"FREEDOM OF SPEECH IN THE CONTEXT OF IT ACT-LOOKING BEYOND SHREYA SINGHAL V. UNION OF INDIA"

Author: Harsha Laddha

Int. B.B.A.LL.B (Specialization in Corporate Laws)

Roll: R760211056

2011-2016

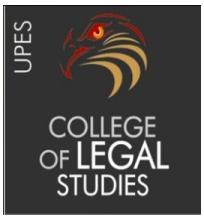
DISSERTATION

Submitted under the guidance of: **Mr. Krishna Deo Singh Chauhan**

Assistant Professor – Senior Scale

This dissertation is submitted in partial fulfillment of the degree of

B.B.A. LL.B. (Hons.)



College of Legal Studies

University of Petroleum and Energy Studies

Dehradun

2016

DECLARATION

I declare that the dissertation entitled *"FREEDOM OF SPEECH IN THE CONTEXT OF IT ACT-LOOKING BEYOND SHREYA SINGHAL V. UNION OF INDIA"* is the outcome of my own work conducted under the supervision of Prof. Krishna Deo Singh Chauhan, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Harsha Laddha
Date:

CERTIFICATE

This is to certify that the research work entitled *"FREEDOM OF SPEECH IN THE CONTEXT OF IT ACT-LOOKING BEYOND SHREYA SINGHAL V. UNION OF INDIA"* is the work done by Harsha Laddha under my guidance and supervision for the partial fulfillment of the requirement of B.B.A., LL.B. (Hons.) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

Krishna Deo Singh Chauhan
Assistant Professor- Senior Scale
Date:

ACKNOWLEDGEMENT

It is with deep sense of gratitude and reverence that I express my sincere thanks to my supervisor **Mr. Krishna Deo Singh Chauhan**, Assistant Professor, College of Legal Studies, University of Petroleum and Energy Studies, Dehradun, for his guidance, encouragement, help and useful suggestions throughout my research period. His untiring and painstaking efforts, methodical approach help made it possible for me to complete this work in time.

I must acknowledge my indebtedness to the authors of various books and research articles which I have quoted without their permission. Last but not the least, I am heartedly thankful to the library and other resources which were provided by the university.

Finally, I would like to express my gratitude to my family members, who are constant source of inspiration and support in all my endeavors.

-Harsha Laddha

TABLE OF CONTENTS

TABLE OF CASES

ABBREVIATIONS

- Art.- Article
- CA- Communications Act
- CrPC- Code of Criminal Procedure
- DCP- Deputy Commissioner of Police
- FIR- First Information Report
- IG- Inspector General
- IPC- Indian Penal Code
- ISPs- Internet Service Providers
- ITAA- Information Technology Amendment Act
- MCA- Malicious Communication Act
- PIL- Public Interest Litigation
- SP- Superintendent of Police
- UOI- Union Of India

INTRODUCTION

"I disapprove of what you say, but I will defend to the death your right to say it"

- Voltaire

The right to Freedom of Speech and Expression has been recognized as a Fundamental Right under the Constitution of India and speech and expression on online forums is given the same privilege by the Supreme Court of India in a beautifully illuminated judgment on March 24, 2015[1]. In what has been heralded as a landmark judgment, the Apex Court of the country struck down the draconian Section 66A of the Information Technology Act, 2000.

Section 66A was inserted in the Information Technology Act by the amendment in 2008. It has been invoked on many occasions to prosecute people for legitimate exercise of their right to free speech online and has exercised arbitrary arrests and detention. Section 66A since its enforcement has become infamous with numerous instances of this section being misused by the police in various states to arrest innocent public for publishing critical opinions about ongoing social and political issues and leaders on social sites.[2] The provision gained attention of people after the arrest of two women by Mumbai Police in November 2012 who had expressed their annoyance at a bandh called in the wake of Shiv Sena Bal Thackerey's death. The Apex Court of the country then erased the provision of law as it went beyond the reasonable restriction put by the Constitution on Freedom of Speech and Expression.[3]

The fact of information technology being exploited frequently to harass or to create public disorder cannot be denied. Anomalies aside, S.66A has at times proved to be a

[1] *Shreya Singhal v. Union of India*, Writ Petition (Criminal) No. 167 of 2012;
[2] Amit Choudhary & Dhananjay Mahapatra- *Supreme Court strikes down Section 66A of IT Act which allowed arrests for objectionable content online*, The Times of India, (Mar 24, 2015, 10:50AM IST), available at http://timesofindia.indiatimes.com/india/Supreme-Court-strikes-down-Section-66A-of-IT-Act-which-allowed-arrests-for-objectionable-content-online/articleshow/46672244.cms, last accessed on March 20, 2016 at 5:46 PM.
[3] Neeti Gupta, *Freedom of Speech Restored- 66A of IT Act Struck Down - A Case Commentary*, Research Paper of Indian Journal of Applied Research, Volume: 5 | Issue: 5 | May 2015 | ISSN - 2249-555X, available at https://www.worldwidejournals.com/ijar/file.php?val=May_2015_1430484119__58.pdf, last accessed on March 16, 2016 at 7:17 AM.

utilitarian remedy, specifically in situations of sensitive nature pertaining to religious and communal sentiments, it also provides an opportunity to genuine victims of cyber harassment to obtain immediate relief against content that may be insulting or injurious in nature, abrogation of which has now made Police authorities toothless in dealing with the growing menace of cyber bullying.[4] The concern that now occupies all minds is that after the repeal of the provision of Section 66A, what would be the treatment of all the offences that were once covered by Section 66A. The Section gave sweeping powers to carry out an arrest pending investigation. In the case of Section 66A, the issue was that if the police officer identified that the material was offensive or abusive he could go ahead and arrest the person unlike the provisions in Indian Penal Code where unwarranted arrest cannot be made.[5]

This dissertation project aims to enlighten that the Fundamental Right to Free Speech and Expression is subject to the restrictions forming part of Article 19(2) of the Indian Constitution and not any other restriction inflicted by any other law in force by unwarranted means. The author has divided the project in seven chapters so as to impart better understanding on the subject.

The *first chapter* will introduce the provision in issue by primarily discussing its legislative history and how the provision came into being. It also gives an overview of the Section after its enactment and ends with considering the major developments after the enactment of the law.

The *second chapter* will discuss the Fundamental right to freedom of speech and expression enshrined under Article 19 and the Indian Constitution. It also discusses the penal provisions for cyber crimes and identifies if it is a violation or exception to the right guaranteed. The chapter will end with placing a balance between fundamental right guaranteed under Article 19(1)(a) and its exception under Article 19(2).

---

[4] Mr. Partha Pati – (Partner) and Ms. Sanjana Sinharoy (Associate) of Abhay Nevagi Associates, *Section 66A: Its repeal and its after-effects*, Legally India, (April 24, 2015), available at http://www.legallyindia.com/Blogs/section-66a-its-repeal-and-its-after-effects, last accessed on March 17, 2016 at 8:59 PM.

[5] Vicky Nanjappa, *Life after Section 66A of the Information Technology Act*, oneindia, (Wednesday, March 25, 2015, 10:40 IST), available at http://www.oneindia.com/feature/life-after-section-66a-of-the-information-technology-act-1694926.html, last accessed on March 19, 2016 at 7:31 AM.

The *third chapter* will analyze the case of *Shreya Singhal vs. Union of India*, and will discuss the various aspects of the case like the vagueness of the provision and the unconstitutionality of Section 66A. At the end of the chapter the effect of the judgment on the other provisions of the Act will be analyzed.

The *fourth chapter* the questions as to whether Section 66A curbs or safeguards social media; and why we need a regulatory mechanism for online media will be dealt. It will also discuss as to how is the section subjected to misuse and what were the challenges posed in the landmark case of *Shreya Singhal vs. Union of India* upon the Section in issue. This chapter will end with discussing the Hicklin test and its limitations and the limits of the law.

The *fifth chapter* will discuss the provision of UK law dealing with the cyber offences, specifically Section 127(1)(b) of the U.K. Communications Act, 2003 in detail. Further, the chapter will discuss the provisions of Indian Penal Code which deal with online media; it will make us realize the fact that even after the repeal of Section 66A, the provisions in other Indian statutes can curb the issue of cyber offences. It lastly does a comparison of Section 66A with Other Statutes.

The *sixth chapter* will analyze the aftermaths of the repeal of Section 66A and what will happen to the cases booked under Section 66A. It will also relate to the provisions which will now be resorted to by the complainants to file a case after the repeal.

The *seventh chapter* being the last chapter is the conclusion and aims to seek for a solution to the problems being faced after the repeal of the provision and will analyze if there is a need of a fresh law. The Chapter will end with the suggestion on creating a balance between granting a right and preventing its misuse.

RESEARCH METHODOLOGY

STATEMENT OF THE PROBLEM:

The right to Freedom of Speech and Expression has been recognized as a Fundamental Right under the Constitution of India and speech and expression on online forums is given the same privilege by the Supreme Court of India in a beautifully illuminated judgment on March 24, 2015. In what has been heralded as a landmark judgment, the Apex Court of the country struck down the draconian Section 66A of the Information Technology Act, 2000. The concern that now occupies all minds is that after the repeal of the provision of Section 66A, what would be the treatment of all the offences that were once covered by Section 66A. The Section gave sweeping powers to carry out an arrest pending investigation.

OBJECTIVES OF THE STUDY:

The purpose of this study is to analyze the current position in law of the offences committed under Section 66A of the Information Technology Act, 2000 which now stands repealed and also to identify if there is a need of any fresh law to curb the issue.

SCOPE AND SIGNIFICANCE OF THE STUDY:

The scope of this dissertation extends to the study of all the relevant provisions across the globe with respect to cyber crimes specifically Information Technology Act, 2000 and its counterparts in the law of UK and other jurisdictions. The study also discusses the analysis of the judgment in detail.

RESEARCH QUESTIONS:

The dissertation aims to identify the various laws to deal with the problems of cyber crimes that were once covered by the provisions under Section 66A and to also find the solution to the deal with the emerging problems after the repeal of Section 66A. During the study, the researcher shall deal with the specific issues involving the concern and probable suggestions to eradicate those issues involving some conflict. The researcher will deal with these tentative research issues:

1. Whether the repeal of Section 66A is a cup half full or half empty?
    1.1 Whether Section 66A was helpful in curbing the cyber offences?
    1.2 Should Section 66A of the IT Act be retained in its present form or should it be modified/ repealed?
    1.3 Whether there is any other provision of law to deal with the cyber offences?
2. Is there a need of regulatory mechanism for online media in India?
    2.1 If yes, should the regulatory authority be self-regulatory or should it have statutory powers?
    2.2 How far are the parallel sections subjected to misuse?
    2.3 What are the laws abroad dealing with cyber crimes?

HYPOTHESIS:

The study assumes that though there are laws related to cyber crime yet there is no straight jacket method in law to curb this issue so there arise a need of a fresh law after

the repeal of Section 66A to deal with the cyber issues in line with the constitutional provisions.

METHODOLOGY:

Research Design: The research in this study has been done having relied upon "Doctrinal Method" of research. The methodology adopted for this project work is analytical, descriptive and comparative.

Source of Data: The study is mainly based on secondary data and has gathered information from various journals, newspapers, books and websites to provide an understanding of the cyber offences and the provisions of the Information Technology Act, 2000 in light with the landmark judgment of *Shreya Singhal vs. Union of India*.

LITERATURE REVIEW:

The objective of this paper is to analyze the current position in law of the offences committed under Section 66A of the Information Technology Act, 2000 which now stands repealed. This paper starts with the discussion on the background of the provision in issue and further goes on to analyze the case of *Shreya Singhal vs. Union of India Judgment dated 24 March 2014* in the wake of which the provision was repealed heralding a victory of free speech in India. The content of this paper is a mixture of text books, Statutes, regulations, scholarly Articles in the field on Information Technology and cyber crimes dealing with the various issues involved. A brief description of the literature used to arrange, plan and prepare this paper has been discussed in order to give an outline of the paper.

BOOKS:

1. **Apar Gupta, Commentary on Information Tecnology Act, Lexis Nexis Butterworths Wadhwa Nagpur 2nd Edition 2011**

This book contains the various provisions of the Information Technology Act, 2000. It also contains the amendments and the guidelines. The researcher has taken assistance of this book to see the historical background of computer related offences and punishment for sending offensive messages.

ARTICLES AND PUBLICATIONS:

1. **Neeti Gupta- Freedom of Speech Restored- 66A of IT Act Struck Down - A Case Commentary, Research Paper of Indian Journal of Applied Research, Volume: 5 | Issue: 5 | May 2015 | ISSN - 2249-555X.**

This paper starts with the general idea of Freedom of Speech and Expression and internet as a medium of speech in a democracy. It then discusses the various perspectives of the provision of the law which is in issue in the light of the Judgment of *Shreya Singhal vs. Union of India*. The paper concludes by saying that the imprints of the judgment goes far beyond the individual judgment. The judgment symbolizes a rare instance of the Court embracing the extreme step of pronouncing a censorship law passed by the Parliament as entirely illegitimate. The Court has expunged 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.

2. **Aniket Tater- From the Courtroom "*Shreya Singhal v. Union of India*: The Landmark Sec. 66A Case", The Libertatem Magazine, ISSN: 2395-4418 [Digital], 2395-6070 [Print].**

This article gives an introduction about the contents of Section 66A, it jots down the facts of the game changing case and highlights that the liberty of thought and expression is not merely an aspirational ideal. It is also "a cardinal value that is of paramount significance under our constitutional scheme."

3. **Gautam Bhatia- The unconstitutionality of S. 66A and how Shreya Singhal broke new ground in India's freedom of speech jurisprudence, the myLaw.net Blog**

The writer of this blog argues to strike down Section 66A for four overlapping reasons. The writer examines the provision and the judgment on various aspects of its proximate relationship with public order, vagueness, chilling effect etc. The blog concludes that *Shreya Singhal v. Union of India* will be most remembered for its long-term impact on India's freedom of speech jurisprudence.

4. **Smitha Krishna Prasad, Huzefa Tavawalla, Rakhi Jindal & Gowree Gokhale- Freedom of Online Speech, Nishith Desai Associates, published on March 26, 2015**

This article starts with a brief background of the Freedom of online Speech and the provisions of Section 66A. It goes on to analyze the arguments of the Petitioners and the Defense and the Judgment passed by the Hon'ble Court after taking into consideration

various aspects. The Supreme Court also took into account the petitioners' various arguments on the fact that the reach of Section 66A is vague, and does not clearly communicate to a citizen what actions would be considered offenses under this provision, and that as a result the restrictions under Section 66A have a chilling effect on free speech on the internet.

5. **Pranesh Prakash- Breaking Down Section 66A of the IT Act, The Centre for internet and society**

This article explains the provisions under Section 66A and identifies and elaborate upon the contents of the provision, it talks about the term of punishment for the offence in India and also other jurisdictions. It also takes into account the laws of other jurisdictions upon the same subject and does comparison between Section 66A and Other Statutes.

6. **Anitha Gutti- Section 66A of IT Act Quashed and Freedom of Speech Recaptured, Lawyerlaw.org, published on April 2, 2015**

This article starts with the reason behind the enactment of Information Technology Act, 2000. It also mentions the various amendments that were incorporated in the IT Act in the amendment of 2008. The article continues with the discussion about the counterparts of the provision in other statutes and highlights that on internet everyone can air their views and that internet neither exists nor operates in an institutional form, and therefore there is a need for some mechanism to put checks and balances on this medium.

7. **Amit Choudhary & Dhananjay Mahapatra- Section 66A quashed: Citizens can still be arrested for online posts, The Times of India, TNN | Mar 25, 2015, 05.32AM IST**

This new article enlightens the social network site addicts that although Section 66A has been quashed yet the postings may invite arrests under similar provisions of Indian Penal Code. Veerappa Moily, the law minister at the time of the enforcement of Section 66A also welcomes the judgment and believes that it empowers the people to have freedom of expression and also that law should be dynamic and evolve with time to meet exigencies peculiar to a particular time.

8. **Aparna Viswanathan- An unreasonable restriction, The Hindu; Opinion; Lead published on February 20, 2013 01:14 IST**

This piece of writing highlights the fact that yet there were many instances of people being accused for the violation of IT Act but it is this case in issue that rocked the nation. The article discussed the constitutionality of the provision and brings it in line with Section 127 of the U.K. Communications Act, 2003. The Union Government defends the constitutionality of the provision by relying on the "Advisory on Implementation of Section 66A of the Information Technology Act 2000" issued by the Department of Electronics and Information Technology rather than taking inspiration from the House of Lords' view about what is 'grossly offensive.'

9. **Utkarsh Anand- Supreme Court takes freedom of speech to the Net by striking down much abused Section 66A, The Indian Express published on March 25, 2015 10:52 am**

The article ponders upon the flaws of the provision in issue and says that Section 66A upset the balance between right to free speech and the reasonable restrictions that may be imposed on this right. It highlights the Supreme Court support to the fact that Section 66A was unconstitutional and failed to qualify under the umbrella of “reasonable restriction” on the assurance given by the NDA government that “An assurance from the present government even if carried out faithfully would not bind any successor government. It must, therefore, be held that Section 66A must be judged on its own merits without any reference to how well it may be administered.”

CHAPTER 1: INTRODUCTION

1.1 Legislative history of Section 66A.

1.2 Present Section 66A: The Draconian Law.

1.3 Major developments after the enactment.

The forts of democracy stand and rise on the pillars of freedom. Freedom of speech and expression is undoubtedly one of those pillars with such crucial importance that enjoys the position of a fundamental right by the virtue of Article 19 (1) (a) of the Constitution of India and is vested in every Indian citizen. The Apex Court of the country has also acted as its guardian constantly protecting the various rights under the Indian Constitution and has from time to time quashed the statutory provisions negating this freedom.[6]

With the advancement of time as well as the technology, serious threats were posed to the state machinery under the pretext of freedom of speech and expression due to the widespread reach of technology. It is therefore unavoidable for the state to step in by enacting legislations to curb down such abuse and Section 66-A of the Information Technology Act, 2000 is one such kind of legislation.[7]

There are hundreds of millions of social media users in urban India out of which, the primary utility of internet is to Search, followed by social networking or online communication. An increase in the rate of cyber crime is predictable with the increase in social media. Simultaneously, there arises the dire need of breakthrough legislation for penal measures to prevent crimes and punish criminals in social media.

Until 2008, offences like sending offensive messages, e-mail account hacking, creating fake profiles, cyber pornography etc. were committed without any fear and were dealt casually, leaving the unfortunate victim helpless and terrorized. The recently alleged ambiguously worded[8] Section 66A was then enacted for the rescue with a subsequent amendment in Information Technology Act, 2000. The provision turned into the herald of

[6] *Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305; Bennet Colemon Co. v. Union of India, (1972) 2 SCC 788; Romesh Thappar v. State of Madras, AIR 1950 SC 124.*

[7] Anuj Bhansal and Shubham Chaudhury, *Momentous Victory or Pillow Sham: A Critique on Shreya Singhal V. Union of India,* available at http://www.rslr.in/uploads/3/2/0/5/32050109/6._shreya_singhal_case.pdf, last accessed on February 22, 2016 at 8:08 AM.

[8] Shivprasad Swaminathan and Neha Tayshete, *Saving free speech from the police*, The Hindu, (November 26, 2012 01:19 IST) available at http://www.thehindu.com/opinion/op-ed/saving-free-speech-from-the-police/article4133852.ece, last accessed on February 25, 2016 at 8:25 AM.

a large number of legal logjams that handicap the smooth functioning of the Fundamental Rights enshrined in the Part III of our Constitution.[9]

This chapter will introduce the reader with the legislative history of Section 66A and the provision as it provided for before the repeal. The chapter will also enlighten the reader on the major developments after the repeal.

1.1 Legislative history of Section 66A

When the stalwarts framers of our Indian Constitution like BN Rau and BR Ambedkar, debated on the merits of letting in 'free speech' as one of the fundamental rights warranted to the citizens of the country. Anticipating that the governments might in future try and corrupt the valuable privileges, they did so. History has positively proved its fears to be true.[10]

Over the years, successive governments have attempted in numerous ways to dominate common-man's tongue. Gratefully, the makers of our Constitution incorporated into the draft document certain fail-safe mechanisms, to preclude a tyrannical overwrite of the core principles. They were successful in fortifying citizens with the power to inflict at the very first instance, the jurisdiction of the apex court if either of the organs of the government whether executive or legislative attempted to unreasonably shorten any of their fundamental freedoms.

The IT Act 2000, was the first law of its kind on technology, e-commerce etc. It was the matter of wide discussions, detailed reviews with a part of the industry blaming some provisions of the Act of 2000 to be termed as draconian law and the others considering it

[9] Akansha Prakash, *Sec 66A- An exaggeration of your rights end where my nose begins*, Live Law, (February 10, 2015), available at http://www.livelaw.in/sec-66a-exaggeration-rights-end-nose-begins-2/, last accessed on February 25, 2016 at 8:27 AM.

[10] Jai Anant Dehadrai, *Why PM Modi should repeal Section 66A of the Information Technology Act, 2000*, The Times of India, Published on January 20, 2015 at 2:26 PM IST, available at http://blogs.timesofindia.indiatimes.com/the-irreverent-lawyer/why-pm-modi-should-repeal-section-66a-of-the-information-technology-act-2000/ last accessed on March 14, 2016 at 2:56 PM.

to be too lenient. Because of some obvious reasons leading the investigators to rely more on century old IPC even in those cases based on the IT Act.

Therefore there arose the need of an amendment- a major one- in the IT Act[11]. Big industry entities were talked to and consultative groups were constituted to analyze the perceived gap in the IT Act while equating it with similar statutes of other countries and recommend changes.

The recommendations then suggested would be examined and late on will be adopted as an Amendment Act that is comprehensive and after significant administrative procedures, the awaited amendment came to be called as the Information Technology Amendment Act, 2008 (ITAA, 2008). It was presented in the Houses of Parliament and was passed by the end of 2008. The ITAA 2008 received assent of the President on February 5, 2009 and started functioning with effect from October 27, 2009.[12]

After the enactment, a number of people were arrested by the Police for publishing offensive content on online platform. The Apex Court of the country examined the constitutionality of Section 66A of the IT Act concerning if the provision was in contradiction to Article 19(1)(a).

At the same time the validity of two more provisions of the IT Act i.e., Section 79(3) where intermediaries were expected to withdraw obnoxious content, and Section 69A about the control of Government to prevent access to certain websites were also examined. The Apex Court concluded that the draconian law i.e., Section 66A infringed the fundamental right under Article 19(1)(a) but upheld the validity of the other two provisions while reading down of Section 79(3).[13]

[11] Bill No. 96-C of 2006.

[12] *IT ACT 2000 – PENALTIES, OFFENCES WITH CASE STUDIES*, Network Intelligence, available at http://www.niiconsulting.com/innovation/IT%20Act%202000.pdf last accessed on March 14, 2016 at 4:43 PM.

[13] *Legislative History of Information Technology Act -2000 (ITA 2000)*, Naavi.org, available at http://www.naavi.org/naavi_comments_itaa/, last accessed on March 14, 2016 at 4:27 PM.

1.2 Present Section 66A: The Draconian Law

Section 66A renders punishment wherever any information that is either 'grossly offensive or of menacing character' is sent by means of a computer resource or through a communication device. The provision also renders punishment for sending false information which causes 'annoyance, danger, obstruction, insult, injury, inconvenience, enmity, hatred, criminal intimidation or ill will' continuously or any electronic mail or message sent to cause annoyance or mislead the recipient of the same regarding the identity of the sender. Such offences are punishable under the provisions of IT Act with fine and imprisonment which may extend to three years.[14]

The Explanation to the provision defines electronic mail as it includes attachments in text, images, audio and video and any other electronic record that may be sent along with the message. This provision will apply in cases like phishing, spoofing, spamming, defamation, extortion, hate speech, criminal intimidation, cyberstalking and similar cybercrimes.

In the present case in discussion of *Shreya Singhal vs. UOI*[15], a PIL was filed before the Apex Court of the country disputing the constitutional validity of Section 66A of the Act of 2000. The State of Maharashtra in this case was made to explain the way in which Ms. Renu Srinivasan and Ms. Shaheen Dadha came to be taken into custody in association with the post by Ms. Dadha on Facebook. Another person, Aseem Trivedi was also taken into custody by the Mumbai Police under the same provision; he filed a writ petition for

[14] In a case before the High Court of Delhi for granting anticipatory bail under the provisions of Section 438 of CrPC, 1973, the petitioner was refused bail under the provisions of Sections 328 and 376 of IPC, 1872 along with Section 66A of the IT Act, 2000 in a FIR. The petitioner in this case was alleged to have had sexual intercourse with prosecuting attorney by faking her to marry. He sent nude pictures of her to certain persons. It was decided by the Court to necessitate the custodial interrogation of accused as certain mails were found to be sent from the accused to complainant's previous husband as provided by the investigation agency. The court declined the bail because of the necessity of the custodial interrogation in the facts of the case and held the question of fiddling of evidence as immaterial.

[15] W.P. (Crl) 167/2012.

impleadment which the court allowed.[16] The writ petition questions the constitutional validity of Section 66A alleging it to be arbitrary, ambiguous, vague and also depriving citizens their fundamental right warranted under Article 19 of Indian Constitution. The Court in the matter issued notice to the Centre along with four States. The Central Government, after the arrest of the petitioners, issued advisory guidelines that any FIR will not be registered under Section 66A unless approved by IG police. These guidelines were with regard to metros, in case of non- metro areas and rural areas, no action can be furthered unless approved by any officer who is of the rank of DCP or SP.

Another PIL was filed before the Supreme Court as *Dilipkumar Tulsidas Shah vs. UOI,*[17] seeking for formulation of effective guidelines for investigation in the cases relating to cybercrimes. The Court wherein issued notice to Center as well as the State Government of Maharashtra to hear the matter along with the landmark case of *Shreya Singhal vs. Union of India* that repealed the provision altogether.

The Information Technology Ministry passed advisory[18] dated January 9, 2013 directing the police to not arrest any person under this provision of IT Act until approved by the IG police at metro level or deputy commissioner of police at non- metro or rural level.[19]

1.3 Major developments after the enactment

Since the enactment of this provision by the amendment of 2008, there have been a few arrests made under Section 66A for social media posts directed at renowned personalities, including politicians. These were averred in nature to be offensive. In November 2012,

[16] Dhananjay Mahapatra, *Centre defends Section 66A of IT Act*, TNN (Jan 11, 2013, 03.06 AM IST), available at http://timesofindia.indiatimes.com/india/Centre-defends-Section-66A-of-IT-Act/articleshow/17975525.cms, last accessed on March 17, 2016 at 4:08 PM.
[17] WP (C) 97/2013.
[18] Advisory guidelines on implementation of Section 66A of the IT Act, 2000, Government of India, Ministry of Information Technology available at http://deity.gov.in/sites/upload_files/dit/files/Advisoryonsection.pdf, last accessed on March 16, 2016 at 6:47 AM.
[19] Karnika Seth, Computer, Internet and New Technology Laws 382-383 (LexisNexis, 2013 Edition).

there were several reports of suspected misuse of the law, moreover the penalties enforced were said to be inappropriate to the offence.

Thenceforth, a Public Interest Litigation (PIL) was filed in the Apex Court, disputing this provision on the grounds of unconstitutionality. It was said to infringe upon the freedom of speech and expression ensured by Article 19(1)(a) of the Constitution.[20]

1.3.1. Government's response so far?

Subsequently, for the purposes of Section 66(A), guidelines were issued by the central government. These guidelines elucidated that prior authority of the Deputy Commissioner or the Inspector General of Police was required before any police officer or police station could file a complaint under Section 66(A). In May 2013, the highest Court of the country (in relation to the above PIL) also gave an order stating that such approval was mandatory before any arrest is to be made. As the matters related to the police and public order are addressed by the governments of respective states, a Supreme Court order was necessitated for these guidelines to be enforced across the country. However, no changes were made to Section 66A itself.

1.3.2. Legislative movement concerning Section 66A?

In 2013, a Bill was presented in Lok Sabha to modify Section 66A of the IT Act. The Statement of Purpose of the Bill submitted that majority of the crimes that Section 66A addressed already found its place under IPC, 1860. This overlapping caused dual penalties imposed for the same offence. As per the Bill there was incompatibility between both the laws with regard to the terms of imprisonment and that to for the same offence. The criminal offence of menacing someone or offending someone through email draws

[20] Apoorva Shankar, *A background to Section 66A of the IT Act, 2000*, (March 24, 2015) available at http://www.prsindia.org/theprsblog/, last accessed on March 13, 2016 at 8:29 PM.

imprisonment of two years as per the IPC and three years as per the IT Act. Finally, the Bill was withdrawn.

A Private Members resolution in the same year was also moved in Parliament. The declaration suggested four changes:

(i) to bring Section 66A in conformity with the Fundamental Rights enshrined in the Constitution;
(ii) prevent the applicability of the section to conversation between two persons;
(iii) exactly define the offence that are covered; and
(iv) cut down the penalty as well as make the crime a non-cognizable one that is no arrest without warrant. Although, this resolution was also withdrawn.

1.3.3. How the PIL proceeded?

In February, 2015, the Apex Court had submitted that the constitutionality of the Section would be examined with regard to the PIL before it. The Government contended that they are ready to modify the provision because their aim was to not to oppress the fundamental right to free speech but to address issues of cyber crimes.

The issue that is analyzed by the Court states the powers given to the police to construe what is abusive and what causes annoyance etc. rather than directing to the Court for examination. The law was also alleged to be ambiguously worded and vague and in the absence of lack of clarity there would be an increase in litigation.

CHAPTER 2: FREEDOM OF SPEECH AND EXPRESSION AND THE INDIAN CONSTITUTION

2.1 Freedom of Speech and Expression: Article 19.

2.2 Penal provisions for cyber crimes: Violation or Exception to the Right.

2.3 Balance between fundamental right guaranteed under Article 19(1)(a) and its exception under Article 19(2).

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

-John Milton

When the stalwarts framers of our Indian Constitution like BN Rau and BR Ambedkar, debated on the merits of letting in 'free speech' as one of the fundamental rights warranted to the citizens of the country. Anticipating that the governments might in future try and corrupt the valuable privileges, they did so. History has positively proved its fears to be true.[21]

The Social Networking websites have become quite popular these days specifically among the younger generation and majority of the net users have got their profiles on many popular social networking sites and Facebook is the most popular among them leading as the largest social networking website. Hardly would there be any person in this world who has no idea of Facebook. Facebook started its journey as a platform meant for college students which was available only by invitation. Eventually it became one of the favorite Social networks, a platform stretching across the globe despite its privacy concerns. The Facebook has more than 500 million users and is still growing.[22]

2.1 Freedom of Speech and Expression: Article 19

Article 19(1)(a)[23] guarantees Freedom of speech and expression as a Fundamental right which means the right to unrestricted speech and also the right to express one's own opinions either by way of writing, printing, pictures, or by words of mouth or in any other

[21] Vicky Nanjappa, *Supra* note 5

[22] Neeraj Aarora, *Cyber Imposter created fake profile of President of India*, available at http://www.neerajaarora.com/cyber-imposter-created-fake-profile-of-president-of-india/ last accessed on March 14, 2016 at 2:40 PM.

[23] The Constitution of India, 1950.

form. It also includes expressing one's article of faith, ideas and opinions freely, by means of any communication device or visible representation, like signs, gestures etc.

Article 19 also includes the liberty to hold beliefs without hindrance and to look for and obtain and convey information and ideas with the help of any media irrespective of boundaries.

The constitutional implication of the fundamental right of freedom of speech and expression dwell in the Preamble of our Constitution where the precepts of liberty of thought, expression, belief, faith and worship[24] are enclosed and is metamorphosed as fundamental right and human right under Article 19(1)(a) as "freedom of speech and expression".

The freedom of speech marks the first essential of liberty. The foremost principle of a liberal society is an unrestricted flow of words and expression in an open assembly. This freedom guaranteed under the Constitution is one of the most significant key liberties warranted against state inhibition or regulation. It capacitates people to chip in to debates concerning social and moral values. Further, it permits political discussions that are required in any nation which aspires to majority rule.[25]

2.1.1. Insight into internet- medium of speech and expression in a democracy

India is a nation of young people. Internet freedom is critical not only because of digital introduction, but also to assist the substantial evolution of majority rule itself. In the preceding few years, there has been a tremendous shift from conventional communication networks to more hi-tech technologies. Internet has also provided a way to show how people, who are socially and politically active participators, behave and interact among themselves.

[24] Preamble, The Constitution of India, 1950.
[25] Neeti Gupta, *Supra* note 3

Social media came forth as an important tool of interacting and communicating and has come up with new methods of circulating public views and promoting engagement and involvement in political and social activities – ranging from writing tweets, expressing support on Facebook, writing blogs and uploading some videos or stories on YouTube.

2.1.2. BACKGROUND

Tendency of politicians to restrict freedom of speech by invoking Section 66A of the IT Act, 2000 on various occasions to convict people for lawfully carrying out their right to freedom of speech online lead to capricious apprehension and detention.

This law particularly got people's attention after the apprehension by the Mumbai Police of two women namely Shaheen Dhada and Renu Srinivasan in November 2012 when they had expressed their disappointment at a bandh or shutdown in Mumbai called in the wake of Bal Thackerey, Shiv Sena's leader's death where one them posted it and the other women 'liked' it.[26] A student of class in Uttar Pradesh was apprehended for posting obnoxious comments on Facebook evidently referring a State Minister. A man in Pondicherry was also apprehended for criticizing the son of P. Chidambaram.

Brief Facts:

A writ petition was filed by the petitioner, Shreya Singhal under Article 32 of the Indian Constitution challenging the constitutional validity of Section 66A of IT Act, 2000[27].

The Petitioner contended that the provisions from Section 66B of the IT Act, 2000 to 67C of the Act and certain other provisions are sufficient to address the issue of threat of internet. It was also contended that Section 66A does not form part of the exception or

[26] *Section 66A of IT Act: Here's all you need to know*, DNA (March 24, 2015, 09:41am), available at http://www.dnaindia.com/india/report-section-66a-of-it-act-here-s-all-you-need-to-know-2071506, last accessed on March 16, 2016 at 12:03 PM.
[27] *All you need to know about Section 66A of the IT Act*, TheHindu (April 13, 2015, 09:45 AM), available at http://www.thehindu.com/news/national/all-you-need-to-know-about-section-66a-of-the-it-act/article7027459.ece, last accessed on March 16, 2016 at 8:18 AM.

prohibition under Article 19(2) of the Indian Constitution, moreover it is alleged to breach Article 14 and Article 21 in the absence of any intelligible differential between people who use internet with the people who use some other media for communication.

The petitioner identifies the law in challenge as "pernicious form of censorship" which has "chilling effect on the fundamental right of freedom of speech and expression".

The legislative organ of the government introduced Section 66A due to the increasing employment of computer and internet which has given way to new classes of crime but the Union of India defends the provision by putting forth the unparallel characteristics of internet which makes it dissimilar from other means of communication.

The Apex Court of the country struck down the Draconian Section 66A as unconstitutional.

Comments:

The judgment that struck down the Draconian Section 66A is well reasoned and logically comprehensive in all aspects. It extends to all aspects of the provision in challenge and nullifies the applicability of the terms used. Even the legislative body of the government is not supposed to pass any law that may infringe any fundamental right guaranteed under the Indian Constitution. Hence, it is not available to the state to place restrictions on freedom of speech and expression to encourage the general public interest. Section 66A of the IT Act, 2000 clearly infringes the freedom of speech by creating a criminal offence against all those persons who cause annoyance or inconvenience by means of Internet to others. By the enactment of Section 66A all such speech and expression is controlled which ultimately affects the right of the people to know, and as a matter of fact no such law would be able to pass the test of constitutionality.[28]

[28] Utkarsh Anand, *Section 66A: Such is its reach (that) its chilling effect on free speech would be total*, indianexpress (March 25, 2015, 10:57 AM), available at http://indianexpress.com/article/india/india-others/such-is-its-reach-that-its-chilling-effect-on-free-speech-would-be-total/, last accessed on March 16, 2016 at 7:48 AM.

Thus, this law also failed to stand the test of constitutionality and reasonableness and can be termed as woolly to the hilt. It is unfriendly to the interests of the people of the society, impinging the fundamental right of freedom of speech and expression and is autocratic.

2.2 Penal provisions for cyber crimes: Violation or Exception to the Right

The condemnable treatment administered to Renu Srinivasan and Shaheen Dhada by the police in reaction to their Facebook post has brought into light the battle between the beautifully incorporated fundamental rights of free speech guaranteed by the Constitution of India and the allegedly vague and ambiguous Section 66A of the IT Act. Nevertheless, what is underlined is that Renu Srinivasan and Shaheen Dhada would likely have experienced the harassment even if there have been no Section 66A in the statutory books.[29]

The judgment of the Supreme Court is based on a series of reasoning which will be discussed as follows:

2.2.1. No proximate relationship with public order

Article 19(2) of the Indian Constitution allows the lawmaker to legislate inflicting certain restrictions called as exceptions to the freedom of speech for the safeguard of some eight specified categories. The exceptions in Article 19(2) of the constitution include "public order, decency or morality, and defamation".

All over its history, the Apex Court has fought the question as to what does it mean to inflict a "reasonable restriction" "in the interests of" "public order". All the three terms are disputed. In majority of the cases, the dispute was concerned with the demand of

[29] Shivprasad Swaminathan and Neha Tayshet, *Supra* note 8.

proximity: should the immediate relationship between confined speech and public order be present? The Apex Court had rejected this statement in early years. In *Ramji Lal Modi*, it preserved Section 295A of the IPC which talks about insulting religious feelings on the basis of malicious abuse to religious sentiments which had a "calculated tendency" to disrupt public order.

However, nearly at once, there was a repel from within the Court, which has deepened over the years. In *Ram Manohar Lohia's* case, the Court quashed a law which illegalized inciting people to not pay their taxes, for the reason that there should be a presence of an immediate relationship of the restriction on speech with the goal of public order. In later years, the Court fastened it further. For example, in *Rangarajan's* Case, it was held that the connectedness between speech and disorder must be like that of a "spark in a powder keg".

In quashing Section 66A, the Court did it by casting a difference between "advocacy" and "incitement". Article 19(1)(a) safeguarded the advocacy of ideas, however bitter. Merely when advocacy attained the level of incitement that is, causing a relationship of proximate approach with public disorder then it could be restricted. The Court guarded this conclusion by including the American "clear and present danger" test.

With this, it became apparent that there was no proximate relationship between Section 66A and public order. Therefore, it could not be protected under Article 19(2).[30]

2.2.2. The over-breadth that disrupted proportionality

Over-breadth is a circumstance in which a law prohibits conduct that the legislature is legally qualified to prohibit, as well as prohibiting conduct that it isn't. In Chintaman Rao, a statute limiting certain kinds of agricultural labour was quashed. The Court indicated that its language was "wide enough to cover restrictions both within and

[30] Gautam Bhatia, *The unconstitutionality of S. 66A and how Shreya Singhal broke new ground in India's freedom of speech jurisprudence,* myBlog.net, available at http://blog.mylaw.net/tag/constitutional-law/ last accessed on March 14, 2016 at 10:15 PM.

without the limits of constitutionally permissible legislative action affecting the right." Over-breadth straight away entails the "reasonableness" of a limitation under Article 19(2).

According to V.G. Row which was also cited by the Court, for a limitation to be reasonable, presence of relationship of balance between the degree of the limitation, the goal, and the broader context is must. The relationship of balance is interrupted in cases of over-broad laws, which apparently go outside the constitutionally-sanctioned restrictions.

The Apex Court accurately noticed words like "grossly offensive", "menacing", and "annoying or inconvenient" in the recent judgment to go far beyond Art.19(2) exceptions such as "defamation", "decency or morality", or "public order". Moreover, it was out of the question to separate, or break up these phrases from the remainder of the statute. Therefore, on the basis of over-breadth, the entire law will have to be quashed.

2.3 Balance between fundamental right guaranteed under Article 19(1)(a) and its exception under Article 19(2)

In its introductory comments in the judgment, the Apex Court has accurately 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". Significantly, the judiciary has struck a distinction between discussion, advocacy, and incitement and has held that limitations on free speech and expression may be inflicted only under Article 19(2) of the Constitution and under those circumstances only where instigation is apparent.

The Court unconditionally submitted that Section 66A arbitrarily, overly and disproportionately encroach upon the right to free speech and disturbs the balance between the right and the reasonable restrictions which are inflicted upon such rights. The

Court placed its point of view on this issue because these days, political leaders forget that the citizens of India are not their subjects but are those who voted them.

2.3.1. Vagueness of 66A

The often heard allegation against Section 66A is its vagueness. The absence of definitions for phrases used in the provision and the obvious lack of mens rea as an ingredient. The judiciary has repeated the same understandings unlike IPC wherein the forms of crimes relating to limitations on free speech are narrow and apparent; Section 66A uses absolutely unrestricted and undefined wordings.

The Court justifiably states that the innocent are trapped by the obscure laws by not being provided fair word of advice. This is in a way a obscure reference to the self-satisfaction of the law makers in framing the laws.

The Court justifiably controverted the guarantee by the government that the law would be dealt with fairness. The Court stated that Section 66A must be adjudicated on its own virtues without any reference to how well it may be dealt with.

2.3.2. Intelligible differentia

The Court answered in affirmative the question as to whether a distinct standard must be enforced to the online media because of the specialty of the mode, specifically its approach.

While supporting the fact that the mode could not impact the subject of speech that could be limited, the court however preserved the argument that distinct laws might be necessary for the distinct features of distinct media. Where this is an obscure expression, the judiciary surely escaped a chance to open the gate for a yet to come challenge to the film censorship regime of India.

However, in its assertion that content-driven limitation will have to pass Article 19(2) regardless of the mode. The Apex Court opened the door to a challenge to the government guidelines that are preposterously wide and vague, and are mostly inflicted to censor films.

2.3.3. Is Public order actually disturbed?

The next test that the Court has employed in analyzing the constitutional validity of Section 66A is to see if the acts prohibited by the statute genuinely result in interrupting public order, or if they simply affected an individual leaving the serenity of society undisturbed. The Court apparently holds that Section 66A is forgetful to such a nuance as long as it punishes even one-to-one interaction between persons which has no link to public order. To put it simply, as per the Court, bare annoyance to a particular individual does not fulfill the necessity of maintenance of public order, which proof is mandatory to support the existence of Section 66A.

To affirm oppression of free speech, the presence of a fair ground to worry that grave evil will ensue if free speech is practiced.

2.3.4. No objectivity

The failure to present clear limits and definitions yields the law capable of abuse, specifically when the works prohibited by it are to be adjudicated by the subjective lens of the receiver of a communication. To put it otherwise, what may be grossly offensive to a person, may appear perfectly justified to the other and still an offence will be made out under Section 66A if the receiver asserts to be aggrieved or annoyed. Hence, the law does not leave itself to the enforcement of objective standards since it relies completely on the receiver's sensibilities.

The Court has also highlighted judgments where judicially trained minds come to contrary conclusion on the same set of facts. In such a situation, it is obvious that expressions such as “grossly offensive” and “menacing” are so obscure or vague.

CONCLUSION

The chronicle of the Apex Court’s involvement with the fundamental right of free speech has been marked by distress and disputed. Behind every outstanding judgment, there are instances when the Apex Court disappointed itself along with the hundreds of millions of citizens of the country who repose their faith, belief and hope in it.

Broadly speaking, the Apex Court cases split into two distinct lines that are in conflict with each other. One side of cases will convince you to believe that the citizens of India are corrupt and dishonest, susceptible to aggression and cannot be believed with such a great standard of freedom particularly when we talk about speech, which is distinctively vitiating. Indians for their sake have to be safeguarded from the harmful effect 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.

Another side of cases sees Indians as thoughtful personalities who decide for themselves how they have to take their life, what is moral, which principles to follow. The government cannot inflict its imagination of what is good, what is right and what is true on persons by preventing what they can sense, speak, hear and see. The Court has supported this idea in some of its early as well as recent cases relating to obscenity and censorship.

Resultantly, whenever the Apex Court adjudicates a significant free speech case, its aftermaths go way beyond the main judgment. Every case on free speech supports one of the two conflicting visions and weakens the other.

This judgment symbolizes a unique case of the Court following the extreme step of quashing a censorship law altogether as illegitimate which was cleared b the houses of Parliament.

The prompt impact of the verdict will be sensed in the field of online speech: lesser obscure arrests, and lesser abuses of political protestors. Possibly in the long run the impact of the verdict will be the most fundamental. This judgment is worthy of being remembered in the history of free speech in India.

CHAPTER 3: SHREYA SINGHAL VS. UNION OF INDIA- A CASE ANALYSIS

3.1 Shreya Singhal vs. Union of India: A brief discussion.

3.2 Unconstitutionality of Section 66A.

This chapter aims at enlightening the reader about the discussions in the court of law in the landmark case of *Shreya Singhal vs. UOI.* The previous two chapters introduced the reader with the legislative history of the provision of law in issue and also illuminate on the fundamental right of freedom of speech and expression.

In this chapter, the author will first discuss the case of Shreya Singhal and will also touch upon the major allegations of unconstitutionality and vagueness. It will further move on to identifying the effect of the judgment on the other provisions of the law.

3.1 Shreya Singhal vs. Union of India: A brief discussion

The constitutional right to freedom of speech and freedom of expression on online platform has been appreciated under the Constitution of India as a fundamental right in a wonderfully illuminated judgment by the Apex Court of India i.e., "Supreme Court" on March 24, 2015[31]. What has been acclaimed as a reformist and landmark verdict, the Supreme Court in the judgment has annulled the disputed and suppressive Section 66A of the Act of 2000. The Court also read the fundamental right to free speech and expression into the alleged provisions of the Act along with the rules that dealt with the ISPs, search engines and other such intermediaries.

Dealing with a number of petitions that were brought before the court on this subject, the highest court of the country addressed three separate sections of the Act:

- First was Section 66A which identified the transmission of offensive messages by means of communication service as punishable;
- Second was Section 69A and the associated rule that allows the government to restrict public access to any online data by virtue of Article 19(2) for the sake of

[31] Shreya Singhal case, *Supra* note 1.

sovereignty of the nation and its integrity, for security of the state, defence, friendly relation with foreign nations, public order or for restricting instigation to the commission of an offence that is of cognizable nature concerning the above.

- Third was Section 79(3)(b) along with the Intermediary rules 3(2) and 3(4) which concern the responsibility of the intermediary to restrict admission to any subject matter that outlaws or offends the restrictions mentioned under Rule 3(2).

The above mentioned provisions, and particularly Section 66A had attained infamy for a long time in the past with many instances of misuse of the provisions for alleged politically driven motives by either police or the central or state governments. The widely famous case on this issue is the apprehension of two female students, wherein one made the post and the other girl 'liked' it on Facebook showing their disappointment upon the shutdown activities by the political parties in the wake of the death of the leader of Shiv Sena in Maharashtra. This marks the social networking fact that like it or not but the comment isn't free![32] Another young girl who was a law student filed a PIL before the Apex Court claiming the fundamental right to freedom of speech and expression guaranteed to every Indian citizen and also questioned the constitutional validity of Section 66A.

There have been a number of instances where people from unlike backgrounds were being detained for publicizing derogatory statements and images in connection with famous political personalities or political parties, religious symbols and also the government throughout the country via various social media forums.

With the increase in the reported number of arrests, public call out against Section 66A and the other related provisions increased. Advocates and the various activists and organizations contended that the provisions in issue infringe the fundamental right guaranteed under the Indian Constitution. The increasing number of reported cases resulted in the writ petitions filed by many citizens and organizations. These petitions aimed at striking down Section 66A that is restrictive in nature.

[32] *Like it or not, comment is not free,* TheHindu (November 21, 2012), available at http://www.thehindu.com/news/national/like-it-or-not-comment-is-not-free/article4119346.ece?ref=slideshow#im-image-0, last accessed on March 16, 2016 at 6:27 PM.

The Apex court in its judgment in the case of Shreya Singhal vs. UOI took cognizance of the writ petitions concerning the same issue together. The Court addressed the challenge of constitutional validity of Section 66A along with Section 69A and Section 79 of the IT Act and the rules that were framed under these provisions.

3.1.1. PETITIONERS' CASE

Out of the many arguments presented by the petitioners before the court, some of them are highlighted below:

- Section 66A: Infringement of Art. 19(1)(a) and Art. 19(2) of the Indian Constitution.

"Section 66A: 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; or

(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 purposes 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, image, audio, video and any other electronic record, which may be transmitted with the message."

Our Indian Constitution warrants specified fundamental rights to all the citizens of India. These rights are enshrined under Art. 19(1) of the Indian Constitution but they are not absolute and can be limited by the Government in conformity with the grounds identified under Article 19(2) of our Constitution.

"Article 19: Protection of certain rights regarding freedom of speech etc.

(1) All citizens shall have the right

(a) to freedom of speech and expression;

.....

(2) 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 [Emphasis supplied]"

It was argued by the petitioners that Section 66A infringes the freedom of speech enshrined in the Indian Constitution under Article 19(1)(a) and also does not form part of the exceptions or the reasonable restrictions granted under Art. 19(2).

- Section 66A: Infringement of Art. 14 of the Constitution:

It was argued by the petitioners that the fundamental right to equality guaranteed under the Indian Constitution is violated by Section 66A.

"Article 14: Equality before law.

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

The petitioners argued that the right to equality as provided for under the Constitution is violated, on the basis that "there is no intelligible differentia between the medium of print, broadcast, and real live speech as opposed to speech on the internet and, therefore, new categories of criminal offences cannot be made on this ground".

- Section 69A: Challenge on Constitutionality:

"Section 69A: Power to issue directions for blocking for public access of any information through any computer resource.-

(1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.

(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine."

It was argued by the petitioners that the provisions of Section 69A and rules framed hereunder allow for a elaborated procedure for restricting the websites and data are not

constitutionally valid as they bypass the principle of natural justice and do not equip the ‘originator’ of the content being restricted with the opportunity of being heard. It is the violation of the principle of *audi alteram partem* and also do not furnish procedural precautions which are there in other laws like the CrPC, 1973.

- Section 79: Vague and violates Article 19(2) of the Indian Constitution:

“Section 79: Exemption from liability of intermediary in certain cases.-

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if—

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not— (i) initiate the transmission, (ii) select the receiver of the transmission, and (iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if— (a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act; (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation. — For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary."

As per Section 79, the intermediaries like ISPs and the search engines are excused from the obligation of the information publicized using their services by the third party. This exemption is based on some specific conditions which includes conformation by the intermediary to the Intermediary Rules under the provision. The provision and the rules furnish that the intermediary on the receipt of the information of performance of any illegitimate act or communication[33] of specified category of content[34], may take away the admission to the content employed to commit such illegitimate act.

It was also argued by the petitioners that Section 79 along with the Intermediary Rules infringes the Constitution for the following reasons:

a) It permits the intermediary to determine what constitutes an 'unlawful act' and whether it is being committed or any content that is prevented is published which is in actual the power of the court or statute.
b) Further, the limitations under the rules of Section 79 or the intermediary rules exceed the allowed limitation under Art. 19(2).

3.1.2. UNION OF INDIA'S DEFENSE

Out of the many arguments presented by the UOI as defense before the court, some of them are highlighted as under:

[33] The rules under Section 79 restrict the hosting, display, uploading, modification, publication, transmission, updating or sharing of certain types of information.
[34] The content restricted under the rules under Section 79 includes, among other things, information that is grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, pedophilic, libelous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise harmful in any manner

- The law is based on certain presumptions and one of them is that a legislation is presumed to be constitutional unless proved otherwise and the Courts will intervene when a law clearly infringes the rights warranted to the citizen of India under the Constitution.
- While determining the constitutional validity of any statute, judiciary must interpret the statute in a way so as to fix it and make it executable.
- On Section 66A of the Act, the Union of India defended that the language of the provision is intentionally loose so as to address the new way of committing crimes online. Moreover, being vague or mere probability of abuse cannot be a basis to regard any statutory provision as invalid or unconstitutional.
- Further, Section 66A as defended by the UOI forms part of the exceptions under Art. 19(2) and was enacted to ensure public order, and prevent defamation, instigation to the commitment of an offence and the other exception listed in the provision and was therefore argued as constitutionally valid.
- The UOI defended the allegations put forth by petitioners on the grounds of equality under Article 14 by stating that there is a difference between the mode of speech online and through other mediums and therefore there should be a liberal standard of tenability of the limitation. The UOI identified certain grounds where the internet is different from the other modes.

i) The internet unlike the print media is not confined by boundaries.

ii) The content on internet unlike print media can be viewed by illiterate people also.

iii) The content on internet unlike the television programme is not pre-censored.

- For Section 79 and the rules framed under it, the UOI argued that it is a worldwide practice for them to have such agreements that set out the terms as per which it will be presumed that the intermediary had information of any illegitimate action and he will remove the content.

3.1.3. SUPREME COURT JUDGMENT

The judgment of the Supreme Court upon various issues is as follows:

- Whether the Fundamental right to Freedom of Speech and Expression is violated by Section 66A.

The Apex court of the country examined Section 66A in light of the fundamental right guaranteed under the Indian Constitution under Art. 19(1)(a). The Court determined three constructs that are significant to Art. 19(1)(a), where the first is discussion followed by advocacy followed by incitement. Mere discussion or advocacy of a specific cause no matter how much unpopular it is, stands at the center of the rights guaranteed under Art. 19(1)(a). Until, this discussion or advocacy meets incitement; Article 19(2) is not triggered and the State would not be permitted to inflict restrictions.

The Supreme Court analyzed the key term of Section 66A i.e., 'information'.

"Information" includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche."[35]

It has to be carefully noted that the definition of the term 'information' is comprehensive and limits itself to the mode of communicating contrary to the subject matter of the data. The Apex Court found that reading the definition of the term information in light of Section 66A will include within its scope all sort of information including information having scientific or artistic value. It was held by the Court that an offence under Section 66A is booked against any person who "affects the freedom of speech and expression of the citizenry of India at large" by the use of internet.

The Supreme Court examined the Union of India's defense that Section 66A formed part of the exceptions under Art. 19(2) and was enacted to ensure public order, to prevent incitement to any offence and the like grounds. The Court examined every component of

[35] Section 2(v) of the Act.

Article 19(2) used as a defense by the Union of India. The Court after relying on various past judgments from various jurisdictions and came up with the decisions[36]:

a) **Public Order:** The Apex Court resorted to certain test for ascertaining whether a particular act can affect public order as established in *Kameshwar Prasad & Ors. v. The State of Bihar & Anr.*[37], *and The Superintendent, Central Prison, Fatehgarh v. Dr. Ram Manohar Lohia*[38]: "does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquillity of society undisturbed?"

It is to be noted that Section 66A does not make any differentiation between dispersion of data to one person or many, further there is no link between the dispersion of the data and the incitement of deeds which threaten the public order. The Apex Court identified that there is hardly any immediate link between the alleged provision and its menace to public order.

b) **Decency/ morality:** It was argued on behalf of UOI that Section 66A should not be read separately but along with the precedents of the highest court of the country and the international courts as well. Attention should also be paid to Article 19(2) of our Constitution and then Section 66A should be construed in such a way so as to provide for the reasonable restrictions under Art. 19(2) like 'decency and morality'. Being 'grossly offensive' or 'annoying' has to be differentiated from 'obscene', the Court observed that reading into Section 66A with the precepts of obscenity or decency is not possible as it has been

[36] The Supreme Court has analysed the Fundamental Right to Freedom of Speech and Expression under the Indian Constitution and the US First Amendment – 'Congress shall make no law which abridges the freedom of speech. Both the US and India protect freedom of speech and expression as well as press freedom. In the US, courts have held that if there is compelling if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. However in India, such law cannot pass muster unless it is covered by one of the eight subject matters set out under Article 19(2).

[37] [1962] Supp. 3 S.C.R. 369.

[38] [1960]2SCR821.

demonstrated by the various judgments at international level over and above the national level.

c) **Defamation:** The Apex Court determined its meaning as under Section 499 of IPC, 1860. It observed that Section 66A does not have to do anything with the 'injury to reputation' of an individual which is an essential ingredient of 'defamation', therefore the Section is not intended at causing statements that are defamatory in nature.

d) **Incitement to an offence:** The Apex Court of the country highlighted that there is a difference between utilization of data with the intent to discuss or highlight a point or opinion and instigation of an offence. The Court further observed that the essentials of Section 66A like being grossly offensive or causing inconvenience etc. can all be considered as element of a crime under the IPC but does not constitute any offence *prima facie* under the Code. Any content that is circulated may cause inconvenience or may also result in other forms of events determined under Section 66A yet it does not imply that such circulation of any content or information will come under the purview of 'incitement to commit an offence'. The Court based on this logical interpretation derived that there is absence of an immediate relationship between Section 66A and instigation to the offence.

The Apex Court did not neglect the arguments of the petitioners alleging Section 66A as vague as it fails to clearly indicate as to what will constitute an offence under section 66A. In the absence of clarity regarding the restrictions, there is a chilling effect in terms of free speech online.

The Court after analyzing various principles demonstrated by it and also the American courts along with various judgments, placed reliance upon its judgment in *S. Khushboo v. Kanniammal*[39] in which a criminal trial was started against a female actor who had made certain comments on premarital sex. The Supreme Court in this case observed that "the

[39] (2010) 5 SCC 600.

real issue of concern is the disproportionate response to the appellant's remarks. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the “freedom of speech and expression” (emphasis supplied).

Placing reliance on the precedents, the Apex Court held Section 66A as unconstitutional for the reason that “it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth”.

Comments:

Section 66A has attained infamy since long and was identified as draconian and is keen to create police state in the country. The infinite number of examples of misuse of the law to guard the political interests and suppress the content that have a dip of protest to these have strengthened such views.

Not only Section 66A, but there are several other laws that inflict restrictions upon the constitutional rights like Section 69A but it is held as constitutional by the Supreme Court as it comes within the purview of the reasonable restrictions forming part of Art. 19(2). Not only this, but it also allows for many safeguards in cases of misuse. To add on, a step into the Act along with the other laws like IPC will bring our attention to the fact that the actions illuminated under Section 66A already form part of the statutes. To elaborate, Section 66D talks about punishment for cheating by personation. Further, Section 67, Section 67A and Section 67B talks about punishment in case of publication or transmission of obscene material that is sexually explicit. Likewise, provisions of the IPC like Section 291, Section 292 and Section 293 identifies sale, public display etc. relating to any obscene material as punishable.

Section 66A attempted to create a limitation on the fundamental rights in a capricious manner, beyond the constitution, and resultantly has been quashed as constitutionally invalid.

- **Whether Section 66A infringes the fundamental right guaranteed under Art. 14 i.e., 'Right to equality before law':**

Among other things, the petitioners argued that in the absence of intelligible differentia among the various modes of print, dissemination, online speech, it infringes Article 14 that is 'Right to equality before law' enshrined in the Constitution by forming new classes of crimes.

The Supreme Court consented to the arguments placed by the UOI which stated that there is a difference between internet and other modes of communication and observed that "there is an intelligible differentia between speech on the internet and other mediums of communication for which separate offences can certainly be created by legislation".

Comments:

The Apex Court did not verify the constitutional validity of Section 66A in detail, particularly in terms of Art. 14. Although, the observation of the Court that in the presence of 'intelligible differentia' among the online speech and other modes of communication, there is a great implication in identifying how legislations will be formulated and upheld in line with the growing technology and a world based on internet.

In this view, it was observed by the Apex Court that the "intelligible differentia is clear – the internet gives any individual a platform which requires very little or no payment through which to air his views". On the basis of these observations given by the Apex Court, attention would be paid to see the manner in which the legislative organ of the government along with the judicial organ carry it ahead to deal with the emerging threats to the present statutes with the advancement of the technology and new ways of

exploiting the same. A question that now comes to my mind is that will we need fresh laws to regulate and control actions online?

- **Whether Section 69A along with the rules framed there under are constitutionally invalid:**

Under Section 69A, the government may block or order the restrictions to be placed upon public access to any content which is 'generated, transmitted, received, stored or hosted in any computer resource in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence'. Further, Section 69A states that the grounds of such restricted being imposed must be entered in writing, also the rules framed under Section 69A states a descriptive procedure which is to be adhered to by the appropriate government agencies or the officers in order to block admission to any information under Section 69A.

The Apex Court identified that Section 69A has a restricted approach as it has been formed taking into consideration the exception under Art. 19(2) along with the checks and balances incorporate in the section. Observing that the provision has reasonable safeguards as it signifies the need of the reasons for restrictions of any content to be registered in writing and is appealable through the filing of a writ petition, the Apex Court held the provision along with the rules framed under it as constitutional.

Comments:

Section 69A of the IT Act states the instances where admission to any online content may be restricted; these grounds are those that form part of exceptions under Art. 19(2) of the Indian Constitution. Section 69A also empowers the government to restrict the public to access any content or information and hence often sensed as inadequate. The Apex Court

on this issue opined that the process to be following for such restriction to be placed is within the limits of the Constitution.

Notwithstanding this fact, the petitioners along with the various advocacy institutions argued that Section 69A along with rule framed under it are wide in its scope and therefore unconstitutional for the reason that they do not permit anyone else except the intermediary to be heard before the award is given. It does not permit even the originator of the content in dispute with the chance to be heard. Another issue that is put forth is regarding the demand to maintain privacy of the requests for blocking. The advocacy organizations have shown their worry that the rules restrict the originator from receiving any information with regard to the grounds on the basis of which their content is blocked.

On the other side, the Supreme Court evidently observed that the reason behind asking for the reason of restricting the content in writing is to snip the order in a writ petition to be filed under Art. 226 of our Constitution.

In the absence of any clarity as to whether the orders or their reasons as recorded has to be made available to the public or the originator or not, one may presume as per the observation of the Supreme Court that the data should be made accessible in such a way so that it can be made appealable. Hence, notwithstanding the constitutional validity of Section 69A along with the rule framed under it upheld by the Apex Court, the observations made by the Court will have significance in its actual application. The government might also need to come out with necessary clarifications.

- **Whether Section 79 of the IT Act along with the Intermediary Guidelines are constitutionally invalid:**

As per Section 79, the 'intermediaries' like the ISPs and the online search engines are excused from the responsibility of any content published by third parties employing the services of the intermediary. This exemption granted is subject to specific terms that have to be satisfied such as abidance with the rules framed under the provision i.e., the Intermediary Rules by the intermediary.

Key provisions of Section 79 along with the Intermediary Rules framed under it are of significance while studying this judgment:

i. The above mentioned rules render that the intermediary or person in charge of the computer resource on which the content is hosted may upon the receipt of the information about the performance of any illegitimate act or communication[40] of some specified content[41], withdraw admission to the content or data used to perform such illegitimate acts or publish such prohibited content.

ii. The excuse granted to the intermediary under Section 79 is based on certain conditions and is subject to Section 79(3)(b). The section states that the excuse shall not be extended if "upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner".

iii. As per Rule 3(4) of the above mentioned rules, an intermediary on the receipt of information either by itself or by information provided by the person affected in writing or by any means regarding the commission of an illegitimate act or circulation of any restricted data or content is obliged to invalidate the information which is contrary to the Intermediary Rules after working it with the originator within 36 hours.

It has been held by the Apex Court that Section 79(3)(b) as well as Rule 3(4) of Rules framed under it should be read down to construe its meaning such that the intermediary has to receive an order from the court or any notice from an agency of the government expecting the intermediary to take down the specific data or content. The Apex Court further stated that any of the above stated court order or government notification should

[40] The rules under Section 79 restrict the hosting, display, uploading, modification, publication, transmission, updating or sharing of certain types of information.

[41] The content restricted under the rules under Section 79 includes, among other things, information that is grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, pedophilic, libelous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise harmful in any manner

necessarily come within the purview of the reasonable restrictions forming part of Art.19(2).

Comments:

Section 79 as it has been, and also the Intermediary Rules states that an intermediary is expected to withdraw access to the content that is alleged illegal as soon as it receives information about its being unlawful. This information can be received by the intermediary itself or can be communicated to it by any person affected or through a government notification.

The provision to the extent of empowering the intermediary to decide upon the illegality of content has made the intermediary a watchdog to the internet.

Further, demanding the intermediary to "act within 36 hours" of obtaining information resulted in a chaos in the industry regarding the clarity as to what formed appropriate action. Moreover, it was a conflict for intermediary whether to act on all the notifications issued by government or private parties to take down the content.

The Apex Court read down the content of Section 79 and the Rules framed there under and cleared up the confusion that the intermediary has to obtain an order from the court or a government agency's notification in order to proceed with the removal of the content.

On the other side, the question that occupies most minds is whether the reading down of the provision hinders the protection extended to the individuals as the unwanted content would still be perceived openly until an order from the court or notification from the government agency has been received that might take certain time. Resultantly, the intermediaries will not be required to take down any content upon receipt of complaints no matter how much grave it is and even if complies to be taken down.

The provision does not also specify the administrative agencies that shall be authorized to issue any notice or order, it is an unanswered question whether the officers designated

under the rules framed under Section 69A of the IT Act have been authorized under Section 79 and the rules framed under it to act?

While certain questions have remained unanswered, the Apex Court in the present judgment in discussion has analyzed and elucidated in an effective manner about the source and evolution of the 'fundamental right to freedom of speech and expression' under the Indian Constitution, along with its practical application in the era of internet as well as electronic communication.

The Supreme Court in its judgment has upheld the fundamental right to freedom of speech and expression guaranteed by the Constitution extending its vision with regard to the new modes of communication like the internet. In doing so, it emphasized the democratic values embedded in the Constitution and the faith of the people in the 'independence of the judiciary'.

3.2 Unconstitutionality of Section 66A

Sometimes after its enactment, the provision has attained a lot of infamy. It had been criticized on various grounds. Around 2014, the Apex Court began to hear a number of challenges against many provisions of the IT Act. A batch of petitions were clubbed with the case of *Shreya Singhal vs. Union of India* where the constitutionality of the provision was questioned. Section 66A has reached a level infamy in present time because of people being arrested unwarranted for posting on Facebook on political issues.

The roots of Section 66A can be extracted from the English Communications Act, and was in the first place proposed to deal with spam and online harassment. As we already know that its enforcement has gone far beyond its objective. Apart from poor enforcement, there are a lot many reasons available with the Court to hold Section 66A as unconstitutional, based on the observation that it violates the freedom of speech

enshrined under Article 19(1)(a) of the Constitution. The other reasons for its unconstitutionality have already been discussed in detail in Chapter 2 of this dissertation.

CHAPTER 4:

THE LIMITS OF THE LAW IN FINDING ILLEGALITY IN OBSCENITY

4.1 Need of Regulatory mechanism for online media.

4.2 Misuse of Section 66A: Issues and Challenges.

4.3 Hicklin test and the limitations.

Since the time of the development of the civilization, man has invariably been moved by the need to move forward and enhance the subsisting technologies. This need to move forward has led to some innovative developments that have been marked as a launch pad for further progress. Out of all the remarkable advances made by mankind till date, the most significant of them is the evolution of the internet; although the rapid evolution of internet has also raised ample legal issues. As the world of internet is growing suspected, countries all over the world are taking recourse to different approaches for controlling, facilitating and regulating electronic communication and commerce.[42] This chapter aims to identify if there is a need of some regulatory authority empowered to restrict the access to objectionable content on social media specifically and the Internet at a broader level, whether it be self-regulatory or one having statutory powers.[43]

4.1 Need of Regulatory mechanism for online media:

4.1.1. Why?

The fact of information technology repeatedly been exploited in order to annoy or upset public order cannot be contradicted. Exceptions aside, Section 66A at the time of enactment had proved as a useful redressal, specifically in cases of sensitive nature relating to political, religious and communal opinions; for example the instance of the hegira of the students of north-east from Bangalore in which the Police Agencies were pushed to resort to Section 66A in order to prevent the spread of rumors that were caused

[42] '*REGULATING INDIAN CYBERSPACE – THE BATTLE FOR 'CONTROL' IN THE NEW MEDIA VERSION 2.0'*, Indian Lawyer 250, available at http://indianlawyer250.com/features/article/229/regulating-indian-cyberspace-battle-control-new-media-version-20/ last accessed on March 14, 2016 at 4:17 PM.

[43] Anja Kovacs, *Regulating social media or reforming section 66A? Our recommendations to the Law Commission of India*, Internet democracy project, available at https://internetdemocracy.in/reports/regulating-social-media-or-reforming-section-66a-our-recommendations-to-the-law-commission-of-india/, last accessed on March 17, 2016 at 7:29 PM.

by instigative messages, disseminated to instigate ferocity against the people belonging to the north-eastern community.

Such cases in which religious and communal symphony have been interrupted by circulating instigative data in any form like texts, posts, etc. are undoubtedly termed as "grossly offensive". Hence, the observation of the Court about Section 66A being outside the purview of Art. 19(2) of the Constitution is baseless.[44]

Section 66A allowed a chance to the actual victims of cyber annoyance to receive prompt remedy against data that is causing annoyance, or is insulting in nature. The repeal of this law has made Police like a toothless tiger while addressing the increasing threat of cyber intimidation. Section 66A undoubtedly had probable chances of being used indiscriminately but by taking down this law on the basis of its probable misuse, the judiciary has chucked out a redressal mechanism accessible to the people to fight cyber offences.

A democratic country like India where freedom of speech is vulnerable to misuse on many sensitive issues of political and religious nature, there should not be an absolute right without restrictions. We need to exercise our fundamental right to free speech and expression but on pragmatic ground i.e. within specified boundaries.

4.1.2. Why should the court have established regulatory guidelines?

The main drawback against Section 66A was its ambiguous wording which made it prone to misuse. This was one defect that the Court intended to rectify by taking recourse of the "lesser adopted" approach of taking down the provision in its entirety.

Rather than taking down the whole provision, an attempt should have been made to impart adequate substance and value to the ambiguous words within it by the Courts in order to fetch them under the ambit of Art. 19(2). The Court could have had regard to the

[44] Mr. Partha Pati – (Partner) and Ms. Sanjana Sinharoy (Associate) of Abhay Nevagi Associates, *Supra* note 4.

probabilities of setting up tests in order to ascertain what constitutes an offence within the meaning of Section 66A. It also prescribes the thresholds which reduces the probability of capricious application of the provision and at the same time also allows for the efficacious functioning of the reasonable restrictions under the Constitution.

The Additional Solicitor General while rationalizing the requirement of holding this provision pointed out that "If the medicine is bitter then we can have sugar after it instead of throwing the medicine. People have to take the medicine as it is for their benefit".

There have been various important cases in the recent few years where the Court has assumed the responsibility to issue guidelines in order to achieve efficient reading of the law in cases when it is identified as vague or susceptible to abuse.

The electronic records are more susceptible to being modified and tampered. The Apex Court in *Anvar P.V. vs. P. K. Basheer*[45] determined the evidential acceptability of electronic evidence within the meaning of Section 65B of the Act of 1872[46] to assure their origin and legitimacy by specifying comprehensive safeguards.

4.2 Misuse of Section 66A: Issues and Challenges

The IT Act, 2000 is the mother law of India in governing the use of 'computers, computer systems, computer networks and computer resources' as well as any data or content in the digital format. After the enactment of this law, legal recognition was extended to electronic contracts. This law has taken into account various prospects relating to electronic signatures, digital signatures, liability of the intermediaries etc. From October 17, 2000, when the IT Act, 2000 came into being till date, this piece of law has encountered quite interesting cases in the form of challenges. With the advent of time, the insufficiencies in the law came to be noticed. A number of difficulties were encountered

[45] (2014) 10 SCC 473).
[46] Indian Evidence Act, 1872.

in the enactment of the said law. The insufficiencies in the IT Act, 2000 to deal with the various emerging developments, disputes and cyber crimes, resulted in the outcry for modification in the cyber law of the country.

After analyzing the suggested recommendations, the Information Technology Amendment Bill, 2008 was brought before the Parliament, which was cleared by the two houses of Parliament. It is strange to notice that the Bill was cleared by the houses in haste, without negotiations in the two Parliamentary houses in December, 2008.[47]

The ITAA 2008 brought a number of sweeping modifications in the existing law dealing with Cyber crimes. The legislatures should undoubtedly be appreciated for their attempt in overcoming various defects in the Cyber law of the country yet it seems to be a mismatch of the nation's expectations with the consequences of the outcome. The most eccentric and astonishing facet is that these new amendments attempts to make the cyber law of the country a favourable legislation for cyber crime; - a law that deals softly with the cyber criminals, a law that prefers to motivate cyber criminals by reducing the amount of punishment they were charged with under the subsisting law; a law that prefers to extend far more exemption to cyber criminals as compared to the existing law; a law which in reality paves the path for cyber criminals and makes it easy for them to destruct the electronic tracks and the evidence in electronic form by allowing them bail and setting them free; a law which makes most of the cyber crimes determined under the IT Act, 2000 as a bailable offences where bail can be claimed as a right; a law that in all probabilities aims to pave path for the nation to become in future the probable capital of the world in terms of cyber crime.

4.2.1. Freedom of Expression:

Section 66A as it is enacted to punish persons when they send offensive messages is very wide in its terms, and evidently violates Article 19(1)(a) of the Indian Constitution. Just

[47] *Salient features of The Information Technology Act, 2000*, Govind Ramnath Kare College Of Law. Margao – Goa, available at http://www.grkarelawlibrary.yolasite.com/resources/LLMSY-IPR-2-Shanoor.pdf last accessed on March 14, 2016 at 5:39 PM.

because certain information is "grossly offensive" (Section 66A(a)) or because it causes "annoyance" or "inconvenience" which is known by the person sending it to be false (Section 66A(c)) cannot be regarded as strong reasons for restricting the fundamental right to free speech except in cases where it is expressly related to public order, decency or morality, and the other exceptions named under Article 19(2). Many people argue that the harm principle of John Stuart Mill gives a more proper framework of freedom of expression as compared to the offence principle of Joel Feinberg. The second part of Section 66A(c), that talks of misrepresentation, is adequate to battle cyber instances like spam and phishing, therefore the former part of the Section, stating annoyance or inconvenience caused is unnecessary.[48] Moreover, an explanation to Section 66A(c) if added to give clarity as to what "origin" implies in the provision then it would be helpful. Depending upon the meaning of that word, it would be convenient to restrict organizations and institutions from using proxy hosts under Section 66A(c), and also refrain an individual from taking use of a sender envelope which is different from the "from" address forming part of an e-mail[49]. Additionally, it will also prevent remailers, and such others forms of remaining anonymous online. This does not appear to have been intended by the legislators, yet the statutory provision is landing up with the same effect. Hence, there is a necessity of an extensive mechanism to confront such challenge and attain the desired purpose.[50]

4.3 Hicklin test and the limitations

There is a consideration about the legal standards that are used to identify obscenity. This part of the chapter concentrates on analyzing contentions for greater clarity in identifying

[48] Pranesh Prakash, *Breaking Down Section 66A of the IT Act*, The centre for internet and society, Published on November 25, 2015, available at http://cis-india.org/internet-governance/blog/breaking-down-section-66-a-of-the-it-act, last accessed on March 19, 2016 at 5:37 PM.

[49] A feature which a number e-mail providers including G-mail follow out to permit people to send e-mails from their work account although logged in to their personal account

[50] *Short note on IT Amendment Act, 2008*, The Centre for Internet & Society, available at http://cis-india.org/internet-governance/publications/it-act/short-note-on-amendment-act-2008 last accessed on March 14, 2016 at 10:39 PM.

the legal tests in order to determine obscenity and aims to figure out a more challenging proposal, that these legal tests and standards are insufficient to define obscenity uptil any amount of reasonable certainty. In that case, the moral desirability on subjective grounds is an option available with the legislature.

The legal standards regulating obscenity derive its roots from the famous case of *Ranjit Udeshi v. State of Maharashtra*[51] in which the Apex Court of India construed Section 292 of IPC, 1860. Although Section 292 illegalizes only printed materials, the definition of obscenity in the provision is referred in other similar provisions like Section 294, which outlaws obscene songs and acts. In the case of Ranjit Udeshi, the Apex Court of India followed the Hicklin Test which was primarily established by Justice Cockburn in *Regina v. Hicklin*.

The test places reliance on judging the content in terms of its propensity to demoralize or corrupt. This depravation is argued to arise from the data arousing an individual's mind to feeling of sexual desire. Additionally, the test does not judge from the point of view of an adult instead those minds that are prone to the "immoral" influences. Its purpose rests at infantilizing the adult mind. The Apex Court followed this test with certain modifications which suggest that, "community standards" is placed at an important relation in judging the lawfulness of any data. The case admitted that such salacity can be a component of a longer episode or song, the only restriction is to, "remain in the shadows". Now if we recollect the old Bollywood movie scenes then the shaking of bush etc. to symbolize love making was not unreasonable.

The test on its face appears vague and inexplicable and this appeared to be among the observation of the judiciary as well. They themselves spelled in the judgment that the "court must, therefore, apply itself to consider each work at a time." This observation in a sense repels against the need of giving appropriate notice to the writers and the artists.

This subjectivity came to be seen when the Apex Court, in *C.K. Kakodar v. State of Maharashtra*, employed the Hicklin Test. To judge the salacity in a story, its composition

[51] [1965] 1 S.C.R. 65

was analyzed, along with the main admirers, and the "artistic merit" in it. The Court while defining its approach stated that it was the duty of the court to determine if the story or book or any paragraph violate Section 292. It impliedly points out that it expects majorly educated and qualified judicial thinkers which aims to balance contending interests to judge if the content is not obscene, or has, "artistic merit". While casting away the petition, the Court held the argument in favour of the writer or the creator and referred the present-day ethical values of our Indian society that is fast changing in nature. Therefore, it was a suitable result supported by unsuitable reasoning.

4.3.1. Restricting the Hicklin test[52]

It is not the case that the Court has not felt the criticism of a temporary approach. The Apex Court had made an explicit mention of Udeshi's case when asked to judge the lawfulness of the security reviews of the movie. In *K.A. Abbas v. Union of India*, the petitioners argued that the compulsory authentication essential to any prior exposition by the Cinematograph Act was constitutionally invalid. The Court upheld the constitutionality of the law and also enacted certain guidelines in order to yield reasonable safeguards. However, in its next-to-last paragraph, it comprised some criticism which designated a minor but important recognition that the legislation ordinarily represented obscure obscenity criteria. Its recommendation repelled against any lenient construction of censorship, expressing that the Parliament had better legislate more, so as to distinguish obscene from the ethical values in an objective manner. When we will move forward, we will observe the restraints of law and that of judicial fluency to govern the arts.

In the meantime of five long years, the Apex Court in *Samaresh Bose v. Amal Mitra*, confronted its previous judgments and noticed a significant shift from it by aiming to restrict the employment of the Hicklin test. Instead, it attempted to establish the

[52] Apar Gupta, *"I know it, when I see it" – The limits of the law in finding illegality in obscenity*, myLaw.net, available at http://blog.mylaw.net/tag/hicklin-test/, last accessed on March 19, 2016 at 7:09 AM.

community criteria as the controlling factor to judge obscenity. In its interrogation, the Court primarily concentrated on certain projections prepared as a part of the community standards grouping after which it continued to a pure examination of obscenity or salacity under Section 292 as well as the Hicklin test. It was accomplished by the Court submitting that for the purpose of examining the crime of obscenity, the judiciary should better position themselves at the place of the creator or author to judge the formal and artistic merit, thereafter they can position themselves in place of an aspirant subscriber of all age groups, which includes not only children but also those who are prone to such influences. After this, the interrogation on the Hicklin test goes forward. This phased approach to judge unlawfulness seems compelling; nevertheless, its application expects immanent findings.

The disarray in criteria that are applicable to obscenity is apparent from the logical thinking of the Supreme Court in *Ajay Goswami v. Union of India*. The tests that have been systematically arranged are introduced as "broad principles" in the judicial rulings. These principles are not only broad, but its girth appears to have enhanced over time.

Although the judgment with regards to the legal aspects of its expression accurately take into account prior judgments, it also clarifies that India had various legal criteria to judge obscenity, allowing subjective approach and restricting sufficient notice unlawfulness to authors and artists.

4.3.2. Express adoption of community standards

The legal position appears to have experienced a striking change in the previous year, with the finding of the Apex Court in *Aveek Sarkar v. State of West Bengal*. The finding explicitly casts away the Hicklin test, expressing that the law is not proper. Instead of the test, it follows the leniently tailored "community standards" test. But the way in which this test is applied by the Court gives a reason for worry. If one goes through the decision, the Court re-examines the subject in dispute along with the social worth in the issue.

Once again, there may be a lenient outcome but the ruling would be simply betterment on Hicklin Test.

It is inappropriate to mention that the explicit acceptance in the Aveek Sarkar case of community standards test in not the reason for hope, though its assurance is limited. As it explicitly signifies the Apex Court’s recognition of the necessity of greater freedom to authors etc. but at the same time it preserves the need for “artistic merit”. The employment of community standards test is prone to criticism on various grounds, the major out of which is that it allows subjectiveness again and a value-based judgment by the judges.

In its two recent cases, the Delhi High Court by the reference of Aveek Sarkar case, denied to forbid the movie exhibition with the certificate of Censor Board. Although, in both the cases, the judiciary gave significant acceptance to the legitimacy of the movies based on the certificate issued. The first case is of *Nandini Tewari and Another v. Union of India* where the Court was required to forbid the display of a movie called Finding Fanny because of the name itself. The Court analyzed the meaning of the term “fanny” besides as it seemed in the dialogs of the movies that appeared in the past. It followed Aveek Sarkar Case along with the previous judgment to impliedly construct a “community interest” and an “anticipated danger” test.

The second case is of *Ajay Gautam v. Union of India,* where the High Court had to analyze the components of PK movie which as per the complaint of the petitioner made fun of Hindu religion and therefore should be forbidden to be projected. Over again, the Court essentially recognized the movie, to a great extent placing its reliance on the presence of the certificate from Censor Board about the movie’s nature which is parody. Although the case does not concern obscenity *prima facie,* the previous judgments on obscenity are bunched with free speech philosophy which includes the “clear and present danger” test.

4.3.3. The limits of the law

A follow up of the previous instance and judgments indicate that both the tests which were in discussion are not only likely to fail in certain stray circumstances but *prima facie* allow subjectivity and value-driven judgments. It is believed that any ethical harm of moral value that has its roots from movies or paintings or the like forms of art is deception. If such a point of view is not presented, even then it is understood to an extent that obscenity is an obscure concept that will emphasize on case to case basis, depending upon the facts of every case wherein the judiciary applying its judicially disciplined mind instead of the artistic one will analyze the probable illegitimacy.

Indian case laws have to a greater extent been aspired by the First Amendment law of the US Supreme Court but have failed to consider the objection of Justice Brennan in the case of *Paris Adult Theatre I v. Slaton*. Justice Brennan’s powerful and effective language lays apparent the limits of the law, which aims to strike a balance between any intended moral harm and the freedom of artists. He quoted the following to end it:

> “Of course, the vagueness problem would be largely of our own creation if it stemmed primarily from our [p84] failure to reach a consensus on any one standard.” He was forced to conclude with his 16 years of debate and experiment that, “the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and, on the other, the asserted state interest in regulating the dissemination of certain sexually oriented materials”. Any effort that is made to draw a boundary that is constitutionally acceptable on state power must resort to such indefinite concepts as “prurient interest,” “patent offensiveness,” “serious literary value,” and the like. The meaning of the above mentioned concepts inevitably vary with the experience, viewpoint, and even mannerisms of the individual defining them. “Although we have assumed that obscenity does exist and that we “know it when [we] see it,” Jacobellis v. Ohio, (STEWART, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.”

CHAPTER 5: PROVISIONS IN OTHER INDIAN STATUTES & JURISDICTIONS ABROAD

5.1 Section 66A: Relative provisions abroad.

5.2 Status after the repeal: Curbing the issue of online media.

5.3 Comparison with other statutes.

This Chapter talks about the relative provisions abroad which are in conformity with Section 66A or rather it is correct to say that Section 66A had its origin from a provision in the law of the UK. The chapter will also discuss the status after the repeal i.e., what would be the other laws to deal with the similar issues in the country and lastly compares the repealed provision with the provisions in other statute.

5.1 Section 66A: Relative provisions abroad

Section 66A was added by the amendment of 2008 in the Information Technology Act, 2000. The major extracts of Section 66A as it stood then are taken from Section 10(2) of the UK's Post Office (Amendment) Act, 1935 which states-

> *"If any person —*
>
> *(a) sends any message by telephone which is grossly offensive or of an indecent, obscene, or menacing character; or*
>
> *(b) sends any message by telephone, or any telegram, which he knows to be false, for the purpose of causing annoyance, inconvenience, or needless anxiety to any other person; or*
>
> *(c) persistently makes telephone calls without reasonable cause and for any such purposes as aforesaid;*
>
> *he shall be liable upon summary conviction to a fine not exceeding ten pounds, or to imprisonment for a term not exceeding one month, or to both such fine and imprisonment."*[53]

[53] UK's Post Office (Amendment) Act, 1935, Section 10(2).

Section 66A resembles to the three constituents of the above mentioned law of 1935, being clauses (b) and (c) united into a single clause (b) of s.66A in the Indian law, accompanied by a batch of fresh "purposes" added.

The grounds of disagreement between the two laws are worth examining.

Term of Punishment

The major difference is with regard to the term of the punishment. The 1935 Act provides for punishment of one month only whereas under Section 66A it is three years. The present equivalent legislation in the UK's regime is Section 127 of the Communications Act, 2003 and Section 1 of the Malicious Communications Act 1988, the penalty for both of which is up to 6 months' imprisonment or a maximum fine of £5000 or both.

"Sending" vs. "Publishing"

The Information Technology Act applies "send" in its provision, and not "publish". Provided that, only messages particularly aimed at another person would be included. Section 66A does not specify as to whom it has to be sent. In UK Communications Act, 2003 there is use of similar language, in contrast to the Malicious Communication Act, 1988 which specifies "sends to another person". The explanation to Section 66A(c) expressly applies the word "transmitted", that is broader in its meaning than "send".

Section 66A(c)

Section 66A(c) was added to the Information Technology Act by the amendment of 2008. It was cleared by the lower house on December 22, 2008, and the upper house a day after. It was done in answer to the consideration by the Standing Committee on Information Technology that any place for spam should not be there thus making it an anti-spam law.

Although, due to its ambiguous wording and vagueness it is anything but anti-spam provision.

The definition problems extend to the definitions of “electronic mail” and “electronic mail message” forming part of the explanation to the provision. These are so wide that almost anything conveyed electronically is considered as an e-mail whether or not they are aimed at specific receiver like an e-mail.

Section 66A(b)

Section 66A(b) of the IT Act has three main ingredient:

(1) the communication should be known by the sender to be false;
(2) it should be sent with the aim of ‘causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will’;
(3) it should be communicated persistently.

The problem that confronts is the various phrases that have been used in (2). The punishment for two different kinds of offences is all the same. This is more like saying that there is equal punishment for calling someone an idiot and insulting him or threatening to murder someone which is criminal intimidation.

Hence, we can conclude by this that the provision is not constitutionally valid.

Section 66A(a)

In Section 66A(a), the question that instantly arises is whether the information that is "grossly offensive" or "menacing" needs to be directed at someone in particular and be seen as "grossly offensive" or "menacing" by that person, or be seen by a 'reasonable man' test.

Roots of UK Law on Sending 'Indecent', 'Menacing', 'Grossly Offensive' Messages

Citing from the case of *DPP v. Collins* [2006] UKHL 40 [6]:

The roots of Section 127(1) of the Communication Act can be identified from Section 10(2)(a) of the Post Office (Amendment) Act, 1935, where sending any grossly offensive or indecent message by telephone was considered an offence. This subsection was produced as it is except the punctuation in Section 66(a) of the Post Office Act 1953. The same was again produced in Section 78 of the Post Office Act 1969, except for the substitution of “by telephone” in place of “by means of a public telecommunication service” and “a message or other matter” in place of “any message”. Section 78 was detailed but considerably restated in Section 49(1)(a) of the British Telecommunications Act, 1981 and was re-enacted in s.43(1)(a) of the Telecommunications Act, 1984 except for the substitution of "system" for "service". This provision was enacted with the same terms as Section 127(1)(a) of the 2003 Act, except for the change that it referred to "a public telecommunication system" rather than to a "public electronic communications network". Sections 11(1)(b) of the Post Office Act 1953 and 85(3) of the Postal Services Act 2000 made sending of prohibited articles by post an offence.

The UK's Post Office Act was overshadowed by the Telecommunications Act in 1984, which was again replaced by the Communications Act in 2003. Provisions from the 1935 Post Office Act were carried forward into the Telecommunications Act (s.43 on the "improper use of public telecommunication system"), and later on into s.127 of the Communications Act ("improper use of public electronic communications network").

Section 127 of the Communications Act states:

> *“**127. Improper use of public electronic communications network***
>
> *(1) A person is guilty of an offence if he —*

(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or

(b) causes any such message or matter to be so sent.

(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he —

(a) sends by means of a public electronic communications network, a message that he knows to be false,

(b) causes such a message to be sent; or

(c) persistently makes use of a public electronic communications network.

(3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

(4) Subsections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990 (c. 42))".

Presently, in UK there is a call for quashing of Section 127.

5.2 Status after the repeal: Curbing the issue of online media

Section 66A was much argued primarily as it was assumed to be infringing "freedom of speech" and secondarily it used "vague" phrases like 'grossly offensive, menacing character' etc. This provision was not enacted with the original Act of 200 but was added by an amendment and came into effect in 2009.

After the enactment of the provision, there have been many controversial cases booked under this section. Now as the law has been quashed, there is no need to celebrate its demise as there are still laws prevailing in other statutes to deal with these cyber crimes.

Section 505 of IPC, 1860:

It has been around 150 years that Section 505 of IPC has been in force. This provision since its enactment have been dealing with "public mischief" and provides punishment for the act which includes the 'making, publishing or circulation of statements, rumors or reports likely to cause "fear" or "alarm" to the public'. It also punishes such statements which are in all probability to instigate "any class or community of persons to commit any offence against any other class or community".

It also punishes statements comprising "rumor or alarming news which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities".

The penalty provided for is 3 years of jail and/or fine. Additionally, it is not bailable and cognizable. It means that a person can be arrested unwarranted and bail under this provision is not a right.

Section 506 of IPC, 1860:

Section 506 awards a punishment of 2 years and/or fine for 'criminal intimidation', which includes 'threatening to injure a person, his property or his reputation'. But if criminal intimidation includes attributing "unchastity" of a woman then the punishment may extend up to 7 years jail and/or fine.

Section 507 of IPC, 1860:

Section 507 punishes criminal intimidation by "anonymous communication" or a communication in which the name or address of the communicator is disguised. The punishment provided for under this provision is 2 years of jail. Like under Section 506, if

the anonymous communication relates to imputing unchastity of a woman, the punishment would be 9 years and/or fine.

Section 509 of IPC, 1860:

Section 509 awards punishment of jail of 1 year and/or fine in case of insulting the modesty of a woman or intruding upon her privacy. IPC also punishes for defamation under Section 499, which means harming the image of a person, or lowering his moral or intellectual character or lowering his character in respect of his caste or profession or causing it to be believed that his body is in a "lothsome" state. It is not only individuals who can be defamed, even companies, organizations, groups of people, dead people etc. can be defamed. The punishment for defamation is 2 years jail and/or fine.

Section 124 A of IPC:

Section 124 A punishes for the offence of sedition which relates to bringing into "hatred or contempt" the Government. It also includes attempts to "excite disaffection" towards the Government in India. The punishment under this provision is imprisonment for life.

Section 295A of IPC

Section 295A punishes statements that insult religious beliefs. The punishment is jail upto 2 years and/or fine. In many such cases **Section 298 of the IPC** may also apply. This section provides jail upto 1 year and/or fine.[54]

[54] Rohas Nagpal, *The Death Of Section 66A Of The IT Act.... Does It Change Anything*, Asian School of Cyber laws, Published on March 24, 2015, available at http://www.asclonline.com/blog/2015/03/24/the-death-of-section-66a-of-the-it-act-does-it-change-anything/, last accessed on March 19, 2016 at 3:36 PM.

5.3 Comparison with other statutes

As we have in the last two sub-chapters have discussed the provisions in other statutes both national as well as international, here we will briefly compare the language of law in the similar provisions with the help of a table.

Section	Term(s)/phrase(s) used in 66A	Term(s)/ phrase(s) used in similar sections
Section 66A	Punishment for sending offensive messages through communication service, etc.	Section 127, Communications Act, 2003, "Improper use of public electronic communications network"
Section 66A(a)	Any person who sends, by means of a computer resource or a communication device.	Section 1(1), Malicious Communication Act 1988, "Any person who sends to another person..."
Section 66A(a)	Grossly offensive	Section 1(1)(a)(i), MCA 1988; Section 127(1)(a), CA, 2003; Section 10(2)(a), Post Office (Amendment) Act, 1935*; Section 43(1)(a), Telecommunications Act 1984*; Section 20, India Post Act 1898
Section 66A(a)	Menacing Character	Section127(1)(a),CA, 2003
Section 66A(b)	Any information which he knows to be false	Section 1(1)(a)(iii), Malicious Communication Act, 1988 "information which is false and known or believed to be false by the sender"; Section 127(2)(a), CA, 2003, "a message that he knows to be false"

Section 66A(b) “purpose of...”	Causing annoyance	Section127(2), CA, 2003
	Inconvenience	Section127(2), CA, 2003
	Danger	
	Insult	Section 504, Indian Penal Code, 1860
	Injury	Section 44 IPC, 1860, "The word 'injury' denotes any harm whatever illegally caused to any person, in body, mind, reputation or property."
	Criminal intimidation	Sections 503 and 505 (2), IPC, 1860
	Enmity, hatred or ill-will	Section 153A(1)(a), IPC, 1860
	Persistently by making use of such computer resource or a communication device	Section 127(2)(c), CA, 2003, "persistently makes use of a public electronic communications network."
Section 66A(c)	Deceive or to mislead	

CHAPTER 6: THE AFTERMATHS OF THE REPEAL

6.1 Impact of the repeal.

6.2 Status of the existing cases under the provision.

6.3 Current provision dealing with the complaints.

The present case in discussion is being seen as a landmark judgment in the IT sector in recent times for preserving the fundamental right to freedom of speech and expression. The Apex Court in '*Shreya Singhal and Ors. vs Union of India'*, quashed Section 66A of the IT Act, 2000. The judgment which is being praised by the people and legal notabilities alike identified the provision of the law to be ambiguous, vague and constitutionally invalid on the basis of the restriction it imposed on the right to freedom of speech of Indian citizens.

Defects in Section 66A:

The Bench of the Judges mainly disapproved of the vague and ambiguously worded Section 66A which was susceptible to misuse and arbitrary application. Apart from this provision being ambiguously worded, the nature of offence under this provision was a cognizable one i.e., any person who committed a crime under Section 66A by 'sending grossly offensive messages' etc. could be detained by the Police Authorities without the need of any warrant to be produced adding to the already crucial drawback. What has made this provision of law susceptible to misuse was to leave the construction of the section which has already attained infamy for being ambiguously worded at the discrete or sweet will of the police. Thus, the overall effect of the judgment is to abolish the discretionary arrests made by the police on vague grounds.

6.1 Impact of the repeal

Where Section 66A has gathered much attention, the other provisions like Section 69A and Section 79 of the IT Act were also given due consideration in the judgment along with their rules. Section 69A along with the 'Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009' empowers the

Government to either restrict or order restriction to an intermediary[55] to prevent public access of any data or content 'generated, transmitted, stored', etc. in any computer resource on being satisfied about its content which in all probable circumstance to cause communal disturbance.

The Apex Court although did not quash these provisions of law rather maintained the constitutionality of the control granted to the Central government by virtue of S.69A to prevent access to website content when encountered with specified circumstances. Additionally, Section 79 was 'read down' so as to mean that the service providers or the intermediaries broadly shall be expected to prevent access to the content subject to the order of the Court or a notice issued by the Government agency. Where the Apex Court has withdrawn the requirement for intermediaries to accept self-policing and self-rule as to the nature of information, it has permitted the government to guide intermediaries to prevent access to such information which is likely to be "harmful/inciteful, etc." appearing on their websites.

The express contradiction that can be seen here is that Section 66A and Section 69A of the IT Act display vague grounds, although the action taken in both these cases is different in nature against obnoxious content. Due to the lack of clarity regarding the purview of Section 66A, the police had no parameter to determine the accuracy and hardship of the accusations made about the content being "annoying/offensive". The same logic if extended to 69A will leave the Court quiet, because if there is no specific guideline then how can a government official be required to accurately construe if the content is capable of disturbing the public order etc. However, where one provision i.e., Section 66A of the IT Act has been quashed for being unconstitutional due to its vagueness, the other provision i.e., Section 69A in spite of it being ambiguous has been upheld, thus questioning the impartiality of the Court's judgment.

The Apex Court realized its order to quash Section 66A of the IT Act necessary in order to prevent misuse and honour the fundamental right of free speech.

[55] E.g.: Facebook, YouTube or any internet/ telecom service provider.

The duality lies in the fact that by upholding Section 69A of the IT Act, this ruling goes on to provide authorities with an opportunity to "restrict free speech" by deciding the case on obscure reasons to filter any circulated content if the same is identified as objectionable.

6.2 Status of the existing cases under the provision

The repeal of Section 66A has affected many laws as discussed in the earlier part of the Chapter. It has also changed the scenario of all the complaints pending in the court of law under this provision and also the complaints that attempt to find their place in the court of law in the near future for the same type of offence.

After the repeal of the law, all the cases booked under Section 66A shall be withdrawn or adjourned. One cannot await the police authority to file an application before the court to withdraw the complaints that were booked under the repealed provision. However, those who were booked under Section 66A can go to the Court to ask for withdrawal of the case referring to the recent landmark judgment of the Apex Court.[56]

On the other hand, the government will notify aiming that the provision be removed from the legal books. This provision in the books of law will now be read as repealed following the Apex Court's verdict.

6.2.1. Should the cases under this provision be completely withdrawn?

Well, the answer to this question will be based upon the cases booked under the provision. It is to be noted that those cases which have been booked only under the repealed provision would be adjourned following the Supreme Court judgment but at the

[56] Vicky Nanjappa, *Supra* note 5.

same time the cases are such in which the provisions of IPC have also been invoked by the police then they will remain in existence and will be fought before the court.

6.3 Current provision dealing with the complaints

The judgment of the Apex Court quashing the draconian law is welcomed as a relief nevertheless it should not be viewed as an advantage to publish anything on the online media. This does not provide a person with the freedom to abuse but the cases can still be filed under IPC.

Section 499 and Section 500 of IPC is of relevance now to register cases. Section 499 talks about what defamation means and Section 500 dictates the punishment. Now, if anyone finds any post on social media or online forum to be offensive then the person can resort to Section 499 and 500 of IPC in the absence of Section 66A. The only difference this provision is going to make is that there is no chance of making arrest without warrant.

The first thing that the police will have to do after booking the case under this provision is to investigate and the courts will then identify the term of punishment. The judgment would be passed by the Court only after being satisfied about the defamatory nature of the material published. On this point, it stands apart from Section 66A as under Section 66A the police could arrest the person without warrant on his own discretion and satisfaction about the nature of content as offensive. Section 66A gave extraordinary power to the police to execute an arrest without investigation which will not be the position now.

CHAPTER 7: CONCLUSION

7.1 Need of a fresh law: A check into the reality.

7.2 Granting a right and preventing the misuse.

In the fifth chapter, we discussed the Statutes in other jurisdiction which are the counterpart of Section 66A. We also analyzed the other statutes in the Indian law that can be resorted to after the repeal of the draconian provision. In the last chapter we have seen the effect of the repeal. In this chapter we will analyze whether there is a need of a fresh law and will conclude with the suggestion of creating a balance between granting a right and preventing the misuse.

7.1 Need of a fresh law: A check into the reality

All the chapters we have discussed above have given us an insight of WHAT the law is, WHY was the provision enacted, WHEN did the issue arise, WHO was the reason behind it, HOW was it repealed and WHERE do we go now.

By the end of this chapter, we are able to answer all the 5 Ws but what about the 6th W. Where do we go now? Some of the people will believe that the other provisions in the IPC have already been referred to for filing the complaints but is this what we call the real solution? Do we not need a separate provision in the IT Act?

People of all age groups from children, youth to political people are all active on social media and these websites are used mostly for the purpose of entertainment and partly for obtaining information about any update on some social issue or the like. The fact that Facebook, Twitter etc. are used to pass time and point out at people rather than for some good cause. Though we have got right to free speech as a fundamental right but that does not imply harming other person's privacy. Therefore there were certain exceptions imposed under Art. 19(2) of the Constitution.

Before the repeal, Section 66A could be resorted to for providing punishment to such offences but after a lot of arguments as discussed in the earlier chapters in the Shreya Singhal case, this provision was quashed for its ambiguity and vagueness. Even after the

repeal, there are other provisions in IPC which deal with similar offences and the person can be accused under those provisions in the absence of Section 66A; but how far is it logical to resort to some other provision for some offence committed under a different provision.

The Supreme Court in its recent judgment observed that there is an 'intelligible differentia' present between communicating on internet and communicating through other modes and stated that the Government was right in enacting separate legislations to address offensive speech online. The Court observed that anyone can express their views on internet and internet did not operate in the form of an institution, and hence there arise a necessity for some extensive mechanism to place checks and balances over this mode.

The judgment of the Supreme Court was gladly accepted by the online media users as well as the global internet titans like Google because they were absolved from withdrawing any data from the internet after any complaint filed by any person after the authoritative declaration of this leading judgment. Also, they will have to remove the content only upon either court order or notice by government agency. The judgment in the end placed a difference between the internet from other forms of media and expressed the need for a fresh legislation which is suitable for its regulation.[57]

7.2 Granting a right and preventing the misuse

The incident that sparked the Petitioner to register this petition in public interest was the 'Palghar Case' in which two young girls were detained by the Police after one of them posted on Facebook showing disregard towards the bandh in Mumbai in the wake of a politician's death and the other girl liked it. This is a great irregularity of law where the

[57] Anitha Gutti, *Section 66A of IT Act Quashed and Freedom of Speech Recaptured*, Lawyerslaw.org, Published on April 2, 2015, available at http://lawyerslaw.org/section-66a-of-it-act-quashed-and-freedom-of-speech-recaptured/, last accessed on March 19, 2016 at 4:24 PM.

discretion of the construction of the words in the provision is left with the Police Authority.

The Court quashed the provision of law without realizing that the defect actually lied in the laws concerning the arrest and detention in the country which remains ambiguous. What was subjected to misuse was the free will of the Police in most of the cases wherein the police in the absence of guiding principles was unable to differentiate benignant free speech from an offensive statement. The unjustified detentions can be avoided when Police is enlightened about the procedure of exercising their discretionary power which arresting persons in cases of such kind.

The Court appears to completely overlook the guidelines issued by the Government to the Police with regard to Section 66A post “Shaheen Dada case” to prevent the recurrence of such situations. According to the guidelines issued, police authorities can proceed with an arrest subject to the permission received from an officer equivalent to the rank of Inspector General of Police in metro areas and DSP in district areas.

Notwithstanding the issue of the guidelines to guide the police officials about the method of addressing the complaints registered under Section 66A by a higher authority to examine if the essentials for the commitment of the offence are present, yet the Bench identified the provision to be susceptible to misuse.

When the Court found out the guidelines to be deficient, it could have formulated a descriptive procedure of carrying out an arrest or detention by the Police authority to guarantee efficient operation of the law. In cases, where the law misses direction, the judiciary should guide on the basis of the ‘settled principles of due process, justice and reason’ read along with the information provided about the case. When the provisions are vague and arbitrary and cannot be worked upon, it is the responsibility of the Court to settle down tests to examine if the essentials of an offence exist and to analyze the severity of the offense so as to adjudicate upon the matter in connection with the measures set by Our Constitution.

Similarly, in the present case the learned Additional Solicitor General had asked the Bench to ‘read into’ the provision in dispute that is Section 66A every subject matter forming part of Art. 19(2) so as to preserve the constitutional validity of Section 66A and also proposed specific principles to be read into the provision to make it executable. However, the Court deemed it proper to repeal the provision in its entirety without allowing for a replacement that could be resorted to in cases of cyber crimes. Any law cannot be anticipated to predict each and every contingency regarding the provision being put to misuse and the discretion of Administrative authorities being used in arbitrary manner. The most that the court can do is formulate a framework to symmetrically allow free speech and at the same time assuring that it is not misused or abused, keeping in mind the fact that misuse of free will by the authority is not excusable every time.

The Court in this case, overlooked the purpose of enacting Section 66A that is because the advancement of internet and the people’s inclination towards social media increased, additionally, freedom of speech is used to subvert the rights of other people. Quashing the provision for its vagueness has ended a legal relief to the people for ensuring protection on online forum. The Court should have drafted specified directions in conformation with the ethical values of the current society to restrict abuse of electronic communication and injury to the reputation of an individual on public forum. Phrases like ‘annoyance’, ‘offensive’, ‘menacing’, are of subjective nature, and cannot be confined to an accurate definition but descriptive guidelines laid down by the Court every now and then which would be helpful in laying down the level of ‘annoyance’, ‘offensive’, ‘menacing’ which will decide the objectionable component of the content required under the section.

The Court being called as independent and impartial, free from any political influences can preferably recommend an elaborative mechanism which efficiently creates a balance between the fundamental right to freedom of speech and expression and at the same time securing the right to one’s privacy and also the image by suitably opposing the unwarranted contents online.

The purpose behind the enactment of section 66A and the invariable need for supervising its abusive effects of free speech have to be kept in mind by the Court and at the same

time also assuring overinflated and false accusations with absolute interests are prevented. Keeping in mind the promptitude and scope with which any online information gets public in this era, the Court taking this case as an opportunity should have responded to the question of the classes and types of freedom of speech and expression that should be fairly restricted.

Conclusion:

Every law is susceptible to exploitation. The mere probability of being abused should not be regarded as a strong ground for quashing or taking down a substantive provision of law in its entirety because nearly all other law will be prone to repeal by the same philosophy. Construing the right to freedom of speech in harmony with the right to secure one’s dignity as a basic right, the Court could have used this case as a suitable opportunity to suggest a workable difference between securing rights and at the same time restricting them.

BIBLIOGRAPHY:

BOOKS:

1. Karnika Seth, Computer, Internet and New Technology Laws 382-383 (LexisNexis, 2013 Edition).
2. Apar Gupta, Commentary on Information Technology Act, Lexis Nexis Butterworths Wadhwa Nagpur 2nd Edition 2011.

STATUTES AND REGULATIONS

1. The Constitution of India, 1950
2. Advisory guidelines on implementation of Section 66A of the IT Act, 2000, Government of India, Ministry of Information Technology
3. British Telecommunications Act, 1981
4. Indian Evidence Act, 1872
5. Information Technology Act, 2000
6. Information Technology Amendment Act, 2008
7. Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009
8. Malicious Communications Act, 1988
9. Post Office (Amendment) Act, 1935
10. Post Office Act, 1953 (reproduced in 1969)
11. Post Office Act, 1969
12. Postal Services Act, 2000
13. Telecommunications Act, 1984
14. The Indian Penal Code, 1860

15. U.K. Communications Act, 2003
16. UK's Post Office (Amendment) Act, 1935.

ARTICLES AND PUBLICATIONS

1. Amit Choudhary & Dhananjay Mahapatra- ‘Supreme Court strikes down Section 66A of IT Act which allowed arrests for objectionable content online’, The Times of India, Published on Mar 24, 2015.
2. Neeti Gupta, ‘Freedom of Speech Restored- 66A of IT Act Struck Down - A Case Commentary’, Research Paper of Indian Journal of Applied Research, Volume: 5 | Issue: 5 | May 2015 | ISSN - 2249-555X.
3. Mr. Partha Pati – (Partner) and Ms. Sanjana Sinharoy (Associate) of Abhay Nevagi Associates, ‘Section 66A: Its repeal and its after-effects’, Legally India published on April 24, 2015.
4. Vicky Nanjappa, ‘Life after Section 66A of the Information Technology Act’, oneindia, Published on Wednesday, March 25, 2015, 10:40 [IST].
5. Anuj Bhansal and Shubham Chaudhury, ‘Momentous Victory or Pillow Sham: A Critique on Shreya Singhal V. Union of India.’
6. Shivprasad Swaminathan and Neha Tayshete, ‘Saving free speech from the police’, The Hindu, Updated November 26, 2012 01:19 IST.
7. Akansha Prakash, ‘Sec 66A- An exaggeration of your rights end where my nose begins’, Live Law, Published on February 10, 2015.
8. Jai Anant Dehadrai, ‘Why PM Modi should repeal Section 66A of the Information Technology Act, 2000’, The Times of India, Published on January 20, 2015 at 2:26 PM IST.
9. ‘IT ACT 2000 – PENALTIES, OFFENCES WITH CASE STUDIES’, Network Intelligence.
10. Legislative History of Information Technology Act -2000 (ITA 2000)’, Naavi.org.
11. Dhananjay Mahapatra, ‘Centre defends Section 66A of IT Act’, TNN (Jan 11, 2013, 03.06 AM IST)

12. Apoorva Shankar, ‘A background to Section 66A of the IT Act, 2000.’
13. Neeraj Aarora, ‘Cyber Imposter created fake profile of President of India.’
14. ‘Section 66A of IT Act: Here's all you need to know,’ DNA (Published March 24, 2015, 09:41am)
15. All you need to know about Section 66A of the IT Act,’ TheHindu (Published April 13, 2015, 09:45 AM)
16. Utkarsh Anand, ‘Section 66A: Such is its reach (that) its chilli.ng effect on free speech would be total’, indianexpress (Published March 25, 2015, 10:57 AM)
17. Gautam Bhatia, ‘The unconstitutionality of S. 66A and how Shreya Singhal broke new ground in India’s freedom of speech jurisprudence’, myBlog.net.
18. ‘Like it or not, comment is not free’, TheHindu (Published November 21, 2012)
19. REGULATING INDIAN CYBERSPACE – THE BATTLE FOR ‘CONTROL’ IN THE NEW MEDIA VERSION 2.0’, Indian Lawyer 250.
20. Anja Kovacs, ‘Regulating social media or reforming section 66A? Our recommendations to the Law Commission of India’, Internet democracy project.
21. ‘Salient features of The Information Technology Act, 2000’, Govind Ramnath Kare College of Law. Margao – Goa
22. Pranesh Prakash, ‘Breaking Down Section 66A of the IT Act’, The centre for internet and society, Published on November 25, 2015.
23. ‘Short note on IT Amendment Act, 2008’, The Centre for Internet & Society.
24. Apar Gupta, ‘“I know it, when I see it” – The limits of the law in finding illegality in obscenity’, myLaw.net.
25. Rohas Nagpal, ‘The Death Of Section 66A Of The IT Act.... Does It Change Anything’, Asian School of Cyber laws, Published on March 24, 2015.
26. Anitha Gutti, ‘Section 66A of IT Act Quashed and Freedom of Speech Recaptured’, Lawyerslaw.org, Published on April 2, 2015.