

“Constitutionality of Section 66 of the Information Technology Act, 2000”

*Sarvesh Raizada
Alliance University,
Bangalore*

ABSTRACT

Anyone will now express themselves freely on the internet without risk of being prosecuted. Many incidents have instilled distrust in the minds of young people who use the internet to express themselves. The fundamental right to freedom of speech and expression is violated when one's ability to express itself is limited. The offence of transmitting material that is insulting or menacing in nature is defined by Section 66A of the Information Technology Act of 2000, which carries a three-year prison sentence and a fine. This repressive legislation was recently ruled unconstitutional by the Hon'ble Supreme Court on the grounds that it explicitly breaches the Constitution of India's protection of freedom of speech and expression, and that any other breach that is not saved by fair exceptions is unconstitutional. The lawsuit was filed on the basis that the statute violated two human rights, but the Supreme Court only admitted one of them. This paper examines the criteria used by the Hon'ble Court in reaching the decision that safeguarded India's freedom of speech.

1. INTRODUCTION

The statute that deals with cybercrime and electronic commerce intrusion is known as the information technology act. It establishes a legal foundation for transactions conducted through the use of web or internet services. This act essentially allows the government to legalize internet transactions such as contracts but still keeping them under tight supervision and making them enforceable. This often entails the use of alternatives to paper-based correspondence and information collection in order to promote electronic record filing with government departments. The primary emphasis of this research paper would be on section 66(a) of the Information Technology Act. In addition, the statutory legitimacy of this provision will be questioned by extensive testing and the use of required questionnaires, which will aid in the process.

Section 66A of the Indian Penal Code makes it illegal to transmit offensive messages from a server, computer network, or computer resource in India. This portion has been interpreted broadly to include almost all that may be considered offensive. Such a structure will put a stop to freedom of speech and expression, as well as discourage free speech, resulting in a chilling impact on speech. Furthermore, the media has extensively publicized and promoted the abuse of this segment. The Supreme Court of India considering all these aspects has decriminalized Section 66A of the IT Act.

1.2. RESEARCH PROBLEM

As this act involves legal recognition to the transaction done via electronic exchange therefore in light of the information technology act which includes a section i.e. 66A which states 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."¹

1.3. EXISTING LEGAL SITUATION

The Supreme Court has struck down Section 66A of the amended Indian Information Technology Act, 2008, a clause of the cyber law that gives authorities the authority to detain people for publishing allegedly "inflammatory" material on websites, in a historic decision upholding freedom of speech. The Supreme Court ruled that the provision violates Article 19(2) of the Constitution, which protects freedom of expression, and that it must be repealed completely.

The penalty for transmitting "offensive" messages via a machine or any other communication device, such as a cell phone or a tablet, is specified in Section 66A of the IT Act. A felony carries a mandatory sentence of three years in prison as well as a fine.²

The Hon'ble Supreme Court observed, (in the light of the 2008 amendment that)

"Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total."

The Hon'ble Supreme striking down the validity of Section 66A of the IT Act held, *"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."*

1.4. LITERATURE REVIEW

Nandan Kamath opined that, there is a single provision dealing with this under Section 66a of The Information Technology Act, 2000 which is a provision with very limited in its scope to deal with every aspect of privacy in digital world.³ The ancillary provisions also include the offence under Section 66 of The Information Technology Act, 2000, which exists if the

¹ Section 66A; Information Technology Act, 2000

² <https://www.lexology.com/library> accessed on 15th feb 2020 at 2:20 pm

³ NANDAN KAMATH, LAW RELATING TO COMPUTERS, INTERNET AND ECOMMERCE, 312-315 (5th Ed., 2015)(2013)

accused commits any contravention under Section 43 with men's rea. The biggest challenge in case of technology based offences is that of proving an intention. As per Vakul Sharma, the computer related offence involves mental act with destructive animus.⁴

1.5. SCOPE AND OBJECTIVE

To understand the scope of existing regulatory framework relating to the contraventions prescribed under Section 66 of The Information Technology Act, 2000. To study the technological challenges and developments which question the effective implementation of Section 66 and to identify the limitations of Information Technology Act, 2000. In the above context, the present study attempts to understand the magnitude of the need for reform in the existing regulatory framework in India concerning Contraventions under Section 66a of The Information Technology Act, 2000. The scope and significance of the present study lies in the fact that no legislation addressing information technology will be complete till the growth and development goes stagnant or stops for a while.

1.6. RESEARCH METHODOLOGY

The methodology used for the study is doctrinal research which is based on evaluation of primary as well as secondary sources. Therefore, all the data collected is from the sources like reference books, law journals, newspapers, periodicals, e-journals and also navigating on certain opinion writings to conclude with suggestions, recommendations. Few of the websites have also been referred to keep up to date with the latest technologies referring the current status of the law.

1.7 RESEARCH QUESTION

Does section 66A of the information technology act of 2000 violate a person's fundamental right as mentioned in Art 19(1) (a) of the Indian constitution?

1.8 HYPOTHESIS

Testing the validity of the Section on the touchstone of the clear and present danger test or the tendency to create public disorder, it can be held that Section 66A should not be included as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates.

In other words Section 66A severely curtails information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject matters under Article 19(2) must, therefore, fall foul of Article 19(1) (a) and is unconstitutional

2. CONSTITUTIONALITY OF SECTION 66A OF IT ACT

If we think about it rationally, the case *Shreya Singhal v Union of India*, which was the contested case, shows that section 66A of the IT Act is legally legitimate because it does not violate any basic rights granted under Part III of the constitution. The applicants' first

⁴ VAKUL SHARMA, *Supra* note 7 at 173-175 – fifth edition

complaint was the inclusion of Section 66A, which was not included in the initial IT Act of 2000 but was enacted by an extension act in 2009. This was the situation in which the act's constitutionality was contested on the grounds that it infringed on human rights.

2.1 Statement of Objects and Reasons

The Statement of Objects and Reasons appended to the bill which introduced the act read as follows in Para 3:

A rapid increase in the use of computer and internet has given rise to new forms of crimes like publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of data by intermediary, ecommerce frauds like personation commonly known as Phishing, identity theft and offensive messages through communication services. So, penal provisions are required to be included in the Information Technology Act, the Indian Penal code, the Indian Evidence Act and the code of Criminal Procedure to prevent such crimes.

The appellant argued that Section 66A failed to include a solution or a deterrent against any new offense that arose as a result of information technology. The petitioners viewed Section 66A's applicability in terms of the Statement of Objects and Reasons, arguing that Sections 66B to 67C are sufficient to address the crimes protected by Section 66A. The Supreme Court, nevertheless, holds that declaring the provision unconstitutional just because it breaches or contradicts the Statement of Objects and Reasons is beyond the limits of judicial scrutiny and activism, since the judiciary may only deem a statute constitutional if it violates the Constitution's fundamental framework and hence, this would not be a valid ground for contending validity of a law in a court.

2.2 Possibility of abuse of law

The government is thought to be in the right position to decide and represent the people's needs, and there is a belief that a clause is constitutional. The constitution does not set arbitrary criteria for deciding validity. The very probability of a clause being abused cannot be used to invalidate it. Further ambiguity is not a reason to throw down a statute. As a result, none of the above reasons for invalidating Section 66A has been admitted.

2.3 Article 19(1)

One of the most essential rights that guarantees the people's voice in a democracy is freedom of speech and expression. It is essential for the life of a democracy and corresponds to the principles of liberty. There are three key principles that are central to freedom of speech and expression:

1. Discussion
2. Activism
3. Motivation

Article 19 limits are not imposed by mere debate or lobbying (1). Article 19 applies only where a debate or activism has reached the extent of incitement (2). At this point, the state can limit this freedom based on the powers granted to it by Article 19(2). This right has been expanding largely in the recent past across the world making it a basic human right and almost, an absolute one till such right reaches the point of incitement. The features of Article 19 as enlisted in the 101st Report of The Law Commission of India⁵

1. Article 19 is confined to citizens and foreigners cannot claim under this right.
2. A corporate body cannot claim citizenship and therefore cannot claim any right under Article 19.

This privilege has been construed in a way that is conducive to citizens' health. The Supreme Court held in **State of Uttar Pradesh v Raj Narain** that Article 19(1) protects not only freedom of expression but also the right of citizens to know and obtain information about matters of public concern. This right has been understood to include the right to fly the National Flag openly with reverence and honour within its vast reach and ambit, subject to the provisions of the Emblems and Names Act and the Prevention of Insults to National Honour Act, 1971, which govern the usage of the National Flag⁶.

Section 66A has further been challenged on the ground that it casts the net far wide and includes all information on the internet. Information is defined by Section 2(v) as including any data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche.

- The definition is an inclusive definition. It includes all type of data and covers all types into its ambit thus not leaving any part of the internet.
- This definition does not refer to what the content can be, and only refers to mode of such content. Thus it includes all information under it.

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

3. VALIDITY OF SECTION 66A

The validity of this law is a supportive agent to the primarily unconstitutional elements and is merely supporting factors that fuel the invalidation of the law. There are the elements which support that the law is loosely framed and has loopholes that makes it not a 'good law'.

3.1 Construction and Vagueness

The vocabulary of Section 66A is somewhat ambiguous. The petitioners argued that neither the officials nor the accused would be fully aware of the existence of the violation of this

⁵ Law Commission of India: Report 101

⁶ Union of India v Naveen Jindal (2004) 2 SCC476

clause. Because of the ambiguity of this clause, the law-abiding citizen must be very careful in determining which behaviors he observes are outside the law's bounds and which are punishable. As a result, any ambiguity should be discouraged. *Winter's v. People of the State of New York* was decided by the United States Supreme Court.⁷ Held that

“The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law--obscene, lewd, lascivious, filthy, indecent or disgusting--and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct--massing stories to incite crime--has resulted in three arguments of this case in this Court.”

As a result, it is critical that penal statutes are clearly construed and written in a way that leaves the least amount of doubt, i.e., the legislature should strive to enact penal statutes strictly or in the manner in which they were meant to be applied.

However, as developed in the cases of *State of MP v. Kedia Leather & Liquor Limited* and *State of MP v. Kedia Leather & Liquor Limited*⁸ and *State of Karnataka v. Appa Balu Ingale*⁹,

The Supreme Court and other courts have consistently ruled that a substantive challenge based on vagueness does not exist. As a result, there is no substantive appeal, as a statute cannot be overturned by the judiciary only on the basis of the vagueness or violation of the law.

3.2 Chilling Effect and Over breadth

Section 66A casts a broad net on information that is something like an impression or statement of a belief that is unpleasant or controversial to a large segment of society. This results in stifled speech. It is self-evident that expressing a point of view on any subject can confuse, inconvenience, or offend some people. In a conservative society, an individual who uses social media to promote women's emancipation or the abolishment of the case system will be chastised and will be subject to Section 66A. It casts the net so wide that every expression of opinion which hurts another or causes annoyance to another falls under it. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total.

Chilling Effect was recognized in Indian law in *R. Rajagopal v. State of Tamil Nadu*¹⁰. The principle of Sullivan was tested in this case and the court laid down as follows

“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

⁷The United States Supreme Court in the case of *winter's v. People of State of New York* 92 L. Ed. 840

⁸ *State of MP v. Kedia Leather & Liquor Limited* 2003 7 SCC 389

⁹ *State of Karnataka v. Appa Balu Ingale* 1995 Supp. (4) SCC 469

¹⁰ *R. Rajagopal v. State of Tamil Nadu* (1994) 6 SCC 632

chilling effect' induced by the 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.”

Further the essence of the law and the chilling effect was upheld in the case of *S. Khushboo v. Kanniamal*¹¹, the court held that 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".

The court further held that chilling effect of defamation is inclusive of bypassing or reaching beyond exceptions in Article 19(2) however the effect must be proximate to the causes and not remote in nature to the exceptions. Summing up, the court held that Section 66A is unconstitutional on the grounds that it takes with it protected and innocent speech and therefore has a chilling effect on free speech and would therefore be struck down on overbreadth.

3.4 Wide Misuse of the law

According to the court, an invalidity appeal for a statute cannot be taken to a court solely on the grounds that it is capable of being misused or that it has been misused. A statute that would otherwise be constitutional cannot be declared unconstitutional unless it has a lot of room for abuse. The converse must be followed as well. A legislation that would be invalid otherwise cannot be validated on the basis that it would be used correctly or equally. Similarly, the fact that Section 66A has a lot of space for abuse isn't a reason to throw it out. Furthermore, a guarantee that it will act in a fair manner is not enough to justify validating a section that is otherwise invalid due to presence of unconstitutional elements. Therefore, it was held that Section 66A has to be judged on its own merits and not on the basis of its usability or reasonableness of its application.

3.5 Severability

Section 66A asserts that fair limitations on the Right to Freedom of Speech and Expression exist under Article 19(1) (a), and contains items that are both protected and not saved by the exceptions to reasonability provided by Article 19(1) (a) (2). In the case of **K.A. Abbas v. Union of India**¹², it must be held that the likelihood of a statute being applied in a way that is illegal or ultra vires the law's ambit and scope should not be underestimated or neglected., that a possibility of a law being used in a manner so as to be unconstitutional or ultra vires the ambit and scope of the application of law should not be overlooked or neglected. In this situation, the possibility of Section 66A being used for reasons other than those authorized by the Constitution cannot be discounted. As a result, the entire Section 66A must be ruled unconstitutional. It was argued in **Ramesh Thapar v. State of Madras**¹³ that the provision in

¹¹ *S. Khushboo v. Kanniamal* (2010) 5 SCC 600

¹² *K.A. Abbas v. Union of India* (1971) 2 S.C.R. 446

¹³ *Ramesh Thapar v. State of Madras* (1950) SCR 594

question had a much broader scope and contained much more than Article 19(2), and that since it was impossible to break up the section, it failed to include the cover afforded by Article 19(2). (2). Applying the same logic to Section 66A, it does not come under any of the subject matters mentioned in Article 19(2), and it is apparent that it may be used for purposes other than those listed. It was decided that the provision in question had a far broader scope and contained much more than Article 19(2), and that since it was impossible to divide the section, it refused to include the protection provided by Article 19(2). (2). Applying the same logic to Section 66A, it does not come under any of the subject matters mentioned in Article 19(2), and it is apparent that it may be used for purposes other than those listed. As a result, the court determined that no portion of the provision is severable, rendering the whole section unconstitutional.

Unreasonable Procedures The appellants argued that Section 66A was indeed unfair in its handling of the legal procedures. The court found that the statute contained legal unreasonableness. The IT Act's Section 66A lacked features or aspects that were poised as precautions in the Criminal Procedure Code, resulting in a great deal of arbitrariness in the way complaints relating to the offence under Section 66A were handled. Sections 95 and 96 of the Criminal Procedure Code are notable clauses that were not included in the protections against the Offense under Section 66A. The sections deal with the ability of a person who is involved in a specific article or job that has been charged with defamation to file a petition under Section 96 within two months to appeal to the High Court to have the declaration set aside, and the High Court will form a bench to hear the case.

Thus, Sections 95 and 96 demonstrate sensitivity to freedom of expression, while such provisions are missing for an offence that casts such a broad net under Section 66A of the Information Technology Act, 2000. However, the court reasoned that the provision had already been ruled invalid for breaching Article 19(1) and was not saved by Article 19(2), so there was no point in examining the section's procedural unreasonableness.

5. CONCLUSION

Article 19 of the Constitution guarantees freedom of speech and expression, and Section 66A has revolutionized the definition (1). As time went by, the Supreme Court interpreted the principle of freedom of expression and the fine line between freedom of speech and defamation law, extending freedom of speech while restricting defamation law to a limited degree. It has recognised the chilling effect of defamation law on free speech and has ensured that free expression is permitted if a free opinion is voiced. Since the Supreme Court was considering Section 66A, the court looked at different parts of the statute to see if it was constitutional. Validity of the law was tested using both constitutional and other parameters. The law's constitutional parameters were examined, and it was determined that it was flagrantly in violation of Article 19 of the Constitution (1) This was the court's reasoning for declaring the statute invalid. The court held that the legislature used intelligible differentia in granting higher imprisonment and finding the crime under Section 66A cognizable whereas the offence under Section 499 of the IPC was non-cognizable since the internet was open and

everyone could express themselves in the cyber environment and it has a greater variety and faster mode of court. The Supreme Court agreed with the petitioners that the said provision was ambiguous in nature and that it failed to define or justify the intent or existence of the said section in the face of numerous others dealing with the same or related subjects. The court went on to say that the legitimacy of a statute is not contingent on its certainty. Applying the same logic on the opposite, a law's invalidation cannot be based on its ambiguity. A statute that is otherwise lawful cannot be ruled unconstitutional because it is ambiguous or unclear, and a law that is otherwise illegal cannot be declared valid unless it is definite. As a result, the Supreme Court applied the first clause, declaring that vagueness is not a basis for declaring a statute null or unconstitutional.

As a result, it is determined that the offence under Section 66A chills free expression and is therefore found illegal because it violates Article 19(1) (a). The Supreme Court has placed a high priority on freedom of speech, limiting the depth and authority of legislators to limit it only to the extent that it is protected by Article 19. (2).

6. BIBLIOGRAPHY

BOOKS REFERRED

- DD Basu, Introduction to the Constitution of India (22nd edn, LexisNexis 2015)
- KD Gaur, Indian Penal Code (6th edn, Universal Law Publications 2018)
- MP Jain, Indian Constitutional Law (8th edn, Lexis Nexis 2018)
- Nandan Kamath , law relating to computers, internet and e-commerce , 312-315 (5th Ed., 2015)(2013)
- Vakul Sharma , Supra note 7 at 173-175 – fifth edition

JOURNALS REFERRED

- Apar Gupta, Commentary on IT ACT,2000 (2nd Edition 2011) accessed on 18th march 2020

BARE ACTS REFERRED

- Indian Constitutional Law, 1950 (Bare Act)
- The Indian Penal code, 1860 (Bare Act)
- Information technology act, 2000 (Bare Act)

WEBSITES REFERRED

- <https://www.lexology.com/library> accessed on 15th feb 2020

CASE LAWS REFERRED

- *Shreya Singhal v Union of India* AIR 2015 SC 1523

- *Keshavananda Bharti v State of Kerala* (1973) 4 SCC 225
- *State of Uttar Pradesh v. Raj Narain* AIR 1975 SC 865
- *Union of India v Naveen Jindal* (2004) 2 SCC476
- *Winters v. People of State of New York* 92 L. Ed. 840
- *State of Madhya Pradesh v. Kedia Leather & Liquor Ltd.* 2003 7 SCC 389
- *State of Karnataka v. Appa Balu Ingale* 1995 Supp. (4) SCC 469
- *R. Rajagopal v. State of T.N.* (1994) 6 SCC 632
- *S. Khushboo v. Kanniammal* (2010) 5 SCC 600
- *The Collector of Customs, Madras v. Nathella Sampathu Chetty and Anr.* (1962) 3 S.C.R. 786
- *K.A. Abbas v. The Union of India and Anr* (1971) 2 S.C.R. 446
- *Romesh Thapar v. State of Madras* (1950) SCR 594