

Social media regulation vs. Suppression of freedom of speech

Pranesh Prakash

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Kafila

Abstract

On the arrest of two girls in Mumbai for their comments on Facebook.

This morning, there was a [short report](#) in the *Mumbai Mirror* about two girls having been arrested for comments one of them made, and the other ‘liked’, on Facebook about Bal Thackeray:

Police on Sunday arrested a 21-year-old girl for questioning the total shutdown in the city for Bal Thackeray’s funeral on her Facebook account. Another girl who ‘liked’ the comment was also arrested.

The duo were booked under Section 295 (a) of the IPC (for hurting religious sentiments) and Section 64 (a) of the Information Technology Act, 2000. Though the girl withdrew her comment and apologised, a mob of some 2,000 Shiv Sena workers attacked and ransacked her uncle’s orthopaedic clinic at Palghar.

“Her comment said people like Thackeray are born and die daily and one should not observe a bandh for that,” said PI Uttam Sonawane.

What provisions of law were used?

There’s a small mistake in *Mumbai Mirror*’s reportage as there is no section “64(a)”¹ in the Information Technology (IT) Act, nor a section “295(a)” in the Indian Penal Code (IPC). They must have meant [section 295A](#) of the IPC (“outraging religious feelings of any class”) and [section 66A of the IT Act](#) (“sending offensive messages through communication service, etc.”). The Wall Street Journal’s Shreya Shah has confirmed that the second provision was section 66A of the IT Act.

Section 295A of the IPC is cognizable and non-bailable, and hence the police have the powers to arrest a person accused of this without a warrant.² Section 66A of the IT Act is cognizable and bailable. Some news sources claim that [section 505\(2\) of the IPC](#) (“Statements creating or promoting enmity, hatred or ill-will between classes”) has also been invoked.

This is clearly a case of misapplication of s.295A of the IPC.³ This provision has been frivolously used numerous times in Maharashtra. Even the banning of James Laine's book Shivaji: Hindu King in Islamic India happened under s.295A, and the ban was subsequently held to have been unlawful by both the Bombay High Court as well as the Supreme Court. Indeed, s.295A has not been applied in cases where it is more apparent, making this seem like a parody news report.

Interestingly, the question arises of the law under which the friend who 'liked' the Facebook status update was arrested. It would take a highly clever lawyer and a highly credulous judge to make 'liking' of a Facebook status update an act capable of being charged with electronically "sending ... any information that is grossly offensive or has menacing character" or "causing annoyance or inconvenience", or under any other provision of the IT Act (or, for that matter, the IPC).⁴ That 'liking' is protected speech under Article 19(1)(a) is not under question in India (unlike in the USA where that issue had to be adjudicated by a court), since unlike the wording present in the American Constitution, the Indian Constitution clearly protects the 'freedom of speech and expression', so even non-verbal expression is protection.

Role of bad law and the police

In this case the blame has to be shared between bad law (s.66A of the IT Act) and an abuse of powers by police. The police were derelict in their duty, as they failed to provide protection to the Dhada Orthopaedic Hospital, run by the uncle of the girl who made the Facebook posting. Then they added insult to injury by arresting Shaheen Dhada and the friend who 'liked' her post. This should not be written off as a harmless case of the police goofing up. Justice Katju is absolutely correct [in demanding that such police officers should be punished](#).

Rule of law demands that laws are not applied in an arbitrary manner. When tens of thousands were making similar comments in print (Justice Katju's article in the Hindu, for instance), over the Internet (countless comments on Facebook, Rediff, Orkut, Twitter, etc.), and in person, how did the police single out Shaheen Dhada and her friend for arrest?⁵

Social Media Regulation vs. Suppression of Freedom of Speech and Expression

This should not be seen merely as "social media regulation", but as a restriction on freedom of speech and expression by both the law and the police. Section 66A makes certain kinds of speech-activities ("causing annoyance") illegal if communicated online, but legal if that same speech-activity is published in a newspaper. Finally, this is similar to the Aseem Trivedi case where the police wrongly decided to press charges and to arrest.

This distinction is important as it being a Facebook status update should not grant Shaheen Dhada any special immunity; the fact of that particular update not being punishable under s.295 or s.66A (or any other law) should.

- Section 64 of the IT Act is about "recovery of penalty" and the ability to suspend one's digital signature if one doesn't pay up a penalty that's been imposed.
- The police generally cannot, without a warrant, arrest a person accused of a bailable offence unless it is a cognizable offence. A non-bailable offence

is one for which a judicial magistrate needs to grant bail, and it isn't an automatic right to be enjoyed by paying a bond-surety amount set by the police.

- Section 295A of the IPC has been held not to be unconstitutional. The first case to challenge the constitutionality of [section 66A of the IT Act was filed recently](#) in front of the Madurai bench the Madras High Court.)
- One can imagine an exceptional case where such an act could potentially be defamatory, but that is clearly exceptional.
- This is entirely apart from the question of how the Shiv Sena singled in on Shaheen Dhada's Facebook comment.

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