

Three reasons why 66A verdict is momentous

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2015-03-29

Times of India

Abstract

Sunday Times News: Earlier this week, the fundamental right to freedom of expression posted a momentous victory.

By Pranesh Prakash

Earlier this week, the [fundamental right to freedom of expression](#) posted a momentous victory. The nation's top court struck down the much-reviled Section 66A of the [IT Act](#) — which criminalized communications that are “grossly offensive”, cause “annoyance”, etc — as “unconstitutionally vague”, “arbitrarily, excessively, and disproportionately” encumbering freedom of speech, and likely to have a “chilling effect” on legitimate speech. It also struck down Sec 118(d) of the Kerala Police Act on similar grounds. This is a landmark judgment, as it's possibly the first time since 1973's Bennett Coleman case that statutory law was struck down by the Supreme Court for violating our right to free expression.

The SC also significantly ‘read down’ the draconian ‘Intermediary Guidelines Rules’ which specify when intermediaries — website hosts and search engines — may be held liable for what is said online by their users. The SC held that intermediaries should not be forced to decide whether the online speech of their users is lawful or not. While the judgment leaves unresolved many questions — phrases like “grossly offensive”, which the SC ruled were vague in 66A, occur in the Rules as well — the court's insistence on requiring either a court or a government order to be able to compel an intermediary to remove speech reduces the ‘invisible censorship’ that results from privatized speech regulation.

The SC upheld the constitutional validity of Sec 69A and the Website Blocking Rules, noting they had several safeguards: providing a hearing to the website owner, providing written reasons for the blocking, etc. However, these safeguards are not practised by courts. Na Vijayashankar, a legal academic in Bengaluru, found a blogpost of his — ironically, on the topic of website blocking — had been blocked by a Delhi court without even informing him. He only got to find out when I published the government response to my RTI on blocked websites. Last December, Github, Vimeo and some other websites were blocked without being given a chance to contest it. As long as lower courts don't follow “principles of natural justice” and due process, we'll continue to see such absurd website blocking, especially in cases of copyright complaints, without any way of opposing or correcting them.

There are three main outcomes of this judgment. First is the legal victory: SC's analysis while striking down 66A is a masterclass of legal clarity and a significant contribution to free speech jurisprudence. This benefits not only future cases in India, but all jurisdictions whose laws are similar to ours, such as Bangladesh, Malaysia and the UK.

Second is the moral victory for free speech. Sec 66A was not merely a badly written law, it became a totem of governmental excess and hubris. Even when political parties realized they had passed 66A without a debate, they did not apologize to the public and revise it; instead, they defended it. Only a few MPs, such as P Rajeev and Bajjayant Panda, challenged it. Even the NDA, which condemned the law in the UPA era, supported it in court. By striking down this totem, the SC has restored the primacy of the Constitution. For instance, while this ruling doesn't directly affect the censor board's arbitrary rules, it does morally undermine them.

Third, this verdict shows that given proper judicial reading, the Indian constitutional system of allowing for a specific list of purposes for which reasonable restrictions are permissible, might in fact be as good or even better in some cases, than the American First Amendment. The US law baldly states that Congress shall make no law abridging freedom of speech or of the press. However, the US Supreme Court has never held the opinion that freedom of speech is absolute. The limits of Congress's powers are entirely judicially constructed, and till the 1930s, the US court never struck down a law for violating freedom of speech, and has upheld laws banning obscenity, public indecency, offensive speech in public, etc. However, in India, the Constitution itself places hard limits on Parliament's powers, and also, since the first amendment to our Constitution, allows the judiciary to determine if the restrictions placed by Parliament are "reasonable". In the judgment Justice Nariman quotes Mark Antony from Julius Caesar. He could also have quoted Cassius: "The fault, dear Brutus, is not in our stars, but in ourselves." Judges like Justice Nariman show the constitutional limits to free speech can be read both narrowly and judiciously: we can no longer complain about the Constitution as the primary reason we have so many restrictions on freedom of expression.

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