

Legality of Sec. 66(A) of Information Technology Act-2000, with Special Reference to Shreya Singhal Case

Abstract

Now anyone can Express their thoughts on the internet without fear of criminal proceedings against them. Many cases had reported such fear in the minds of the youth who use the internet to voice their views. Such limitation to voice one's views is contradictory to the Fundamental Right to Freedom of speech and Expression. Section 66-A of the Information Technology Act, 2000 is the offence which is constituted by sending information which is offensive, menacing in nature and prescribes a punishment of three years with fine. This section was declared to be unconstitutional by the Hon'ble Supreme Court recently on the ground that it violates the Freedom of Speech and Expression guaranteed by the Constitution of India. The case had been filed on grounds of the law being violative of fundamental rights. However, only one of them has been accepted by the Supreme Court. This Article analyzes the parameters and the way the hon'ble Court arrived at the judgement which protected the Freedom of Speech and Expression in India.

Keywords: Internet, IT ACT, Social Media, Freedom of Speech & Expression.

Introduction

The Shreya singhal case¹ was considered by the Hon'ble Supreme Court of India as a Writ Petition under Article 32 of the Constitution of India and was decided by the Court on 24th March 2015. by way of this writ petition, the Supreme Court commonly disposed of these petitions by ruling Sections 66-A of the IT Act, 2000, hereinafter called as Section 66-A and Section 118(d) of the Kerala Police Act unconstitutional as being violative of Article 19(1) and not saved by Article 19(2). Further, ruled the Section 69-A, 79 of the IT Act, 2000 and the Information Technology Rules, 2009 constitutionally valid².

Section 66-A is the section that criminalizes the sending of offensive messages using a computer, computer network or computer resource located in India. This section has been construed in a very broad manner covering almost anything which one might regard offensive. Such a construction would bring a halt on the Freedom of Speech and Expression and would in fact deter free speech and thus, bring about a chilling effect on speech. Further, the misuse of this section has been widely known and popularized by the media. The Supreme Court of India considering all these aspects has decriminalized Section 66-A of the IT Act.

The immediate concern of the applicants was the presence of Section 66-A which was not a part of the original IT Act, 2000 but came into force by virtue of an amendment Act of 2009. Section 66-A reads as follows "Any person who sends, by means of a computer resource or a Communication device,-

1. Any information that is grossly offensive or has menacing character; or
2. Any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or
3. Any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine."³



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The elements of the Section are

1. Sending information by means of a communication device
2. Such information having a grossly offensive meaning or menacing character
3. Such information which he knows to be false but sends it for the purpose of but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will.
4. An email or message which is sent for purpose of causing annoyance of inconvenience or to deceive or to mislead the addressee or recipient about origin of such messages

The validity of this section has been contended on the following grounds by way of the writ petition

1. Article 19(1)- Freedom of Speech and Expression
2. Article 19(2)- Reasonable Restrictions
3. Article 14-Right to Equality
4. Statement of Objects and Reasons of the IT Act

Along with Section 66-A, the validity of Section 69 shall also be tested with regard to the following provision. These provisions are of phenomenal importance as they are very fundamental to the Constitution and are basic human rights that are prevalent in a democratic nation like India. The Supreme Court recognized these as basic human rights and any law which is in contravention with the basic structure of the Constitution shall be regarded as unreasonable and arbitrary in nature as a result of it being not acceptable violating the basic human rights fundamental to the Constitution of India.⁴

Objectives of the Study

This Paper attempts to find, How Social media is strengthening the freedom of speech and expression, after Supreme Court historical decision of *Shreya Singh vs. Union of India*. (2015)

Methodology

This Paper based on Content analysis of *Shreya Singhal vs. Union of India Case*, Since it is subject to Article 19(1) a; and Sec-66-A of IT ACT, 2000.

Review of Literature

On reviewing the existing literature, the present research papers have highlighted the challenges before law in curbing the misuse of social media in India. As Shishir Tiwari and Gitanjali Ghosh (2014) stated how Section 66-A of the Information Technology Act, 2000 which says that any electronic message that is grossly offensive disseminated with a purpose of causing annoyance shall be punishable with imprisonment up to three years with fine is hugely misused. They have given the incidences of infringement of Freedom of Speech and Expression.

"In April 2012, Ambikesh Mahapatra, a Professor of chemistry in Jadavpur University in West Bengal, was arrested for posting a cartoon on West Bengal Chief Minister Mamata Nanerjee on social networking sites.

In November 2012, Shaheen Dhada was arrested for questioning the shutdown of Mumbai following the death of Shiv Sena supremo Bal Thackeray in her Facebook post, which was "liked"

and shared by her friend, Renu, who was also arrested by the Thane Police in Maharashtra."

To overcome such embarrassment before the world, the Ministry of Communications and Information Technology, Government of India has advised the State Government to arrest any person under Section 66-A only with prior approval from an officer above the rank of Inspector General. But After the Supreme Court Decision on *Shreya Singhal vs. Union of India* (2005) case, the arresting becomes illegal under Sec-66A of I.T.ACT-2000.

Although there is no specific legislation in India which deals with social media, there are several provisions in the existing so-called cyber laws which can be used to seek redress In case of violation of any rights in the cyber space, internet and social media.

Validity of Section 66-A of I.T. ACT-2000 Under Constitutional Law

Article 19(1)(a)

Freedom of speech and Expression is one of the most important rights which guarantees voice of the people in a democracy. It is fundamental to the existence of a democracy and is in consonance with the ideals of freedom. There are main concepts fundamental to the Freedom of Speech and Expression namely

1. Discussion
2. Advocacy
3. Incitement

Mere discussion or advocacy does not invite limitation of Article 19(2). It is only when such discussion or advocacy reaches the point of incitement does it attract Article 19(2). At this stage, the state, as per the powers vested in it by Article 19(2) may curtail this freedom. This right been expanding largely in the recent past across the world making it a basic human right and almost, an absolute one till such right reaches the point of incitement. The features of Article -19 as enlisted in the **101st Report of the Law Commission of India**⁵

1. Article -19 is confined to citizens and foreigners cannot claim under this right.
2. A corporate body cannot claim citizenship and therefore cannot any right under Article -19.

Section 66-A clearly affects the freedom of speech and expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66-A.

Article 19(2)

Reasonable restrictions may be placed by the Government when such use of the freedom of speech and expression under Article 19(1) Crosses the point of advocacy of an idea, however unpopular or contrary to public opinion it may be, it is noteworthy to observe the US Supreme Court Judgement in the case of *Chaplinsky Vs New Hampshire*⁶

In India The understanding of the freedom of speech and expression in Indian scenario may be understood with the help of the Supreme Court's judgement in the case of **Indian Express Newspaper (Bombay) vs. Union of India**⁷, in which the court ruled that while examining the constitutionality of a

law in India, solely considering the US law with regard to freedom of speech and expression would not suffice. But in order to understand the principles, they can be used as a highly persuasive value. The pattern of the limitations which are placed are different from those which are acceptable in under the eight heads mentioned under Article 19(2) which are as below:

Section 66-A has been challenged on the ground that it places a limitation on a very wide note and not in particular falling under any of the heads mentioned under Article- 19(2). The Supreme Court laid down that the heads cannot be easily expanded because it would be too wide to construe the term reasonable and it has to be limited in its scope. In **Sakal Papers vs. Union of India**⁸, it was laid down that it may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgment on the same grounds as are set out in Clause (6) of Article -19.

Defamation

Defamation is defined in Section 499 of IPC and an essential element of defamation is injury to reputation. Section 66-A does not concern itself with reputation. The section only talks of something grossly offensive and not about defamation. Therefore it is clear that the section does not aim to cover defamatory statements at all.

Incitement to An Offence

Section 66-A does not specifically discuss incitement because a fair comment till the level of discussion or advocacy does not amount to incitement to an offence. The information may not incite anyone per se, it might as well be till the point of discussion or advocacy. As Section 66A severely curtails information that may be sent through the internet and does not mention whether the information be opposed to the eight subjects under Article 19(2) thus making it ultra- vires the constitution or unconstitutional.

Decency or Morality

The test laid down in **Hicklin's case**⁹ was approved by Supreme Court in **Ranjit Udeshi vs State of Maharashtra**¹⁰. The test was 'Whether the tendency of the matter charged as being obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may? However, later the SC laid down the standard in **Director General, Directorate General of Doordarshan vs. Anand Patwardhan**¹¹ that a material would be treated as obscene if the average person applying contemporary standards would find that subject matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary artistic, political, educational or scientific value.

Section 66-A cannot possibly be said to create an offence which falls within the expression 'decency' or 'morality' in that what may be grossly offensive or annoying under the Section need not be

obscene at all-in fact the word 'obscene' is conspicuous by its absence in Section 66-A.

Public Order

This ground of restriction was added by the Constitution (First Amendment) Act, 1951 to overcome the difficulties created by interpretation of the provisions in certain cases. In **Romesh Thaper vs. State of Madras**¹² the petitioner was the printer, publisher and editor of an English weekly called 'Cross Roads' published in Bombay. The Government of Madras issued an order under the Madras Maintenance of Public Order Act, 1949 on 1st March, 1950 imposing a ban on the entry and circulation of the journal in the State of Madras. By a writ petition under Article 32, the petitioner challenged the order and the particular section of the Act under which order was made on the ground that his fundamental right under Article 19(1) (a) of the Constitution was violated.

In **Dr. Ram Monohar Lohiya vs. State of Bihar**¹³ the court held that 'public order' was said to comprehend disorders of less gravity than 'security of state'. The supreme court further interpreted 'public order' into three parts, they are as below-

1. Law and Order
2. Public Order
3. Security of State

Section 66-A clearly does not pass this test as it has no element or tendency to create public disorder which ought to be an essential ingredient of the offence which it creates.

Article 14

The petitioners further contended that the section distinguished between medium of print, broadcast, real live speech as opposed to speech on the internet and therefore new categories of criminal offences cannot be made on this ground. The defamation law and Section 66-A is further distinguished as below:

1. Defamation law Recognizes All modes but- Sec- 66-A Specifically Recognizes mode of computer network.
2. Defamation is punishable under Sec- 499 (I.P.C) and maximum duration of punishment is two years but under Sec. 66- A I. T.- ACT in case of online Defamation maximum duration of punishment is three years.
3. Defamation is non- Cognizable offence but under Sec -66- A. I.T.-Act, it is a Cognizable offence.

Statement of Objects and Reasons of the I.T. ACT

The Statement of Objects and Reasons appended to the bill which introduced the act, read as follows in Para 3:

A rapid increase in the use of computer and internet has given rise to new forms of crimes like publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of data by intermediary, ecommerce frauds like personation commonly know as Phishing, identity theft and offensive messages through communication services. So, penal provisions are required to be included in the Information Technology Act, the Indian Penal code, the Indian Evidence Act

and the code of Criminal Procedure to present such crimes.

The contention of the petitioner was that Section 66-A did not act as a remedy or a safeguard against any new crime that emerged as a result of information technology. The petitioners interpreted the usability of Section 66-A in light of the Statement of Objects and Reasons when Sections 66-B to 67-C are good enough to deal with the crimes covered under Section 66-A. However, the Supreme Court held that declaring the section unconstitutional merely on ground of it being violative or opposed to the Statement of Objects and Reasons is beyond the scope of *Judicial Scrutiny and Activism* as Judiciary can declare a law constitutional only if it violates the basic structure of the Constitution¹⁴ and hence, this would not be a valid ground for contending legality of a law in a court.

The legislature is considered to be in the best position to assess and represent the interests of the people and there is a presumption in favour of legality of provision. The Law does not impose impossible standards of determining validity. Mere possibility of abuse of a provision cannot be a ground of invalidation of such provision. Further vagueness is also not a ground to invalidate law. Hence, the two mentioned grounds have not been accepted as grounds to invalidate Section 66-A

Conclusion

The legality of this law is a supportive agent to the primarily unconstitutional elements and is merely supporting factors that fuel the illegality of the law. There are the elements which support that the law is loosely framed and has loopholes that makes it not a 'good law'.

The language used in Section 66-A I.T. Act is very vague. The petitioners contended that neither the authorities nor the accused would be completely in tune with the nature of the offence committed under this section. The vagueness of this section makes the law abider really cautious as to which behaviour observed by him would be over-stepping the limits set by the law and which behaviour observed by him would be over-stepping the limits set by the law and which behaviour would be punishable. Thus such vagueness must not be encouraged.

The Supreme Court agreed with the petitioners in the respect that the said section was very vague in nature and did not specify or clarify the purpose. However, it was further held by the court that the legality of a law does not depend on its certainty. In this case the Supreme Court clearly declared that the section 66-A IT ACT 2000 is unconstitutional on the ground of violation of fundamental right of individual.

Thus, on the ground of being violation of Article 19(1) (a) and not saved by Article 19(2), it is

ruled that the offence under Section 66- A obstructs right to free speech and expression, hence it is declared unconstitutional. The Hon'ble Court in this Revolutionary decision, has given a high value to individual's right to free speech and expression guaranteed under Supreme Law of Land.

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5. *Law Commission of India: Report 101*
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9. *Keshavananda Bharti vs. State of Kerala (1973) 4 SCC 225*
10. *Chaplinsky vs. New Hampshire MANU/USSC/0058/1942*
11. *Indian Express Newspapers (Bombay) private Limited and Others Vs. Union of India (1985) 2 SCR 287*
12. *The Superintendent, Central Prison, Fatehgarh vs. Ram Manohar Lohia (1960)2 S.C.R. 820*
13. *Regina vs. Hicklin L.R. 2 Q.B. 360 (1868)*
14. *Ranjit Udeshi vs. State of Maharashtra A.I.R. 1965 S.C.881*
15. *Director General, Directorate General of Doordarshan vs. Anand Patwardha 2006 (8) SCC 433*
16. *Romesh Thapar vs. State of Madras (1950) SCR 594*

Footnotes

1. *Shreya Singhal vs Union of India AIR 2015 SC 1523*
2. *Ibid note 1*
3. *Section 66A; Information Technology Act, 2000*
4. *Keshavananda Bharti vs State of Kerala (1973) 4 SCC 2*
5. *Law Commission of India Report-101*
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7. *(1985) 2 SCR287*
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11. *2006 (8) S.C.C.433*
12. *A.I.R 1950 S.C. 124*
13. *(1966) 1 S.C.R. 709*
14. *Supra Note-4*