

THE CRIMINALIZATION OF ONLINE SPEECH

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ABSTRACT

Sometimes your words and your online speech can lead to a criminal prosecution in the real life. With the evolution of social media; Facebook, YouTube, Twitter etc., people have different ways of communicating. While you are sitting in one place, you see your words travel around the world within a few minutes. The fact is the speaker's intention and what he means are always subject to misinterpretation, and states sometimes use cybercrime tools to restrict online speech. So the question is what are human rights in cyberspace? And how to solve the conflict between the right to know and the right to privacy.

Keywords: Social media, privacy, human rights, online speech, Section 66A

INTRODUCTION:

Social media and internet offers huge opportunities to people for the freedom of expression. Individuals are able to see their thoughts traveling the globe in a few minutes and its interpretation is not automatically dependent on the filtering process of the media of the governments. The freedom of expression on the Internet is a crucial challenge to address in formulating an inclusive information society. The vehicle by which information moves in this space is the internet and it precedes onward the interstate called World Wide Web. However, apparently to national space and domain that we call a nation or an express, the way people act and settle on choices in this space is guided through principles and standards generally recorded in constitutions or laws on account of Cyberspace, these citizens are internet users all as far and wide as possible. Public Privacy is about fundamental flexibility and privacy rights grounded in global human rights law. Cyberspace is a borderless public space in which nationals, paying little respect to their citizenship, nationality, ethnicity, political introduction, sexual orientation or overall foundation convey and associate. Through new innovations, Cyberspace offers an environment that comprises numerous members with the capacity to influence and impact one another. So the question here is what are the human rights in cyberspace? and an understanding of the criminalization of online speech. These two tenets of criminalization of online speech will be discussed below.

HUMAN RIGHTS IN CYBER-SPACE:

Humanity has been longing for respect, tolerance and equality for a long time, but it is strange to notice that despite the enormous strides that our societies have made in many ways in the technological, political, social and economic fields, they are still suffering from the same problems that they had thousands

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of years ago. Human rights are moral principles or social norms that describe a model of human behavior which is generally understood to be the fundamental rights that cannot be infringed due and authentic to each person simply because he or she is a human being regardless of their identity, place of birth, language, religion, ethnic origin or other status. And its protection is organized as legal rights under domestic and international law.

A range of human rights has been identified as related rights in relation to the Internet such as Freedom of expression, data protection, privacy and freedom of association. In addition, the right to education, consumer rights and capacity-building have been identified in the context of the right to development as Human rights have been described as the "missing link" between technology-based and value-based methodologies for the Internet. A novel in Catholic News service reported in November 2011 (CNS) about an editorial in the Jesuit journal says that Internet is a public and universal commodity that must be accessible to all with respect to the rights of others, and in cases of repressive regimes that prohibit access to information and communication, democratic governments must ensure access to the Internet and adopt general principles that ensure respect for the use of the Internet for universal human rights, also said in the article that what is permitted by the law or ban in a way of internet should apply in case of dealing with the Internet. There is also a broad international consensus about some of the online materials, which should be banned, such as child pornography and online terrorism.

Also the Jesuit magazine said that with the abuse of freedom of expression by individuals, through the potential exploitation of computer companies for financial gain and repressive regimes that prohibit access to information to their citizens, the world needs a "Human Rights Charter for the Internet". The Electronic Frontier Foundation also criticized the US government for thinking about the loss of property rights during the acquisition of Mega upload by storing data on a cloud computing service in mega upload case.

Human rights in cyberspace are a relatively new and uncharted area of law. The United Nations Human Rights Council (UNHRC) has stated that the freedoms of expression and information under Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) include the freedom to receive and communicate information, ideas and opinions through the Internet. An important clause is Article 19(3) of the ICCPR, which provides that: The exercise of the right provided in paragraph two of this article carries with it special duties and responsibilities. It may therefore be subjected to certain restrictions, but these shall only be such as are provided by law and are necessary (a) For respect of the rights or reputations of others (b) For the protection of national security or of public order, or of public health and morals. The (HRC) has stated that "the same rights that people have offline must also be protected online" (mentioning, in particular, freedom of expression). It is widely regarded that this freedom of information must be balanced with other rights.

Human rights in cyberspace depends on the evolution of the law and its interpretation by national and international governing bodies. Jon Bing warns that once rules and regulations are automated, they become extremely arduous to subject to judicial review.

The often proclaimed Right to Internet which aims to allow individuals have access to internet at any time and the Right to be Forgotten which assures that one's own private data remains private and can be deleted at any time are already part of the overall human rights standards concerning access to information the right to privacy and data protection (as in the EU Fundamental Rights Charta) and participation. It is therefore no longer an issue of international debates whether freedom rights exist or not but rather how to implement and enforce them into national legislation. During the conference all UN member states confirmed that all human rights derive from the dignity and worth inherent in the human person and that the human person is the central subject of human rights and fundamental freedoms.

PRIVACY IN THE INFORMATION TECHNOLOGY AGE:

The advances in computer technology and telecommunications have dramatically increased the amount of information that can be stored, retrieved, accessed and collected immediately these days. In the era of technology, information is so easily accessible that with one tap on a button you could know huge amounts of information about the personal life of an individual in terms of electronic information. A person in the age of internet and technology should be able to keep his personal information to himself. Advances in computer technology are making it easy to do what was impossible to do a few years back; through the information in databases you can easily know the personal details of people and even predict their behavior. This behavior is determined by an individual's transactions with various educational, financial, governmental, professional and judicial institutions for the use of electronic marketing etc. There are serious privacy issues that the person should take in his consideration before logging onto the internet. Every time an individual logs onto the internet he/she leaves behind a trail where the companies can trace his/her details for their direct marketing, for example; every time one shops from the internet and uses his/her credit card he/she leaves behind a trail about where one shopped from and what was shopped. They can even get to know about one's favorite brands and restaurants.

The law of privacy has not kept pace with the technological development. It must be noted that the right to freedom of speech and expression and right to privacy are two sides of the same coin. One person's right to know and be informed may violate another's right to be let alone. These rights must be harmoniously construed so that they are properly promoted with the minimum of such implied and necessary restrictions. The law of privacy endeavors to balance these competing freedoms.

Privacy as a human right is a new concept to some. However, it is actually guaranteed in the United Nations Universal Declaration of Human Rights. Digital privacy as a human right has been given a great importance particularly because it may be compromised very easily. Privacy is a human right and guarantor

of human dignity, which is important to maintain personal security, protect identity and promote freedom of expression in the digital age. So, as privacy is a recognized human right by the United Nations Universal Declaration of Human Rights it is the state's obligation to protect the privacy of a person as well as it is the corporate's responsibility to respect human rights and personal privacy.

Freedom of information in the Article 19 of the international convention on civil and political rights guaranteed that the right to impart and receive information is a species of the right to freedom of speech and expression. A citizen has a Fundamental Right to use the best means of imparting and receiving information. The State is not only under an obligation to respect the Fundamental Rights of the citizens, but also equally under an obligation to ensure conditions under which the Right can be meaningfully and effectively enjoyed by one and all. Freedom of speech and expression is basic to and indivisible from a democratic polity. The world has moved towards the universalization of the right to freedom of expression. In this context reference may be made to Article 10 of the European Convention on Human Rights. Article 10 of the Convention provides that everyone has the right to freedom of expression and this right shall include freedom to hold opinions and to receive information and ideas without interference by the public authorities regardless of the frontiers.

The International Covenant on Civil and Political Rights declares in article 19(1 and 2) that everyone has the right to hold opinions without interference, and everyone shall have the right to freedom of expression, and this right shall include freedom to seek, receive and impart information of ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice. The Universal Declaration of Human Rights, 1948 in article 19 also provides the same protection that everyone has the right to freedom of opinion and expression and this right includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media regardless of frontiers. The Indian constitution in article 19(1)(a) guarantees to all citizens the right of freedom and expression. But the constitution at the same time permits the State in article 19(2) to make any law in so far as such law imposes reasonable restrictions on the exercise of the rights conferred by Article 19(1) (a) of the constitution in the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency, morality, contempt of court, defamation and incitement of offence. So, every citizen has the right to receive and impart information and that right is derived from the concept of freedom of speech and expression guaranteed in Article 19 of the constitution. However, from the reading of Article 19 we can make out that the right to freedom of speech and expression guaranteed under this article is available only to Indian citizens; foreigners have no right under this article because they are not citizens of India. So for non-citizens of India, Article 21 of the constitution should be applied, which is available to every person irrespective of his or her nationality. Article 21 of the Indian constitution has guaranteed every person the right to life and personal liberty. The term right to life and

personal liberty is a short term which includes within it different rights and attributes and one of these rights is the right to know.

Article 21 of the constitution provides every person the right to know under the right of life and personal liberty which includes the right to receive information. The scope of Article 21 is much wider than the scope of Article 19(1) (a). So courts are required to expand the scope by way of interpretation and judicial activism. The Supreme Court in R.P. Limited v Indian Express Newspapers read into Article 21 the right to know. The Supreme Court held that the right to know is a necessary ingredient of participatory democracy as the international communities are moving together towards global perspective in various fields and human rights is one of them. In P.U.C.L v U.O.I the Supreme Court observed that Fundamental Rights themselves have no fixed contents, most of them are empty vessels into which each generation must pour its contents in the light of its experience. The attempt of the court should be to expand the reach and ambit of the Fundamental Rights by the process of judicial interpretation. So the right of personal privacy is conflicted with the right of speech and expression and the right to know, basically the right to privacy is protected by law. The Information Technology Act (2000) under section 43A provides civil and criminal protection to the person affected; so that the corporate holds liability for the damages done to the person. There are laws enacted from time to time in case of the welfare of the society permitting the disclosure of information such as section (269) of the Indian penal code (1860) where the person suffering from infectious disease is under obligation to disclose the information and if he failed to do so he or she will be liable to be punished under this section by imprisonment which may extend to six months or with fine or both.

THE CONSTITUTIONALITY OF SECTION 66A OF THE IT ACT 2000:

At this point, we are going to discuss the constitutionality of section 66A of the Information Technology Act 2000 as this section caused a row in the country and many writ petitions were made reclaiming the unconstitutionality of this section saying that it violates the rights guaranteed to people under Articles 32 and 19 of the constitution. As originally enacted section 66A was not in the act. It came into force after the amendment of the act in 2008 with effect from 2009. And ever since many arguments rose by several councils reclaiming the unconstitutionality of this section.

Section 66(A) reads: "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 makes 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 and mislead the addressee or the recipient about the origin of such messages shall be punishable with imprisonment for a term which may extend up to two 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.

The genealogy of this Section may be traced back to Section 10(2) (a) of the U.K. Post Office (Amendment) Act, 1935, which made it an offence to send any message by telephone which is grossly offensive or of an indecent, obscene, or menacing character. This Section was substantially reproduced by Section 66 of the UK Post Office Act, 1953 as follows:

66. Prohibition of sending offensive or false telephone messages or false telegrams, etc. If any person (a) sends any message by telephone which is grossly offensive or of an indecent, obscene or menacing character. (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 purpose as aforesaid. He shall be liable on summary conviction to a fine not exceeding ten pounds, or to imprisonment for a term not exceeding one month, or to both.

The first case challenging the constitutionality of section 66A was filed in accordance to public interest litigation in November 2012 Shreya Singhal v Union of India calling for the unconstitutionality of section 66A of the information technology act stating that the language of the section is so wide and vague and incapable of being judged on objective standards, section 66A hence violated article 14, 19 and 21 of the constitution by creating new offences and curtailing human rights granted to people under the constitution, specially the right to speech and expression. And here she requested the court to issue of guidelines to reconcile section 41 and 156 of the criminal procedure code with article 19 (1) of the constitution and any other legislation if they involve the freedom of speech and expression to be treated as a non cognizable offence.

In reply, Mr. Tushar Mehta learned Additional Solicitor General; defended the constitutionality of Section 66A. He argued that the legislature is in the best position to understand and appreciate the needs of the people. The Court will, therefore, interfere with the legislative process only when a statute is clearly violative of the rights conferred on the citizen under Part-III of the Constitution. There is a presumption in favor of the constitutionality of an enactment. Further, the Court would so construe a statute to make it workable and in doing so can read into it or read down the provisions that are impugned. The Constitution

does not impose impossible standards of determining validity. Mere possibility of abuse of a provision cannot be a ground to declare a provision invalid. Loose language may have been used in Section 66A to deal with novel methods of disturbing other people's rights by using the internet as a tool to do so. Further, vagueness is not a ground to declare a statute unconstitutional if the statute is otherwise legislatively competent and non-arbitrary. He cited a large number of judgments before us both from this Court and from overseas to buttress his submissions.

The apex court issued notices to the central government and other four states Maharashtra, Delhi, West Bengal and Puducherry. The court directed the attorney general to appear before it and Maharashtra government to explain the situation why the police arrested two girls from Palghar for posting comments on Facebook regarding Bal Thackeray's funeral. Well, the replay supported the validity of section 66A and assured that section 66 had not been misused. Subsequently, the central government issued guidelines on the 6th of January 2013 to ensure that section 66A is not misused. Attorney general GE Vahanvati apprised the apex court of the same which provides that "state governments are advised that as regard to arrest of any person in complain registered under section 66A of the information technology act, the concerned police officer of a police station may not arrest any person until he/she has obtained prior approval of such arrest from an officer not below the rank of inspector general of police in metropolitan cities or of an officer not below rank of deputy commissioner of police or superintendent of police at district level as the case may be".

Finally, the apex court which refused to pass an order to completely ban the arrest of the person for making objectionable comments on websites under section 66A of the IT act opined in 2013 that the state government should ensure strict compliance and any person should not be arrested under section 66A without permission from senior police officials.

Finally the Supreme Court struck down section 66A of the Information Technology act in 23/03/2015; *Shreya Singhal v. Union of India* and declared that this section violated article 19(1) of the constitution saying that the provision clearly affects the fundamental right to freedom of speech and expression guaranteed under the constitution. The court held that the terms like "annoying" "inconvenient" and "grossly offensive" used in the provision are vague and it is difficult for the law enforcement agencies and the offenders to know the ingredients of the offence and hence declared section 66A unconstitutional, because it is not possible for law enforcement to know what is grossly offensive and what is not, because what is offensive to someone may not be to the others. While the decision of the Supreme Court is of immense significance in protecting online free speech against arbitrary restrictions, Section 66A, which was declared unconstitutional, has continued to be used as a punitive measure against online speech in several cases.

At the end of this discussion we should clarify that section 66A of the Information Technology Act 2000 was incorporated in the amended bill for the purpose of protecting people and preventing the misuse of networks but the only flaw of it was the language of this section was vague and that might be interpreted in a way beyond the reasonable restriction on free speech guaranteed in the constitution under article 19(2). Therefore, section 66A needs to be amended to work in harmony with the freedom of speech and expression as guaranteed in the constitution. However, till section 66A is challenged, we should be very careful while using the internet or any other network.

ONLINE SPEECH AND SOCIAL MEDIA:

The Supreme Court held that the freedom of speech and expression has no geographical limitations and it moves with the right of a citizen to collect information and to exchange thought with others not only in India but abroad as well. The zest of the Article 19 says: “Everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to pursue, receive and promulgate information and ideas through any media regardless of state boundaries”. But sharing your views or expressing your ideas online in India is of concern as the authorities have prosecuted legitimate political comments and personal views expressed on social media. In fact, social media offers people a chance to express their ideas online and see their ideas travel the world while they are sitting at the same place, but this opportunity has been taken away from them after the introduction of section 66A of the Information Technology act (2000). Many people got arrested due to their posts on social media under section 66A. For an instance, police arrested a 21 year old girl in Mumbai Maharashtra due to her post on Facebook on Sunday 18th November 2012, a 21-year-old Mumbai woman, Shaheen Dhada, shared her views on Facebook on the shutdown of the city as Shiv Sena chief Bal Thackeray’s funeral was being held. Her friend Renu Srinivasan liked her post. At 10.30 am the following day they were both arrested and were ordered by a court to serve 14 days in jail. Hours later they were eventually allowed out on bail after paying two bonds of Rs. 15,000 (£145) each, Dhada had posted, Respect is earned, not given and definitely not forced. Today Mumbai shuts down due to fear and not due to respect. A local Shiv Sena leader filed a police complaint and Dhada and Srinivasan were booked under Section 295 A of the Indian Penal Code (IPC) for deliberate and malicious acts intended to outrage the religious sentiments or any class by insulting its religion or religious beliefs. Subsequently, they were also charged under Section 505 (2) of the IPC for making statements for creating or promoting enmity, hatred or ill will between classes and the police added Section 66A of the IT Act to the list of charges.

Section 66A of the Information Technology Act (2000) is in fact over board and also carries exaggerated punishment. The punishment is up to three years for sending any information that has ill will or grossly offensive or any information that may cause enmity among classes. Section 66A also takes away the Freedom of Speech and Expression guaranteed under Art. 19(1) (a) of the Indian constitution and is not

saved by the reasonable restrictions mentioned under the Art. 19(2). Moreover, In 2011 Communications Minister Kapil Sibal asked Google, Facebook and Yahoo! to design a mechanism that would pre-filter inflammatory and religiously offensive content. This request was not just noted as technologically impossible but also a clear assault on free speech.

CONCLUSION:

People nowadays have huge opportunities offered by social media to express their feelings and thoughts online and that indeed is a crucial challenge to the information society. From the above discussion we can see that there are a lot of socially objectionable content on the internet. However, to determine whether or not a specific thing is violating the law should be made by the judiciary or other independent body free from political, commercial or other influence.

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