.

Anything that makes it easy to silence such watchdogs or even companies in competing space stifles innovation and reduces opportunities for healthy competition. If taking out a competitor/critique is easily accomplished by construing any sort of advertisement or communication as defamatory and a cognisable, non bailable offence, the value of legitimate competition is reduced. The proposed amendment is draconian in that sense, and it stands to reason that is detrimental to industry since it provides a way to stifle competition easily.

This also applies to non profits who act as industry watch dogs and safe guards society against malpractices. A historic struggle such as Plachimada would not be possible if it was easy for Coca Cola to take out the oppressed via a draconian provision.

We humbly urge the honourable chief minister and cabinet to analyse our arguments and reconsider the proposed amendment.

Yours Sincerely,
For Swathanthra Malayalam Community,

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16. Santhosh Thottingal
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CC: Sri A K Balan, Honourable Minister of Law, Government of Kerala.