



Freedom of Speech Restored- 66A of IT Act Struck Down - A Case Commentary

KEYWORDS

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ABSTRACT It is a case commentary on the recent landmark judgment (*Shreya Singhal v Union of India*) declaring Section 66A of the IT Act 2000 which allows arrest of a person for posting allegedly "offensive" content on websites, as unconstitutional. This comes in the background of a slew of arrests made under section 66A thereby violating the right to freedom of speech and expression enshrined in Article 19(1)(a) of the Constitution. The court has struck a perfect balance between the right to freedom of speech and the reasonable restrictions under Article 19(2). Court has attacked its inherent vagueness, the absence of definitions for terms used in it and the conspicuous lack of *mens rea*. This law arbitrarily, excessively and disproportionately invades the right of free speech and has no proximate connection with incitement to commit an offence. Court has relied heavily on American judgments to delve deeper into the impact and content of free speech. Judgment heralds a victory of free speech in India.

SHREYA SINGHAL VERSUS UNION OF INDIA WRIT PETITION (CRIMINAL) NO. 167 OF 2012 IN THE SUPREME COURT OF INDIA DATE OF JUDGMENT: 24 MARCH 2014

Hailed as a landmark judgment of the Supreme Court, heralding a victory of free speech in India

Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties". John Milton

FREEDOM OF SPEECH AND EXPRESSION

Freedom of speech and expression guaranteed under Article 19(1)(a) means the right to speak and to express one's opinions by words of mouth, writing, printing, pictures or in any other manner. It is to express one's convictions and opinions or ideas freely, through any communicable medium or visible representation, such as, gesture, signs and the like.

It includes the freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers.

The constitutional significance of the freedom of speech consists in the Preamble of Constitution where the principles of liberty of thought, expression, belief and faith are enshrined and is transformed as fundamental and human right in Article 19(1) (a) as "freedom of speech and expression".

The freedom of speech is regarded as the first condition of liberty. The first principle of a free society is an untrammelled flow of words in an open forum. It is one of the most important fundamental liberties guaranteed against state suppression or regulation. It enables people to contribute to debates about social and moral value. It allows political discourse which is necessary in any country which aspires to democracy

Penetration of internet- a medium of speech in a democracy

India is a young nation. Internet freedom is vital not just for digital innovation, but to support the wholesome evolution of democracy itself. Over the past few years, a noted shift occurred from traditional communication networks

and technologies to more advanced technology mythologies.

Internet has begun to take center stage in how people that are politically active interact with each other.

Social media has emerged as a vital tool of communication and has created new ways of mobilizing public opinion and encouraging participation in political and civic activities – ranging from joining online petition and social groups, posting short messages on Twitter, expressing supports through blogs and uploading videos on YouTube.

BACKGROUND

Propensity of politicians to curb freedom of speech and expression

Section 66-A of the Information Technology Act 2000 has been invoked on several occasions to prosecute people for legitimately exercising their right to free speech online, and has enabled arbitrary arrests and detention.

This law attained particular infamy after the arrests by the Mumbai Police in November 2012 of two women who had expressed their displeasure at a bandh called in the wake of Shiv Sena Bal Thackeray's death. A class 11 student in UP was arrested for posting on Facebook, objectionable comments apparently attributable to a State Minister. A Puducherry man was arrested for criticizing P.Chidambaram's son.

BRIEF FACTS OF THE CASE

Shreya Singhal, the petitioner, filed the writ petition under Article 32 of the Constitution primarily challenging the constitutionality of Section 66A of the Information Technology Act 2000.

Petitioners contend that Section 66B to 67C of the IT Act 2000 and various provisions are enough to deal with the threat of internet (as perceived by the legislature). Also they contend that Section 66A is not saved by Article 19(2) of the Constitution and it breaches Article 14 and 21 as there is no intelligible differential between those who use internet and those who use other media of communication. The petitioner describes the impugned law as "insidious form of censorship" and has "chilling effect on free-

dom of speech and expression”

The legislature introduced 66A owing to the increase in the use of computer and that internet has given rise to new forms of crime and the government defends it by putting fore the unique features of internet that makes it different from other modes of communication.

The Supreme Court struck down Section 66A as unconstitutional.

COMMENTS

The judgment striking down Section 66A is quite comprehensive and well reasoned. It touches all aspects of the impugned law and negates the pertinence of each of the terms used. This law could not stand the test the test of reasonableness and is woolly to the hilt. It is inimical to the democratic interests of the society and is tyrannical.

Balance between rights guaranteed in Article 19(1)(a) and Article 19(2)

In its prefatory remarks in the judgment, the Apex Court has rightly observed that “*when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme*”. Importantly, the Court has struck a distinction between discussion, advocacy, and incitement and has held that restrictions on free speech and expression may be imposed only under Article 19(2) of the Constitution and only in instances where incitement is manifest.

The Court categorically stated that Section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and reasonable restrictions that may be imposed on such rights. The Court took a proper stand on this issue because nowadays, politicians forget that citizens are not their subjects or vassals. They are the ones who voted them in making public servants.

Vagueness of 66A

The frequently heard charge against Section 66A is its inherent vagueness, the absence of definitions for terms used in it and the conspicuous lack of *mens rea* (the intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to the action or conduct of the accused) as an ingredient. The Court has echoed the very same apprehensions since unlike the Indian Penal Code wherein the contours of offences relating to restrictions on free speech are narrow and clear, Section 66A uses completely open ended and undefined phraseology.

The Court rightly puts that vague laws may trap the innocent by not providing fair warning. If arbitrary and discriminatory enforcement is to be presented, laws must provide explicit standards for those who apply them. This in a way is a veiled reference to the complacency of the legislature in framing the laws.

The Court rightly refuted the government’s guarantee that the law would be administered fairly. The Court said that 66A must be judged on its own merits without any reference to how well it may be administered.

Intelligible differentia

On the question of whether a different standard/yardstick must be applied to the internet by virtue of the peculiarity of the medium, in particular its reach, the Court has answered in the affirmative.

While affirming the fact that the medium could not affect the content of speech that could be restricted, the court nonetheless did uphold the contention that different laws might be needed for the unique features of different media (such as website blocking). While this is an ambiguous formulation, the court certainly missed an opportunity to open the door for a future challenge to India’s film censorship regime.

Nonetheless, in its affirmation that content-based restrictions would have to pass 19(2) muster (relating to the circumstances in which speech can be curbed) regardless of medium, the Supreme Court did open the door to a challenge to the government guidelines that are ridiculously overbroad and vague (for instance, prohibiting “double meaning words that might cater to the baser instinct”), and are most commonly invoked to censor films.

Public order actually disturbed?

The next litmus test that the Court has applied in examining the constitutionality of Section 66A is whether the acts proscribed by the provision truly result in disturbing public order, or do they merely affect an individual leaving the tranquility of society undisturbed. The Court clearly holds that Section 66A is oblivious to such a nuance since it penalizes even one-to-one communication between individuals which has no nexus to public order. Simply put, according to the Court, mere annoyance to a certain individual does not satisfy the requirement of maintenance of public order, which justification is necessary to support the existence of Section 66A.

To verify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.

Reliance on American judgments and the principle of Market place of ideas

The judgment is heavily relied on American judgments in context of Art 19(1)(a) and the principle of “marketplace of ideas”. American judgments only have a persuasive value but we can rely on them in order to understand the basic principles of free speech and the need for such freedom in a democracy. We can rely because both the US and India opine that a restriction in order to be reasonable must be narrowly tailored so as to abridge or restrict only what is absolutely necessary.

Justice Holmes, deriving his justification from John Stuart Mill, has given the notion of market place of ideas in *Abrams v. United States*. In the marketplace of ideas good ideas will displace bad ideas. Wrong opinions will yield to more rational and factional ones. Justice Nariman’s invocation of the marketplace of ideas is a claim that free speech is necessary in a liberal democracy because it will eventually ensure a public discourse driven by truth, honesty and rationality.

This principle holds bad because it is too optimistic and it does not consider the play of power in liberal polities. So sexist, casteist, class ideologies will dominate a society not on the strength of its truth but on the strength of its hegemony over that society.

No objectivity

The absence of clear boundaries and definitions renders the provision capable of abuse, particularly when the acts forbidden by it are to be judged through the subjective lens of the recipient of a communication. In other words,

what is grossly offensive to one, may seem perfectly normal or justified to another and yet an offence would be made out under (the erstwhile) Section 66A if the recipient claims to be offended or annoyed. Therefore, the provision does not lend itself to the application of objective standards since it is dependent entirely on the recipient's sensibilities.

The Court has also shed light on judgments where judicially trained minds can come to diametrically opposite conclusion on the same set of facts. In such a scenario, it is obvious that expression such as "grossly offensive" and "menacing" are so vague.

CONCLUSION

The history of the Indian Supreme Court's engagement with the freedom of speech has been fraught and conflicted. For every great judgment, there have been times when the Supreme Court has let itself down – along with the millions of citizens who repose their trust in it.

Speaking broadly, Supreme Court cases cleave along two distinct lines, which are in deep tension with each other. One set of cases would have you believe that Indian citizens are corrupt and corruptible, prone to violence, and cannot be trusted with too great a measure of freedom – especially when it comes to speech, which is quintessentially corrupting. For their own good, Indians need to be protected from the malign influences of speech. This understanding was at work when the court upheld the constitutionality of sedition, pre-censorship of films, and our own version of a blasphemy law.

But another set of cases views Indians as thinking beings who bear the responsibility of choosing for themselves how to lead their lives, which doctrines to subscribe to, what is moral, or decent. It is not for the government to impose its vision of the good, right and true on individuals by restricting what they can see, speak or hear. In its early cases on press censorship, and in some of its more recent cases on obscenity and film censorship, the court has endorsed this idea.

Consequently, every time the Supreme Court decides an important free speech case, its consequences go far beyond the individual judgment. Every free speech case strengthens one of the two competing visions and undermines the other.

This judgment represents a rare instance of the Court adopting the extreme step of declaring a censorship law as passed by the Parliament as altogether illegitimate. The Court has struck a vicious blow against the duplicitous stand taken by the State, which consistently represents the freedom of speech and expression as a fragile guarantee at best.

The immediate impact of the decision will be felt in the domain of online speech: fewer arbitrary arrests, and fewer persecutions of political dissenters. But it is perhaps in the long-term that the effects of the judgment will be most profound. We can now challenge the noxious culture of censorship that pervades the Indian State. This judgment deserves to be long-remembered in the annals of Indian free speech and civil liberties history.

REFERENCE

1. Romesh Thapar v. State of Madras, AIR 1950 SC 124 | 2. Life Insurance Corporation v. Manubhai D. Shah, AIR 1993 SC 171 | 3. Secretary, Ministry of I&B v. Cricket Association Bengal, AIR 1995 SC 1236 | 4. "Facebook trouble: 10 cases of arrest under Section 66A of IT Act", Hindustan Times; 24 March, 2015 | 5. Whitney v California, 71 L. Ed. 1095 | 6. Abrams v. United States, 250 US 616 (1919) | 7. Article 19(2) of the Constitution of India, "Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence" | 8. Article 66A of Information Technology Act, 2002, "Punishment for sending offensive messages through communication service, etc. | 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. | Explanation.— For the purpose of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, images, audio, video and any other electronic record, which may be transmitted with the message." |