An arbitrary restraint on free speech

Can a penal statute be vague enough to give room to the police to act in an "arbitrary and whimsical" manner? The answer given by the Supreme Court in *Shreya Singhal vs. Union of India* on 24.03.2015 was an emphatic No.

While acknowledging the distinctions between the print and other media as opposed to the internet, the Court examined the State's endeavour to curb the content of free speech over the internet before concluding that section 66A of the Information and Technology Act 2000 ("the Act") is unconstitutional. Commenting on the wide reach of the section which could catch within its net "virtually any opinion on any subject", the court observed that "if it is to withstand the test of constitutionality, the chilling effect on free speech would be total."

Section 66A before being struck down conferred on the State the power to punish with up to three years imprisonment and with fine those who sent by a "computer resource" or a "communication device" i) any information that is "grossly offensive or has a menacing character"; or ii) information that the sender knew to be false but sends it for causing "annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will"; or iii) any electronic mail or message for causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages.

Section 2 (1) (v) defines information:

"Information includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche."

Before testing the constitutionality of the section the judgment notes that the definition of information (a fundamental ingredient of section 66A) only refers to the medium through which such information is disseminated and not to what the content of the information can be.

Vagueness can make a penal statute void:

A person cannot be convicted only on the basis that he or she caused *injury, danger or annoyance* by sending some information. Even assuming that the nature of the information is "grossly offensive" or is of "menacing character" according to a section of the society, or it causes "injury, danger or annoyance" to some, how can the law be completely silent about the nature of the content of such information, the very basis on which individuals would be arrested, charged and convicted? Referring to other offences the Court noted that annoyance can be an ingredient of an offence provided it is clearly defined but observed that Section 66A uses "completely open ended, undefined and vague language."

Clearly, the sweep of 66A was broad enough to enable authorities to cast a net that could catch all possible offenders. As the numerous instances of the abuse of the powers conferred by section 66A indicate, the police in different states shifted to overdrive the moment a sensitive politician merely became the subject matter of criticism.

The judgment notes that American courts have even held that a penal law can be declared void for vagueness if it fails to define the criminal offence with "sufficient definiteness". Ordinary people should be able to understand what the law prohibits and permits. Those who administer the law should also have enough clarity so that there is no scope for abuse of powers. Relying upon *KA Abbas vs. Union of India* the judgment noted that a law which takes away a guaranteed freedom would offend the constitution if the persons applying the law are in a "boundless sea of uncertainty".

Restrictions do not come within the ambit of Article 19 (2):

Another hurdle before the government during the course of the hearing of the writ petitions was to establish that the ingredients of the section fell within the ambit of one of the eight "reasonable restrictions" under Article 19(2) of the constitution which alone could save any law that curtails the right to freedom of speech and expression enshrined under Article 19 (1) (a).

In particular, the Government sought to rely on the heads of public order, defamation, incitement to an offence and decency or morality under Article 19 (2) while defending the constitutionality of section 66A. It argued that the global reach of the internet, potential of creating serious social disorder and invading individual's privacy called for a relaxed standard of reasonableness of restriction.

While rejecting this argument, the judgment relies upon the *Cricket Association of Bengal* case that dealt with freedom of speech and expression in the context of electronic media such as radio and television. In *Cricket Association of Bengal* the Court had held that wider range of circulation of information or its greater impact cannot restrict the content of the right to freedom of speech and expression nor can it justify its denial.

Public Order

While examining if the restrictions in section 66A can be justified to protect public order the court first formulated the test that one must examine whether the act complained of results in disturbing the current life of the community or does it merely affect an individual, leaving the tranquility of society undisturbed. The judgment goes on to hold that there is no ingredient in the offence contemplated under section 66A of inciting anybody to do anything which a reasonable man would regard as "the tendency of being an immediate threat to public safety or tranquility." Extracting Mark Antony's famous speech in Julius Caesar, the judgment classifies the content of "freedom of speech and expression" into discussion, advocacy and incitement and highlights the importance of understanding the subtle differences between the three while restricting such freedom on the ground of "public order".

Defamation

The court also rejected the Government's contention that the section is aimed at defamatory statements and observed that section 66A does not concern itself with injury to reputation, a fundamental ingredient in the offence of defamation. The fact that my statement is grossly offensive or may annoy you does not necessarily mean that it shall affect your reputation. The conspicuous absence of any requirement of an injury to reputation could only mean that the section was never intended to cover defamatory statements.

Offences relating to decency or morality

The judgment also rejected the argument that restrictions on the freedom of free speech and expression can be justified as a necessary measure to deal with incitement to an offence relating to decency or morality. The court observed that mere causing of annoyance, inconvenience, danger etc. or being grossly offensive or having a menacing character may be ingredients of offences under the IPC but are not offences in themselves. Being silent about obscenity the section "cannot possibly be said to create an offence which falls within the expression 'decency' or 'morality'".

The judgment delivered on 24.03.2015 by the apex court striking down section 66A of IT Act, 2000 is a significant milestone in the long struggle to defeat the arbitrary and unconstitutional means to curtail the right to freedom of speech and expression. That the lead petitioner, Shreya Singhal, a student of law, is the great granddaughter of our Law Minister during the emergency only adds to this significance.

For further information on this topic please contact Abir Phukan. Advocate, Supreme Court of India Partner at KMNP Law by telephone (+91-11-45502527) or email (phukan@kmnplaw.com).

The KMNP Law website can be accessed at www.kmnplaw.com .