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DISRUPT PRINCIPLES BEHIND THE JUDGMENT OF STRIKING DOWN OF SECTION 66A*

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Abstract

While the judges give a philosophical basis to their reasoning, there are certain complexities unique to the medium that disrupt the principles behind the judgment that have not been given the attention they deserve.

Shreya Singhal v. Union of India is being hailed as a landmark judgment of the Supreme Court, heralding a victory of free speech in India. A lot has been written on the judgment, examining its arguments and implications. In this article, I shall focus on three broad strands, rather themes, of the judgment that have not received the attention that they deserve. First, I briefly examine the principle of 'marketplace of ideas' that forms the basis of Justice Rohinton F. Nariman free speech jurisprudence. Second, I discuss the frustrating encounter of law with the inherent excesses of the Internet. This encounter emerges as a subtext in parts of the judgment pertaining to Article 14 of the Constitution. It also brings forth the anxieties of the government in regulating the Internet. And third, I deal with the unresolved concerns in the government's blocking of websites under Section 69A of the Information Technology Act, 2000. These distinct themes emerge from the Shreya Singhal judgment, a fine fabric interwoven with several complex ideas.

Introduction

This case was considered by the Hon'ble Supreme Court of India as a Writ Petition under Article 32 of the Constitution of India and was decided by the Court on 24th March 2015.

By way of this writ petitions, the Supreme Court commonly disposed of these petitions by ruling Sections 66A of the IT Act, 2000, hereinafter called as Section 66A and Section 118(d) of the Kerala Police Act unconstitutional as being violative of Article 19(1)(a) and not saved by Article 19(2). Further, it ruled those Sections 69A and 79 of the IT Act, 2000 and the Information Technology Rules, 2009 constitutionally valid.

Section 66A is the section that criminalizes the sending of offensive messages using a computer, computer netw015ork or computer resource located in India. This section has been construed in a very broad manner covering almost anything which one might regard offensive.

Such a construction would bring a halt on the Freedom of Speech and Expression and would in fact deter free speech and thus, bring about a chilling effect on speech. Further, the misuse of this section has been widely known and popularized by the media. The Supreme Court of India

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Court of India considering all these aspects has decriminalized Section 66A of the IT Act.

The immediate concern of the applicants was the presence of Section 66A which was not a part of the original IT Act, 2000 but came into force by virtue of an amendment Act of 2009.

Section 66A reads as follows

"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; or

(c) Any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine."

Along with Section 66A, the validity of Section 69 shall also be tested with regard to the following provisions. These provisions are of phenomenal importance as they are very fundamental to the Constitution and are basic human rights that are prevalent in a democratic nation like India. The Supreme Court recognized these as basic human rights and any law which

is in contravention with the basic structure of the Constitution shall be regarded as unreasonable and arbitrary in nature as a result of it being not acceptable violating the basic human rights fundamental to the Constitution of India.

Constitutionality of Section 66A

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 contention of the petitioner was that Section 66A did not act as a remedy or a safeguard against any new crime that emerged as a result of information technology. The petitioners interpreted the usability of Section 66A in light of the Statement of Objects and Reasons when Sections 66B to 67C are good enough to deal with the crimes covered under Section 66A.

However, the Supreme Court held that declaring the section unconstitutional merely on ground of it being violative or opposed to the Statement of Objects and Reasons is beyond the scope of Judicial Scrutiny and Activism as judiciary can declare a law constitutional only if it violates the basic structure of the Constitution and hence, this would not be a valid ground for contending validity of a law in a court.

Possibility of abuse of law

The legislature is considered to be in the best position to assess and represent the interests of the people and there is a presumption in favour of constitutionality of provision. The constitution does not impose impossible standards of determining validity. Mere possibility of abuse of a provision cannot be a ground of invalidation of such provision. Further vagueness is also not a ground to invalidate a law. Hence, the two mentioned grounds have not been accepted as grounds to invalidate Section 66A.

Article 19(1)

Freedom of Speech and Expression is one of the most important rights which guarantee voice of the people in a democracy. It is fundamental to the existence of a democracy and is in consonance with the ideals of freedom.

This right has been construed in a welfare manner beneficial to the citizens. In *State of Uttar Pradesh v Raj Narain*, the Supreme Court laid down that Article 19(1) not only guarantees freedom of speech but also ensures and comprehends right of citizen to know, right to receive information regarding matters of public concern. This right has been construed and given such importance that it has been interpreted to include the Right to fly the National Flag freely with respect and dignity within its huge scope and ambit subject to the provisions of the Emblems and Names Act and Prevention of Insults to National Honour Act, 1971 which regulate the use of the National Flag.

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.

In *American Communications Association v. Douds*"Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored."

Article 19(2)

Reasonable restrictions may be placed by the Government when such use of the freedom of speech and expression under Article 19(1) crosses the point of advocacy of an idea, however unpopular or contrary to public opinion it may be. It is noteworthy to observe the US Supreme Court Judgment in the case of *Chaplinsky v New Hampshire*"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

The differences between the Right to Freedom of Speech and Expression in USA (1st Amendment) and the Indian Law are

a) The US law does not specifically put a barrier on the legislature to make a law which is oppressive in regard to the fact that they suppress or limit the Fundamental Rights or specifically, the Freedom of Speech.
b) The US law has considered 'expression' part of freedom of speech while the Supreme Court has considered 'press' as part of Article 19(1)(a).
c) The starking difference is with regard to the

aspects of a reasonable restriction. A reasonable restriction is acceptable in India if such restriction falls under the eight categories mentioned under Article 19(2) while in USA, such restriction may be reasonable if it is a compelling necessity to achieve an important governmental or societal goal. However, 'public interest' per se does not hold muster in the Indian scenario of the restriction on Article 19.

Principles: Marketplace of ideas

In evaluating the extent, to which American judgments on free speech are relevant to India, Justice Nariman concludes, based on precedents, that although they only have a persuasive value, we can still rely on them in order to understand the basic principles of free speech and the need for such freedoms in a democratic polity. After establishing a persuasive case for the legitimacy of this principle-based reliance on American courts, he discusses Justice Oliver Wendell Holmes's notion of "marketplace of ideas" as expressed in his dissent in *Abrams v. United States* In effect, Justice Nariman's claim is that the Internet is a dominant platform for the "marketplace of ideas" and the role of free speech laws is to regulate the efficiency of this market. But what exactly is this principle? The judicial history of the concept takes us back to Justice Holmes, who in turn derives his justification for the principle from John Stuart Mill's defence of free speech in On Liberty (incidentally, Justice Holmes mentions in a letter to Harold Laski that he had been re-reading On Liberty in 1919). The argument is basically that in the marketplace of ideas, good ideas (truth) will displace bad ideas. Wrong opinions will yield to more rational and factual ones. J.S. Mill therefore suggests an absolute freedom of speech, where even hate speech ought not to be banned because such a speech will be tested by the standards of rational arguments and will eventually be refuted. Hence, Justice Nariman's invocation of the marketplace of ideas, following Holmes and Mill, is a claim that free speech is necessary in a liberal democracy because it will eventually ensure a public discourse driven by truth, honesty and rationality. The principle may have several implications on jurisprudence, such as, that truth will eventually prevail in the marketplace of ideas; or that the best remedy for bad speech is more speech; or that content-based judgment of speech is not a good idea etc.

Although attractive, the idea is too optimistic. First, there is little evidence to show that good, just and rational arguments always triumph over bad and unjust arguments. Psychological research shows that we are quicker to agree with views that we already hold or prefer, rather than change it on purely rational grounds. Second, the principle is too teleological and does not consider the play of power in liberal politics (the marketplace is after all an economic-model based on rational, self-interested subjects). So, sexist, casteist, class ideologies will dominate a society, not on the strength of its truth but on the strength of its hegemony over that society. So the economic analogy may comprehend efficiency in the marketplace but not social-justice. And third, we need to be able to make an argument to 'tolerate' banal, silly and vulgar speech as well. Not because they will eventually lead to truth, but because we want to live in a society where talking banal, vulgar and senseless is needed in itself, instead of always living in an obsessive search for truth. The AIB roast controversy is an instance for the need to protect even bad humour, not for the sake of truth, but for its own sake. So the principle of marketplace of ideas, with its long and intricate intellectual history, needs to be closely interrogated for its implications on India's free speech jurisprudence.

Anxieties: Encountering the Internet

The frustration of law in encountering the Internet is a subtext that emerges in the arguments around "intelligible differentia" (Article 14) in the judgment. The crux of the government's defence of Section 66A was that (a) the Internet is in fact a very different medium of communication that has to be treated unlike

television, newspapers etc; (b) On establishing this difference, they went on to argue the need for separate and specially-crafted laws, like Section 66A, to regulate the Internet specifically; (c) Thus, the need to reinterpret "reasonable restrictions" in Article 19(2) was to account for these special circumstances introduced by this new governance problem called the "Internet". The Supreme Court disagreed with the Article 19(2) argument but stated that "we make it clear that there is an intelligible differentia between speech on the Internet and other mediums of communication…" Para 27 of the judgment quotes the Additional Solicitor General talking about the radical alterity of the Internet as compared to other media of communication. For instance, he articulates the borderless reach of Internet, its anonymity, the difficulty of censoring it, sharing content by just a click, the possibilities of morphing images, invasion of privacy, spreading abusive content to "trillions of people" etc. It is at this juncture that the subtext I refer to emerges. Which is, that we need to understand the deep differences in the essence of common law and the nature of the Internet, to really make sense of this encounter. Law's attempt to control and police meanings, the dissemination and representation of digital content, is bound to fail. The digital age has produced the conditions for an endless reproducibility, and the internet allows for an instant proliferation of content. Every reproduction of the image is within a new context and in every context the content re-emerges as a site of contestation against the sovereignty of law. As Costas Douzinas, Peter Goodrich and others argue, modern positivist law constitutes itself by keeping its logic closed, internal, pure and free from the excessive interpretation (which is otherwise inherent in digital and online content). And so, information mediated by the Internet ultimately shatters the image, logic and sovereignty of law. The polysemy of digital content threatens law's hegemonic control over singularity in meaning.

Conclusion

To briefly sum up, although the judges invoke over-breath and vagueness to strike down Section 66A, they unfortunately ignore the need for transparency, the lack of which pervades the application of Section 69A in India. Regardless, what is noteworthy of the judgment is that the judges lay a philosophical basis for their reasoning. However, as noted above, this needs some further interrogation and fine tuning. And finally, the judgment needs to be read in a much larger context of a 'struggle'- where the law struggles to keep up with the radicalism of the internet, with the former being unable to grasp what the latter entity exactly is.

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