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Section 66A: A Dead Law that still Breathes

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ABSTRACT

This paper particularly deals with Section 66A of the Information Technology Act, 2000, which further discusses the history, the enactment of this provision and how it was struck down by the landmark judgement of the Supreme of Court of India Shreya Singhal v. Union of India. Moreover, it also discusses how the Supreme Court tackled the opposition faced by India because of some suggested provisions by several countries like Nigeria, Georgia, the U.K. and many more. And what is the significance of the freedom of speech and expression on the internet. This paper additionally talks about various other landmark judgements related to the Right to freedom of speech and expression and how it has been violated by Section 66A of the IT Act, 2000. The author has also discussed the reasons for the poor administration of the judicial declaration and solutions as to how it could be resolved. It tries to make understand the readers the point of view of various eminent authors and reads out various reports by The Economic Times and Special Rapporteur. Apart from these provisions Article 19 of the Universal Declaration of Human Rights has also been discussed in the paper.

In a nutshell, it describes how important the Right to freedom and expression is, and any inconsistencies with the said right would ultimately lead to the elimination of it from the book of law.

Keywords: Section 66A, Information technology Act 2000, Right to freedom of speech and expression.

I. INTRODUCTION

The Information Technology Act of 2000 aims to give legal recognition to transactions conducted through electronic data exchange and other electronic communication channels, which are colloquially known as “electronic commerce”.² It facilitates the electronic filing of documents with government agencies. There have been amendments in various statutes, for example, the Indian Penal Code, the Banker’s Book Evidence Act, of 1891, the Indian Evidence Act, of 1872, and the RBI Act, of 1934. Further, an amendment was made in the year 2008, to include cyberterrorism, child pornography etc. It extends to the whole of India as well as out of

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² MINISTRY OF LAW, JUSTICE AND COMPANY - Ministry of Electronics and ..., <https://www.meity.gov.in/writereaddata/files/itbill2000.pdf>.

India, and also applied to any offence or contravention. However, it is not applied to documents or transactions specified in 1st schedule. This Act was commenced on 17th of October, 2000. This act tends to recognize electronic records, digital signatures, and activities carried by electronic means, for example, e-mails.

Many of the Indian Laws continue to be implemented in the country in spite of being declared as unconstitutional by the judiciary. We are well aware that the judiciary is the curator or guardian of the constitution, so any law that is made in the country whether it is constitutional or whether it complies with the provisions of the constitution or not is decided by the judiciary and it is done by the mechanism called judicial review. Under judicial review, the judicial system of the country decides whether a law that is existing in the country is compliant with the provisions of the Constitution or not. Consequently, when a law is declared as unconstitutional by the judiciary it should not be implemented in the country, as it does not comply with the provisions of the Constitution. But in ground zero many laws in the country that are already declared as unconstitutional still prevail and still continue to be implemented in the country.

II. JOURNEY OF SECTION 66A

One of such example is Section 66A of the Information Technology Act, 2000. On 22nd December, 2008 Information (Amendment) Bill was passed in Lok Sabha and then the very next day on 23rd of December, 2008 it was passed in Rajya Sabha. Soon after this, on 27th October 2009 Information Technology (Amendment) Act, 2008 came into force. In November, Shreya Singhal filed a public interest litigation questioning the constitutionality of Section 66A. Then, on January 9, 2013, the Central Government released an advisory saying that any arrest made in accordance with Section 66A would not be permitted unless senior police personnel approved it. After several discussions and looking after the past judgements the Supreme Court in the case of Shreya Singhal v. Union of India, on March 24, 2015, declared that Section 66A was unconstitutional. However, this was very much visible that even after being declared this provision as unconstitutional, its continued use could be seen, and this issue was discussed by Abhinav Sekhri and Apar Gupta in their paper work in the year 2018 titled Section 66A and other legal zombies. The Supreme Court also ordered the dispersal of the Shreya Singhal judgment to all courts nationwide, as well as to senior administrative officers and director generals of police.

Under this provision, the police were left with option to choose that whether the material is defamatory or not, on the basis of which that person maybe arrested. This gave discretionary power to the police. Although, it is the court's discretion which decides the period of sentence

where the police will lodge a case, will investigate it and report it to the court, and then if the court is pleased that the content is defamatory then only it will pass the judgement. Therefore, to ensure that there is no infringement of a person's fundamental right to speech there is a need that the legislature must come up with an fill-in to Section 66A.

The Constitution of India is centered on the fundamental foundation of guaranteeing certain fundamental rights to its citizens. The Constitution of India guarantees the fundamental right to freedom of speech and expression under Article 19(1)(a). This provision affirms that every citizen has the right to freely express their thoughts and opinions. The Supreme Court of India has extensively interpreted and upheld this right in various significant legal rulings.

In *Union of India v. P. Jagjivan Ram*³, 1989, the Supreme court of India held as follows:

"We find both amusement and concern in the State Government's stance on a film that has received the National Award. We pose a troubling question: What is the value of safeguarding freedom of expression if the State fails to uphold it? If a film is unobjectionable and cannot be constitutionally restricted under Article 19(1), the State cannot suppress freedom of expression due to the threat of demonstrations, processions, or violence. Such an action would amount to a disregard for the Rule of Law and a capitulation to blackmail and intimidation. Safeguarding freedom of expression is the State's duty since it is a liberty protected against the State. The State cannot claim incapacity in handling hostile audience reactions; it is obligated to prevent such incidents and protect freedom of expression.

Legitimate and constitutionally protected freedom of expression should not be held hostage by an intolerant group. The fundamental freedom under Article 19(1)(a) can be reasonably restricted for the purposes mentioned in Article 19(2), and any restriction must be justified by a genuine necessity, not mere convenience or expediency. Criticizing government policies and operations openly is not a valid reason for restricting expression. Tolerance for diverse views is essential, as intolerance is equally perilous to democracy as it is to the individual."

In *Dr. D.C. Saxena, Contemnor v. Hon'ble the Chief Justice of India*⁴, AIR 1996, K. Ramaswamy, J. gave his views which were as follows:

"28. The freedom of speech and expression, as guaranteed by Article 19(1)(a) in our secular and socialist republic, is considered a precious liberty. This freedom allows individuals to openly express their thoughts, even if not always in the most universally agreeable manner, contributing to open discussions and advocacy. The significance of this liberty lies in its role in

³ 1989 SCR (2) 204, 1989 SCC (2) 574

⁴ 1996 SCC (7) 216, JT 1996 (6) 529

fostering a more egalitarian society, promoting equality in various aspects of life, including social, economic, and political justice. The transformative process towards a more cohesive and united society depends on open discussions and unfrozen secular values. In the marketplace of ideas, where truths are relative and subject to competition, freedom of expression plays a vital role in disseminating information of political and social importance. This freedom is not synonymous with certainty but serves as a tool for peaceful social transformation under the Rule of Law. The right to free speech is integral to self-development and the fulfillment of fundamental duties outlined in Part IVA of the Constitution. The State's objective is to secure citizens' freedom to develop their faculties and participate effectively in democracy. Public discussion, particularly on political and social issues, is crucial for the formation of public opinion and effective democratic governance. The significance of freedom of speech and expression is particularly highlighted in political speeches, which receive a higher degree of protection and status. The potential impact of a speaker's development on political and social questions is essential for encouraging human development and the effective functioning of democratic institutions.

30. However, the maintenance of democracy also allows society to regulate freedom of speech through democratic action. This regulation is justified to protect the interests of people involved, considering factors such as the speaker's perspective, the context, the audience, the purpose of the speech, and the place or forum where freedom of speech is exercised. The State has a legitimate interest in regulating freedom of speech to set limits on defamatory or libelous expressions, ensuring the dignity of individuals and preventing interference with others' rights.

31. Freedom of speech and expression is subject to constitutional provisions like Article 19(2), as well as other legal considerations such as contempt of court, defamation, or incitement to an offense. International agreements, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, also recognize the right to freedom of expression but impose corresponding duties and responsibilities, allowing restrictions as necessary for protecting life, reputation, national security, public order, public health, or morals. In essence, the liberty of speech and expression comes with a corresponding duty and responsibility, with limitations imposed on its exercise.

In the case of *Secretary Ministry of Information and Broadcasting v. Cricket Association of Bengal, 1959*⁵, it can be observed by the contentions of the author Eric Barendt that:

“The right to freedom of speech and expression encompasses the right to access information

⁵ 1995 AIR 1236, 1995 SCC (2) 161

and share it. This freedom is vital for self-expression, a crucial avenue for free conscience and personal fulfillment. It empowers individuals to participate in discussions on societal and moral matters, serving as the most effective means for discovering the most accurate representation of any subject. This right allows for the broadest dissemination of ideas, making it the cornerstone of political discourse essential for a functioning democracy. Additionally, it plays a significant role in supporting artistic and scholarly pursuits across various domains”.

However, it is important to note that the fundamental right to freedom of speech and expression under Article 19(1)(a) is not an absolute right. Article 19(1)(a) allows for the imposition of specific reasonable restrictions in the interests of various factors, including the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, decency or morality, public order, and concerns related to contempt of court, defamation, or incitement to an offense.

Freedom of Press is included within the right of freedom of speech and expression as it opens a wide door for interpretation. This is being held in the renowned case of *Express Newspaper Pvt. Ltd. v. Union of India*⁶, AIR 1986, the Supreme Court of India held:

“The freedom of the press is encompassed within the broader right to freedom of speech and expression guaranteed by Article 19(1)(a). Both the freedom of thought and expression, as well as the freedom of the press, are not only valuable in themselves but also fundamental to the functioning of a democratic government. Democracy operates on the principle that governmental issues can be resolved through the free exchange of ideas and public discourse on various national issues. It is crucial to underscore the significance of freedom of speech and expression, especially the right to dissent, in a democratic society like ours. The freedom of the press is indispensable to democracy, and everyone has an inherent right to freely comment on matters of public importance. This right is considered a pillar of individual liberty, which the Supreme Court has consistently safeguarded. Despite the immense value of freedom of speech under Article 19(1)(a), it is essential to recognize that this freedom is not absolute and unrestricted in all situations; it is subject to the limitations outlined in Article 19(2).

Furthermore, it is widely acknowledged that the right to know or the right to access and communicate information is another aspect of freedom of speech. The right to know, receive, and impart information is integral to the broader right to freedom of speech and expression. Citizens have a fundamental right to employ the most effective means of conveying and receiving information, including access to broadcasting for this purpose.”

⁶ AIR 1986 SC 872: (1985) 3 SCR Supl 382

III. IMPACT OF FREEDOM OF SPEECH AND EXPRESSION ON THE INTERNET

The arrival of the Internet has extended the reach of freedom of expression for millions of Internet users and netizens. By offering people additional avenues for self-expression the internet has empowered freedom of expression. Conversely, there is a need for content regulation as there is increase in the free flow of information.⁷

To a large extent, internet can be seen to be the pioneer of a new kind of culture, a culture which delivers universal access to free speech to people across the world. Internet is entrusted to freedom of speech and provides various platforms and manifestations for expressing one's ideas.

The Internet has emerged as a vital communication platform that individuals utilize to exercise their right to freedom of expression. This right, encompassing the freedom to seek, receive, and transmit information and ideas without boundaries, is guaranteed by Articles 19 in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Internet enables rapid and borderless communication, significantly influencing the sharing and acquisition of information and ideas, as well as the field of journalism.

According to the report from the Special Rapporteur on the promotion and protection of the right to freedom of expression, as noted by the United Nations Secretary-General in General Assembly A/66/290, international human rights law, especially the provisions pertaining to the right to freedom of expression, remains pertinent and applicable to the internet. This relevance is evident in the explicit recognition that everyone possesses the right to freedom of expression through any chosen medium, irrespective of limitations or boundaries, Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights were drafted with the prolepsis to include and lodge future technological developments through which individuals may exercise this right⁸ and has distinctly highlighted the gravity of freedom of speech and expression on the Internet.

Consequently, a scrutiny of the abovementioned clearly shows that there is cosmic significance of freedom of speech and expression on the internet and this would not have been the position, had the said freedom of speech and expression not been exercised by its users and various stakeholders.

⁷ DHEERENDRA PATANJALI, Freedom of Speech and Expression, India v America - A study, https://www.indialawjournal.org/archives/volume3/issue_4/article_by_dheerajendra.html

⁸ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Note by the Secretary- General United Nations, General Assembly A/6/290.

IV. SHREYA SINGHAL V. UNION OF INDIA

On March 24, 2015, in the Shreya Singhal v. Union of India case, the Supreme Court declared Section 66A of the Information Technology Act, 2000 unconstitutional. The court, in assessing its constitutional validity, concluded that Section 66A violated Article 19(1)(a). Furthermore, the court stated that "it is evident that Section 66A arbitrarily, excessively, and disproportionately infringes upon the right of free speech and disrupts the balance between such right and the reasonable restrictions that may be imposed on the right." The case was decided by the divisional bench comprised of R.F. Nariman J. and J. Chelameswar. The facts of the case were as follows; 2 women were detained for commenting on the bandh called on demise of Shri Bal Keshav Thackeray on Facebook. The Supreme Court was analyzing the constitutional validity of Section 66A of the Information Technology Act, 2000. The Supreme Court examined Section 66A in the light of fundamental right to freedom of speech and expression enshrined under Article 19(1)(a) of the Indian Constitution and also in the backdrop of the various reasonable restrictions that can be imposed under Article 19(1)(a). Also, the Supreme court examined the various landmark judgements in this regard. In the following judgments the Court held that:

"It has been determined by the court that Section 66A of the Information Technology Act grants the authority to impose restrictions on the fundamental right outlined in Article 19(1)(a) in language broad enough to encompass restrictions both within and beyond the limits of constitutionally permissible legislative action. Following the precedent set in K.A. Abbas' case, it has been acknowledged that Section 66A might be applied for purposes not sanctioned by the Constitution. Therefore, it is deemed entirely unconstitutional and void.

Distinguishing Romesh Thappar's case in the context of a right under Article 19(1)(g), it is explained that Romesh Thappar's judgment applies directly to the current situation, where Section 66A is found to violate Article 19(1)(a). In a challenge under Article 19(1)(g), where the law concerns reasonable restrictions in the interests of the general public, the question of applying the law for purposes not sanctioned by the Constitution does not arise. However, in the present case involving Article 19(1)(a), it is affirmed that Section 66A does not fall within the subject matters outlined in Article 19(2). The possibility of its application for purposes outside those specified subject matters is evident. Consequently, the court concludes that no part of Section 66A is severable, and the provision as a whole must be declared unconstitutional."

Looking after all these factors, the Supreme Court declared Section 66A of the Information

Technology Act, 2000 as unconstitutional and hence was not protected by Article 19(2) of the Indian Constitution.

The matter of serious concern is that despite the court holding Section 66A as unconstitutional in 2015, it has been reported that several states are continuing to register FIRs for offences under Section 66 A of the Information Technology Act, 2000. Over which Chief Justice U.U. Lalit expressed his concern stating “it is a cause for significant concern that, despite clear and authoritative rulings by this court regarding the validity of the provision, offenses under the said provision are still being registered and pursued.”

The power to block public access to any information through any internet resource is granted by Section 69 A and in some circumstances, Section 79 exempts intermediaries from liability. So, basically Section 66 A was acting as a contrary to both Article 19 i.e, free speech and Article 21 i.e, Right to Life.

The recent report by The Economic Times on January 24, 2023, reported that the Indian government in its submissions to the United Nations Ad Hoc Committee on cybercrime has taken an impenetrable move with another as it eliminated the provisions that were identical to that of Section 66A of IT Act, 2000. The provisions that were suggested by India has been facing strong criticism since June, 2022. Several countries have been opposing such restrictions as they infringe the freedom of speech and expression, these countries were El Salvador, Nigeria, the European Union, Georgia, Luxembourg and the United Kingdom. And this was the reason why the Supreme Court of India set aside Section 66A in *Shreya Singhal v. Union of India*. After the storm of opposition, in August 2022 a new policy document was submitted by India that removed any reference of Section 66A. It has also been reported that the UN Ad-Hoc committee is working on creating an international convention to combat cybercrime, which particularly impacts India.

V. WHY SECTION 66A STILL IN FORCE?

One of the notable cases was of the Muzaffar Nagar police, even after declaring this provision unconstitutional the Muzzafar Nagar police in U.P, arrested and detained the person for allegedly committing a crime under Section 66 A i.e, he was alleged of the offence that he posted some comments on the Facebook and this happened after 2015 after the Supreme Court made this judgement.

If we look at the media we will see that various media reported that many other instances had happened where Section 66 A has been invoked by the police. So, on one hand, Supreme Court made it unconstitutional but the law and order system i.e, the police have used the same section

of the IT Act in order to arrest and detain a person. Thus, this points to a serious concern of implementation of the verdict so this verdict was not implemented in its true spirit. It shows that there is a tendency of some laws to inhabit the Indian legal system even after the legal deaths.

VI. REASONS FOR THE POOR ADMINISTRATION OF THE JUDICIAL DECLARATIONS

There are differences between the different branches of the government. For example, judiciary, executive and legislature, so here judiciary once makes a declaration it must be properly communicated to the executive and also to the legislature. So here, the judiciary has declared section 66 A as unconstitutional, so the role of the legislature is to issue a statute declaring this provision unconstitutional. However, this is not the case here because of a lack of coordination or communication between these branches. Moreover, there is no established procedure for the official promulgation of information regarding such decisions. There has to be a proper channel. The decision that are taken by the authority has to be properly communicated to the lower levels of the organization a proper hierarchy must be followed. This is needed for the bureaucratic structure to survive.

Secondly, there is active non-compliance with the judicial declaration, even after the judiciary makes such kind of declarations it is clear that they are not complied with. The reason is that the other organs of the government like the executive or the legislature doesn't make sure that the final decisions are enforced. Moreover, another reason is the non-amendment of the state by Parliament. The law making body in the country is Parliament hence if a law that is made by the Parliament is declared as unconstitutional by the judiciary the Parliament has to take steps to amend a statute in order to decide the law as unconstitutional or void unless the Parliament does so it will continue in the statute book as for example Section 66 of IT, Act is yet to be removed by the Parliament and are still present in the statute.

Another major issue is that there is a lack of notifications. Government officials are advised to refer to notifications and circulars released by the pertinent ministries.. These notifications will help in officially sharing the information about the judgments that have declared some provisions as unconstitutional. The problem here with the notifications is that it is not mandatory and as it is not mandatory there is no method to ensure that these notifications are issued and moreover there exists no formal system for information sharing, under the Indian judiciary there is a hierarchical setup that is they have Supreme court on the top then High Court and Lower Courts, so there is proper hierarchy in the Indian judiciary system but there is lack of formal system in communication sharing or information sharing in this hierarchical setup.

VII. WAY AHEAD

We have seen that the Indian judiciary do not have the authority to enforce its own decisions. For example, the Supreme Court declares a law unconstitutional but after the declaration, it does not have the authority to enforce the decision. So for this, there is a need to avoid human error in enforcing judicial decisions and it will be a repudiation of such unconstitutional laws as they will have to suffer the humiliation of lawless arrest.

Now, there is no such law but those people who were arrested and detained will stand to loose their rights. Therefore, There is a necessity to get over from a system where communication about judicial decisions depends on the discretion of the officers., there should be a proper communication system among the branches of the government.

As rightly asserted by ASG Mehta, the internet is not a kind of an organized establishment. So, there is an exigency of a law, that is not squandered by the political authorities and police torment the people and also which is not vaguely framed. The internet has witnessed an increase in the misuse of the platform, where some people use it for addressing their problems and views and for discussions on the other hand there exist some delinquents who use it to defame others. So, there remains an exigency to make use of IT laws in case of any violation, but along with it has to be kept in mind that it does not override its power and becomes a hurdle in a person's fundamental rights. Thereupon, it feels a great need to formulate a law under IT Act to deal with such cases.

VIII. CONCLUSION

Before formulating any new provision by the government these pointers has to be kept in mind. Firstly, the law that was in force prior amendment was surrounded with various shortcomings, so the new laws should not be identical to that of the old law. While drafting the new law the public's privacy and security have to be kept in mind and have to be formulated with due care as this law was the one which was initially misused by the politicians. Secondly, the first and foremost aim of the internet is to connect people with information, for sharing their views and to discuss various issues, to share pictures and videos. However, we have seen that there are few users who use it to post transposed pictures, videos and other content which is likely to enrage the public and spread violence. Hence, a proper law is needed. Thirdly, there has been similar provisions related to misuse of electronic device across various countries, so a reference could be taken from other legislations of the world so as to skip the similar mistakes that were there in the old law. Expert opinion could be taken by the government like advocates, judges, privacy groups, police and other eminent citizens before formulation of the new law. A proper

debate needs to be conducted so as to highlight the inaccuracies that are there in the new drafted law. And lastly the main reason for which the old law was declared unconstitutional i.e, because the fundamental right of the citizens were curbed, this should not be the position of the new drafted law. It should not be prepared favoring the political parties instead should look for the greater interest of the public. This way the new law could not be misused by politicians to harass people.
