

SPEECH BY SHRI RAJEEV CHANDRASEKHAR, MP
DURING THE DEBATE IN PARLIAMENT ON RESOLUTION TO AMEND SECTION 66A OF
THE IT ACT, 2000

Friday, 14 December, 2012

Sir, let me thank my colleague P. Rajeev for introducing this resolution, and thus initiating a debate on this critical issue.

Let me start with a quote from Voltaire - *"I disapprove of what you say, but I will defend to the death your right to say it"* – Sir, this summarizes the essence of our democracy.

Sir, let us clearly understand the background to today's debate.

Despite being the largest democracy in the world, India currently ranks 39 globally in terms of free speech over the internet and has reported a negative trajectory in terms of internet freedom over the years (Source: 2012 Freedom on the Net report which reviews country-wise laws that may negatively affect free speech online, violate users' privacy, or punish individuals who post certain types of content). CNN ran a report two weeks ago on November 28, titled "India a Democracy sans Freedom". It has a detailed description of Section 66A, calling it archaic, draconian and absurd.

In March, India was added to the list of countries "under surveillance" in the latest Annual Report presented by "Reporters without Borders", on enemies of the internet.

The misuse of Section 66A of Information Technology Act, 2000 (introduced by the 2008 amendment) has been raised at various instances. There is overwhelming evidence that there is misuse and discretionary interpretation, parts of which the Hon'ble Minister admitted earlier today. A Public Interest Litigation has been filed recently (Petitioner Ms. Shreya Singhal) before the Supreme Court and there are fasts/protests by citizens.

Sir, that is the background against which this resolution is being discussed.

Sir, The IT Act was passed on 23 December 2008, the last day of the winter session of the 14th Lok Sabha, in seven minutes flat - without any discussion.

While the Hon'ble Supreme Court may be inclined to look at devising possible procedural solutions/guidelines, it is incumbent on the Parliamentary representatives of the citizens to seek immediate legislative intervention; the defence by the Hon'ble minister that the Parliamentary Committee recommended this is, respectfully I say, facetious, because he is aware of the many cases where government ignores the Committee, and in any event, the issue is of the law and its impact on citizens, and its weakness and its implications vis-à-vis our constitutional guarantee of freedom to express, and not about the interpretations of the Standing Committee.

In fact, the learned Attorney General's admission in the Court of the potential misuse and the fact that the Government now has to issue guidelines is testament to the large scale abuse.

Guidelines is not an answer when the content of the law is bad: Issuance of procedural guidelines (raising the level of Officers from an Inspector) does not remedy fundamental flaws within Section 66A of the IT Act. To say that it is only a Law enforcement implementation problem is mis-characterizing the problem. Of course, there is the issue of abuse by agencies, as recent incidents have shown. The police machinery is not equipped with legal tools to interpret the statutes in online speech cases, and cave in to political pressure.

The recent step of raising the level of officers who can invoke a law tells us that officers who have constitutional authority of making arrests under all other laws may even be misled or misinterpret the law. There can be no better admission of infirmity in the law than this self admission which the Hon'ble Minister had to resort to recently. Further, guidelines also cannot be a substitute to a review of the Act, to prevent encroachment of fundamental freedoms.

Added to this, the section itself is bad law. Hence, this Resolution in the House to bring amendments to 66A.

Sir, I will lay out my reasoning on why a review of this Act and Section is required, in addition to what my colleague Mr. P. Rajeev has laid out.

Restrictions on free speech, such as under Section 66A must pass the muster of 'reasonableness'. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness unless it strikes a proper balance between the freedom guaranteed in Art.19 (1) and the social control permitted by clause (2) of Art. 19, it must be held to be wanting in that quality (*Chintaman Rao v. State of M.P.*, AIR 1951 SC 118).

Undefined and overbroad words such as 'grossly offensive' and 'menacing character' (clause (a)) are subject to discretionary interpretations and abuse. This presents a danger to free speech under Article 19(1)(a). The danger is amplified when even law enforcement officers at the district level can impose the provision.

Reliance on import of provisions from other countries does not assist. 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.

The Supreme Court observed in *Union of India v. Assn. for Democratic Reforms* - '*One sided information, disinformation, misinformation and non information, all equally create an uninformed citizenry which makes democracy a farce. Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions*' (2002(005) SCC 0361SC).

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 Section 20 (b) of the Indian Post Office Act (prohibiting the sending by post materials of an indecent, obscene, seditious, scurrilous, threatening, or grossly offensive character). The big difference between Section 20 (b) of the IPO Act and Section 66A of the IT Act is that the former is clearly restricted to one-to-one communication, as is the case of almost all the international precedents being referred to by the Hon'ble Minister. Reducing the scope of Section 66A to direct communications would make it less prone to misuse.

Redundancy in wake of other statutes in India must be seen. Criminal statutes have undergone judicial scrutiny and implementation of robust procedures to prevent possible encroachment on to personal freedom. "Annoyance" and "inconvenience", "insult", "ill will" and "hatred" are very different from "injury", "danger", and "criminal intimidation". The question arises whether you need a separate provision in the IT Act for that. Criminal intimidation is already covered by Sections 503 and 506 of the IPC. Similarly, different kinds of causing danger are taken care of in Sections 188, 268, 283, 285, 289, and other provisions. Similarly with the other "purposes" listed there, if, for instance, a provision is needed to penalize hoax bomb threats, then the provision clearly should not be mentioning words like "annoyance", and should not be made "persistent".

The purportedly anti-spam provision under clause (c) does not cover spam. It does not have the two core characteristics of spam: that it is unsolicited and that it is sent in bulk. The definitional problems extend to "electronic mail" and "electronic mail message" in the 'explanation' that are vast to cover anything communicated electronically, including forms of communication that aren't aimed at particular recipients the way e-mail is.

On the procedural front, Section 66A punishes the same actions in a stricter manner than the treatment the actions would have received under penal laws in India (IPC and Criminal Code). Further, making it a cognizable offence means a police officer can arrest without a warrant. In combination with the above deficiencies, this exponentially increases the threat to free speech under Section 66A.

Sir, sometimes 66A seems like a solution looking for a problem, especially when the father of a girl receiving a cake from a boy files a case under 66A, as is the case a few days ago.

Considering the potential and (recently) demonstrated abuse of Section 66A in contravention of freedom of speech, it may be worthwhile to explore a judicial review before arrests under Section 66A can be made. The UN Special Rapporteur's report last year on Internet Freedom and Hate speech detailed the tests and procedures for implementing reasonable restrictions on online speech to be applied only in emergency situations for a limited duration. While doing so, the report specifically mentioned that:

"Any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application."

Sir, a free and open Internet is important for innovation, connection and economic growth. Therefore, there is a need to review Section 66A holistically, keeping in mind the constitutional tenets and international conventions that we are a signatory to. To those in government who raise national security or law and order as justification, let me quote President Obama - *"We reject as false the choice between National security and our ideals of democracy"*. We can meet both these goals.

Sir, there is a clear case for proactive intervention on this by the Government : Little progress has been made by the Government to act on these apparent and widely reported abuse issues. There have been proposals, on two occasions, from the Hon'ble Minister to constitute an Empowered group to discuss all issues on the table and look at alternative formulations. The Minister made this commitment when the First Open House was held in August this year and then again on Nov 29th where I understand from press reports that he met representatives from civil society, Intermediaries and industry. I attended the Open House in

August and it seems nothing has been done in these five months. What has got done between these two meetings? Why has the Government allowed issues to come to a boiling point? Sir, there should be no ego involved here. Let's frankly accept that there is a problem with the Act, its clauses and the rules. I do not propose my specific interpretation of constitutional guarantee of free speech nor should the Hon'ble Minister expect us to blandly accept his. Let's accept the Hon'ble Chairman Rajya Sabha's view earlier today that this is an evolving issue. So sir, let the law evolve. Let the Government constitute a Drafting Committee immediately with a multi-stakeholder representation (including civil society) to address these issues and arrive at a sustainable framework, as in the case of RTI and several other statutes earlier. Sir, that is what is expected from a government that represents a great democracy like our country.

Sir, let me end by sharing a quote with this House - John Milton's - *"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."*

I support this resolution.

Jai hind.