

# INDISPENSABILITY OF FREEDOM OF SPEECH AND EXPRESSION IN A DEMOCRACY

Kratika Singhal<sup>415</sup> & Kanika Gupta<sup>416</sup>

*“It is difficult, indeed dangerous, to underestimate the huge changes this revolution will bring or the power of developing technologies to build and destroy not just companies but whole countries.” ~ Rupert Murdoch*

## 1. INTERNATIONAL ASPECTS RELATED TO FREEDOM OF EXPRESSION

The right to freedom of expression occupies an exceptional position in international law. It extends to unpopular ideas and statements which shock, offend or disturb. The inherent dignity and equality of every individual is the foundational axiom of international human rights. It is, therefore, perhaps not surprising that international law condemns statements which deny the equality of all human beings.<sup>417</sup> Article 20(2) of the ICCPR requires states to condemn any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. There is little debate internationally that restrictions on freedom of speech can be justified. Nevertheless, Article 20(2) of the ICCPR has proven highly controversial and is variously criticized as being overly restrictive of free speech. Some states, notably the USA, have taken the view that only incitement which is intended to cause imminent violence justifies restricting such a fundamental right. One important motivation underlying this position is the fear that a broader ban on inciting “discrimination or hostility” will be abused by governments or will discourage citizens from engaging in legitimate democratic debate, for example on questions regarding religion and minorities. Owing to such concerns, several established democracies, including Belgium, Denmark, Finland, Iceland and the USA, have entered reservations to Article 20(2) of the ICCPR.<sup>418</sup> The UNHRC (UN Human Rights Committee) has stated that there is no contradiction

---

<sup>415</sup> 4th Year Student, School of Law, Christ University, Bangalore

<sup>416</sup> 4th Year Student, School of Law, Christ University, Bangalore

<sup>417</sup> Defending freedom of speech and expression, Hate Speech, available at <http://www.article19.org/pages/en/hate-speech-more.html>, last seen on 6/7/2015.

<sup>418</sup> Internet and Racism: Cyberbullying, United Nations Development Programme (UNDP), available at <https://munap2013.files.wordpress.com/2013/02/internet-and-racism-cyberbullying.pdf> last seen on 6/7/2015

between the duty to adopt domestic legislation under Article 20(2) of the ICCPR and the right to freedom of expression.

Besides the ICCPR, a number of other international instruments have a bearing on free speech. Of particular relevance is Article 4 of *Committee on the Elimination of Racial Discrimination* (CERD) which goes substantially further than Article 20(2) of the ICCPR and requires states parties, among other things, to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred and incitement to racial discrimination.<sup>419</sup> In contrast to the ICCPR, CERD requires the prohibition of racist speech even if it does not constitute incitement to discrimination, hostility, criminal intimidation, enmity, hatred, ill will or violence. The effect of Article 4 of CERD appears to be tempered a bit by its opening paragraph, which states that in adopting measures to implement its provisions, states should have “due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention,” which include freedom of expression. Inevitably, however, these requirements – to prohibit all racist speech and to respect the right to freedom of expression as recognized under international law – are considered by many to be in direct contradiction with one another.

In a 2001 Joint Statement, the UN, OSCE (Organization for Security and Co-operation in Europe) and OAS (Organization of American States) Special Mandates on the right to freedom of expression set out a number of conditions which restrictions on free speech laws should respect:

- No one should be penalized for statements which are true
- No one should be penalized for the dissemination of free speech unless it has been shown that they did so with the intention of inciting discrimination, hostility, violence annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will.
- The right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance
- No one should be subject to prior censorship

---

<sup>419</sup> global campaign for free expression, Article 19org available at <http://www.article19.org> , last seen on 6/7/2015.

- Any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

These provide a good basis for assessing the legitimacy of any particular restriction on free speech law.

Germany has legislation that outlaws incitement to racial hatred and limits its constitutional protection of free speech to only that which is truthful and does not contravene human rights of others. Although some cases are clear cut, the prosecution for sending offensive messages through communication service is different because of the need to prove beyond of reasonable doubt that the offender was motivated by prejudice and also because of the difficulty.<sup>420</sup> In United Kingdom, making remarks based on racism is punishable under Public Order Act 1986 with a sentence of 7 years of imprisonment. In Ireland, right to free speech is guaranteed under article 40.6.1 of the constitution. As a reasonable restriction, the country have Incitement to Hatred Act which prohibits the use of words and conduct that threatens, abuses or harass a particular group of people.

Under Article 51 of the Indian Constitution<sup>421</sup> international human rights instruments and conventions may be used in the interpretation of the Indian Constitution to this extent, the following aspects of international human rights law are relevant:

- Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, whereby States Parties shall ‘declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any racial or group of persons of another color or ethnic origin.
- Article 7 of the Universal Declaration on Human Rights, whereby all people are ‘entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.’<sup>422</sup>

---

<sup>420</sup> Nathan Hall, *Hate Crime*, Willan Publisher, 2005

<sup>421</sup> a Directive Principle, requiring that the state ‘foster respect for international law and treaty obligations in the dealings of organized peoples with one another’

<sup>422</sup> requirements as to standards and practice on the promotion of racial equality

- The Human Rights Council...Stressing that defamation of religions is a serious affront to human dignity leading to a restriction on the freedom of religion of their adherents and incitement to religious hatred and violence...Noting with concern that defamation of religions and incitement to religious hatred in general could lead to social disharmony and violations of human rights, and alarmed at the inaction of some States in combating this burgeoning trend and the resulting discriminatory practices against adherents of certain religions and, in this context, stressing the need to effectively combat defamation of all religions and incitement to religious hatred in general and against Islam and Muslim sin particular...<sup>423</sup>

These provisions must be read in the context of resolutions by international bodies regarding ‘defamation of religion’. The first such resolution was articulated by the UN Commission on Human Rights in 1999, with similar resolutions passed by the Commission every year until 2005; the UN Human Rights Council enacted equivalent resolutions from 2007 to 2010. The most recent such resolution, that of the 13th Session of the Human Rights Commission, is illustrative.

Though this resolution lacks the significance of a Convention ratified by India, it is indicative of the evolution of international legal thought towards their cognition of defamation of religions as a significant form of ‘harm’. Given the extent, as noted above, to which international legal norms may be used in the interpretation of the Indian Constitution, the reiterated condemnation of restriction on free speech by the Human Rights Council may similarly foreshadow similarly shifting interpretations of the Constitution by the Indian judiciary.

## **2. IS INTERNET A FREE DEMOCRATIC SPACE?**

The internet is described as the socio-technological system, where the technical system is both the medium and the outcome of the human agency and human objects. One arena where internet has brought great changes is the mass media. The traditional media has been unidirectional but after

---

<sup>423</sup>racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban declaration and programme of action

the evolution of internet, the new form of social media has become multi directional. The social media is a networked media which is designed in a way so that the news is circulated early. The social media includes blogspot, podcast, micro blogs, wikis, photo sharing, video sharing, forums, rates and reviews and other online communities. The social media is new, dynamic and seemingly limitless and this is the reason that it is difficult to regulate it. This has led to the issues like susceptibility of youth to bullying, Anti-Semitism and other kinds of harassment. The digital revolution has drastically lowered the costs of copying and distributing Information, and has made it easier for content to cross cultural and geographical borders. It has helped to develop common standards for storing and encoding information digitally, which are crucial to lowering the costs of transmission and distribution. All this has democratized speech, made it freer, more accessible and open. More and more people can receive digital content from more and more people. This is why social media is now being called the ‘fifth estate’ of democracy.<sup>424</sup> Information technology has emerged as an important and powerful means for public opinion. The most recent example is Anti-corruption Bill movement led by Anna Hazare which was supported by more than 1 lac supporters on facebook and twitter. Another striking example is of wikileaks Julian Assange; the US reporter exposed U S against the Afghanistan and Iraq war. Thus internet has become a primary source for dissemination of knowledge, means to make effective communications and generate public opinion.

As internet has become the indispensable need of today, the probability of its being misused has also increased. This led to the necessity of enacting laws to regulate cyber space and internet. But what should be the extend of regulation became the debate of the hour.

For instance, in September 2007, information-technology worker Lakshmana Kailash K was jailed for 50 days for allegedly defaming an Indian historical figure Chatrapathi Shivajee online. It later emerged that another person had posted the material, and Kailash was arrested based on the wrong IP address. In May 2008, two men were arrested and charged for posting derogatory comments about Congress party Chief Sonia Gandhi on Orkut; the case is still pending. As in the 2007 case, Google, which owns Orkut, accommodated the authorities’ request for identity information. In

---

<sup>424</sup> Dutton, W. H., “The Fifth Estate Emerging through the Network of Networks”, *Prometheus*, Vol. 27, No. 1, March (2009), pp. 1-15.

July 2010, a magazine editor in the southern city of Kerala was arrested on defamation charges for an article posted on the magazine's website about an Indian businessman residing in Abu Dhabi. In 2009, the Supreme Court of India has ruled that both bloggers and moderators can face libel suits and even criminal prosecution for comments posted by other users on their websites. A 19 year old young person from Kerala, Ajith D moderated a blog wherein several anonymous comments criticizing the right-wing party Shiv Sena. That party's youth wing filed a criminal complaint against Ajith, who approached the Supreme Court to quash the prosecution, but the court rejected his request.<sup>425</sup>

### **3. LEGAL REGIME FOR FREE SPEECH IN INDIA**

In the Indian context, the contemporary meaning of the term free speech is inextricable from its origins as a form of legal action in colonial attempts 'to assume the role of the rational and neutral arbiter of supposedly prevalent and inevitable religious conflicts'.<sup>426</sup> Macaulay, in his commentary upon the Indian Penal Code, explicitly endorsed this interpretation of 'free speech' under Indian law, observing that the principle underlying Chapter XV (prohibiting 'offences relating to religion and caste') is that 'every man should be suffered to profess his own religion, and... no man should be suffered to insult the religion of another.'<sup>427</sup> Article 19(1) (a) of the Indian Constitution guarantees the right of all citizens 'to freedom of speech and expression'. This right, however, is not expressed in absolute terms. Instead, it is subject to article 19(2), which allows the State to make laws imposing 'reasonable restrictions' upon freedom of speech and expression in the interests of 'the sovereignty and integrity of India', 'the security of the State', 'friendly relations with foreign States', 'public order', 'decency or morality' or in relation to 'contempt of court, defamation or incitement to an offence'. It is under the ground of 'public order' that India has prohibited and penalized 'hate speech'. The Supreme Court have justified the restrictions on free

---

<sup>425</sup> Prof. M.Sridhar, State regulation of social network community, Centre for Media and Public Policy, NALSAR, Hyderabad available at <http://thegiga.in/LinkClick.aspx?fileticket=wbKMC3hsjHI%3D&tabid=589> last seen at 6/7/2015

<sup>426</sup> Asad Ali Ahmed, Specters of Macaulay: Blasphemy, the Indian Penal Code, and Pakistan's Postcolonial Predicament in Raminder Kaur and William Mozzarella (eds), censorship in south asia: cultural regulation from sedition to seduction, Indiana University Press, 2009, 173.

<sup>427</sup> Thomas Macaulay, INDIAN PENAL CODE, 1838, 2002 reprinting, 101.

speech imposed by article 19(2) on utilitarian grounds: some restrictions on freedom may be necessary so that others may also enjoy their liberties.

Ram Manohar Lohia (1960) lays down that, public order is necessary for citizens to 'peacefully pursue their normal avocations of life.'<sup>428</sup>

As already mentioned above that free speech is not an absolute right, thus, there are few statutory provisions that criminalises the free Speech beyond a point. For instance, the approach of the Indian judiciary towards issues of free speech as they intersect with questions of public order has been exemplified, and in many senses established, by the cases of *Ramji Lal Modi v. State of Uttar Pradesh* and *Gopal Vinayak Godse v. Union of India and Ors.* In *Ramji Lal Modi*, the Supreme Court of India upheld the constitutionality of section 295A of the Indian Penal Code as a reasonable restriction upon free speech in the interests of public order. The Court rejected the need for any nexus between acts possessing a tendency to cause public disorder and the actual occurrence of such public disorder. Furthermore, the Court noted the relatively limited scope of section 295A. It stated that the section does not penalize any and every... insult to or attempt to insult the religion or the religious beliefs of a class of citizens but it penalizes only those acts or insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetuated with the deliberate and malicious intention of outraging the religious feelings of the class. Such intentional insults, as distinct from insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention, possess a clear calculated tendency to disrupt the public order.

It may be good policy to balance the width of a power by the width of a remedy afforded to prevent the abuse of that power. But that is for the Legislature to consider. A Court called upon to construe the nature and content of a remedy is bound by the language of the Section which prescribes the remedy. What is sound policy may not be a safeguard to the true construction of a section.

The Court rejected the petitioners' contention that section 99A of the Code of Criminal Procedure is violative of the freedoms of speech, property and profession. To this end, the Court in declaring the use of national, rather than regional or sectional, restrictions, to be non-arbitrary placed significant weight upon then-recent Indian history: Promotion of hatred between different classes

---

<sup>428</sup> Superintendent, Central Prison v. Ram Manohar Lohia AIR 1960 SC 633.

of citizens, as for example, Hindus and Muslims or deliberate, malicious acts intended to outrage the religious feelings of any class by insulting its religion or religious beliefs are not purely local problems. Recent history shows that these tendencies constitute a serious danger to the very way of life to which we are pledged under the Constitution. In upholding such national restrictions, the Court similarly turned its mind towards practical considerations, in order to afford the relevant provisions their due substance.

The demand for holistic interpretation was highlighted in *Chandmal Chopra v. State of West Bengal and Ors*<sup>429</sup>, in which an attempt to ban all copies of the Quran whether printed or online, on the grounds that it incited violence, disturbed public tranquility, promoted feelings of enmity, hatred and ill-will between different religious communities and insulted the religion or religious beliefs of other communities in India. The court laid down that any attempt to impugn the Quran in the manner as has been sought to be done would infringe the right to freedom of religion including the right to profess, practice and propagate religion. Though the Indian Constitution prescribes explicit grounds upon which speech may be restricted, one should not therefore assume that the Indian judiciary have universally treated freedom of speech with any less reverence than American judges.

The judgment of Krishna Iyer J. in *Raj Kapoor v. State*<sup>430</sup>, written with regard to a film accused of moral depravity, is illustrative in this respect:

‘The world’s greatest paintings, sculptures, songs and dances, India’s lustrous heritage, the Konarks and Khajurahos, lofty epics, luscious in patches, may be asphyxiated by law, if prudes and prigs and State moralists proscribe heterodoxies.’<sup>431</sup>

Section 153A of the Indian Penal Code criminalizes the promotion of enmity between different groups on grounds of religion, race, place of birth, residence, language etc, or doing acts prejudicial to maintenance of harmony. The section prohibits, inter alia:

---

<sup>429</sup> 1988 Cri. L. J 739 Calcutta HC

<sup>430</sup> AIR 1980 SC 258

<sup>431</sup> Raj Kapoor v. State ,AIR 1980 SC 258.



- the promotion of ‘disharmony or feelings of enmity, hatred or ill-will’ between different communities through ‘words, either spoken or written, or by signs or by visible representations or otherwise’ (section 153A(1)(a));
- Acts which are ‘prejudicial to the maintenance of harmony’ between communities, or which ‘disturb or are likely to disturb the public tranquility’ (section 153A (1) (b)).

The broad scope of section 153 A is further supported by section 153B, which prohibits imputations and assertions prejudicial to national-integration. The section criminalizes the use of words either spoken or written, signs, or by visible representations or otherwise which, inter alia:

- impute to any class of persons, by reason of their membership of a particular community, an inability to bear true faith and allegiance to the Constitution of India or uphold the sovereignty and integrity of India (section 153B (1) (a));
- assert, counsel, advise, propagate or publish that any class of persons, by reason of their membership in any community, shall be denied or deprived of their rights as citizens of India (section 153B(1)(b));
- assert, counsel, advice, plead or appeal concerning the obligations possessed by any class of persons, by reason of their membership in any community, where such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill will between such members and other persons (section 153B(1)(c)).

These provisions co-exist with other, broader provisions of the Indian Penal Code, with significant implications for free speech. These provisions include the following:

- section 295, which prohibits ‘injuring or defiling any place of worship with intent to insult the religion of any class’;
- section 295A, which prohibits ‘deliberate and malicious acts, intended to outrage religious feelings or any class by insulting its religion or religious beliefs’;
- section 298, which prohibits ‘uttering words, etc, with deliberate intent to wound religious feelings’;
- section 505(1), which prohibits ‘statements conducive to public mischief’;
- Section 505(2), which prohibits ‘statements creating or promoting enmity, hatred or ill-will between classes’.

These provisions are supplemented by the Information Technology Act 2000 and its Rules, which govern the electronic broadcasting of 'hate speech'. Under section 66A of the Act "Any person who sends, by means of a computer resource or a communication device,

- a) any information that is grossly offensive or has menacing character; or
- b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,
- 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.

These messages may be any information created, transmitted or received on a computer system, resource or device including attachments in the form of: Text, Images, Audio, Video or any other electronic record which may be transmitted with the message

The law targets messages that:

- a. Are grossly offensive or menacing; or
- b. Proffer false information intending to cause annoyance, inconvenience, intimidation, insult, obstruction, etc.; or
- c. Are intended at deceiving the addressee about the origin of the message

The Information Technology (Intermediaries Guidelines) Rules 2011, functioning in addition to the Act, further expand the capacity of the government of India to prohibit 'hate speech'. In addition, clause 3(2) (b) of the Rules prohibit the dissemination of material which is 'racially or racially objectionable', or 'otherwise unlawful in any manner whatsoever', while clause 3(2) (i) prohibits material which 'threatens the unity, integrity, defence, security or sovereignty of India,

friendly relations with foreign states, or public order or causes incitement to the commission of any cognizable offence or is insulting to any other nation.’

One of the main problems with the act is the fact that it is not clearly worded and thus is vague and ambiguous in most of the aspects. For instance, what is grossly offensive information having menacing character is nowhere defined. This is the biggest loophole of the act which allowed law enforcers to give wide interpretation to certain provisions and use such provisions to curb citizen’s right of free speech.

The main purpose of government in moulding this draconian Act so open ended and subjective was to save itself from making later amendments to include upcoming future cyber crimes. In doing so what government failed to foresee was the high probability of Act being misused to prosecute people who dare to have and express a controversial or different opinion that may not necessarily be dangerous.

The first PIL on this 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 as one of them posted a comment against the shutdown in Mumbai following Shiv Sena leader Bal Thackeray’s death and the other 'liked' it.

Dealing with the word "grossly offensive", the bench observed that "what is grossly offensive to you, may not be grossly offensive to me and it is a vague term.

Apart from the two girls who were arrested in Maharashtra mentioned earlier, some other controversial arrests around the act are:

- A tourism officer in Varanasi was arrested for uploading “objectionable” pictures of Mulayam Singh Yadav, Akhilesh Yadav and Azam Khan on Facebook.
- Ambikesh Mahapatra, a Jadavpur University professor, was arrested in Kolkata for forwarding a cartoon about Mamata Banerjee.
- A man was arrested in Puducherry for tweeting that Karti Chidambaram, son of then union minister P Chidambaram was 'corrupt'.

The main defence of the government has been that the act cannot be quashed merely because of the possibility of its abuse.

The large parts of the section can be traced from the S.10 (2) of UK's Post Office (Amendment) Act, 1935<sup>432</sup>:

There are few differences between the two which can be easily figured out regarding are the punishments and the words.

### Term of Punishment

The maximum term of imprisonment in the UK's Post Office (Amendment) Act is only one month, compared to three years in s.66A of the IT Act. The current equivalent laws in the UK are the Communications Act, 2003 (s. 127) and the Malicious Communications Act 1988<sup>433</sup> (s.1) for both of which the penalty is up to 6 months' imprisonment or to a maximum fine of £5000 or both. The Information Technology (Amendment) Bill of 2006, the penalty for section 66A was up to 2 years, and it was changed on December 16, 2008 through an amendment moved by Mr. A. Raja (the erstwhile Minister of Communications and IT) to 3 years. Given that parts of s.66A(c) resemble nuisance, it is instructive to note the term of punishment in the Indian Penal Code (IPC) for criminal nuisance: a fine of Rs. 200 with no prison term.

### Sending v. Publishing<sup>434</sup>

J. Sai Deepak, a lawyer, has made an interesting point that the IT Act uses "send" as part of its wording, and not "publish". Given that, only messages specifically directed at another would be included. While this is an interesting proposition, it cannot be accepted because: (1) even blog

---

<sup>432</sup> If any person:

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

<sup>433</sup> Malicious Communications Act 1988, available at <http://www.legislation.gov.uk/ukpga/1988/27/section/> last seen on 6/7/2015

<sup>434</sup> "The unconstitutional section 66A", available at <http://www.outlookindia.com/article.aspx?283149> , last seen on 6/7/2015

posts are "sent", albeit to the blog servers — s.66A doesn't say who it has to be sent to; (2) in the UK the Communications Act 2003 uses similar language and that, unlike the Malicious Communication Act 1988 which says "sends to another person", has been applied to public posts to Twitter, etc.; (3) The explanation to s.66A(c) explicitly uses the word "transmitted", which is far broader than "send", and it would be difficult to reconcile them unless "send" can encompass sending to the publishing intermediary like Twitter. Part of the narrowing down of s.66A should definitely focus on making it applicable only to directed communication (as is the case with telephones, and with the UK's Malicious Communication Act), and not be applicable to publishing.

The term "grossly offensive" will have to be read in such a heightened manner as to not include merely causing offence. The one other place where this phrase is used in Indian law is in s.20 (b) of the Indian Post Office Act (prohibiting the sending by post of materials of an indecent, obscene, seditious, scurrilous, threatening, or grossly offensive character).<sup>435</sup> The big difference between s.20 (b) of the IPO Act and s.66A of the IT Act is that the former is clearly restricted to one-to-one communication (the way the UK's Malicious Communication Act 1988 is). Reducing the scope of s.66A to direct communications would make it less prone to challenge.

Additionally, in order to ensure constitutionality, courts will have to ensure that "grossly offensive" does not simply end up meaning "offensive", and that the maximum punishment is not disproportionately high as it currently is. Even laws specifically aimed at online bullying, such as the UK's Protection from Harassment Act 1997, can have unintended effects. Undefined and overbroad words such as 'grossly offensive' and 'menacing character' (clause (a)) are subject to discretionary interpretations and abuse. This presents a danger to free speech under Article 19(1) (a). The danger is enhanced when even law enforcement officers at the district level can impose the provision. The Supreme Court observed in *Union of India v. Assn. for Democratic Reforms* - *'One sided information, disinformation, misinformation and non information, all equally create an uninformed citizenry which makes democracy a farce. Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions'*.<sup>436</sup> The

---

<sup>435</sup> The Indian Post Office Act, 1898 , available at <http://www.indiapost.gov.in/Pdf/Manuals/TheIndianPostOfficeAct1898.pdf>, last seen on 6/7/2015

<sup>436</sup> AIR 2001 Delhi 126, 2000 (57) DRJ 82

term "grossly offensive" will have to be read in such a heightened manner as to not include merely causing offence. The one other place where this phrase is used in Indian law is in Section 20 (b) of the Indian Post Office Act (prohibiting the sending by post materials of an indecent, obscene, seditious, scurrilous, threatening, or grossly offensive character). The big difference between Section 20 (b) of the IPO Act and Section 66A of the IT Act is that the former is clearly restricted to one-to-one communication, as is the case of almost all the international precedents being referred to by the Hon'ble Minister. Reducing the scope of Section 66A to direct communications would make it less prone to misuse.<sup>437</sup> The Section 79<sup>438</sup> rules put the onus of censorship on intermediaries – on everyone from ISPs to Cybercafes and websites. The rules are structured in a way that intermediaries will comply with any complaint in order to free themselves of any liability; the rules put the onus of playing judge on intermediaries, hamper freedom of expression, and do not provide a recourse to the person whose content or comments are being censored. The terms defined in clause 2 are too broad, and provide room for censorship of free speech. Clause 2, 4 and 7 of IT Rules, section 3 of the IT Rules.<sup>439</sup> To avoid the misuse of the powers and wide definition of the act, the Indian Supreme Court has directed all state governments to implement the Indian government guideline which requires the approval of a senior police official before arresting any person for posting defamatory content on social networking platforms like Facebook and Twitter. The Indian Government had issued these guidelines in November 2012, which mandated the approval from an officer of DCP (Deputy Commissioner of Police) level in the rural areas and of IG (Inspector General) level in the metros before registering complaints under Section 66 (A) of the IT Act. Following up the cases of abuse of power by the officials, Baijayant Jay Panda, A Lok Sabha MP from Kendrapara, Odisha (BJD), had filed a Private Member's Bill in the Lok Sabha seeking the amendment of Section 66A of the IT Act.<sup>440</sup> He contended that clause (a) and (b) of section 66(A) should be repealed as they are very wide and allow interpretation according to the whims of the police officials. Prior to this, P.Rajeev, a Rajya Sabha MP from Kerala, and a member of the Communist Part of India (Marxist) moved a motion in the Rajya Sabha for writing off of the Rules in the Information Technology (Intermediary Guidelines) Rules 2011, which

---

<sup>437</sup> [http://www.rajeev.in/News/Impedes\\_Freedom\\_Speech/Dec142012.html](http://www.rajeev.in/News/Impedes_Freedom_Speech/Dec142012.html)

The Information Technology (Amendment) Bill, 2008, available at <http://www.cyberlaws.net/itamendments/IT%20ACT%20AMENDMENTS.PDF>, last seen on 6/7/2015

<sup>439</sup> NOTIFICATION, New Delhi, the 11th April, 2011

<sup>440</sup> A private member's bill to amend 66 A, available at <http://www.outlookindia.com/article.aspx?283169>, last seen on 6/7/2015.

made intermediaries responsible for content posted by individuals on the Internet, but the motion was defeated in the Upper house.<sup>441</sup> Many people in politics have taken initiatives to amend the sections and make them free from ambiguity.

Finally pronouncing judgement over the PIL, filed in 2012 by law student Shreya Singhal, Supreme Court did not accepted the contention of the Government and struck down this section as being against the constitutional guaranteed fundamental right of freedom to speech and expression which form the two cardinal pillars of the democracy.

#### 4. **Justification for striking down Section 66A of IT Act, 2000**

For a society in India, which is a union of different religions, regions, castes and languages but also divided by the same factors, any small provocation is enough to disturb. Balance between the rights and restrictions should be sought to be achieved. There should not be a blanket ban on rights. Freedom of expression is the lifeblood of democracy without which an effective rule of law is not possible<sup>442</sup>.

The earlier laws in India, allowed citizens to go to court over information that has even caused them annoyance under Section 66A of the IT Act. To ensure this is not abused, the government has now mandated that a senior police officer looks at individual cases before allowing charges to be filed to avoid nuisance cases. With higher post there will be higher responsibility towards the society which will help in avoiding arrest of innocent people for non-serious statements. The senior police officer shall take action against the accused in accordance with the impact of his piece of expression in the society.

Section 69A of the IT Act authorizes the Central government, the power to direct either a government agency or an intermediary to block access to any website under a list of very specific circumstances. If intermediary sites fail to comply with a blocking order, they may get punishment of imprisonment and fines.

Inspite of having all such rules, there were major flaws in the said Act. Few of the Flaws were:

---

<sup>441</sup> Debate on writing off the rules for intermediaries by MP Rajeev, available at <http://www.rajeevmp.org/pdfs/Assembly-Questions.pdf> last seen on 6/7/2015

<sup>442</sup> Alex Bailing, "Criminalizing free speech?", *Criminal Law Review* (2011)

**Ambiguity:** The purpose of Section 66A was not clear even to senior cops- few of them considered this section to be there for the protection of the women, few considered it as against anti spamming and other few thought it was there to prevent cyber harassment. So in this regard the act was very ambiguous.

**Umbrella Provision:** Section 66A has been used in a wide range of cases from defamation, blasphemy, impersonation, cyber squatting, obscenity, stifling political criticism, criminal intimidation and so on. In all of these cases, it has been used either in conjunction with existing provisions of the Indian Penal Code or as a substitute for missing crimes like cyber squatting and political criticism. But the point to be noted here is that wherever it is used in conjunction with other sections of the IPC, it apparently serves no purpose since the IPC already covers these offences and in cases where it has been used as a substitute for missing laws, it simply invents new crimes. There are several instances mentioned in the paper where arrest of several innocent people took place even after the guidelines were issued. Even if the absurdity of the case were to be ignored and it were to be discussed technically, it's still clear that the law was invoked without application of mind.

**Unnecessary Curb on Free Speech: As already stated that** Section 66A invents new crimes such as causing annoyance, insult and inconvenience even though they are well within our Constitutional right to offend, annoy, inconvenience or even insult institutions, practices, individuals, etc. as long as it is within the limits of decency and does not border on hate speech. But in this case hatred was considered to be hate speech and was seen as the necessary restriction on the right to free speech. In this manner almost whatever content was not liked by the other was brought under the hate speech and thus was restricted.

Thus it will not be wrong to say that Section 66A of IT Act, 2000 was against the fundamental right to free speech and expression and hence was rightly held unconstitutional and ultra vires to the constitution by the court and correctly was struck down.