

Online hate speech in post 66A scenario: Do we need a new Law?

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Introduction

'We all human beings-must be free and able to express ourselves, and to seek, receive and impart information and ideas, regardless of frontiers.' This principle is first not just in order but in importance. It is the basic principle. Freedom of expression is not merely one among many freedoms. It is the one upon which all others depend. The power of speech is what distinguishes us from other animals and from any machines yet invented. If we cannot express our thoughts and feelings, we can never realise our full humanity. If we cannot hear and see those other human beings, we will never understand what it means to be them. The richer and more open our interactions with others, the better we will understand ourselves as well, for 'who knows one, knows none.'¹ Need for Freedom of speech and Expression in a democratic country has been well justified as such: ".....the only kind of security system that can preserve a free government-one that leaves the way wide open for people to favour discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us."² The right to freedom of speech and expression has been described as "the touchstone of individual liberty"..... the matrix, the indispensable condition of nearly every form of freedom.³

The enormous significance of Right to Freedom of Speech and Expression in a democracy needs to be reemphasized here again. Shastri J. of the Supreme Court observed in Romesh Thapar's case⁴ ".....freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular Government, is possible."

¹ Observation by the German philologist and comparative religionist Max Muller, quoted in Prothero 2011,16; cited in Ash Garton Timothy (2016), Free Speech, Ten Principles for Connected World, Atlantic Book, London, p. 119.

² Yates Vs. U.S. (1958) 354 US 298 (344), cited in Durga Das Basu (2015), Commentary on the Constitution of India, 9th Edition, p. 3664.

In Union of India Vs. Motion Picture Association,⁵ the supreme Court observed thus: " Free Speech is the foundation of a democratic society. A free exchange of ideas, dissemination of information without restraints, dissemination of knowledge arising of different viewpoints debating and forming one's own views and expressing them, are the basic ideas of a free society. This freedom along makes it possible for people to formulate their own views and opinions on a proper basis and to exercise their social, economic and political rights in a free society in an informed manner. Restraints on this right have been jealously watched by courts." Democracy is by the people, of the people and for the people. It is imperative in a democracy to make constant endeavours to educate people by letting them unfettered opportunities to discuss and debate without fear and apprehensions on all the matters under the sky. An informed citizenry is a sign qua non for successful running of any democracy. Justice Bhagwati in Maneka Gandhi case⁶ has apply observed thus: " Democracy is based essentially on free debate and open discussion, for, that is the only corrective of Government, action in a democratic set up. If democracy means Government of the people, by the people, it is obvious that every citizen must be entitled to participate in the democratic process, and in order to enable him to intellectually exercise his right of making a choice, free and general discussion of public matters is absolutely essential." In a little more emphatic way, the Supreme Court in a later judgment said:⁷ " The freedom of speech is the bulwark of democratic Government. This freedom is essential for proper functioning of democratic process. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right," a natural right and the like." Freedom of expression is recognised as a universal human right in Article 19 of the Universal Declaration of Human Rights and the same article of the subsequent. International Covenant on Civil and Political Rights Article 19 speaks of freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers of speech and expression has been enshrined in the Indian Constitution in Article 19 (1) (a) which states as follows:

"Article 19. Protection of certain right regarding freedom of speech, etc.-

(1) All citizens 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 sub-clause in the

³ Palco Vs. Connecticut, 302 US 319 (1937), cited in Durga Das Basu (2015), Commentary On The Constitution of India, 9th Edition, p. 3664.

⁴ Romesh Thapar vs. State of Madras, AIR 1950 SC 124. AIR 1999 SC 2334.

⁵ Maneka Gandhi Vs. Union of India, AIR 1978 SC 597.

⁷ In re Ramlila Maidan Incident, (2012) 5 SCC 1

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." The Preamble of the Constitution of India inter alia speaks of liberty of thought, expression, belief, faith and worship. It also says that India is a sovereign democratic republic. It cannot be over emphasized that when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme.⁸ Here, it is pertinent to know about the span of right to freedom of speech and expression under Article 19 (1) (a). Whether this right is confined to print medium, including freedom of the press only or it encompasses other mediums also. The questions was well responded by the Supreme Court in Secretary, Ministry of Information & Broadcasting, Government of India Vs. Cricket Association of Bengal.⁹ The Court observed thus: "The freedom of speech and expression includes the right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debate on social and moral issues. It is the best way to find a trust model of anything, since it is only through it that the widest possible range of ideas can circulate.The right to communicate, therefore, includes right to communicate through any media that is available, whether print or electronic or audio-visual, such as advertisement, movie, article, speech etc." Thus, for the first time in this case, it was clarified that communication through any medium, print, electronic, audio-visual etc, fall into the purview of right to freedom of speech and expression under Article 19 (1) (a) of the Constitution.

The Present age is rightly called the "Age of Internet". India is among top five internet- user countries. The internet culture has brought a paradigm shift in the field of communications. The internet has no boundaries and its reach is global. Anything posted on the internet can go viral worldwide and reach millions in no time. By the medium of internet, rumours having a serious potential of creating a serious social disorder can be spread to trillions of people without any check which is not possible in case of other mediums. Internet can be accessed by literate and illiterate both since one click is needed to download an objectionable post or a video. Further, no pre-censorship is possible in case of internet in contrast to television serials and movies and each individual is publisher, printer, producer, director and broadcaster of the content without any statutory

regulation. Moreover, in case of an internet, morphing of images, change of voices and many other technologically advance methods to create serious potential social disorder can be applied. By the very nature of the medium, the width and reach of internet is manifold as against newspaper and films. In case of an internet a person abusing the internet, can commit an offence of any place at the time of his choice and maintaining his anonymity in almost all cases. Thus, taking into consideration all these views and other reasons, the then UPA Government at the Centre introduced a new Section 66-A in the Information Technology Act, 2000. 'The fact is that 66A was Knee-jerk legislation. Almost as thoughtless and compulsive as a netizen's derisive tweet. On December 22, 2008, the penultimate day of the winter session, the UPA government had got seven bills passed in seven minutes in the Lok Sabha. One of the bills was to amend the IT Act. It went to the Rajya Sabha the next day, when members were hurrying to catch their trains and flights home for the year-end vacation. They just okayed the bill and hurried home. The argument then was that there was no need to discuss the bill as it had been examined by a standing committee of Parliament. Indeed, it had been. But, the committee, headed by Nikhil Kumar of the Congress, had met only for 23 hours and five minutes. Nine of its 31 members had not attended a single meeting.'¹⁰ Besides, there were some past incidents which paved the way for introducing this Section 66A in a hurry. Shaheen Dhada from Palghar simply commented on Facebook about a Shiv Sena Bandh on the death of Bal Thackeray. Her friend Rinu Srinivasan liked it. The two teenagers were bundled into a police station. Again, Jadavpur University Professor Ambikesh Mahapatra was picked up by the police in Trinamool Congress- ruled West Bengal in April 2012, for posting a cartoon ridiculing Chief Minister Mamata Banerjee. Vicky Khan, 22, was arrested in Rampur, UP, for a Facebook post on Samajwadi Party leader Azam Khan. The Uttar Pradesh Police also arrested dalit writer Kanwal Bharti from Rampur for criticising the U.P. Government's suspension of IAS Officer Durga Shakti Nagpal in 2013.¹¹ A Goa Facebook user was issued summons for a post warning about a 'second holocaust' if Narendra Modi was elected prime minister¹² and a Karnataka MBA student arrested for an MMS that had Modi's face morphed into a corpse.¹³ In Uttar Pradesh alone, Section 66A was invoked in 399 cases.¹⁴ while at least 30 people in AIADMK ruled Chennai have been booked under Section 66A.¹⁵ The Supreme Court in Shreya Singhal Vs. Union of India (2015), ultimately set aside Section 66A of the IT Act, which says any person who sends offensive, menacing or false information to cause

⁸ Nariman J. in Shreya Singhal Vs. Union of India, (2015) 5 SCCL, Para 8.

⁹ AIR 1995 SC 1236.

¹⁰ Kumar Smarika, (April 5, 2015), The Supreme Court has said that Speech can be censored when it falls under the restrictions provided under article 19 (2), The Week (Cover Story).

¹¹ Ibid.

¹² Nagvenkar (2014), Cited in Gautam Bhatia (2016), Offend, Shock, or Disturb, Oxford University Press, New Delhi, p. 190.

¹³ Saikia (2014), Ibid.

¹⁴ Vikram Sood (30.3.2015), The Unintelligent 66A, The Economic Times.

¹⁵ Smarika Kumar (April 5, 2015), The Supreme Court has said that speech can be censored when it falls under the restrictions provided under article 19 (2), The Week.

annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, or uses email to trouble or deceive him/ her about the origin of such messages, can be punished with a jail term upto three year and a fine. The Court also struck down section 118 (d) the Kerala Police Act, which says any person who makes indecent comments by calls, mails, messages or any such means causing grave violation of public order or danger can be punished with imprisonment upto three years or a fine not exceeding Rs. 10,000, or both. This Judgment is seen as a landmark Judgment. It is regarded as heralding the birth of a new free speech jurisprudence and restoring the public space for dissent in India. Now, a very pertinent question arises here. Do we need another law to replace Section 66A of the IT Act or the provisions of the Indian Penal Code and other Acts, if any will suffice? Taking into consideration, the all-pervading influence of the Internet, is there a real necessity to have such law as contained in Section 66? Or if we need such law, what should be the safeguards, precisely in the light of the above quoted Supreme Court Judgment. This question needs to be probed and answered here.

Constitutionality of Section 66A:

Section 66 A of the Information Technology Act was not in the Act as originally enacted, but came into force by virtue of an Amendment Act of 2009 with effect from 27.10.2009. The Section is as such:

"66-A Punishment for sending offensive messages through communication service, etc.- Any person who sends, by means of a compute 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 of 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 attachment in text, image, audio, video and any other electronic record, which may be transmitted with the message." Here, it is of some significance to note that the genealogy of this section may be traced back to section 10 (2) (a) of

the U.K. Post Office (Amendment) Act, 1935, which made it an offence to send any message by telephone which is grossly offensive or of an indecent, obscene, or menacing character. This Section was substantially reproduced by Section 66 of the UK Post Office Act, 1953. This Section in turn was replaced by Section 49 of the British Telecommunication Act, 1981 and Section 43 of the British Telecommunication Act, 1984. In its present form in the UK it is Section 127 of the Telecommunication Act, 2003 which is relevant and which is as follows-

127. Improper use of public electronic communication network.

- (1) A person is guilty of an offence if he-
 - (a) sends by means of a public electronic communication network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
 - (b) cause any such message or matter to be sent.¹⁶

As discussed earlier, the Supreme Court of India declared Section 66A unconstitutional in a landmark judgment of Shreya Singhal Vs. Union of India in the year 2015. The main grounds of this Judgment are as under:

(i) Infringement of Fundamental Right to Free Speech and Expression [Art. 19 I(a)]

It was alleged by the petitioners that Section 66A infringes the fundamental right to free speech and expression and is not saved by any of the eight subjects covered in Article 19 (2). According to them, the causing of annoyance, inconvenience danger, obstruction, insult, injury, criminal intimidation, enmity hatred or ill-will are all outside the purview of Article 19 (2). The Apex Court observed thus:

"20.....It is clear, therefore, that the petitioners are correct in saying that the public's right to know is directly affected by Section 66A. Information of all kind is roped in- such information may have scientific, literary or artistic value, it may refer to current events, it may be obscene or seditious. That such information may cause annoyance or inconvenience to some is how the offence is made out. It is clear that the right of the people to know- the market place of ideas- which the internet provides to persons of all kinds is what attracts section 66A. That the information sent has to be annoying, inconvenient, grossly offensive etc, also shows that no distinction is made between mere discussion or advocacy of a particular point of view which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of state etc. The petitioners are right in saying that Section 66A is creating an offence against persons who use the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and

¹⁶ cited in Shreya Singhal Vs. Union of India, (2015) 5 SCC 1, (footnote to para 1)

expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66A."

(ii) Article 19 (2):

The Petitioners' claim was that Section 66A has no proximate relation with any of the eight subject matters contained in Article 19 (2). However, the State's claim was that Section 66A can be supported under the heads of public order, defamation, incitement to an offence and decency or morality.

(a) Public Order:

The Court held that:

"35.....It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. The Section makes no distinction between mass dissemination and dissemination to one person. Further, the Section does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent- there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquillity. On all these counts, it is clear that the Section has no proximate relationship to public order whatsoever. The example of a guest at a hotel 'annoying' girls is telling- this court has held that mere 'annoyance' need not cause disturbance of public order Under Section 66A, the offence is complete by sending a message for the purpose of causing annoyances, either 'persistently' or otherwise without in any manner impacting public order."

(b) Incitement to an Offence:

The Court held thus:

" 44. Equally, Section 66 A has no proximate connection with incitement to commit an offence. Firstly, the information disseminated over the internet need not be information which "incites" anybody at all. Written words may be sent that may be purely in the realm of "discussion" or "advocacy" of a "particular point of view". Further, the mere causing of annoyance, inconvenience, danger etc, or being grossly offensive or having a menacing character are not offences under the Penal Code at all. They may be ingredients of certain offences under the Penal Code are not offences in themselves. For these reasons, Section 66A has nothing to do with "incitement to an offence".

(c) Vagueness:

The Court relying upon the Indian and the English case laws and drawing analogies to some provision of the Indian Penal Code and the Information Technology Act, held that:

"82..... If Judicially trained minds can come to diametrically opposite conclusions on the same set of

facts it is obviously that expressions such as "grossly offensive" or "menacing" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66A and the authorities who are to enforce Section 66A have absolutely no manageable standard by which to book a person for an offence under Section 66A. This being the case,, it is clear that Section 66A in unconstitutionally vague."

(d) Chilling Effect and over breadth:

The Court held that:

"83. Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech..... In point of fact, section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech could be total."

(e) Article 14:

Answering the question of differentiation in between the print, and broadcast medium and the internet, the Court thus held:

"98We make it clear that there is an intelligible different in differentiation between speech on the internet and other mediums of communication for which separate offences can certainly be created by legislation. We find, therefore' that the challenge on the ground of Article 14 must fail."

The Supreme Court in the above-mentioned case, thereafter, also held Section 118 of the Kerala Police Act. unconstitutional on the same grounds as enumerated above.

Post Section 66A Scenario

An expert committee was constituted by the Centre after the Supreme Court struck down the controversial Section 66A of the Information Technology Act in 2015. The Committee, headed by former Law Secretary and Lok Sabha Secretary General T.K. Viswanathan, submitted its report to the Union Home Secretary in the last week of September, 2017. The expert Committee, in its report, has stated that" representatives of the Ministry of Women and Child Development stressed upon re-introducing a renovated Section 66A within the IT Act, incorporating suitable changes." But, it goes onto say, other members of the committee advocated the line that with the IT Act being "Commercial in nature", it

was important for an Act invoking punishment to amend the Indian Penal Code.¹⁷

The Committee's recommendations include:

- (1) Prohibiting incitement to hatred.

Amend IPC Section 153C to include in communication "spoken or written words, signs, visible representation, information, audio, video or combination of both, transmitted, retransmitted through any telecommunication service, communication device or computer resource."

Punishment: Up to two years or fine of Rs. 5,000 or both.

- (2) Causing fear, alarm or provocation of violence in certain cases:

By amending IPC section 505 A, punishment of any person or group of persons who intentionally, on ground of religion, race, caste or community, gender, sexual orientation, place of birth, residence, language, disability or tribe, uses any means of communication to communicate. Punishment: Up to a year, or Rs. 5000 or both.

- (3) Amendment to Code of Criminal Procedure, 1973.

Add section 25B and 25C- creating the post of a State Cyber-crime coordinator and District Cyber Crime Cell, respectively.

- (4) Amendment to IT Act, 2000:

Amendment to Section 78 allows a police officer not below the rank of sub-Inspector to investigate any offence under this Act (report specifies young police officers, directly recruited as SIs, better equipped and trained to investigate cyber offences).

A Critical Appraisal of the Recommendations

(a) In *Shreya Singhal*, the Court found that not defining terms such as "grossly offensive" or "menacing" fell foul of Article 19(1) (a), due to the wide scope for discretion it allowed and the consequential chilling effect on freedom of speech. Accordingly in the draft formulations of Section 153C and 505A, only online speech that relates to religion, race, caste, community, sex, gender, place of birth residence and language falls within the purview of the proposed section.

(b) In relation to Section 153C (a) it is critical to note that the formulation proposes to regulate threatening words on any of the grounds mentioned above only if the person used them with the intent to cause fear of injury or alarm.

(c) In addition, a high bar has been created to ensure that speech that is not "gravely threatening" is not treated as an offence under this provision.

(d) Further, the proposed Section 153 c (b) can be distinguished from the erstwhile Section 66A which was struck down for being vague as it criminalised offensive and annoying speech. The proposed formulation, on the other hand, clearly defines the kind of speech that would constitute an offence.

(e) Accordingly, the proposed section 153C. Criminalises online speech only when it both advocates hatred and causes the incitement of an offence.

(f) This formulation requires that the speech be highly disparaging, abusive or inflammatory, and is made with the intention to cause fear or injury or alarm or that the speech be gravely threatening or derogatory and made with the intention to provoke violence. Thus, the online speech having potential to affect social stability or disturb public order is liable to be penalised. Here is a word of caution- this should be ensured that there is no chilling effect on online speech.

(g) Section 505A, refers to "highly disparaging, indecent, abusive, inflammatory, false or grossly offensive information" and "derogatory information." These are extremely broad terms, not having any guiding jurisprudence within Indian or international law, which may be helpful in restrictively interpreting them. It is important to note the similarities between this provision and the repealed section 66A of the Information Technology Act, which sought to criminalise speech that was "grossly offensive; having "meaning character", or "causing annoyance..... danger insult... enmity, hatred or ill will."

Conclusion

Democracy is such system of government which requires a requisite level of informed and aware citizenry. It takes a long time to entrench herself in a country. However, in our country, democracy is a nascent one. It is gaining momentum slowly but steadily. Simultaneously, we are passing through turbulent times. The sudden growth of terrorism is one of the significant indicator of the growing turmoil and unrest within the society Hate Speech is the expression of these symptoms. People are expressing their anger and discontentment through unpalatable words using the most potent medium of the present century i.e. internet. It appears that people are running short of patience. This sudden splurge of hate speech has raised concerns among lawmakers and in order to curb this vicious tendency, new laws are coming up in the statute books. Section 66A of the Information Technology Act, 2000 is such an example which tries to curb hate speech online. But the cause of concern is that

¹⁷ Seema Chishti (October 6, 2017), Prescription post Section 66A: 'Change law to punish hate speech online', The Indian Express.

such laws are made as a result of knee-jerk reaction of the law-makers. No proper thought on the subject matter is being accorded while legislating a new law. As a consequences exercising the power of judicial review, our courts are deciding against such laws. In the recent times, our Apex Court has in a landmark judgment in *Shreya Singhal Vs. Union of India* (2015) has declared Section 66A of the IT Act as 'unconstitutional'. Govt. of India, since then has constituted an expert committee, headed by former Law Secretary, Mr. T.K. Vishwanathan to study and suggest the further course of action in the aftermath of *Shreya Singhal* Judgment. The expert committee has given its recommendations now. These recommendations, prima facie suggest, some moderation from the old law, yet it seems that letter and spirit of the Apex Court's order has not been heeded. For example, the language of amended section 505A & 505B still suffers from vagueness. Section 505 A contains the words like "highly disparaging, indecent, abusive, inflammatory, false or grossly offensive information" and "derogatory information" which are extremely broad terms, not having any guiding jurisprudence within Indian or international law. They also remain exceedingly broad and contrary to the requirement that restrictions on speech must be couched in the narrowest possible terms. Even "retweeting" has also not been exempted in the new provisions. The proposed formulations penalise online speech having potential to affect social stability and disturb public order. In addition, the speech itself must be gravely threatening, advocating hatred or abusive and inflammatory. But these considerations, while implementing the law on ground, may very well lead to chilling effect on online speech. Over-broadness of restrictions on speech are likely to be dangerous for free speech. There is no mechanism provided in the recommendations to ensure freedom of speech and expression as suggested in the Supreme Court's judgment in *Shreya Singhal's* Case. Therefore, the Central Government must examine these recommendations and make a close scrutiny in the light of observations made in the Apex Court's judgment before making fresh amendments in the concerned Acts. Freedom of Speech and Expression is a right of utmost importance enshrined in our Constitution which should not be tempered with at any cost. We should always keep in mind the following passage from the judgment of European Court of Human Right in the case of *Handyside V. United Kingdom* (1976) which is worth quoting here: "[The freedom of expression] is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as matter of indifference, but also to those that offend, shock or disturb...."¹⁸

¹⁸ Cited in Bhatia Gautam (2016), *Offend, Shock or Disturb, Free Speech under the Indian Constitution*, Oxford University Press, New Delhi.