Social Media Postings and Freedom of Speech and Expression -A Critical Study

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***Abstract*— The face book posting against the Bandh" in Mumbai on the death of sena supremo Bal thakere and a tweet on the alleged corruption charges against karthi chindabaram had virtually lead to the demand for scrapping of sec. 66 A of IT Act which was primarily meant for protecting the misuse of freedom of speech. Though the apex court struck down sec. 66 partially the debate is on whether to retain or regulate the provision with certain conditions. in view of this fact article intends to focus on the constitutionality of sec. 66A and significance of freedom of speech in the light of case law and draw conclusions in this regard.**

INTRODUCTION

The Two girls by names Shaheen Dhada, aged 21 years, and her friend Rini Srinivas would never have imagined that they could land in jail because of a Facebook post. The two girls were arrested in Palghar following a complaint from local Shiv Sena workers against Shaheen's post on Facebook, where she questioned the need for a 'bandh' being observed in Mumbai on the death of the Sena supremo Bal Thackery.

While the two girls' experience was traumatic, the action by the police has given fodder to activists and cyber experts to raise the clamour for scrapping section 66A of the IT Act, which they term as being draconian.

The Palghar incident is not an isolated event. Recently, Ravi Srinivasan, a 45-year-old volunteer with India against Corruption got into trouble with police after he tweeted about alleged corruption charges against Karti Chidambram, son of Finance Minister P Chidambaram.

There was a common factor in all these cases - arbitrary use of the Section 66 (A) of the Information Technology Act, 2000. The only mistake that most of these so-called offenders had committed was publishing their views online.

the language used in Section 66A of the IT Act, 2000 has been borrowed from Section 127 of the UK Communication Act, 2003 and the Malicious Communications Act, 1988.

"These two particular provisions are applicable in cases where the communication is directed to a particular person. Section 1 of the Malicious Prosecution Act begins with the, "any person who sends to another person" and hence it is clear that the provision does not include any post or electronic communication which is broadcasted to the world and deals with only one-to-one communication," said Ghosh.

Section 127 only deals with "improper use of public electronic communications network". It was meant to prevent misuse of public communication services. Therefore, social media Web sites do not fall under its ambit. However, the Section 66(A) in its current form fails to define any specific category, which has led to inconsistent and arbitrary use of the provision, said Ghosh.

One of the principles of interpretation of statute is that of absurdity. It states that when there are two interpretation of the law - where one renders it absurd and arbitrary, while the other puts it within the constitutional limits - then the latter interpretation is adopted.

USE OR MISUSE OF SEC 66 A OF IT ACT

In the case of 66(A), interpreting it to include any form of communication transmitted using computer resource or communication device renders it to be absurd and arbitrary. Therefore, it should be interpreted and made applicable only to communication between two parties," he opined.

According to Pavan Duggal, cyber law expert and advocate at Supreme Court of India, primarily section

66(A) is for protecting reputation and preventing misuse of its own.

"It is so vast – what is annoyance and inconvenience – gives a tremendous handle in the hands of the complainant and the police to target anyone. Further, if you send any information through email or SMS, which aims to mislead the addressee about such mail or message is a crime. All this suddenly opens a Pandora box of offences," he said.

"So, when you look at case of Mamta Banerjee or latest case of those two girls getting arrested in Mumbai, it shows that Section 66(A) becomes an effective tool in the hands of ingenious complainants to gag free speech. And, that is why there is so much noise," Duggal said. To use, not abuse Sighting the recent case of the two girls from Mumbai, he said the law was abused and all they need to do is just exploit – whether clicking a 'Like' button on Facebook could involve Section 66(A) – and this case is setting a precedence that 'liking' a comment can be an offensive of Section 66(A).

"When you click a 'Like' button, you do not send any information that is defined under Section 66(A). You only send information of 'liking' that information or message," he said.

However, it has become a code of misuse in its own sense. Parameters given there in the Act are extremely wide and can be interpreted in broader perspective

"It has only one good thing – it makes the offence bailable, which means bail as a matter of right. But, once you get stuck under Section 66(A),along with that invites a long period of mental agony and trauma because the trial will take five-six years and you will have to undergo the trial," he added.

DEBATE ON SCRAPPING OR RETENTION OF SEC. 66A

So does it mean the Government should scrap or completely abolish this Section from the IT Act, 2000 or should the people of India file a petition against this Section?

Sunil Abraham, Executive Director, Centre for Internet and Society says there are laws specifically dealing with cyber stalking and communications and therefore, there we do not need an additional law.

"Either scrap or retain narrow parameters, which could be made defamatory. Otherwise, more such cases would be seen in future under this section. It has not done anything significant and has an impact on basic free online speech to public," says Duggal.

A better approach would be to strike down the provision and include separate well defined anti-stalking and anti-spamming provision, said Ghosh of Centre for Internet and Society.

However, Mahesh Uppal, Director, ComFirst India (consultancy firm on regulatory issues) said it would be premature, in these circumstances, for any litigation against this Section.

"The issue is serious. However, this is as much to do with policing in general as it is to do with Section 66(A) which needs an amendment and clarification to remove any scope for abuse," he said.

But, is the Government ready for any change?

LAND MARK JUDGMENT ON SEC. 66A

Minister of Communications and IT, Kapil Sibal recently said, "Just because some people do not follow it properly, we cannot entirely scrap the law. Can we do away with penal code? We cannot."

So, does that mean we, as citizens, have to consult legal notes before posting a message online or sending an SMS? And, even if we do, are all laws, sections and under-sections comprehendible by the common man? If not, how big a risk are we, and the person who 'Likes' what we say is taking?

The answers to these questions determine the future of freedom of speech.

The apex court has struck down the provision in the cyber law which provides police power to arrest a person for posting "offensive" content online and provides for a three-year jail term. It pronounced its verdict on a batch of petitions challenging constitutional validity of certain sections of the cyber law.

Here are five points observed by the SC in its verdict:

1. Describing liberty of thought and expression as "cardinal", a bench of justice J Chelameswar and justice RF Nariman said, "The public's right to know is directly affected by section 66A of the Information Technology Act."

Nariman, who pronounced the verdict in a packed court room, said that the provision "clearly affects" the fundamental right to freedom of speech and expression enshrined in the Constitution.

2. Elaborating the grounds for holding the provision "unconstitutional", the court said terms like "annoying", "inconvenient" and "grossly offensive", used in the provision, are vague as it is difficult for the law enforcement agency and the offender to know the ingredients of the offence.
The bench also referred to two judgements of UK courts which reached different conclusions on whether the material in question was offensive or grossly offensive.

3. "When judicially trained minds can reach on different conclusions" while going through the same content, then how is it possible for law enforcement agency and others to decide as to what is offensive and what is grossly offensive, the bench said, adding, "What may be offensive to a person may not be offensive to the other."

4. The bench rejected the assurance given by the NDA government during the hearing that certain procedures may be laid down to ensure that the law in question is not abused. The government had also said that it will not misuse the provision.
5. "Governments come and go but section 66A will remain forever," the bench said, adding the present government cannot give an undertaking about its successor that they will not abuse the same. The bench, however, did not strike down two other provisions - sections 69A and 79 of the IT act - and said that they can remain enforced with certain restrictions. Section 69A provides power to issue directions to block public access of any information through any computer resource and 79 provides for exemption from liability of intermediary in certain cases.
The court observed that the expressions used in 66A are completely open-ended and undefined and it is not covered under Article 19(2) of Indian Constitution. Section 6A actually had no proximate connection or link with causing disturbance to public order or with incitement to commit an offence and hence it was struck down by the court. The approach adopted by the court was to protect the fundamental right of freedom of speech and expression and in way the legislation can take away this right by claiming the shield under Article-19(2) of the Constitution.

WHAT IS SECTION 66A

Section 66A of the IT act reads: "Any person who sends by any means of a computer resource any information that is grossly offensive or has a menacing character; or any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult shall be punishable with imprisonment for a term which may extend to three years and with fine."

POSTS IN THE PAST

The first PIL on the issue was filed in 2012 by law student Shreya Singhal,
who sought amendment in section 66A of the act after two girls -- Shaheen Dhada and Rinu Shrinivasan -- were arrested in Palghar in Thane district after one of them posted a comment against the shutdown in Mumbai following Shiv Sena leader Bal Thackeray's death and the other 'liked' it.
These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is "grossly offensive" or "menacing". In Collins' case, both the Leicestershire Justices and two Judges of the Queen's Bench would have acquitted Collins whereas the House of Lords convicted him. Similarly, in the Chambers case, the Crown Court would
have convicted Chambers whereas the Queen's Bench acquitted him. If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious 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, having regard also to the two English precedents cited by the learned Additional Solicitor General, it is clear that Section 66A is unconstitutionally vague.
Ultimately, applying the tests referred to in Chintaman Rao and V.G. Row's case, referred to earlier in the judgment, it is clear that Section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right.

The principle of Sullivan [376 US 254 : 11 L Ed 2d 686 (1964)] was carried forward - and this is relevant to the second question arising in this case - in Derbyshire County Council v. Times
Newspapers Ltd. [(1993) 2 WLR 449 : (1993) 1 All ER 1011, HL] , a decision rendered by the House of Lords. The plaintiff, a local authority brought an action for damages for libel against the
defendants in respect of two articles published in Sunday Times questioning the propriety of investments made for its superannuation fund. The articles were headed "Revealed: Socialist tycoon deals with Labour Chief" and "Bizarre deals of a council leader and the media tycoon". A preliminary issue was raised whether the plaintiff has a cause of action against the defendant. The trial Judge held that such an action was maintainable but on appeal the Court of Appeal held to the contrary. When the matter reached the House of Lords, it affirmed the decision of the Court of Appeal but on a different ground. Lord Keith delivered the judgment agreed to by all other learned Law Lords. In his opinion, Lord Keith recalled that in Attorney General v. Guardian Newspapers Ltd. (No. 2)[(1990) 1 AC 109 : (1988) 3 All ER 545 : (1988) 3 WLR 776, HL] popularly known as "Spy catcher case", the House of Lords had opined that "there are rights available to private citizens which institutions of... Government are not in a position to exercise unless they can show that it is in the public interest to do so". It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech" and further that action for defamation or threat of such action "inevitably have an inhibiting effect on freedom of speech". The learned Law Lord referred to the decision of the United States Supreme Court in New York Times v. Sullivan [376 US 254 : 11 L Ed 2d 686 (1964)] and certain other decisions of American Courts and observed - and this is significant for our purposes- "while these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as 'the chilling effect' induced by the Shreya Singhal vs U.O.I on 24 March, 2015 Threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available." Accordingly, it was held that the action was not maintainable in law." In the present case, the substance of the controversy does not really touch on whether premarital sex is socially acceptable. Instead, the 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". 86. That the content of the right under Article 19(1)(a) remains the same whatever the means of communication including internet communication is clearly established by Reno's case (supra) and by The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal & Anr.,(1995) SCC 2 161 at Para 78 already referred to. It is thus clear that not only are the expressions used in Section 66A expressions of inexactitude but they are also over broad and would fall foul of the repeated injunctions of this Court that restrictions on the freedom of speech must be couched in the narrowest possible terms. For example, see, Kedar Nath Singh v. State of Bihar, [1962] S.C.R. 769 at 808 -809. In point of fact, judgments of the Constitution Bench of this Court have struck down sections which are similar in nature. A prime example is the section struck down in the first Ram Manohar Lohia case, namely, Section 3 of the U.P. Special Powers Act, where the persons who "instigated" expressly or by implication any person or class of persons not to pay or to defer payment of any liability were punishable. This Court specifically held that under the Section a wide net was cast to catch a variety of acts of instigation ranging from friendly advice to systematic propaganda. It was held that in its wide amplitude, the Section takes in the innocent as well as the guilty, bonafide and malafide advice and whether the person be a legal adviser, a friend or a well wisher of the person instigated, he cannot escape the tentacles of the Section. The Court held that it was not possible to predicate with some kind of precision the different categories of instigation falling within or without the

field of constitutional prohibitions. It further held that the Section must be declared unconstitutional as the offence made out would depend upon factors which are uncertain.

90. These two Constitution Bench decisions bind us and would apply directly on Section 66A. We, therefore, hold that the Section is unconstitutional also on the ground 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. Possibility of an act being abused is not a ground to test its validity:

91. The learned Additional Solicitor General cited a large number of judgments on the proposition that the fact that Section 66A is capable of being abused by the persons who administered it is not a ground to test its validity if it is otherwise valid. He further assured us that this Government was committed to free speech and that Section 66A would not be used to curb free speech, but would be used only when excesses are perpetrated by persons on the rights of others. In The Collector of Customs, Madras v. Nathella Sampathu Chetty & Anr., [1962] 3 S.C.R. 786, this Court observed:

CONCLUSIONS

Describing liberty of thought and expression as "cardinal", and The public's right to know is directly affected by section 66A of the Information Technology Act, that the provision "clearly affects" the fundamental right to freedom of speech and expression enshrined in the Constitution.

REFERENCES

[1] Madras v. Nathella Sampathu Chetty & Anr., [1962] 3 S.C.R. 786,
[2] The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal & Anr.,(1995).
[3] Kedar Nath Singh v. State of Bihar, [1962] Supp. 2 S.C.R. 769 at 808 -809.
[4] Chintaman Rao and V.G. Row's case
[5] The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal & Anr.,(1995)
[6] Kedar Nath Singh v. State of Bihar,
[7] Shreya Singhal vs U.O.I