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Rejuvenating Free Speech: Shreya Singhal v Union of India

by
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Abstract — Outbreak of massive social media in the 21st Century has raised new and peculiar challenges to "free speech". Internet has outlined four innovative aspects of free speech: democratic self-governance, market place of ideas, human dignity and self-fulfillment. Circumstances wherein civic involvement are rapidly flourishing online, the law regulating cyberspace turns out to be the law regulating free speech. Cyber law configures principal mechanism for exercising right to free speech communications or transfer of data online. Strong and persistent approach towards commitment to right to free speech in every sphere has enabled the society to sweep out all the legal hurdles in order to develop the history's most powerful and far-reaching platforms for free speech. Internet through electronic media has made right of self-expression accessible, which was earlier unknown to ordinary people. Though cyber law turns out vital in protecting right to free speech of individuals, but Section 66A of the Information Technology Amendment Act, 2008 being too vague, violates provisions of Articles 19(1) and 19(2) resulting in denying people the basic right to free speech.

The research paper emphasizes the reasons as to why such arbitrary, disproportionate, and unjust Section of the Information Technology Act, 2000 was struck down and the jurisprudential analysis which the Hon'ble Supreme Court of India applied behind doing so. It also emphasizes on the point that the present context necessitates legislation that strikes a balance between attaching culpability to illegal and infringing acts and restoring people their hard fought right to free speech.



INTRODUCTION

The increase in both the size and the capability of computer networks and, in particular, the development of the internet and the world wide web, have raised a certain amount of disquiet as to the extent to which these media can be used for propagation of undesirable material.¹ Though use of such media has led to excellence in different aspects of human life, but their potential misuse has continued to be the core issue of concern. Internet aims to diversify the range of speakers and increases access to speech, reducing the historical bias in favor of free speech of the rich²....therefore it has become common platform for interaction amongst all sections of the society. In an age of information, free speech greases the economic regime.³ Though right to free speech has been much advocated but increase in cyber-crimes has necessitated the need for a substantial law that shall regulate online conduct.

Information Technology Act, 2000, provided a much awaited breakthrough in the Indian legal system to combat cyber-crime. What are cyber-crimes? A simple yet

sturdy definition of cyber-crime would be 'unlawful acts wherein the computer is either a tool or target or both'.⁴ These can be defined as crimes that are committed by the help of computer, computer system, computer network or any communication device. This kind of conduct usually involves a modification of a conventional crime by means of computer.⁵ Enactment of the IT Act, 2000, provided legal recognitions to the transactions carried out by interchange of electronic data, commonly referred as e-commerce.⁶ It is considered to be a data protection regime in India.⁷ The Act was further amended to widen the scope of the Act by introducing Information Technology Amendment Bill that was introduced in the Parliament in 2006. Though the Bill acquired legal status on 22nd December 2008, after it received presidential assent and Information Technology (Amendment) Act, 2008 (hereinafter "ITAA, 2008"), it came into force on 26th October 2009 after the notification by Central Government.⁸ The main objective of the ITAA, 2008 was to address the



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unresolved cyberspace concerns such as phishing, internet fraud etc., which though were one of the most vulnerable issues, but not covered under the previous legislation. The Act provides no specific definition of cyber-crimes, however, it includes both cyber contraventions as well as cyber offences.⁹ The Act had been formed according to the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") model.¹⁰

ITAA 2008: WHETHER A BOON OR BANE

Laws throughout the world have regulated the use of new technologies with varying degrees of sophistication, but the Indian legal system yet is in dearth of a nuanced balance between protecting the freedom of speech on social media and regulating speech that is illegal or infringing.¹¹ The ITAA 2008 Amendment Act has been involved in much controversy. The reason being, that no substantial debate on the Bill took place.¹² The extensive analysis of the Act in the research paper *per se* exemplifies how the Bill failed to acquire proper debate and discussion. The Amendment Act contains certain provisions that are vague in nature and criminalizes offences without even defining the scope of such offences. This is a result of poor drafting. Major concerns raised by the Amendment Act are that the law not only lacks critical safeguards to prevent dominance and abuse of power but also raises questions on the constitutionality of the Act.¹³

On coming into force of IT Act, 2000, the Act was denoted as a draconian law, wherein under Section 80 of the Act police was enabled to arrest any person without warrant. Prior to the amendment most of the cyber-crimes were registered under only two sections namely Section 66 and Section 67 of the IT Act, 2000. Statistics show that in 2007, out of the total 190 cases registered under IT Act, 2000, in all of India, 175 were booked under Section 66 and Section 67.¹⁴ The earlier generalized provisions of the Act were provided with due specifications, categorizing cyber offences under sending offensive messages, receiving stolen computer, identity theft or phishing, impersonation, voyeurism, cyber terrorism, sexually explicit



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content, child pornography among other offenses to make the Act more stringent and effective.

The Statement of Object and Reasons attached to the Amendment Bill clearly states:

"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, e-commerce frauds like personation commonly known 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 prevent such crimes."¹⁵

Under cyber law, ideally, a country shall focus on and penalize four major types of conduct to be regarded as a country putting blanket ban on cyber-crimes. These can be categorized as:

- a. offences which involve subject of confidentiality, integrity, and availability of computer data and system,*
- b. cyber offences that involve intention to defraud,*
- c. obscene content related offences, and*
- d. offences that involve infringement of copyright and related issues.¹⁶*

Though the fourth ground enables the victim to recognize the perpetrator to some extent, the first three grounds leave very minimal chance for the victim to realize the offender and approach the court, therefore, role of the state becomes imperative in providing justice to such victim.

The gradual growth and development of humans with subsequent changes in society, combined with technological advancement, has ensured occurrence of variety of new types of crimes developing in various forms and levels in a linear fashion.¹⁷ The ITAA, 2008, thus added several



sections to curb such offences so as to not let the public order and morality be threatened. Chapter XI of the Act specifies "Offences" under the Act categorically under the Sections 65, 66, 67. The ITAA, 2008 has almost replaced Section 66 enlarging the scope of the provision from merely prohibiting "hacking" to any "any act referred to in Section 43", if committed, "dishonestly or fraudulently".¹⁸ Sections 66 and 67 which form the core issue of the research paper have been widely amended so as to include contemporary cyber-crimes in form of sending offensive messages, phishing or identity theft, child pornography, receiving stolen computer etc.

CRITICAL ANALYSIS: SECTION 66A

Section 66A provides for punishment for sending offensive messages. It reads:

"Any person who sends, by means of a computer resource or a communication device,

- a. any information that is grossly offensive or has menacing character; or*
- b. 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,*
- c. any electronic mail or electronic mail message for 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."*


Section 66A, for the first time provided for an innovation under which Information Technology provides grounds for prosecution of social media. It elaborated the scope of offences under the IT Act in form of cyber stalking, spam mails, threat mails, and phishing mails, criminal intimidation, annoyance, inconvenience, insult, and injury, perceiving an objective of strengthening the cyber law and bringing offences that were neglected in the old legislation under the jurisdiction of IT Act.¹⁹ Section 66A on

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being clubbed together includes cases of blackmailing through email,²⁰ dowry harassment,²¹ defamatory internet content and even unauthorized disclosure²².

However, critical evaluation of the Section puts forth certain key obstructions making it controversial. Terminologies used in the Clause (a) such as "grossly offensive", "menacing character" are not only impossible to have a universal application but are also highly subjective by individual standards, making the very essence vague.²³ Clause (b) of the Section specifies penalties for offences such as "annoyance", "criminal intimidation", thereby prescribing the same punishment for both annoyance as well as criminal intimidation, such use of separate terms within the same clause has been a cause of major confusion. One of the key criticism that this Section faces is that, it imposes harsher punishments than are imposed for the same crime when committed offline. For example, under the Indian Penal Code, 1860, the charge of defamation carries a maximum sentence of 2 years or fine or both,²⁴ whereas under Section 66A of the Act maximum sentence for the same offence is prescribed to be of 3 years or fine or both. It is not an offence to verbally insult or annoy someone without anything more being done such as threat to commit an offence, etc. and when such is the case with verbal communications, there is no reason to make any exception for those made through the electronic medium.²⁵ It is well recognized that the impossibility of framing a definition with mathematical precision does not justify the use of vague expressions in any legislation.²⁶ Terms such as "inconvenience", "annoyance", "obstruction", "ill will" used in Clauses (b) and (c) of the Act provide for no explanation throughout the Act or any other legislation, making these terms deceptive and increasing the chance of possible misuse of the provision.

Section 66A(c) was inserted through an amendment as a response to the observation made by the Standing Committee on Information Technology that there was no provision for spam, however, poor and careless phrasing makes it anything except perhaps an anti-spam provision. If "for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages" was to be

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replaced by "for the purpose of causing annoyance and inconvenience and to deceive and to mislead the addressee or recipient about the origin of such messages", it would have been somewhat in proximity to anti-spam provision, but still it would lack two indispensable characteristics, i.e. that it be solicited and that it be sent in bulk.²⁷

1. PROVISION BEING ULTRA VIRES

Section 66A has been formulated on the same lines as of Section 127(1)(a) of United Kingdom's Communication Act, 2003 as both of them seek to penalize "grossly offensive" online communication. In *Director of Public Prosecutions v. Collins*²⁸, House

of Lords held that the phrase must be interpreted as per the standards and norms of an open and just multi-racial society, "there can be no yardstick of gross offensiveness otherwise than by the application of reasonably-enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context". It has been further argued that the above Section uses terminologies in its extreme sense making the Section patently in violation of Article 19(1) of the Constitution. Any information just for the reason being it is "grossly offensive" or that it leads to "annoyance" or "inconvenience" though being in knowledge to be false cannot be the reason for curbing the freedom of speech unless it is in direct relation to decency or morality, public order, defamation, or any of the grounds mentioned under Article 19 (2).²⁹ Although the section has tried to overcome the modern day cyber-crimes, but its poor drafting has led to a series of cases rife with confusion and chaos, leaving the interpreters perplexed.

Article 19(1)(a) of the Constitution Of India guarantees every citizen the right to freedom of speech and expression, however, Section 66A being too broad and vague has often been used to violate the fundamental rights of the citizen. The very provision of the Act has been widely mooted upon. In *Shreya Singhal v. Union of India*³⁰ it was pleaded that the arrests under Section 66A, by the police, had been arbitrary and baseless. It was further argued that the section creates a 'chilling effect' wherein citizens are severely dis-incentivized from their constitutionally protected right to free speech for fear of frivolous prosecution.³¹ Furthermore, it was argued that whether or not the Section qualifies the test of 'reasonableness' as provided under Article 19(2), it nonetheless violates Articles 14 and 21, therefore, the




Section should be declared *ultra vires* of Articles 14, 19, 21. The Section has been criticized at large as Section 66A of the Act cannot be used as reasonable restriction under Article 19(2).³² Although on being pleaded, the Hon'ble Supreme Court has declared the offence under this Section to be non-cognizable. There has been a flurry of incidents wherein citizens' constitutional right to freedom of speech has been breached without cause.³³ A glaring example of this is the arrest of Shaheen Dhada, who commented on Facebook seeking reason as to why Mumbai was closed just because of the death of a political leader, Bal Thackeray, by a natural cause.³⁴ While the Indian public sphere representation seems to be curtailed by the vagaries of Section 66A, politicians have continued to justify the act on mass appealing grounds of protection of civil unrest, violent protests and death.³⁵ Although the general populace has argued against the constitutionality and misuse of the Section, the government seems to be supporting it and refuses to ensure necessary changes.³⁶

SUPREME COURT JURISPRUDENCE: STRIKING DOWN SECTION 66A OF THE ITAA 2008

1. PURVIEW OF FREEDOM OF FREE SPEECH AND EXPRESSION, AND RESTRICTIONS UNDER 19(2), CONSTITUTION OF INDIA

Justice Brandies in *Whitney v. California*³⁷ argued that mere fear or possibility of serious injury alone cannot justify suppression of free speech and assembly. Rather, it is the attribute of free speech that enables humans to overpower bondage of irrational fear. Thought control is a copyright of totalitarianism and government has no control over it; censorship can only be justified as far as censors are better shielded against error than censored.³⁸ Freedom of Speech and Expression under Article 19(1) basically constitutes of three major aspects, discussion, advocacy and incitement. The essence

of the freedom includes discussion and advocacy not inconsistent


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with its unpopularity, it is only the third aspect i.e. incitement which brings in the ambit of Article 19(2).³⁹ As far as Section 66A is concerned it has no proximity with incitement of an offence. Information disseminated on internet is not necessarily inciting in nature, it may be just a discussion, advocacy on any particular aspect. Moreover mere causation of annoyance, inconvenience, etc. or having menacing character or grossly offensive are no offence under the Indian Penal Code, 1860. Definition of "Information" under Section 2(1)(v)⁴⁰ ITA, 2000 is inclusive, not defining the possible content of such information, thus affecting public's right to know. Under the prospects of 66A the information must be annoying, inconvenient, grossly offensive, etc., showing that no distinction is made between mere discussion or advocacy of a particular point which may be annoying, inconvenient, grossly offensive to some and incitement by such words lead to imminent casual connection with public disorder, security of state etc.⁴¹

Freedom of speech under the Constitution is much wider, it cannot, like the freedom to carry on business, be curtailed in the interest of general public. Wherein law affecting it is challenged, it is no answer that restrictions enacted by it are enforceable under the scope of Article 19(3) to (6).⁴² In order to impose a reasonable restriction "in the interest of public order", there shall be proximate relation between the restriction and the public order to be achieved.⁴³ Though electronic media is considered to be more dominating and having wider reach than print media, but to contend that, thereby the restrictions to be imposed on the electronic media shall be in addition to those mentioned in Article 19(2) and dedicated by the use of public resources in the general interest of public, is to misconceive both the content of Freedom of Speech and Expression and the problems posed by the element of public property.⁴⁴ Section 66A does not come under any of the subject in Article 19(2) and there is much possibility of it being applied for purposes not mentioned under such Article, therefore principle of severability cannot be applied to it and the Section shall be nullified in entirety.

2. DISRUPTION OF PUBLIC ORDER

An act of an individual may affect law and order but not public order as similar as an act may affect public order but not security of the state.⁴⁵ Public order is more associated with community involvement than law and

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order, therefore, disturbance of public order shall be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public peace.⁴⁶ Therefore, in order to determine whether an act infringes public order or not, it is *sine qua non* to establish whether the act of an individual amounts to mere disturbance in the life of an individual, leaving the community at large unaffected, or it disturbs the current life of the society at large. However, Section 66A makes no difference between mass dissemination and individual dissemination. The Section nowhere specifies that such message shall disrupt public order and leaves no reasonable nexus between the message and the action that may be taken based on such message.⁴⁷ It lacks any ingredient that as per a man with

reasonable prudence shall lead to incitement of an act which might lead to threat of disrupting public tranquility. Section 66A deals with "annoyance" which won't disrupt public order. Freedom of speech and expression necessitates that it cannot be impugned unless the circumstances created by allowing the freedom are pressing and the interest of the society is endangered.⁴⁸ Mere dissatisfaction, or enmity, or annoyance amongst certain people does not amount to disruption of public order, else may lie down negative on Freedom of speech and expression.⁴⁹

3. VAGUENESS OF PROVISIONS

Since man is deemed to be free to maneuver through lawful and unlawful conduct, it becomes necessary that individual shall be given reasonable opportunity to distinguish between the two, so that he may act accordingly, else vagueness may lead to trapping of innocent man without giving him a fair warning.⁵⁰ It shall be noted that impossibility of drawing a precise demarcation between permissible uncertainty in a statute caused by defining crime words by words well understood and regularly used in criminal law - obscene, indecent and the unconstitutional vagueness, leaving a person totally perplexed about the prohibited conduct leaves open widest conceivable enquiry, the scope and result of which can never be foreseen.⁵¹ Moreover, wherein statute is vague to such an extent that it may represent an innocent act as a criminal, a conviction under such act cannot be sustained.⁵² For proper application and implementation of law it is necessary that the authorities entrusted with implementation of such law must know about the offence committed so that arbitrary and discriminatory



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implementation of law does not take place.⁵³ But Section 66A fails to specify the offences under it and keeps the offences in clout of vagueness. This vagueness and uncertainty in the impugned provision makes it void.⁵⁴ Similarly provisions of Communications Decency Act, 1966 of United States, which deals with penal offences in relation to use of internet, were also struck down for being unconstitutional, as they used terminologies such as "*patently offensive*" very similar to vague terminology "*grossly offensive*" used under Section 66A.⁵⁵ Central Provinces and Berar Goondas Act, 1946 was also declared to be void for the reason being its uncertainty and vagueness, to bring proceeding against a person under Section 4 and 4A he must be held Goonda under the Act, however, the definition of Goonda nowhere outlines procedure to determine whether a person accused is a Goonda or not.⁵⁶ Section 3 of the National Security Ordinance providing "*acting in any manner prejudicial to the maintenance of supplies and services essential to the community*" was also struck down on the basis of its vagueness and probability of wanton abuse.⁵⁷

Words like "*criminal intimidation*" are neither defined in Section 2 of the IT Act nor are they asked to be referred under the definitions in Indian Penal Code, 1860. Term "*persistently*" used in the Section is quite imprecise and vague, sending of messages four times may be persistent for one and not for others. Considering the above analysis and observations, Section 66A has been rightly nullified in public interest.

EXTENDING REGIME OF FREE SPEECH IN INDIA: CONSTITUTIONAL VALIDITY OF CRIMINAL DEFAMATION BEING CHALLENGED.

Less than a month after striking Section 66A of the IT Act, the Hon'ble Supreme Court has taken up the issue of constitutional validity of Section 499 and 500 of Indian Penal Code 1860 that makes an offence of defamation punishable by a term up to 2 years.⁵⁸ It has been contended that the criminal defamation puts unreasonable

restrictions on right to free speech and is in violation of Article 19 of the Constitution. Though people need protection against defamation, but such protection is adequately satisfied by providing laws for civil defamation. Criminal defamation ideally is a

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measure generally exercised by powerful and elite class that demands its wrongs not to be publicized. Almost all the liberal countries in the modern world have abolished their laws in respect of criminal defamation, except China which gives its citizens a limited free speech. Therefore, it is on India to decide whether it follows China, which restricts citizens' right to free speech, or wants to follow the libertarian ideology as practiced by most of the countries.

CONCLUSION

From the detailed analysis it is clear that Section 66A is excessive, arbitrary, and disproportionately infringes right to freedom of speech that the constitution of India ensures to its citizens under Article 19(1)(a). It destroys the sanctity and balance between such freedom and restrictions imposed on it through 19(2). Therefore, the impugned Section was struck down in entirety by the Hon'ble Supreme Court since it was in violation of Article 19(1) and not saved under Article 19(2). In *Shreya Singhal v. Union of India*, Section 66A was also held unconstitutional on the grounds that it takes within its sweep protected speech and speech that is innocent in nature and liable to be used so as to have a chilling effect on citizen's right to free speech, therefore, also struck down on the ground of over breadth. Rather than being instrumental in promoting free speech and expression, there are possibilities that internet might become widely censored, in respect to every utterance subject to third party censorship or self-censorship. Provisions under the impugned Section threatened to turn us from citizens to subjects. Though the Hon'ble Court has protected citizen's right to free speech, a legislation is still required which particularly specifies grounds and procedures that shall help in restricting free speech so that public tranquility is maintained. Social media facilitates citizens with electronic communication which in turn enriches our political, social, and economic domain. Similar platform can also prove to be potential deterrent when it disseminates defamatory content, information or comment that can lead to personal and public harm, furthering disruption of public order. Therefore, the present context necessitates legislation that strikes balance between attaching culpability to illegal and infringing acts and restoring people their hard fought right to free speech.

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⁴⁶ *Arun Ghosh v. State of W.B.*, (1970) 1 SCC 98 : (1970) 3 SCR 288.

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