

## CASE COMMENTARY ON: SHREYA SINGHAL v. UNION OF INDIA

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### FREE SPEECH: UNCONSTITUTIONALITY OF SECTION 66A

Liberty of thought and expression is one of the core values of our democracy, which was reinforced by the Supreme Court in its landmark judgment of *Shreya Singhal vs. Union of India*, by striking down the infamous S.66 A of the Information technology Act, 2000 in March this year.

The criminal writ filed before the apex court in 2012, challenged the constitutional validity of section 66 A<sup>1</sup>, which criminalized any information transferred online which is inconvenient, annoying or is offensive, on the grounds of being vague, and violative of the fundamental right to speech and expression, and the apex court obliged the petitioners by rendering unconstitutional the aforementioned section of the act.

The basis of the petition were the various arrests made in different regions of the country of people who had used social media networks and the internet to voice their dissenting opinions, and made caricatures about political leaders, the petition challenged the unbridled powers to the police to arrest anyone who disagrees with a view and posts it on a social website under the section, which expressly provides for a jail term of upto three years and a fine for any person for sending any information that is grossly offensive or has menacing character, or 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, the section was brought about by the government as a measure to prevent the rapidly increasing crimes using the internet like the publishing of sexually explicit material, video voyeurism and breach of confidentiality and leakage of data by intermediary, e-commerce frauds through communication services. Even though the objective was novel the resultant was a blanket provision under which anyone could be arrested for expressing any dissenting opinion, this was in gross violation of the fundamental right to free speech and expression.

The section is constitutionally wrong on two fronts, the vagueness of the language used and the over breadth, both these are universally acknowledged principles of the free speech jurisprudence, the detailed judgment dealt with both these issues and it was held that it was vague meaning thereby, that persons of ordinary intelligence have no reasonable opportunity to know what is prohibited, and what is not, further, over breadth potentially includes within its prohibitions both speech that it is entitled to prohibit, and speech that it is not. The section if maintained would lead to a chilling effect, referring to a situation where, faced with

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<sup>1</sup> Brought about by the amendment of 2007.

uncertainly defined boundaries of the legal and the illegal, citizens exercise abundant caution and steer so well clear of the illegal zone, that they end up self-censoring even when it comes to legal and legitimate conduct.

The court while extensively referring to the free speech jurisprudence both in the USA and in our nation, examined the main issue of whether the section was unconstitutional and violated the right to free speech and expression under article 19 (1) (a), proclaimed by the constitution of India to every citizen, granted under the reasonable restrictions on eight specific subjects given in article 19(2), including public order, morality and decency especially on these three particular grounds, on the demand of the defendants and coming to conclude that the section was unconstitutional and could not be saved.

The detailed and well-reasoned judgment firstly examined all the factors that affect the right of free speech, the basic fundamental right is not absolute, giving the citizen to express and even advocate his ideas on any public platform but not incite; it is at this level that free speech is restricted and the government gets the authority to curb it on the grounds of maintaining public order, decency or morality, and defamation. The two judge bench analyzed the difference between advocacy of ideas and incitement in the context of public order and opined that advocacy of ideas however unpopular and undesirable, could not be held criminal; however incitement could be regulated, restricted or curbed to protect public order. The judges relied on the precedents of the US courts to define public order as signifying “a state of tranquility which prevails amongst the members of a political society as a result of the internal regulations enforced by the Government which they have established.”

The Supreme Court reiterated that ‘public order’ embraced more of the community than the concept of ‘law and order’, holding that in this particular matter, the section, which is inclusive and does not refer to content rather focusing on the medium, did not establish any proximate relationship between the speech complained of and the speech reasonably restricted for the maintenance of public order and thus could not be held to be disruptive of public tranquility and order.

The court then dealt with the question of information that was “grossly offensive”, “annoying and inconvenient”, the court held that both these phrases were vague and could not be brought into definition on certain and specific terms by bringing the obscenity argument which was referred to by the defendants; the court held that any information that is ‘grossly offensive’ or ‘annoying’ need not be ‘obscene’ and reasoned that the word ‘obscene’ was conspicuous by its absence from the provision, and it could not be construed to be present and thus these phrases could not be simply read down as was being asked for by the defendants and the entire section did not pass the critical test of not being vague. A vague law creates uncertainty and also gives wide discretionary powers in the hands of the implementation authorities, and thereby is impermissible; this becomes all the more important when there is a question of fundamental rights is concerned, as it is not merely a question of law but rather of protection of the first condition of liberty.

The over breadth of the provision was also noted and it was held that due to the wide scope of the language used, the provision could easily be used to cover the situations that did not fall within the ambit of the law. The vagueness and over breadth of the provision were also held to have a chilling effect, and thereby reducing the free flow of ideas and public discourse, the essentials of the right to free speech and expression.

The two judge bench sought to define the circumstances in which freedom of speech and expression could be legitimately curtailed under the Indian Constitution. The Supreme Court while recognizing the two mediums, i.e., the traditional media and the online mode as different emphasized that similar level of constitutional scrutiny shall be applied to determine the constitutionality of the provisions, while ruling out the demand for a relaxed test of reasonableness for internet speech<sup>2</sup>.

Concluding that the section was unconstitutional and further reading down section 79 of the Information Technology Act on intermediary liability, the court said that the provision must now be read as providing for intermediary liability only where an intermediary has received actual knowledge from a court order or on being notified by Government that unlawful acts related to Article 19(2) are going to be committed, and that intermediary had failed to expeditiously remove or disable access to such information, and in a relief to the government upheld the constitutionality of section 69 A, which was also challenged in the same petition.

The court's decision, in conformity with the constitutional guarantees and in furtherance of the fundamental rights, comes as welcome step in protection of unlawful arrests made in the name of public order, and comes at a time when there are various contours of freedom of speech and expression, in trying to clearly define and understand the scope of every aspect involved, the decision will set a precedent not only for further policies of the government in this regard but also will set a precedent that would be the benchmark of free speech jurisprudence in India.

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<sup>2</sup> Gautam Bhatia '*Free Speech under the Indian Information Technology Act: The Supreme Court's Recent Judgment*' (OXHRH, 27 March 2015)<http://ohrh.law.ox.ac.uk/?p=16969> [21<sup>st</sup> May, 2015].