



Fixing the Contours of Free Speech: A Case of Active Intervention by Supreme Court in Nullifying Section 66A of IT ACT

KEYWORDS

Intervention, Reasonable Restrictions, Public Order, Grossly Offensive, Citizenry.

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ABSTRACT *Protagonists of free speech almost accept without reservation that unfettered liberty would degenerate into authoritarianism. Therefore the "reasonable restrictions" clause attached to Fundamental Rights not only delimits the absoluteness of such rights but also delineates its scope for the establishment of an egalitarian and just social order. But an excess of such restrictions falling outside the constitutional purview poses a serious challenge to basic human liberties. The amendment of Section 66 of IT Act (2008) inserted Section 66A which endorsed new forms of limitations to curb free speech on Internet. This paved the way for a series of arrests purely on political grounds and a host of PILs from the active citizenry and intervention by the judiciary thereof, through landmark judgments to restore freedom.*

Introduction

Freedom of speech and expression constitute the sine qua non of fundamental freedoms in India. As an integral part of the Indian Bill of Rights, it finds clear cut exposition within the ambit of "Right to Freedom" in part 3 of the constitution. The indispensability of this right was moored by Sardar Bhopinder Singh Mann in the Constituent Assembly debate as "I regard freedom of speech and expression as the very life of civil liberty and I regard it as fundamental. For the public in general and for the minorities in particular, I attach great importance to association and to free speech. It is through them that we can make our voice felt by the Government and can stop the injustice that might be done to us.....Mr Vice President, I want these rights should not be restricted so much and all opposition that is peaceful and not seditious should get full opportunity, because opposition is a vital part of every democratic government. To my mind suppression of lawful and peaceful opposition means heading towards fascism". (Constituent Assembly: 1948)

The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberty, it is truly said about the freedom of speech that it is the mother of all liberties. Freedom of speech and expression means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. The first principle of a free society is an untrammled flow of words in an open forum. Liberty to express opinions and ideas without hindrance and especially without fear of punishment plays significant role in the development of a just society and ultimately the democratic state. It is one of the most important fundamental liberties guaranteed against state suppression and regulation. Free speech may be justified on specific grounds – a) for discovery of truth by open discussion. b) for self-fulfillment and development. c) expression of political belief and attitudes. d) for active participation in a democracy.

The paper intends to ritualistically examine the constitutional ambit of free speech, its limitations, intrusion by Section 66A of IT Act into its jurisdiction and the intervention by the Supreme Court to expand the frontiers of free speech on internet.

Ambit of free speech in the constitution

There was a vociferous demand for this right in the pre independence era when it first appeared in the Swaraj Bill of 1895 inspired by Lokmanya Tilak. Later the Constituent Assembly with scholarly erudition envisaged in the Preamble "Liberty of thought, expression, belief, faith and worship..." The Preamble also says that India is a Sovereign, Democratic, Republic It cannot be overemphasised that when it comes to democracy liberty of thought and expression is a cardinal value. More elaborate expression of this right is found in Article 19(1) (a) of the constitution - "all citizens shall have right -to freedom of speech and expression". Its violation reprimands the Supreme Court and High Court to take stringent action through issuances of writs.

Freedom of speech and expression in our constitution is however not absolute. It is hedged in with reasonable restrictions for its wider social enjoyment. Under Indian law, freedom of speech and expression do not therefore confer an absolute right to express one's thought freely. Clause (2) of article 19 of the constitution enables the legislature to impose certain restrictions on free speech under following heads:-

- a) Defamation
- b) Contempt of court
- c) Decency or morality
- d) Security of the state
- e) Friendly relations with foreign countries
- f) Incitement to an offence
- g) Public order
- h) Maintenance of sovereignty

Reasonable restrictions on these grounds can be imposed only by a duly enacted law and not by any executive action.

Section 66A of IT Act

Notwithstanding such limitations the infamous Sec 66A of the Information Technology Act opened up the floodgates for newer forms of controls to muzzle free speech on Internet, thereby making the Indian citizen vulnerable to frequent executive interferences. The Information Technology Act 2000 was amended in 2008. The amended act which received the assent of the President on February 2009, contains sec 66A, though it was absent in the original IT

Act of 2000. Sec 66A empowered the police to make arrests over what policemen in terms of their subjective discretion could construe a message on internet as "offensive", "menacing" or for the purpose of causing "annoyance", "inconvenience" etc. Over the years the police invoked this provision a number of times and several people including a cartoonist, professor, students and industrialists were arrested more particularly when they posted contents against politicians.

Sec66A relates to punishment for sending offensive messages through communication service etc. Any person who sends by means of a computer resource or a communication device -

- 1) any information that is grossly offensive or has a menacing character or
 - 2) any information that is known 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.
 - 3) 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.

Judicial Intervention

In a landmark judgment, expanding the contours of free speech in internet, the Supreme Court, while entertaining a PIL (Shreya Singhal vs Union Of India : 2012) on the matter, struck down the draconian sec66A of IT Act which authorizes the policeman to arrest a person for posting allegedly "offensive and "menacing "contents on website. It also struck down 118D of the Kerala police Act on similar grounds. The court quashed the section in its entirety as it "arbitrarily, excessively and inappropriately invaded the right to free speech, right to dissent, right to know" and had a "chilling effect "on constitutional mandates. The Bench (Supreme Court : 2015) pronounced that this provision "clearly affects" the Fundamental Right to freedom of speech and expression enshrined in the constitution. Elaborating the grounds for holding the provision as "unconstitutional" it said terms like "annoying"; "inconvenient" and "grossly offensive" used in the provision are vague as it is difficult for the law enforcement agency and offender to know the ingredients of offence.

The court therefore demeaned the legislative enactment as it did not clearly explain the term "annoying", "grossly offensive", "incitement to offence", causing public disorder. Section 66A is intended to punish anyone who uses internet to disseminate any information falling within the sub clauses of sec 66A. The section makes no distinction between mass dissemination and dissemination to one person." Further the Sec does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and the action that may be taken based on the message is conspicuously absent. There is no ingredient in this offence of inciting anybody to do anything which would prove an immediate threat to public safety or tranquillity. On all these counts, it is clear that the section has no proximate relationship to public order whatsoever.

Freedom of speech and expression includes the right to

disseminate information to a wide section of people as is done for example in print or electronic media. If this is so then the access which enables this right is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial as argued by the government. The virtues of electronic media cannot become the enemy of man. However the control should only be exercised within the frame work of Article 19(2). "To plead for other grounds is to plead for unconstitutional measures".

Striking down sec 66A the Supreme Court said seamless exchange of views on any subject was cardinal to democracy and argued against stifling annoying statements of citizens."It cannot be overemphasized that when it comes to democracy, liberty of thought and expression that's paramount under ourconstitutional scheme, "said the bench. They said, as citizens of a democratic country we must realise the importance of giving space to the right to dissent and air views even if they are unpopular. "This requires free flow of opinions. While an informed citizenry is a precondition for meaningful governance, open dialogue is of great importance", the bench said as it found Sec66A offensive to free speech guaranteed under Article 19(2). The court reiterated that freedom of speech and expression is embodied in three concepts ----- discussion, advocacy and incitement. Mere discussion or advocacy of a particular cause howsoever unpopular is at the heart of article 19(1) (a). It's only when the discussion or advocacy reaches the level of incitement that restriction in article 19(2) kicks in. The court faulted sec66A for being loosely worded and widely cast to catch every internet user. It accepted that "public's right to know" is directly affected by such a law.

The information sent through internet is annoying, inconvenient or grossly offensive also shows no distinction is made between "discussion or advocacy of a point which may be annoying or grossly offensive to some and incitement by which such words lead to an imminent casual connect with public disorder...". Sec 66A therefore has no proximate connection with incitement to an offence. Firstly the information disseminated over the internet need not be information which "incites" anybody at all. Written words may be sent that may be purely in the realm of "discussion" or "advocacy" of a "particular point of view". Further the mere causing of annoyance, inconvenience, danger etc, or being grossly offensive or having a menacing character are not offences under the Penal Code at all. They may be ingredients of certain offences under the Penal Code but are not offences in themselves. For these reasons, Sec66A has nothing to do with "incitement to an offence". Therefore sec 66A contains new avenues for curtailment of free speech and falls foul to Article 19(1) (a).

Critical Analysis & Conclusion

Every expression used in Section 66A is nebulous in meaning. What may be offensive to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause the same to another. Even the expression "persistently" is completely imprecise as there is no demarcating line as to the number of times the message has to be sent so as to be considered persistent.

Further the causing of annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will are all outside the purview of Article 19(2). None of the aforesaid terms are even attempted to be defined, the result being that innocent persons were roped

in. Such persons are not told clearly on which side of the line they fall. It would be therefore open to the authorities to be arbitrary and whimsical as they like in booking such persons under the said section. The enforcement of the said Section would be an insidious form of censorship which impairs the core value contained in Article 19(1) (a).

The jurisdiction of this Section breaches Fundamental Rights under Articles 14 and 21 as it does not intelligibly differentiate between those who use the internet and those who by words spoken or written use other mediums of communication. To punish somebody because he uses a particular medium of communication is discriminatory and is violative of Article 14.

The Supreme Court referred to two important judgments in UK (2006, 2013) illustrating that if judicially trained minds come to diametrically opposite conclusions on the same set of facts, it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not. Therefore Section 66A lacks a manageable standard by which to book a person for an offence.

The judgment sought to fortify the constitutional position of free speech and upheld its significance and indispensability. It may be contended that sec66A was an ill considered and hasty legislation being passed in Parliament without debate only to be challenged by few MPs (Rajeev 2012, Panda 2012 and Chandrashekhar 2013). Thus it was ill-fated and met a dead end when Supreme Court struck down the law.

The Indian Constitution places hard limits on the power of the Parliament and allows the judiciary to determine if the restrictions placed by the Parliament on free speech are 'reasonable'. It is therefore the judiciary to act as an "efficacious corrective machinery" (Soli Sorabjee: 1993), to challenge the restriction. It is the judiciary which performs the task of reconciling freedom of expression with certain imperatives of public interest such as national security, public order, public health or morality and individual rights such as reputation and right to privacy.

There are innumerable instances where the Supreme Court has upheld free speech and expression through important

judgments. While doing so the court has vividly explained jurisdiction of reasonable restrictions Article 19(2) and safely anchored the right. To cite a few important cases:

- a) Romesh Thapar vs State of Madras(1950)
- b) Sakal Papers(P)Ltd and Ors v Union of India(1962)
- c) Chintaman Rao v The State of Madhya Pradesh(1950)
- d) Benett Coleman and Ors v Union of India and Ors(1973)
- e) S Khushboo vkanniamal and Anr(2010)
- f) State of Madras vVG Row (1952)
- g) Ram Manohar Lohia v State of Bihar and Others(1966)

In the present context, the citizens still need to be careful while posting comments on websites and social networking sites as provisions similar to Section66A exist in Indian Penal Code, examples are: [Section500 (Defamation)], [Section505 (Public Mischief)], [Section506 (Criminal Intimidation)], [Section 507 (Anonymous Communication)], [Section509 (Insulting Modesty)],[Section 124A (Sedition), Section 295A - (Blasphemy)].

Free speech is one of the most significant factors for sustenance of democracy. The vital need of the hour is that the legal provisions sensitive to free speech be extensively deliberated and debated in Parliament, by civil society, intellectuals and media to avoid a ruckus due to frequent executive interferences into the ambit of free speech.

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