



## **SECTION 66A OF INFORMATION TECHNOLOGY ACT, 2000: AN ANALYSIS**

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**Abstract--** The growing access to information in cyberspace has given rise to access and information in cyberspace, done by a variety of actors, who have diverse goals and values. The real challenge is to fully exploit the potential of new media while not compromising civil liberties, which include the right to freedom of expression, to education and also to privacy. In the wake of various cases of abuse of provisions especially invoking Section 66A of the Information Technology (IT) Act, 2000, a need arose where the Supreme Court of India had to intervene and strike down this provision for failing to pass the constitutionality test. The situation has necessitated the need to look for better checks and balances.

The paper looks into the provision which has been disputed for its being put in the IT Act, 2000 and later the misuse of the same at instances. It further, looks in as to how the Supreme Court of India struck down the provision for failing to pass the constitutionality test. It also looks in if misuse and repealing provisions is the way forward in situations of abuse of the provisions. Finally, to conclude the paper provides an opinion which might have been taken in appreciating the need of the provision in the present scenario.

### **I. INTRODUCTION**

In the 1800s Charles Babbage's developed the first computer, and a military network of 40 computers followed this in 1969 known as the Advanced Research Projects Agency Network (ARPANET) which in turn has evolved as the internet we know it today. The www (World Wide Web) today links the whole globe and the new technology to the remotest places and thus we see how our lives have progressed, which try to remove the hurdles of economy, polity, society and administration.<sup>1</sup> E-governance and e-Commerce are two aspects which have become integral to every nation; however, this cyberspace is not all about goodness and opportunity to all. The 'www' is a domain for a new set of criminals, the one who comes out in the darkness, with the assistance of a network offered by millions of computers and where we see the legal systems around the world are trying their best to keep them in check, with less rate of success. The internet has seen to be challenging every single belief and norms of a traditional legal system.<sup>2</sup>

The Information Technology (IT) Act, 2000 was enacted to bring in alternatives to a paper-based mode of storage and communication of information. The government by doing so gave a lot of impetus on the development of Information Technology industries through a well structured regulatory framework that handled all the Electronic Data. However, the thrust of this enactment was to promote the Information Technology industries rather than trying to foresee the misuse of technology, which is known as Cyber Crimes.

It was after several cases and complaints of this misuse of technology that in the year 2008 an amendment was brought in, through The Information Technology Amendment Act, 2008. This Amendment was a substantial addition to the existing law then. The Indian Computer Emergency

<sup>1</sup> Sruti Chaganti, Information Technology Act Danger of Violation of Civil Rights, *available at: <http://www.jstor.org/stable/4413940>* (Visited on June 20, 2019).

<sup>2</sup> *Ibid*



Response Team (CERT-In) administers the provisions of this Act. The Amendment was brought in to look into the loopholes/issues which the original Act had not addressed and to provide further impetus to the development of Information Technology and related security concerns which existed then. However, it is seen that the Amendment has been criticized for lacking sufficient safeguards to protect the civil rights of individuals and more specifically in the case of freedom of Speech and Expression. More specifically in this regard the outrage that was seen with reference to section 66A, which was brought in through the amendment saw a serious outcry amongst the citizens and netizens of our country for the blatant misuse of this provision in curtailing few of the basic fundamental rights of individuals.

## II. THE ABUSE OF IT ACT, 2000 (SECTION 66A)

Section 66-A has been surrounded by outrage due to the arbitrary arrests of individuals who had posted content on social media against few politicians and the police arrested few using the vague language of the provision to their advantage. Before the provision was struck down by the Supreme Court, there had been incidents related to comments, information sharing or thoughts expressed by a person to a wider audience on the internet have attracted criminal penalties under Section 66-A. Many deliberations and discussions have taken place over the scope of this provision and its reach to enforce stern actions<sup>3</sup>.

A few instances where cases were booked under Section 66-A are as follows:

- For posting ‘objectionable comments and caricatures’ of former Prime Minister Manmohan Singh, and couple more politicians on a social media wall; on February 6, 2013, Sanjay Chaudhary was booked under section 66-A.;
- For causing ‘inconvenience’ to Sharad Pawar’s relatives in November 2011, Manoj Oswal was booked;
- For a political cartoon on Mamata Banerjee, a professor of Jadavpur University Ambikesh Mahapatra was booked;
- For alleged defamatory remarks on social media sites against a trade union leader and a politician, two Air India employees were put behind bars for 12 days;
- And it was this instance, when on the demise of Shiv Sena Supremo Bal Thackeray, two girls Shaheen Dadha and Renu Srinivasan, posted a comment on a social media site questioning the need to shutdown of Mumbai, the girls were booked.<sup>4</sup>

It was this last incident that had sent shockwaves throughout the nation that two young women were arrested and following this in November, 2012, a Public Interest Litigation (PIL), by Shreya Singhal was submitted to the Supreme Court of India stating that Section 66-A hinders freedom of speech and expression and also violates Articles 14, 19 and 21 of the Constitution of India.

## III. WHAT IS SECTION 66-A OF IT ACT, 2000?

66-A. Punishment for sending offensive messages through communication service, etc.<sup>5</sup>

Any person who sends, by means of a computer resource or a communication device,-

<sup>3</sup> Apoorva Shankar, A background to Section 66A of the IT Act, 2000, available at: <https://www.prssindia.org/theprssblog/background-section-66a-it-act-2000> (Visited on June 15, 2019).

<sup>4</sup> Aparna Viswanathan, An unreasonable restriction, available at: <http://www.thehindu.com/opinion/lead/an-unreasonable-restriction/article4432360.ece> (Visited on June 14, 2019).

<sup>5</sup> The Information Technology Act, 2000 (Act 21 of 2000), s. 66 A



- (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.”

Section 66-A was introduced in the year 2009, with an amendment to the Information Technology Act. The said provision has been adopted from Section 127 of the U.K. Communications Act, 2003. In fact, both the provisions that is, Section 66A and Section 127 are very different, where we see the House of Lords has ‘read down’ the provision on the grounds that legislation cannot be intended to criminalise a statement where one person may find it to be polite and acceptable and the another may decide it to be ‘grossly offensive’.<sup>6</sup>

#### **IV. CONSTITUTIONALITY OF SECTION 66A**

Like all legal provisions, Section 66A was supposed to comply with Part III of the Constitution of India that is Fundamental Rights. We see that Article 19(1) (a) guarantees the freedom of speech and expression and Article 19(2) permits reasonable restrictions which can be in the interests of “public order, decency or morality”. Thus we may say that probably the only way in which Section 66A can be justified is that it has to be shown that, it had to fall within the categories of “public order” or of “morality”. It was thus in *Shreya Singhal vs. Union of India*<sup>7</sup>, that the Constitutionality of Section 66-A was tested.

In *Shreya Singhal case*<sup>8</sup>, a number of petitions were filed under Article 32 of the Constitution before the Hon’ble Supreme Court of India. The main reason to challenge this provision that is section 66A was to check if any Fundamental Rights in relation to Freedom of Speech and Expression stated under Article 19(1) (a) had been violated by the implementation of section 66A. According to the petitioners, the subsections of section 66A were vague and certain terms such as causing of annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, etc. were not defined, which resulted in the arrest of innocent individuals.

The Supreme Court in its judgement has observed that Section 66-A of the Information Technology Act, 2000 has been struck down completely, for it has violated Art. 19(1)(a) and the same was not saved under Art. 19(2)

In this regard the Hon’ble Supreme Court has observed as follows: “Section 66A was enacted with the intent to punish any individual who shares information using the internet, as per the subsections of

<sup>6</sup> *Supra* note 4

<sup>7</sup> AIR 2015 SC 1523

<sup>8</sup> *Ibid*



section 66A. Here it was noticed that the recipient was not considered to be an important person who receives the message from the person who is accused of this provision. Thus, the information sent may be to an individual or several people. Here we see that the section does not make any distinction with regard to the information that is sent as between an individual and to a group of people. It was observed that when the section does not need the message to have a tendency to disrupt the public at large, the nexus between the message and the action that follows up is conspicuously absent, that is the tendency of an immediate threat to the public safety at large and tranquillity".<sup>9</sup>

Thus it was clearly observed that the Section had no proximate relationship to public order whatsoever. In order to complete the offence under section 66A, the message had to cause annoyance which was either persistent or otherwise, without impacting public order. It was thus viewed that section 66A would not pass muster, as the element of any tendency to create public disorder was not present here as an essential ingredient.<sup>10</sup>

Similarly, it was observed that there was no proximate connection between incitement to commit an offence and section 66A. The message/information need not be something which incites anybody at all. The message could be pure with the intent of discussion and advocacy from a particular point of view. Further, the IPC does not categorise mere causing of annoyance, inconvenience, danger etc., or being grossly offensive or having a menacing character as offences. These could be ingredients of certain offences, but are not considered as offences per se. As none of the above aspects affected Article 19(2) it was held that Art. 19(1)(a) was violated and thus declared unconstitutional.<sup>11</sup>

Further, applying the tests of reasonable restriction<sup>12</sup>, it was clearly held that it invades the right to free speech, disproportionately, excessively and arbitrarily. It was seen that a large portion of protected and innocent speech was eclipsed by undefined terms such as annoyance and inconvenience. There may be certain information on the internet which may be made with a viewpoint of discussion and advocacy, relating to government, literary or scientific aspects, which could be unpalatable to a certain section of society. In fact section 66A was cast so widely that any opinion on any subject matter would be brought under its ambit. Thus it was held that section 66A is unconstitutional also on the ground that it brought under its ambit protected speech and innocent speech too and thus in a way having a chilling effect on free speech and therefore struck down.<sup>13</sup>

Further, when the learned Additional Solicitor General gave an assurance that section 66A would be administered in a reasonable manner, the Court observed that section 66A cannot be saved on the assurance of the government, as governments come and governments go but section 66A would be there forever and that such assurances would not act as a binding force on successive governments. Thus it was observed that section 66A must be judged on merits rather than how well it would be applied in future by the government.<sup>14</sup>

<sup>9</sup> *Ibid*, p. 1542

<sup>10</sup> *Supra* note 7 p. 1542

<sup>11</sup> *Ibid*, pp.1544,1545

<sup>12</sup> Chintaman Rao vs The State of Madhya Pradesh, [1950] S.C.R. 759, the court observed: The phrase 'reasonable restriction' states that the restrictions imposed on an individual in enjoyment of his right should not be arbitrary or excessive in nature, beyond what is necessary in the interest of public. 'Reasonable' here implies an intelligent care and deliberation, in which reason must dictate. The Legislation which are arbitrary or excessively invades on the right of an individual cannot be said to have contained the quality of reasonableness and thus if there is no proper balance between the freedom under article 19(1)(g) and clause (6) of article 19, it has to be held for wanting of quality. ( p. 763)

<sup>13</sup> *Supra* note 7, pp. 1523, 1524

<sup>14</sup> *Ibid*, p.1524



Further, the Hon'ble Court rejecting the application of Doctrine of Severability<sup>15</sup> observed that, the fundamental rights contained in Art. 19(1) (a) are restricted by section 66A. It stated that there could be a chance where section 66A be applied to purposes which are not sanctioned by the constitution and thus it had to be held wholly unconstitutional and void. As section 66A was seen not to cover any of the subject matters of Art. 19(2), there would be every possibility that it's applied to subject matters outside Art. 19(2) and therefore no part of Section 66A were severable and that the provision as a whole was declared unconstitutional.<sup>16</sup>

And finally in regards to whether there is intelligible differentia between speech on the internet and other mediums of communication, the Hon'ble Court stated that there was indeed intelligible differentia. This was clear as an individual requires very little or no payment to air his views on the internet and when something is posted it travels like lightning to reach millions of people across the world. Thus, it was observed that for other mediums of communication separate offences can certainly be taken up by legislation.<sup>17</sup>

However, there were other provisions that were also tested by the Hon'ble Court, Section 69A which provides for issuance of directions for blocking for public access of any information through any Computer resource and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 and Section 79 which provides, Intermediaries not to be liable in certain cases and Information Technology (Intermediary Guidelines) Rules, 2011, which were all held constitutionally valid.

#### **V. MISUSE AND REPEALING PROVISIONS: IS IT THE WAY FORWARD**

It is true that Information Technology has been misused to harass and create public disorder. Even though Section 66A had shortcomings, it was useful in certain situations like when there were instances of spreading of inflammatory SMS's, the police had taken recourse to section 66A to avoid the spread of such information. The provision provided immediate relief to genuine victims of cybercrime such as cyber bullying.<sup>18</sup> To draw inference, few provisions such as Section 124(A) (Sedition), Section 295 –A (outrage religious feelings), Section 500( Defamation), etc. of Indian Penal Code, 1860 are misused and abused. Just as a provision is vulnerable to misuse, one cannot guarantee the fair implementation of due process of law. There have been instances when the Hon'ble Supreme Court has opined that laws are prone to misuse.<sup>19</sup>

In the 243<sup>rd</sup> report of the Law Commission in the year 2012 it has taken a similar view on the misuse of Section 498-A of the IPC and observed that the said provision is misused in many instances, however section 498-A has a lofty social purpose and it has to remain in the statute books. It stated that the object and purpose could not be overridden by potential abuse and misuse. The commission appreciated the need to discourage frivolous complaints but was not inclined to dilute the efficacy of

<sup>15</sup> Doctrine of Severability - when a part of the enactment is declared unconstitutional, the unconstitutional part has to be removed and the remaining valid part will continue to be valid.

<sup>16</sup> *Supra* note 7, p. 1525

<sup>17</sup> *Supra* note 7, p. 1525

<sup>18</sup> Partha Pati and Sanjana Sinharoy, "Section 66A: its Repeal and its After Effects" 29, Legal News and Views, p. 3 (2015)

<sup>19</sup> *Ibid* p. 5



section 498-A, as atrocities against women are on the rise. Thus, a balanced and holistic view which weighs the pros and cons of a provision is the need of the hour.<sup>20</sup>

One of the main criticisms against 66A has been overly ambiguous and broad meaning which was applicable made it susceptible to misuse. Here it can be opined that the Bench could have considered establishing specific tests to determine what would constitute an offence under section 66A along with prescribed reasonable restrictions provided by the Constitution. As pointed out by the Additional Solicitor General, while justifying the need to retain this provision, he says that if medicine is bitter then we can have sugar after it instead of throwing it. People have to take it as it is for their benefit.<sup>21</sup>

## VI. CONCLUSION

In the past the Judiciary has taken upon itself the task of issuing guidelines for effective interpretation of the law when they are vague or prone to abuse. Recently with reference to Section 498-A of the IPC, due to the extensive misuse of this provision, the Supreme Court in Amesh Kumar vs. State of Bihar and Ors. specifically laid down the principles and parameters to be followed by the Magistrates and police authorities while making arrests and/or authorizing the detention of the accused under Section 498-A. Thus providing some respite from the mechanical approach adopted by the authorities in authorising detentions and arrests on the basis of mere allegation of commission of an offence.<sup>22</sup>

The main defence that has been put forth by the government was that the provision cannot be "quashed" simply due to the likelihood of its "abuse". It may be argued that Section 66A, as it stood, was unduly restrictive of free speech. However, even though the Supreme Court reads down Section 66A so that free speech is achieved, it wouldn't in itself build India towards free speech unless the larger problems are remedied. The judiciary could have laid down the clearest guidelines but unless the mechanism that is the police adhere to them before setting the law in motion, right to free speech will continue to remain imperilled.<sup>23</sup>

The judiciary struck down the provision appreciating the flaw in the law, which lead to arbitrary arrests, however there were guidelines issued by the central government in this regards that prior permission of a rank of Inspector General of Police in metros and Deputy Police Commissioners or Superintendent of Police in district areas was made necessary which seem to be overlooked in this case.

And as stated above if the mechanism which bring the provisions of law to life are not aware of the law of the land, are seen enforcing section 66A even after it has been struck down. A petition which has been filed by People's Union for Civil Liberties (PUCL) has stated that 22 people have been prosecuted under the said provision, even after it being scrapped by the Supreme Court in 2015.

However, it can be said that it was an instance where the Hon'ble Court had an opportunity to formulate the guidelines, rather than striking down the provision, as it had done in Bangalore Water

<sup>20</sup> 243rd Report of the Law Commission of India 2012 <http://lawcommissionofindia.nic.in/reports/report243.pdf> in Partha Pati and Sanjana Sinharoy, "Section 66A: its Repeal and its After Effects" 29, Legal News and Views, p 5 (2015)

<sup>21</sup> *Supra* note 18, p. 5

<sup>22</sup> *Ibid*

<sup>23</sup> Shivprasad Swaminathan & Neha Tayshete, What the outcry over Section 66A of the IT Act misses is the need for a mechanism to prevent arrests on flimsy interpretations of criminal law provisions, *available at:* <http://www.thehindu.com/opinion/op-ed/saving-free-speech-from-the-police/article4133852.ece> (Visited on June 14, 2019).



Supply and Sewerage Board v. A. Rajappa<sup>24</sup> or Vishaka and others v. State of Rajasthan and others<sup>25</sup>. Failing to do so the Hon'ble court has lost an opportunity to rectify the issues at hand i.e. the over reach of the police authorities than striking down the provision. With the present central government assuring new and improved guidelines to fill the concerns of the security establishments, the vacuum created in the absence of Section 66-A needs to be filled in soon.

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<sup>24</sup> (1978) 2 SCC 213

<sup>25</sup> (1997) 6 SCC 241