

The ‘unconstitutional’ section 66A

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Abstract

With yet another arrest in Palghar today, the focus seems fixed on the grossly misused provision of the IT Act. Exploring why this section is unconstitutional, how it came to be, the state of the law elsewhere, and how we can move forward.

Section 66A of the Information Technology Act, which prescribes ‘punishment for sending offensive messages through communication service, etc.’ is widely held by lawyers and legal academics to be unconstitutional. Exploring why that section is unconstitutional, how it came to be, the state of the law elsewhere, and how we can move forward.

Back in February 2009 (after the IT Amendment Act, 2008 was hurriedly passed on December 22, 2008 by the Lok Sabha, and a day after by the Rajya Sabha¹ but before it was [notified on October 27, 2009](#)) I had written that [s.66A](#) is “patently in [violation of Art. 19\(1\)\(a\) of the Constitution of India](#)”:

Section 66A which punishes persons for sending offensive messages is overly broad, and is patently in violation of Art. 19(1)(a) of our Constitution. The fact that some information is “grossly offensive” (s.66A(a)) or that it causes “annoyance” or “inconvenience” while being known to be false (s.66A(c)) cannot be a reason for curbing the freedom of speech unless it is directly related to decency or morality, public order, or defamation (or any of the four other grounds listed in Art. 19(2)). It must be stated here that many argue that John Stuart Mill’s harm principle provides a better framework for freedom of expression than Joel Feinberg’s offence principle. The latter part of s.66A(c), which talks of deception, is sufficient to combat spam and phishing, and hence the first half, talking of annoyance or inconvenience is not required. Additionally, it would be beneficial if an explanation could be added to s.66A(c) to make clear what “origin” means in that section. Because depending on the construction of that word s.66A(c) can, for instance, unintentionally prevent organisations from using proxy servers, and may prevent a person

¹The Information Technology (Amendment) Bill, 2008, was one amongst the eight bills that were passed in fifteen minutes on December 16, 2008.

from using a sender envelope different from the “from” address in an e-mail (a feature that many e-mail providers like Gmail implement to allow people to send mails from their work account while being logged in to their personal account). Furthermore, it may also prevent remailers, tunnelling, and other forms of ensuring anonymity online. This doesn’t seem to be what is intended by the legislature, but the section might end up having that effect. This should hence be clarified.

I stand by that analysis. But given that it is quite sparse, in this post I will examine s.66A in detail.

Here’s what s. 66A of the IT (Amendment) Act, 2008 states:

66A. Punishment for sending offensive messages through communication service, etc.,

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;
- (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,
- (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.

Explanation: For the purposes of this section, terms “electronic mail” and “electronic mail message” means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, images, audio, video and any other electronic record, which may be transmitted with the message.²

A large part of s.66A can be traced back to s.10(2) of the UK’s Post Office (Amendment) Act, 1935:

If any person —

- (a) sends any message by telephone which is grossly offensive or of an indecent, obscene, or menacing

²Inserted vide Information Technology Amendment Act, 2008.

character; or

- (b) sends any message by telephone, or any telegram, which he knows to be false, for the purpose of causing annoyance, inconvenience, or needless anxiety to any other person; or
- (c) persistently makes telephone calls without reasonable cause and for any such purposes as aforesaid;

he shall be liable upon summary conviction to a fine not exceeding ten pounds, or to imprisonment for a term not exceeding one month, or to both such fine and imprisonment.

Section 66A bears a striking resemblance to the three parts of this law from 1935, with clauses (b) and (c) being merged in the Indian law into a single clause (b) of s.66A, with a whole bunch of new “purposes” added. Interestingly, the Indian Post Office Act, 1898, was never amended to add this provision.

The differences between the two are worth exploring.

Term of punishment

The first major difference is that the maximum term of imprisonment in the 1935 Act is only one month, compared to three years in s.66A of the IT Act. It seems the Indian government decided to subject the prison term to hyper-inflation to cover for the time. If this had happened for the punishment for, say, criminal defamation, then that would have a jail term of up to 72 years! The current equivalent laws in the UK are the Communications Act, 2003 (s. 127) and the [Malicious Communications Act 1988](#) (s.1) for both of which the penalty is up to 6 months’ imprisonment or to a maximum fine of £5000 or both. What’s surprising is that in the Information Technology (Amendment) Bill of 2006, the penalty for section 66A was up to 2 years, and it was changed on December 16, 2008 through an amendment moved by Mr. A. Raja (the erstwhile Minister of Communications and IT) to 3 years. Given that parts of s.66A(c) resemble nuisance, it is instructive to note the term of punishment in the Indian Penal Code (IPC) for criminal nuisance: a fine of Rs. 200 with no prison term.

“Sending” vs. “Publishing”

J. Sai Deepak, a lawyer, has made an interesting point that [the IT Act uses “send” as part of its wording, and not “publish”](#). Given that, only messages specifically directed at another would be included. While this is an interesting proposition, it cannot be accepted because: (1) even blog posts are “sent”, albeit to the blog servers — s.66A doesn’t say who it has to be sent to; (2) in the UK the Communications Act 2003 uses similar language and that, unlike the Malicious Communication Act 1988 which says “sends to another person”, has been applied to public posts to Twitter, etc.; (3) The explanation to s.66A(c) explicitly uses the word “transmitted”, which is far broader than “send”, and it would be difficult to reconcile them unless “send” can encompass sending to

the publishing intermediary like Twitter.

Part of the narrowing down of s.66A should definitely focus on making it applicable only to directed communication (as is the case with telephones, and with the UK's Malicious Communication Act), and not be applicable to publishing.

Section 66A(c)

Section 66A(c) was also inserted through an amendment moved by Mr. Raja on December 16, 2008, which was passed by the Lok Sabha on December 22, 2008, and a day after by the Rajya Sabha. (The version introduced in Parliament in 2006 had only 66A(a) and (b).) This was done in response to the observation by the Standing Committee on Information Technology that there was no provision for spam. Hence it is clear that this is meant as an anti-spam provision. However, the careless phrasing makes it anything but an anti-spam provision. If instead of “for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages” it was “for the purpose of causing annoyance and inconvenience and to deceive and to mislead the addressee or recipient about the origin of such messages”, it would have been slightly closer to an anti-spam provision, but even then doesn't have the two core characteristics of spam: that it be unsolicited and that it be sent in bulk. (Whether only commercial messages should be regarded as spam is an open question.) That it arise from a duplicitous origin is not a requirement of spam (and in the UK, for instance, that is only an aggravating factor for what is already a fine-able activity).

Curiously, the definitional problems do not stop there, but extend to the definitions of “electronic mail” and “electronic mail message” in the ‘explanation’ as well. Those are so vast that more or less anything communicated electronically is counted as an e-mail, including forms of communication that aren't aimed at particular recipients the way e-mail is.

Hence, the anti-spam provision does not cover spam, but covers everything else. This provision is certainly unconstitutional.

Section 66A(b)

Section 66A(b) has three main elements: (1) that the communication be known to be false; (2) that it be for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will; (3) that it be communicated persistently. The main problem here is, of course, (2). “Annoyance” and “inconvenience”, “insult”, “ill will” and “hatred” are very different from “injury”, “danger”, and “criminal intimidation”. That a lawmaker could feel that punishment for purposes this disparate belonged together in a single clause is quite astounding and without parallel (except in the rest of the IT Act). That's akin to having a single provision providing equal punishment for calling someone a moron (“insult”) and threatening to kill someone (“criminal intimidation”). While persistent false communications for the purpose of annoying, insulting, inconveniencing, or causing ill will should not be criminalised (if need be, having it as a civil offence would more than

suffice), doing so for the purpose of causing danger or criminal intimidation should. However, the question arises whether you need a separate provision in the IT Act for that. Criminal intimidation is already covered by ss. 503 and 506 of the IPC. Similarly, different kinds of causing danger are taken care of in ss.188, 268, 283, 285, 289, and other provisions. Similarly with the other “purposes” listed there, if, for instance, a provision is needed to penalise hoax bomb threats, then the provision clearly should not be mentioning words like “annoyance”, and should not be made “persistent”. (At any rate, s. 505(1) of the IPC suffices for hoax bomb threats, so you don’t need a separate provision in the IT Act).

I would argue that in its current form this provision is unconstitutional, since there is no countervailing interest in criminalising false and persistent “insults”, etc., that will allow those parts of this provision to survive the test of ‘reasonableness’ under Art.19(2). Furthermore, even bits that survive are largely redundant. While this unconstitutionality could be cured by better, narrower wording, even then one would need to ensure that there is no redundancy due to other provisions in other laws.

Section 66A(a)

In s.66A(a), the question immediately arises whether the information that is “grossly offensive” or “menacing” need to be addressed at someone specific and be seen as “grossly offensive” or “menacing” by that person, or be seen by a ‘reasonable man’ test.

Additionally, the term “grossly offensive” will have to be read in such a heightened manner as to not include merely causing offence. The one other place where this phrase is used in Indian law is in s.20(b) of the Indian Post Office Act (prohibiting the sending by post of materials of an indecent, obscene, seditious, scurrilous, threatening, or grossly offensive character). The big difference between s.20(b) of the IPO Act and s.66A of the IT Act is that the former is clearly restricted to one-to-one communication (the way the UK’s Malicious Communication Act 1988 is). Reducing the scope of s.66A to direct communications would make it less prone to challenge.

Additionally, in order to ensure constitutionality, courts will have to ensure that “grossly offensive” does not simply end up meaning “offensive”, and that the maximum punishment is not disproportionately high as it currently is. Even laws specifically aimed at online bullying, such as the UK’s Protection from Harassment Act 1997, can have unintended effects. As George Monbiot notes, the “first three people to be prosecuted under [the Protection from Harassment Act] were all peaceful protesters”.

Constitutional arguments in importing laws from the UK

The plain fact is that the Indian Constitution is stronger on free speech grounds than the (unwritten) UK Constitution, and the judiciary has wide powers of judicial review of statutes (i.e., the ability of a court to strike down a law passed by Parliament as ‘unconstitutional’). Judicial review of statutes does not exist in the UK (with review under its EU obligations being the exception) as they

believe that Parliament is supreme, unlike India. Putting those two aspects together, a law that is valid in the UK might well be unconstitutional in India for failing to fall within the eight octagonal walls of the reasonable restrictions allowed under Art.19(2). That raises the question of how they deal with such broad wording in the UK.

Genealogy of UK law on sending ‘indecent’, ‘menacing’, ‘grossly offensive’ messages

Quoting from the case of DPP v. Collins [2006] UKHL 40 [6]:

The genealogy of [s. 127(1) of the Communication Act] may be traced back to s.10(2)(a) of the Post Office (Amendment) Act, 1935, which made it an offence to send any message by telephone which is grossly offensive or of an indecent, obscene or menacing character. That subsection was reproduced with no change save of punctuation in s.66(a) of the Post Office Act 1953. It was again reproduced in s.78 of the Post Office Act 1969, save that “by means of a public telecommunication service” was substituted for “by telephone” and “any message” was changed to “a message or other matter”. Section 78 was elaborated but substantially repeated in s.49(1)(a) of the British Telecommunications Act 1981 and was re-enacted (save for the substitution of “system” for “service”) in s.43(1)(a) of the Telecommunications Act 1984. Section 43(1)(a) was in the same terms as s.127(1)(a) of the 2003 Act, save that it referred to “a public telecommunication system” and not (as in s.127(1)(a)) to a “public electronic communications network”. Sections 11(1)(b) of the Post Office Act 1953 and 85(3) of the Postal Services Act 2000 made it an offence to send certain proscribed articles by post.

While the above quotation talks about s.127(1) it is equally true about s.127(2) as well. In addition to that, in 1988, the [Malicious Communications Act](#) (s.1) was passed to prohibit one-to-one harassment along similar lines.

The UK’s Post Office Act was eclipsed by the Telecommunications Act in 1984, which in turn was replaced in 2003 by the Communications Act. (By contrast, we still stick on to the colonial Indian Post Office Act, 1898.) Provisions from the 1935 Post Office Act were carried forward into the Telecommunications Act (s.43 on the “improper use of public telecommunication system”), and subsequently into s.127 of the Communications Act (“improper use of public electronic communications network”). Section 127 of the Communications Act states:

127. Improper use of public electronic communications network
- (1) A person is guilty of an offence if he —
 - (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
 - (b) causes any such message or matter to be so sent.
 - (2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he —
 - (a) sends by means of a public electronic communications network,

- a message that he knows to be false,
 (b) causes such a message to be sent; or
 (c) persistently makes use of a public electronic communications network.
- (3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.
- (4) Subsections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990 (c. 42)).

Currently in the UK there are calls for repeal of s.127. In a separate blog post I will look at how the UK courts have ‘read down’ the provisions of s.127 and other similar laws in order to be compliant with the European Convention on Human Rights.

Comparison between S.66A and other statutes

Section 144, IPC, 1860

Power to issue order in urgent cases of nuisance or apprehended danger

1. **...obstruction, annoyance or injury** to any person lawfully employed, or **danger** to human life, health or safety, or a disturbance of the public tranquillity

Babulal Parate v. State of Maharashtra and Ors. [1961 AIR SC 884] (Magistrates order under s. 144 of the Cr. PC, 1973 was in violation of Art.19(1)(a) of the Constitution).

Note: The data in the table below has been compiled thanks to the efforts of Snehashish Ghosh

Table 1: Comparison of S.66A IT Act with other Indian & UK laws

Section	Term(s)/phrase(s) used in 66A	Term(s)/ phrase(s) used in similar sections
Section 66A (heading)	Punishment for sending offensive messages through communication service, etc	Section 127, CA, 2003, “Improper use of public electronic communications network”
Section 66A(a)	Any person who sends, by means of a computer resource or a communication device	Section 1(1), MCA 1988, “Any person who sends to another person...”

Section	Term(s)/phrase(s) used in 66A	Term(s)/ phrase(s) used in similar sections
Section 66A(a)	Grossly offensive	Section 1(1)(a)(i), MCA 1988; Section 127(1)(a), CA, 2003; Section 10(2)(a), Post Office (Amendment) Act, 1935*; Section 43(1)(a), Telecommunications Act 1984*; Section 20, India Post Act 1898
Section 66A(a)	Menacing character	Section 127(1)(a), CA, 2003
Section 66A(b)	Any information which he knows to be false	Section 1(1)(a)(iii), MCA 1988 “information which is false and known or believed to be false by the sender”; Section 127(2)(a), CA, 2003, “a message that he knows to be false”
Section 66A(b) “purpose of...”	Causing annoyance Inconvenience Danger Insult Injury	Section 127(2), CA, 2003
	Criminal intimidation Enmity, hatred or ill-will	Section 504, IPC, 1860 Section 44 IPC, 1860, “The word ‘injury’ denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.” Sections 503 and 505 (2), IPC, 1860
	Persistently by making use of such computer resource or a communication device	Section 153A(1)(a), IPC, 1860 Section 127(2)(c), CA, 2003, “persistently makes use of a public electronic communications network.”
Section 66A(c)	Deceive or to mislead	-

Notes

MCA 1988: [Malicious Communications Act](#) (s.1)

CA: [Communications Act 2003](#) (s.127)

*Replaced by Communications Act 2003

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