

Draft nonsense

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Abstract

Seriously flawed and dodgily drafted provisions in the IT Act provide the state a stick to beat its citizens with.

Section 66A of the Information Technology Act once again finds itself in the middle of a brewing storm. It has been used in cases ranging from the Mamata Banerjee cartoon case, the Aseem Trivedi case, the Karti Chidambaram case, the Chinmayi case, to the current Bal Thackeray-Facebook comments case. In all except the Karti Chidambaram case (which is actually a case of defamation where 's. 66A' is inapplicable), it was used in conjunction with another penal provision, showing that existing laws are more than adequate for regulation of online speech. That everything from online threats wishing sexual assault (the Chinmayi case) to harmless cartoons are sought to be covered under this should give one cause for concern. Importantly, this provision is cognisable (though bailable), meaning an arrest warrant isn't required. This makes it a favourite for those wishing to harass others into not speaking.

Section 66A prohibits the sending "by means of a computer resource or a communication device" certain kinds of messages. These messages are divided into three sub-parts : (a) anything that is "grossly offensive or has menacing character";(b) information known to be false for the purposes of "causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will" and is sent persistently;or (c) "for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages". This carries with it a punishment of up to three years in jail and a fine without an upper limit. As even non-lawyers can see, these are very broadly worded, with use of 'or' everywhere instead of 'and', and the punishment is excessive. The lawyers amongst the readers will note that while some of the words used are familiar from other laws (such as the Indian Penal Code), they are never used this loosely. And all should hopefully be able to conclude that large parts of section 66A are plainly unconstitutional.

If that is so obvious, how did we end up getting this law? We copied (and badly at that) from the UK. The sad part is that the modifications that were introduced while copying are the bits that cause the most trouble. The most noteworthy of these changes are the increase in term of punishment to 3 years (in the UK it's 6 months); the late introduction (on December 16, 2008 by A Raja)

of sub-section (c), meant as an anti-spam provision, but covering everything in the world except spam; and the mangling up of sub-section (b) to become a witches brew of all the evil intentions in this world.

Further, we must recognise that our Constitution is much stronger when it comes to issues like free speech than the UK's unwritten constitution, and our high courts and Supreme Court have the power to strike down laws for being unconstitutional, unlike in the UK where Parliament reigns supreme. The most the courts can do there is accommodate the European Convention on Human Rights by 'reading down' laws rather than striking them down.

Lastly, even if we do decide to engage in policy-laundering, we need to do so intelligently. The way the government messed up section 66A should serve as a fine lesson on how not to do so. While one should fault the ministry of communications and IT for messing up the IT Act so badly, it is apparent that the law ministry deserves equal blame as well for being the sleeping partner in this deplorable joint venture. For instance, wrongfully accessing a computer to remove material which one believes can be used for defamation can be considered 'cyber-terrorism'. Where have all our fine legal drafters gone? In a meeting, former SEBI chairman M Damodaran noted how bad drafters make our policies seem far dumber than they are. We wouldn't be in this soup if we had good drafters who clearly understand the fundamental rights guaranteed by our constitution.

There are a great many things flawed in this unconstitutional provision, from the disproportionality of the punishment to the non-existence of the crime. The 2008 amendment to the IT Act was one of eight laws passed in 15 minutes without any debate in the 2008 winter session of Parliament. For far too long the Indian government has spoken about "multi-stakeholder" governance of the internet at international fora (meaning that civil society and industry must be seen as equal to governments when it comes to policymaking for the governance of the internet). It is about time we implemented multi-stakeholder internet governance domestically. The way to go forward in changing this would be to set up a multi-stakeholder body (including civil society and industry) which can remedy this and other ridiculously unconstitutional provisions of our IT Act.

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