THE SUPREME COURT CASES

(2015) 5 SCC

(2015) 5 Supreme Court Cases 1

(BEFORE JASTI CHELAMESWAR AND ROHINTON FALI NARIMAN, JJ.)

SHREYA SINGHAL .. Petitioner;

Versus

UNION OF INDIA .. Respondent.

Writ Petitions (Crl.) No. 167 of 2012† with Nos. 199, 222, 225 of 2013, 196 of 2014, Writ Petitions (C) Nos. 21, 23, 97, 217 of 2013 and 758 of 2014, decided on March 24, 2015

A. **Constitution of India — Arts. 19(1)(a) & 19(2) and Preamble — Freedom of speech and expression — Scope — Freedom to express unpalatable views, cause annoyance, inconvenience or grossly offend, so long as it does not amount to incitement leading to imminent causal connection with any of the eight subject-matters set out in Art. 19(2) — Freedom to express views dissenting with the mores of the day — Held, while an informed citizenry is a precondition for meaningful governance, the culture of open dialogue is generally of great societal importance — The ultimate truth is evolved by "free trade in ideas" in a competitive "marketplace of ideas" [*see in detail* Shortnotes *F*, *G*, *J*, *N*, *P*, *Q*, *R*, *W* and *X*] — Jurisprudence — Truth — Attainment of, via dialetical opposition**

B. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — Ss. 66-A, 69-A and 79 — Constitutionality — Held, S. 66-A is violative of Art. 19(1)(a) and not saved by Art. 19(2) of the Constitution, hence struck down in its entirety — S. 69-A is constitutionally valid — S. 79 is also valid subject to S. 79(3)(b) being read down — Constitution of India, Arts. 19(1)(a) and 19(2)**

C. **Information Technology, Internet, Computer and Cyber Laws — Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 — Rr. 3 to 10, 14 and 16 — Rules, held, constitutionally valid — Constitution of India, Arts. 19(1)(a) and 19(2)**

† Under Article 32 of the Constitution of India

D. **Information Technology, Internet, Computer and Cyber Laws — Information Technology (Intermediary Guidelines) Rules, 2011 — Rr. 3(2) & (4) — Held, are valid subject to sub-rule (4) being read down — Constitution of India, Arts. 19(1)(a) and 19(2)**

E. **Police — Kerala Police Act, 1960 (5 of 1961) — S. 118(d) — Held violative of Art. 19(1)(a) and not saved by Art. 19(2) of the Constitution, hence struck down — Constitution of India, Arts. 19(1)(a) and 19(2)**

I. SCOPE OF FREEDOM OF SPEECH AND EXPRESSION

F. **Constitution of India — Preamble and Art. 19(1)(a) — Importance of freedom of speech and expression from standpoints of liberty of the individual and democratic form of government — Concept of "free trade in ideas" in competitive "marketplace of ideas"**

G. **Constitution of India — Arts. 19(1)(a) and 19(2) — Freedom of speech and expression — Content — Concepts of discussion, advocacy and incitement explained and distinguished — Discussion and advocacy are core of freedom of speech and expression and even if they cause annoyance, inconvenience or grossly offend, etc., they cannot be curbed by law — Only when discussion or advocacy reaches level of incitement which tends to have a proximate relation with any of the eight subject-matters set out in Art. 19(2) that law imposing reasonable restrictions on freedom of speech and expression can be validly enacted [*see also* Shortnotes *J*, *N*, *P*, *Q*, *R*, *W* and *X*] — Words and Phrases — "Discussion", "advocacy", "incitement" — Distinguished — Penal Code, 1860, Ss. 153-A and 295-A**

H. **Constitution of India — Arts. 19(1)(a) and 19(2) — Freedom of speech and expression — Content — Compared and contrasted with US First Amendment — Held, both India and the US protect the freedom of speech and expression as well as freedom of the press — Insofar as abridgement and reasonable restrictions are concerned, both Supreme Court of India and the US Supreme Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary — It is only when it comes to the eight subject-matters specified in Art. 19(2) of the Indian Constitution that there is a vast difference — In the US, if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster — But in India, such law cannot pass muster if it is merely in the interest of the general public — Such law has to be covered by one of the eight subject-matters set out under Art. 19(2) — If it does not, and is outside the pale of Art. 19(2), Indian courts will strike down such law — Thus, US Court judgments have great persuasive value on content of freedom of speech and expression in India — Constitutional Interpretation — External aids — Foreign decisions — American decisions, reliance upon — Have persuasive value on freedom of speech and expression and of the press under Art. 19(1)(a) of the Constitution**

I. **Constitution of India — Arts. 19(1)(a) & (2) — Grounds for testing reasonableness of restrictions on freedom of speech and expression, held, cannot be dehors Art. 19(2) — A law restricting freedom of speech and expression cannot pass muster if it is merely in the interest of the general public — Such law has to be covered by one of the eight subject-matters set out under Art. 19(2) — If it does not, and is outside the pale of Art. 19(2), Indian courts will strike down such law**

Held :

The Preamble of the Constitution of India inter alia speaks of liberty of thought, expression, belief, faith and worship. It also says that India is a sovereign democratic republic. When it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme. The importance of freedom of speech and expression both from the point of view of the liberty of the individual and from the point of view of our democratic form of government has been recognised by the Supreme Court in its various judgments. Freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved. It lies at the foundation of all democratic organisations. Public criticism is essential to the working of its institutions. This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a precondition for meaningful governance, the culture of open dialogue is generally of great societal importance. The ultimate truth is evolved by "free trade in ideas" in a competitive "marketplace of ideas". (Paras 8 to 10)

Romesh Thappar v. *State of Madras*, 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514; *Sakal Papers (P) Ltd.* v. *Union of India*, (1962) 3 SCR 842 : AIR 1962 SC 305; *Bennett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788; *S. Khushboo* v. *Kanniammal*, (2010) 5 SCC 600 : (2010) 2 SCC (Cri) 1299, *applied*

Abrams v. *United States*, 250 US 616 : 63 L Ed 1173 (1919); *Whitney* v. *California*, 71 L Ed 1095 : 274 US 357 (1927), *followed*

There are three concepts which are fundamental in understanding the reach of freedom of speech and expression, the most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(*a*). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, etc. These concepts gain importance here because most of the arguments of both petitioners and respondents tended to veer around the expression "public order". (Para 13)

It is significant to notice the differences between the US First Amendment and Article 19(1)(*a*) read with Article 19(2) of the Indian Constitution. The first important difference is the absoluteness of the US First Amendment—Congress shall make *no law* which abridges the freedom of speech. Second, whereas the US First Amendment speaks of freedom of speech and of the press, without any reference to "expression", Article 19(1)(*a*) of the Indian Constitution speaks of freedom of speech and expression without any reference to "the press". Third, under the US Constitution, speech may be abridged, whereas under our Constitution, reasonable restrictions may be imposed. Fourth, under our

Constitution such restrictions have to be in the interest of eight designated subject-matters—that is any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject-matters set out in Article 19(2). (Para 15)

Insofar as the first apparent difference is concerned, the US Supreme Court has never given literal effect to the declaration that Congress shall make no law abridging the freedom of speech. That approach of the US Supreme Court continues even today. So far as the second apparent difference is concerned, the American Supreme Court has included "expression" as part of freedom of speech and the Indian Supreme Court has included "the press" as being covered under Article 19(1)(*a*), so that, as a matter of judicial interpretation, both the US and India protect the freedom of speech and expression as well as press freedom. Insofar as abridgement and reasonable restrictions are concerned, both the US Supreme Court and the Supreme Court of India have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. It is only when it comes to the eight subject-matters specified in Article 19(2) of the Indian Constitution that there is a vast difference. In the US, if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject-matters set out under Article 19(2). If it does not, and is outside the pale of Article 19(2), Indian courts will strike down such law. Viewed from the above perspective, American judgments have great persuasive value on the content of freedom of speech and expression and the tests laid down for its infringement. (Paras 16 to 24)

Chaplinsky v. *New Hampshire*, 86 L Ed 1031 : 315 US 568 (1942); *Kameshwar Prasad* v. *State of Bihar*, 1962 Supp (3) SCR 369 : AIR 1962 SC 1166; *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121; *Sakal Papers (P) Ltd.* v. *Union of India*, (1962) 3 SCR 842 : AIR 1962 SC 305; *Supt., Central Prison* v. *Ram Manohar Lohia*, (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002, *relied on*

II. INFORMATION TECHNOLOGY ACT, 2000 — S. 66-A — CONSTITUTIONALITY

(1) Expansive expression "any information"

J. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — Ss. 66-A and 2(1)(v) — Offence under S. 66-A is made out against persons who disseminate "information" through computer resource or communication device causing "annoyance or inconvenience" to others — Having regard to inclusive and broad definition of "information" in S. 2(1)(v), S. 66-A ropes in all kinds of information disseminated over internet regardless of content of information and irrespective of whether the same falls within realm of discussion or advocacy causing only annoyance, inconvenience, etc. to some (which is permissible), or the same causes incitement leading to imminent causal connection with any of eight subject-matters contained in Art. 19(2) of the Constitution (which is not permissible) — Held, S. 66-A affects right of people to know, hence violates Art. 19(1)(a) of the Constitution beyond the extent permissible under Art. 19(2) — Hence, struck down in its entirety [*see also* Shortnotes *G*, *N*, *P*, *Q*, *R*, *W* and *X*]**

Held :

Section 66-A of the IT Act, 2000 casts the net very wide—all information that is disseminated over the internet is included within its reach. The definition of information in Section 2(1)(*v*) is an inclusive one. Further, the definition does not refer to what the content of information can be. In fact, it refers only to the medium through which such information is disseminated. Thus the public's right to know is directly affected by Section 66-A of the IT Act, 2000. Information of all kinds is roped in—such information may have scientific, literary or artistic value, it may refer to current events, it may be obscene or seditious. That such information may cause annoyance or inconvenience to some is how the offence is made out. It is clear that the right of the people to know—the marketplace of ideas—which the internet provides to persons of all kinds is what attracts Section 66-A of the IT Act, 2000. That the information sent has only to be annoying, inconvenient, grossly offensive, etc., to attract Section 66-A also shows that no distinction is made between mere discussion or advocacy of a particular point of view which may be annoying or inconvenient or grossly offensive to some on the one hand, and, incitement by which such words lead to an imminent causal connection with public disorder, security of State, etc., i.e. any of the eight subject-matters enumerated in Article 19(2) of the Constitution on the other. Section 66-A of the IT Act, 2000 in creating an offence against persons who use the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66-A of the IT Act, 2000. (Para 21)

American Communications Assn. v. *Douds*, 94 L Ed 925 : 339 US 382 (1950), *relied on*

(2) Reasonableness of restriction and infringement of Article 14

K. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Unreasonable restriction — Wider reach and range of circulation over internet, held, cannot justify restriction of freedom of speech and expression on that ground alone dehors the standard tests applicable under Art. 19(2) of the Constitution — If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right — The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial — The virtues of the electronic media cannot become its enemies — It may warrant a greater regulation over licensing and control and vigilance on the content — However, this control can only be exercised within the framework of Art. 19(2) — Though a distinction may validly be made between print and other media as opposed to the internet (*see* Shortnote *M*, below), S. 66-A being so widely drafted fails in being a reasonable restriction on the freedom of speech and expression — S. 66-A contrasted with S. 69-A — Nor does S. 66-A have a nexus with any of the eight subject-matters set out in Art. 19(2) [*see* Shortnotes *N*, *O*, *P*, *Q*, *R* and *S*] — S. 66-A fails to meet these standard tests and hence, is struck down**

L. **Constitution of India — Arts. 19(1)(a) & (2) — Wider range of reach and range of circulation of information through a particular medium, held, is not an independent ground dehors Art. 19(2) on which freedom of speech and expression can be abridged**

M. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Discrimination — Intelligible differentia between speech and expression on the internet and medium of print, broadcast, real live speech, etc. exists — Hence, creation of new category of criminal offence under S. 66-A is not violative of Art. 14 on the ground that it pertains to a different medium — However, S. 66-A struck down as it did not fall within Art. 19(2)**

Held :

If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content. However, this control can only be exercised within the framework of Article 19(2) of the Constitution. To plead for other grounds is to plead for unconstitutional measures. (Para 32)

Ministry of Information & Broadcasting, Govt. of India v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161, *applied*

There are intelligible differentia between the medium of print, broadcast and real live speech as opposed to speech on the internet. The intelligible differentia is clear—the internet gives any individual a platform which requires very little or no payment through which to air his views. Something posted on a site or website travels like lightning and can reach millions of persons all over the world. If the petitioners were right, this Article 14 argument would apply equally to all other offences created by the Information Technology Act which are not the subject-matter of challenge in these petitions. There is an intelligible differentia between speech on the internet and other mediums of communication for which separate offences can certainly be created by legislation. (Para 102)

A distinction may be made between the print and other media as opposed to the internet and the legislature may well, therefore, provide for separate offences so far as free speech over the internet is concerned. There is, therefore, an intelligible differentia having a rational relation to the object sought to be achieved—that there can be creation of offences which are applied to free speech over the internet alone as opposed to other mediums of communication. Thus, an Article 14 challenge has to be repelled on this ground. However, there is nothing in the features of how information may be disseminated on the internet outlined by the State (and set out in para 30) that warrant any relaxation in the Court's scrutiny of the curbing of the content of free speech over the internet. While it may be possible to narrowly draw a section creating a new offence, such as Section 69-A for instance, relatable only to speech over the internet, yet the validity of such a law will have to be tested on the touchstone of the tests applicable under Article 19(2) of the Constitution. (Paras 26 to 32)

Ministry of Information & Broadcasting, Govt. of India v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161; *Chintaman Rao* v. *State of M.P.*, 1950 SCR 759 : AIR 1951 SC 118; *State of Madras* v. *V.G. Row*, 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966, *applied*

N.B. Khare v. *State of Delhi*, 1950 SCR 519 : AIR 1950 SC 211 : (1951) 52 Cri LJ 550; *Mohd. Faruk* v. *State of M.P.*, (1969) 1 SCC 853, *relied on*

(3) Whether Section 66-A of the IT Act, 2000 can be protected under heads of public order, defamation, incitement to an offence and decency or morality

a On the challenge to Section 66-A of the IT Act, 2000 on ground that the offence created by the said section has no proximate relation with any of the eight subject-matters contained in Article 19(2) of the Constitution, the State claimed that the said section can be supported under the heads of public order, defamation, incitement to an offence and decency or morality.

(i) Public order

b N. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Held, has no proximate relation with "public order" within the meaning of the expression used in Art. 19(2) of the Constitution — It intends to punish person who disseminates "any information" through the internet irrespective of whether to the community at large or to an individual — Information sent may cause** c **annoyance to others and thereby constitute offence under S. 66-A but without any tendency to disrupt public order — Hence, S. 66-A fails the proximity test [*see also* Shortnotes *G*, *J*, *P*, *Q*, *R*, *W* and *X*] — Constitution of India — Art. 19(2) — "Public order" — Meaning and connotation — Test for determining disruption or likely disruption of public order — Words and Phrases — "Public order"**

Held :

d Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. The test to determine whether public order is disrupted or has tendency to disrupt, is, does a particular act lead to disturbance of the current life of the community or e does it merely affect an individual leaving the tranquility of society undisturbed? Going by this test, it is clear that Section 66-A of the IT Act, 2000 is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66-A of the IT Act, 2000. The recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this section is concerned, save and except where under sub-clause (*c*) the addressee or recipient is deceived or misled about the origin of f a particular message. It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. Section 66-A of the IT Act, 2000 makes no distinction between mass dissemination and dissemination to one person. Further, Section 66-A of the IT Act, 2000 does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the g message is conspicuously absent—there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquillity. On all these counts, it is clear that Section 66-A of the IT Act, 2000 has no proximate relationship to public order whatsoever. Mere "annoyance" need not cause disturbance of public order. Under Section 66-A of the IT Act, 2000, the h offence is complete by sending a message for the purpose of causing annoyance, either "persistently" or otherwise without in any manner impacting public order.

(Paras 37 and 38)

Ram Manohar Lohia v. *State of Bihar*, (1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608; *Supt., Central Prison* v. *Ram Manohar Lohia*, (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002; *Arun Ghosh* v. *State of W.B.*, (1970) 1 SCC 98 : 1970 SCC (Cri) 67, *applied*

Romesh Thappar v. *State of Madras*, 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514; *Brij Bhushan* v. *State of Delhi*, 1950 SCR 605 : AIR 1950 SC 129 : (1950) 51 Cri LJ 1525, *considered*

Pushkar Mukherjee v. *State of W.B.*, (1969) 1 SCC 10, *cited*

(ii) Test of clear and present danger to public order/Tendency to create public disorder

O. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Dissemination of information punishable under, held is not of such nature as to create clear and present danger to public order or tendency to created public disorder — Constitution of India — Art. 19(2) — Public order — Tendency to affect — Test of clear and present danger — Words and Phrases — "Clear and present danger", "tendency to create"**

Held :

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the legislature has a right to prevent. It is a question of proximity and degree. This test of "clear and present danger" has been used by the US Supreme Court in many varying situations and has been adjusted according to varying fact situations. It appears to have been repeatedly applied. Echoes of it can be found in Indian law as well such as in *S. Rangarajan*, (1989) 2 SCC 574. The Supreme Court in some other cases has used the expression "tendency" to create immediate public disorder. (Paras 39 to 41)

Schenck v. *United States*, 63 L Ed 470 : 249 US 47 (1919); *Terminiello* v. *Chicago*, 93 L Ed 1131 : 337 US 1 (1949); *Brandenburg* v. *Ohio*, 23 L Ed 2d 430 : 395 US 444 (1969); *Virginia* v. *Black*, 155 L Ed 2d 535 : 538 US 343 (2003); *S. Rangarajan* v. *P. Jagjivan Ram*, (1989) 2 SCC 574; *State of Bihar* v. *Shailabala Devi*, 1952 SCR 654 : AIR 1952 SC 329 : 1952 Cri LJ 1373; *Ramji Lal Modi* v. *State of U.P.*, 1957 SCR 860 : AIR 1957 SC 620 : 1957 Cri LJ 1006; *Kedar Nath Singh* v. *State of Bihar*, 1962 Supp (2) SCR 769 : AIR 1962 SC 955 : (1962) 2 Cri LJ 103; *Ramesh Yeshwant Prabhoo* v. *Prabhakar Kashinath Kunte*, (1996) 1 SCC 130, *followed*

Abrams v. *United States*, 250 US 616 : 63 L Ed 1173 (1919), *relied on*

Gompers v. *Buck's Stove & Range Co.*, 221 US 418 : 31 S Ct 492 : 55 L Ed 797 : 34 LRA (NS) 874 (1911); *Virginia* v. *Black*, 155 L Ed 2d 535 : 538 US 343 (2003); *Watts* v. *United States*, 22 L Ed 2d 664 : 394 US 705 (1969), *cited*

Viewed from either the standpoint of the clear and present danger test or the tendency to create public disorder test, Section 66-A of the IT Act, 2000 would not pass muster as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates. (Para 44)

(iii) Defamation

P. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Not aimed at defamatory statements at all — Not concerned with injury to reputation which is the essential ingredient for something to be defamatory — Something may be grossly offensive and may annoy or be inconvenient to somebody without at all affecting his reputation — Penal Code, 1860 — S. 499 — Defamation —**

Essential ingredient of — Injury to reputation — Constitution of India — Art. 19(2) — Words and Phrases — "Defamation" **(Para 46)**

a ***(iv) Incitement to an offence***

Q. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Has no proximate connection with incitement to commit an offence — Constitution of India — Art. 19(2) — Incitement to commit an offence — Words and Phrases — "Incitement to an offence" — Distinguished from causing of annoyance,**
b **inconvenience, danger, etc., or being grossly offensive or having a menacing character [*see also* Shortnotes *G*, *J*, *N*, *P*, *R*, *W* and *X*]**

Held :

Section 66-A of the IT Act, 2000 has no proximate connection with incitement to commit an offence. Firstly, the information disseminated over the internet need not be information which "incites" anybody at all. Written words
c may be sent that may be purely in the realm of "discussion" or "advocacy" of a "particular point of view". Further, the mere causing of annoyance, inconvenience, danger, etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all. They may be ingredients of certain offences under the Penal Code but are not offences in themselves. For these reasons, Section 66-A of the IT Act, 2000 has nothing to do with "incitement to an offence". (Para 47)

d As Section 66-A of the IT Act, 2000 severely curtails information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject-matters under Article 19(2) must, therefore, fall foul of Article 19(1)(*a*), and not being saved under Article 19(2), is declared as unconstitutional. (Para 47)

(v) Decency and morality

e R. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Offence contemplated under, does not fall within the expression "decency" or "morality" — Constitution of India — Art. 19(2) — Decency or morality — Words and Phrases — "Obscenity" — What may be grossly offensive or annoying under S. 66-A need not be obscene at all**

f *Held* :

What has been said with regard to public order and incitement to an offence equally applies here. Section 66-A of the IT Act, 2000 cannot possibly be said to create an offence which falls within the expression "decency" or "morality" in that what may be grossly offensive or annoying under Section 66-A of the IT
g Act, 2000 need not be obscene at all—in fact the word "obscene" is conspicuous by its absence in Section 66-A of the IT Act, 2000. (Para 50)

Directorate General of Doordarshan v. *Anand Patwardhan*, (2006) 8 SCC 433; *Aveek Sarkar* v. *State of W.B.*, (2014) 4 SCC 257 : (2014) 2 SCC (Cri) 291, *relied on*

Ranjit D. Udeshi v. *State of Maharashtra*, (1965) 1 SCR 65 : AIR 1965 SC 881 : (1965) 2 Cri LJ 8, *considered*

R. v. *Hicklin*, (1868) LR 3 QB 360, *held, distinguished*

Director of Public Prosecutions v. *Collins*, (2006) 1 WLR 2223 : (2006) 4 All ER 602 (HL);
h *Connolly* v. *Director of Public Prosecutions*, (2008) 1 WLR 276 : (2007) 2 All ER 1012; *Terminiello* v. *Chicago*, 93 L Ed 1131 : 337 US 1 (1949); *Brandenburg* v. *Ohio*, 23 L Ed 2d 430 : 395 US 444 (1969); *Whitney* v. *California*, 71 L Ed 1095 : 274 US 357 (1927);

Chaplinsky v. *New Hampshire*, 86 L Ed 1031 : 315 US 568 (1942); *Hustler Magazine Inc.* v. *Falwell*, 485 US 46 : 99 L Ed 2d 41 (1988), *referred to*

(vi) Interpretation — Reading into Section 66-A of the IT Act, 2000 the eight subject-matters contained in Article 19(2) of the Constitution

S. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Interpretation to save constitutionality — Court cannot read into S. 66-A the eight subject-matters enumerated in Art. 19(2) of the Constitution when legislature never intended to do so — Constitution of India — Art. 19(2) — Eight subject-matters contained in Cl. (2) cannot be read into a statutory provision when legislature did not intend the same**

T. **Interpretation of Statutes — Subsidiary Rules — Construction to save constitutionality of statute — Court cannot read into a provision something or add something which is not there, to save its constitutionality, when legislature never intended to do so — Doing so would be doing violence to language of the provision and wholesale substitution of the provision — Which is not the same as reading down a provision to save it**

Held :

It is not possible to read into Section 66-A of the IT Act, 2000 each of the subject-matters contained in Article 19(2) in order to save its constitutionality. The reason is that when the legislature intended to do so, it provided for some of the subject-matters contained in Article 19(2) in Section 69-A. The Court would be doing complete violence to the language of Section 66-A of the IT Act, 2000 if it reads into it something that was never intended to be read into it. (Para 51)

Further, the State submitted that the statute should be made workable by reading into Section 66-A of the IT Act, 2000 several matters suggested by it. But that is also not possible since what the State is asking the Court to do is not to read down Section 66-A of the IT Act, 2000, instead, it is asking for a wholesale substitution of the provision which is obviously not possible. (Para 52)

(4) Vagueness

U. **Constitution of India — Arts. 19(2) & 19(1)(a) and Art. 14 — Penal law restricting freedom of speech and expression liable to be struck down for vagueness and not providing manageable standards — A law restricting freedom of speech is rendered unconstitutional on ground of vagueness, when it lacks reasonable and manageable standards and clear guidance for citizens, authorities and courts for drawing a precise line between allowable and forbidden speech, expression or information — When a law uses vague expressions capable of misuse or abuse without providing notice to persons of common intelligence to guess their meaning, it leaves them in a boundless sea of uncertainty, conferring wide, unfettered powers on authorities to curtail freedom of speech and expression arbitrarily — Criminal Law — Requirements of valid penal law or penal provisions — Need for offences to be clearly defined with manageable standards**

V. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A and Ss. 66 & 66-B to 67-B — S. 66-A, held, is unconstitutional on ground of being vague and not providing manageable standards — Contrasted with more clearly defined offences in S. 66 and Ss. 66-B to 67-B of IT Act and in the Penal Code —**

Expressions used in S. 66-A are open-ended, undefined and vague as a result of which neither would accused be put on notice nor would authorities be clear as to on which side of a clearly drawn line a particular communication would fall — Expressions used in S. 66-A are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence — Though some of the expressions used in S. 66-A also occur in certain provisions of the Penal Code, but those expressions used therein are well defined and are ingredients of certain offences, whereas the same used in S. 66-A are offences in themselves and none of them are defined — S. 66-A arbitrarily, excessively and disproportionately invades right of free speech and upsets balance between such right and reasonable restrictions that may be imposed on such right — Constitution of India — Arts. 19(1)(a) and 19(2)

— Penal Code, 1860 — Ss. 268, 294 and 510 — Held, the mere causing of annoyance, inconvenience, danger, etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all — They may be ingredients of certain offences under the Penal Code but are not offences in themselves

Held :

Where no reasonable standards are laid down to define guilt in a section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable. A penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness. Ordinary people should be able to understand what conduct is prohibited and what is permitted. Also, those who administer the law must know what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place. The Constitution does not permit a legislature to set a net large enough to catch all possible offenders and leave it to the Court to step in and decide who could be held guilty. (Paras 55 to 68)

Musser v. *Utah*, 92 L Ed 562 : 68 S Ct 397 : 333 US 95 (1948); *Winters* v. *New York*, 92 L Ed 840 : 333 US 507 (1948); *Burstyn* v. *Wilson*, 96 L Ed 1098 : 343 US 495 (1952); *Chicago* v. *Morales*, 527 US 41 : 144 L Ed 2d 67 (1999); *United States* v. *Reese*, 92 US 214 : 23 L Ed 563 (1876); *Grayned* v. *Rockford*, 33 L Ed 2d 222 : 408 US 104 (1972); *Reno* v. *American Civil Liberties Union*, 521 US 844 : 138 L Ed 2d 874 (1997); *Federal Communications Commission* v. *Fox Television Stations Inc.*, 132 S Ct 2307 : 183 L Ed 2d 234 (2012); *State of M.P.* v. *Baldeo Prasad*, (1961) 1 SCR 970 : AIR 1961 SC 293 : (1961) 1 Cri LJ 442; *K.A. Abbas* v. *Union of India*, (1970) 2 SCC 780; *Harakchand Ratanchand Banthia* v. *Union of India*, (1969) 2 SCC 166; *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271 : 1982 SCC (Cri) 152; *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899, *relied on*

The expressions used in Section 66-A of the IT Act, 2000 are completely open-ended and undefined whereas in all computer related offences that are spoken of by Section 66, mens rea is an ingredient and the expressions "dishonestly" and "fraudulently" are defined with some degree of specificity, unlike the expressions used in Section 66-A of the IT Act, 2000. The provisions contained in Sections 66-B up to 67-B also provide for various punishments for offences that are clearly made out. (Paras 72 to 74)

The mere causing of annoyance, inconvenience, danger, etc., or being grossly offensive or having a menacing character are not offences under the Penal Code, 1860 at all. They may be ingredients of certain offences under the Penal Code, 1860 but are not offences in themselves (Para 47)

In the Penal Code, 1860 a number of the expressions that occur in Section 66-A of the IT Act, 2000 occur in Section 268 IPC. Whereas, in Section 268 IPC the various expressions used are ingredients for the offence of a public nuisance, these ingredients now become offences in themselves when it comes to Section 66-A of the IT Act, 2000. Further, under Section 268 IPC, the person should be guilty of an act or omission which is illegal in nature—legal acts are not within its net. A further ingredient is that injury, danger or annoyance must be to the public in general. Injury, danger or annoyance are not offences by themselves howsoever made and to whomsoever made. The expression "annoyance" appears also in Sections 294 and 510 IPC. The annoyance that is spoken of in Section 294 IPC is clearly defined—that is, it has to be caused by obscene utterances or acts. Equally, under Section 510 IPC, the annoyance that is caused to a person must only be by another person who is in a state of intoxication and who annoys such person only in a public place or in a place for which it is a trespass for him to enter. Such narrowly and closely defined contours of offences made out under the Penal Code are conspicuous by their absence in Section 66-A of the IT Act, 2000 which in stark contrast uses completely open-ended, undefined and vague language. None of the expressions used in Section 66-A of the IT Act, 2000 are defined. Even "criminal intimidation" is not defined—and the definition clause of the Information Technology Act, Section 2 does not say that words and expressions that are defined in the Penal Code will apply to this Act.

(Paras 75 to 78)

Further, every expression used in Section 66-A of the IT Act, 2000 is nebulous in meaning. What may be offensive to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another. Even the expression "persistently" is completely imprecise—suppose a message is sent thrice, can it be said that it was sent "persistently"? Does a message have to be sent (say) at least eight times, before it can be said that such message is "persistently" sent? There is no demarcating line conveyed by any of these expressions. (Para 79)

Two English judgments — *Collins*, (2006) 1 WLR 2223 and *Chambers*, (2013) 1 WLR 1833 would illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is "grossly offensive" or "menacing". If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" used in Section 66-A of the IT Act, 2000 are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66-A of the IT Act, 2000 and the authorities who are to enforce Section 66-A of the IT Act, 2000 have absolutely no manageable standard by which to book a person for an offence under Section 66-A of the IT Act, 2000. (Paras 82 and 85)

Director of Public Prosecutions v. *Collins*, (2006) 1 WLR 2223 : (2006) 4 All ER 602 (HL); *Chambers* v. *Director of Public Prosecutions*, (2013) 1 WLR 1833, *considered*

Director of Public Prosecutions v. *Collins*, (2006) 1 WLR 308 : (2005) 3 All ER 326, *referred to*

Thus it is clear that Section 66-A of the IT Act, 2000 arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right. (Para 86)

Chintaman Rao v. *State of M.P.*, 1950 SCR 759 : AIR 1951 SC 118; *State of Madras* v. *V.G. Row*, 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966, *applied*

The submission that though expressions that are used in Section 66-A of the IT Act, 2000 may be incapable of any precise definition but for that reason they are not constitutionally vulnerable, is not acceptable. (Para 80)

Madan Singh v. *State of Bihar*, (2004) 4 SCC 622 : 2004 SCC (Cri) 1360; *Zameer Ahmed Latifur Rehman Sheikh* v. *State of Maharashtra*, (2010) 5 SCC 246; *State of M.P.* v. *Kedia Leather & Liquor Ltd.*, (2003) 7 SCC 389 : 2003 SCC (Cri) 1642; *State of Karnataka* v. *Appa Balu Ingale*, 1995 Supp (4) SCC 469 : 1994 SCC (Cri) 1762, *distinguished*

(5) Chilling effect and Overbreadth

W. **Constitution of India — Arts. 19(1)(a) & (2) and Preamble — Freedom of speech and expression — Scope — Freedom to express unpalatable views, cause annoyance, inconvenience or grossly offend so long as it does not amount to incitement leading to imminent causal connection with any of the eight subject-matters set out in Art. 19(2) — Freedom to express views dissenting with the mores of the day [*see also* Shortnotes *G*, *J*, *N*, *P*, *Q*, *R* and *X*]**

X. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Restriction on freedom of speech and expression must be couched in the narrowest possible terms to avoid chilling effect on such freedom — Expressions used in S. 66-A of the IT Act, 2000 are very wide and terms of inexactitude, capable of taking within its sweep even protected and innocent speech, and the question as to whether the offence is made out thereunder depends upon uncertain factors — Thus S. 66-A of the IT Act, 2000 is liable to be used in such a way as to have chilling effect on the right under Art. 19(1)(a) and liable to be struck down on ground of overbreadth [*see also* Shortnotes *G*, *J*, *N*, *P*, *Q*, *R*, *U*, *V* and *W*] — Constitution of India — Art. 19(1)(a) — Words and Phrases — "Chilling effect"**

Y. **Constitution of India — Arts. 19(1)(a) & (2) — Restrictions on the freedom of speech must be couched in the narrowest possible terms**

Held :

The content of the right under Article 19(1)(*a*) remains the same whatever be the means of communication including internet communication. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by "liberal views"— such as the emancipation of women or the abolition of the caste system or

whether certain members of a non-proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66-A of the IT Act, 2000. In point of fact, Section 66-A of the IT Act, 2000 is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the section and is liable, therefore, to be used in such a way as to have a chilling effect on freedom of speech. If its constitutionality is upheld, the chilling effect on free speech would be total. (Paras 90, 87 and 94)

Reno v. *American Civil Liberties Union*, 521 US 844 : 138 L Ed 2d 874 (1997); *Ministry of Information & Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161, *followed*

R. Rajagopal v. *State of T.N.*, (1994) 6 SCC 632; *S. Khushboo* v. *Kanniammal*, (2010) 5 SCC 600 : (2010) 2 SCC (Cri) 1299, *relied on*

New York Times Co. v. *Sullivan*, 376 US 254 : 11 L Ed 2d 686 (1964); *Derbyshire County Council* v. *Times Newspapers Ltd.*, 1993 AC 534 : (1993) 2 WLR 449 : (1993) 1 All ER 1011 (HL); *Attorney General* v. *Guardian Newspapers Ltd. (No. 2)*, (1990) 1 AC 109 : (1988) 3 WLR 776 : (1988) 3 All ER 545 (HL), *cited*

Not only are the expressions used in Section 66-A of the IT Act, 2000 expressions of inexactitude but they are also over broad and would fall foul of the repeated injunctions of the Supreme Court that restrictions on the freedom of speech must be couched in the narrowest possible terms. In point of fact, judgments of Constitution Benches of the Supreme Court have struck down sections which are similar in nature. (Para 90)

Supt., Central Prison v. *Ram Manohar Lohia*, (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002; *Kameshwar Prasad* v. *State of Bihar*, 1962 Supp (3) SCR 369 : AIR 1962 SC 1166, *applied*

Kedar Nath Singh v. *State of Bihar*, 1962 Supp (2) SCR 769 : AIR 1962 SC 955 : (1962) 2 Cri LJ 103, *relied on*

Section 66-A of the IT Act, 2000 is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down as unconstitutional on the ground of overbreadth. (Para 94)

(6) Possibility of an act being abused by authorities

Z. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Provision must be judged on its own merits and so judged, it is unconstitutional — Proposition that mere possibility of provision capable of being abused by authorities administering it cannot be test of determining its validity — Held, cannot hold good when provision is otherwise found to be wholly unconstitutional — Provision cannot also be saved on basis of assurance on behalf of Government that it would be administered in a reasonable manner — Constitution of India — Arts. 13 and 19(1)(a) and 19(2) — Statute Law — Validity/Judicial review — A provision must be judged on its own merits without reference to how well it may be administered or any assurance in that regard from the Government of the day**

Held :

It is true that the fact that Section 66-A of the IT Act, 2000 is capable of being abused by the persons who administer it is not a ground to test its validity if it is otherwise valid. But it is the converse proposition i.e. a statute which is

otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner, which would apply here. If Section 66-A of the IT Act, 2000 is otherwise invalid, it cannot be saved by an assurance from the present Government that it will be administered in a reasonable manner. Governments may come and Governments may go but Section 66-A of the IT Act, 2000 will go on forever. An assurance from the present Government even if carried out faithfully would not bind any successor Government. It must, therefore, be held that Section 66-A of the IT Act, 2000 must be judged on its own merits without any reference to how well it may be administered. (Para 95)

Collector of Customs v. *Nathella Sampathu Chetty*, (1962) 3 SCR 786 : AIR 1962 SC 316 : (1962) 1 Cri LJ 364, *relied on*

Belfast Corpn. v. *O.D. Cars Ltd.*, 1960 AC 490 : (1960) 2 WLR 148 : (1960) 1 All ER 65 (HL), *cited*

(7) Severability

ZA. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Found unconstitutional — Whether constitutionally valid portion severable — Doctrine of severability, held, not applicable, as S. 66-A purports to authorise imposition of restrictions on freedom of speech and expression in a language wide enough to cover restrictions both within and without the limits of constitutionally permissible action affecting such right — Possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out as it does not fall within any of the subject-matters contained in Art. 19(2) of the Constitution — As it cannot be split up into what is within and what is without the protection of Art. 19(2), provision as a whole must be declared as unconstitutional — Constitution of India — Arts. 13 and 19(1)(a) & 19(2) — Doctrine of severability — Applicability (Paras 97 to 100)**

Romesh Thappar v. *State of Madras*, 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514, *applied*

K.A. Abbas v. *Union of India*, (1970) 2 SCC 780, *followed*

R.M.D. Chamarbaugwalla v. *Union of India*, 1957 SCR 930 : AIR 1957 SC 628, *relied on*

State of Bombay v. *F.N. Balsara*, 1951 SCR 682 : AIR 1951 SC 318 : (1951) 52 Cri LJ 1361; *State of Bombay* v. *United Motors (India) Ltd.*, 1953 SCR 1069 : AIR 1953 SC 252, *cited*

(8) Procedural unreasonableness

ZB. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Procedural safeguards provided under Ss. 95, 96, 196 and 199 CrPC not available when any person is booked under S. 66-A for commission of similar offences over the internet — Contention regarding such procedural unreasonableness need not be considered once S. 66-A is struck down on substantive grounds — Criminal Procedure Code, 1973, Ss. 95, 96, 196 and 199 (Paras 105 and 106)**

III. INFORMATION TECHNOLOGY ACT, 2000 — S. 69-A AND RULES — CONSTITUTIONALITY

ZC. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 69-A — Rules framed under sub-section (2) — S. 69-A and Rules providing sufficient safeguards, held, not unconstitutional — Constitution of India — Arts. 19(1)(a) and 19(2) —**

Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 — Rr. 3 to 10, 14 and 16 — Valid

The constitutional validity of Section 69-A of the Act and the Rules has been assailed on the grounds that there is no pre-decisional hearing afforded by the Rules particularly to the "originator" of information, which is defined under Section 2(*za*) of the Act to mean a person who sends, generates, stores or transmits any electronic message; or causes any electronic message to be sent, generated, stored or transmitted to any other person. Further, procedural safeguards such as which are provided under Sections 95 and 96 CrPC are not available here. Also, the confidentiality provision was assailed stating that it affects the fundamental rights of the petitioners.

Rejecting the contention, the Supreme Court

Held :

Section 69-A, unlike Section 66-A of the IT Act, 2000, is a narrowly drawn provision with several safeguards. First and foremost, blocking can only be resorted to where the Central Government is satisfied that it is necessary to do so. Secondly, such necessity is relatable only to some of the subjects set out in Article 19(2) of the Constitution. Thirdly, reasons have to be recorded in writing in such blocking order so that they may be assailed in a writ petition under Article 226 of the Constitution. (Para 114)

The Rules further provide for a hearing before the Committee set up—which Committee then looks into whether or not it is necessary to block such information. It is only when the Committee finds that there is such a necessity that a blocking order is made. It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the "person" i.e. the originator is identified he is also to be heard before a blocking order is passed. Above all, it is only after these procedural safeguards are met that blocking orders are made and in case there is a certified copy of a court order, only then can such blocking order also be made. It is only an intermediary who finally fails to comply with the directions issued who is punishable under Section 69-A(3). (Para 115)

Merely because certain additional safeguards such as those found in Sections 95 and 96 CrPC are not available does not make the Rules constitutionally infirm. The Rules are not constitutionally infirm in any manner. (Para 116)

IV. Information Technology Act, 2000 — S. 79 And Information Technology (Intermediary Guidelines) Rules, 2011

ZD. **Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 79(3)(b) — Held, valid subject to being read down — S. 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that: (1) a court order has been passed asking it to expeditiously remove or disable access to certain material, or (2) on being notified by the appropriate Government or its agency that unlawful acts relatable to Art. 19(2) of the Constitution are going to be committed, then fails to expeditiously remove or disable access to such material — The court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Art. 19(2) of the Constitution — Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, Rr. 3 to 10, 14 and 16**

ZE. **Information Technology, Internet, Computer and Cyber Laws — Information Technology (Intermediary Guidelines) Rules, 2011 — R. 3(4) — Held, valid subject to being read down — Held, the knowledge spoken of in the said sub-rule must only be through the medium of a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Art. 19(2) of the Constitution are going to be committed and the intermediary then fails to expeditiously remove or disable access to such material — The court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Art. 19(2) of the Constitution**

Held :

Section 79 being an exemption provision, it is closely related to provisions which provide for offences including Section 69-A. Under Section 69-A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. There are only two ways in which a blocking order can be passed—one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69-A read with the 2009 Rules. (Para 121)

However, Section 79(3)(*b*) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material or on being notified by the appropriate Government or its agency that unlawful acts relatable to Article 19(2) of the Constitution are going to be committed then, fails to expeditiously remove or disable access to such material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook, etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. In other countries worldwide this view has gained acceptance, Argentina being in the forefront. Furthermore, the court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Article 19(2) of the Constitution. Unlawful acts beyond what is laid down in Article 19(2) of the Constitution obviously cannot form any part of Section 79. With these two caveats, it is not necessary to strike down Section 79(3)(*b*). (Paras 122 and 124.3)

The Additional Solicitor General informed that it is a common practice worldwide for intermediaries to have user agreements containing what is stated in Rule 3(2). However, Rule 3(4) needs to be read down in the same manner as Section 79(3)(*b*). Subject to this, the Information Technology (Intermediaries Guidelines) Rules, 2011 are valid. (Para 123)

V. KERALA POLICE ACT, 1960, S. 118

ZF. **Police — Kerala Police Act, 1960 (5 of 1961) — S. 118 — In pith and substance S. 118 falls under Sch. VII List II Entry 2 and additionally under Sch. VII List II Entry 1 of the Constitution, hence valid — Constitution of India — Art. 246 — Legislative competence — Pith and substance rule**

ZG. **Police — Kerala Police Act, 1960 (5 of 1961) — S. 118(d) — Held, vague and violative of Art. 19(1)(a), being not saved by Art. 19(2) of the Constitution — Constitution of India, Arts. 19(1)(a) and 19(2)**

Held :

The Kerala Police Act as a whole would necessarily fall under Entry 2 of List II of Schedule VII to the Constitution. In addition, Section 118 would also fall within Entry 1 of List II of Schedule VII to the Constitution in that as its marginal note tells it deals with penalties for causing grave violation of public order or danger. (Para 108)

If on examination of the enactment as a whole, it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. A statute cannot be dissected and then examined as to under what field of legislation each part would separately fall. (Para 109)

A.S. Krishna v. *State of Madras*, 1957 SCR 399 : AIR 1957 SC 297 : 1957 Cri LJ 409, *followed*

However, what has been said about Section 66-A of the IT Act, 2000 of the Information Technology Act would apply directly to Section 118(*d*) of the Kerala Police Act, as causing annoyance in an indecent manner suffers from the same type of vagueness and overbreadth, that led to the invalidity of Section 66-A of the IT Act, 2000, and for the reasons given for striking down Section 66-A of the IT Act, 2000, Section 118(*d*) also violates Article 19(1)(*a*) of the Constitution and not being a reasonable restriction on the said right and not being saved under any of the subject-matters contained in Article 19(2) of the Constitution is hereby declared to be unconstitutional. (Paras 111 and 124.4)

Writ petitions disposed of R-D/54597/CR

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19. 1995 Supp (4) SCC 469 : 1994 SCC (Cri) 1762, *State of Karnataka* v. *Appa Balu Ingale* 164*b*
20. (1994) 6 SCC 632, *R. Rajagopal* v. *State of T.N.* 167*b-c*
21. (1994) 3 SCC 569 : 1994 SCC (Cri) 899, *Kartar Singh* v. *State of Punjab* 161*a*
22. 1993 AC 534 : (1993) 2 WLR 449 : (1993) 1 All ER 1011 (HL), *Derbyshire County Council* v. *Times Newspapers Ltd.* 167*c*
23. (1990) 1 AC 109 : (1988) 3 WLR 776 : (1988) 3 All ER 545 (HL), *Attorney General* v. *Guardian Newspapers Ltd. (No. 2)* 167*e*
24. (1989) 2 SCC 574, *S. Rangarajan* v. *P. Jagjivan Ram* 145*a*
25. 485 US 46 : 99 L Ed 2d 41 (1988), *Hustler Magazine Inc.* v. *Falwell* 149*c*
26. (1985) 1 SCC 641 : 1985 SCC (Tax) 121, *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* 133*c-d*
27. (1982) 1 SCC 271 : 1982 SCC (Cri) 152, *A.K. Roy* v. *Union of India* 159*f-g*
28. (1972) 2 SCC 788, *Bennett Coleman & Co.* v. *Union of India* 128*g*
29. 405 US 156 : 31 L Ed 2d 110 (1972), *Papachristou* v. *Jacksonville* 155*e-f*
30. 33 L Ed 2d 222 : 408 US 104 (1972), *Grayned* v. *Rockford* 153*d*, 153*e*, 156*b*
31. (1970) 2 SCC 780, *K.A. Abbas* v. *Union of India* 157*e*, 172*a-b*
32. (1970) 1 SCC 98 : 1970 SCC (Cri) 67, *Arun Ghosh* v. *State of W.B.* 142*d*
33. (1969) 2 SCC 166, *Harakchand Ratanchand Banthia* v. *Union of India* 158*e*
34. (1969) 1 SCC 853, *Mohd. Faruk* v. *State of M.P.* 137*c*
35. (1969) 1 SCC 475, *Municipal Committee, Amritsar* v. *State of Punjab* 157*f-g*
36. (1969) 1 SCC 10, *Pushkar Mukherjee* v. *State of W.B.* 143*d-e*
37. 23 L Ed 2d 430 : 395 US 444 (1969), *Brandenburg* v. *Ohio* 145*a*, 148*e-f*
38. 22 L Ed 2d 664 : 394 US 705 (1969), *Watts* v. *United States* 145*a*
39. (1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608, *Ram Manohar Lohia* v. *State of Bihar* 142*b*, 142*d*, 142*d-e*, 143*f*
40. (1965) 1 SCR 65 : AIR 1965 SC 881 : (1965) 2 Cri LJ 8, *Ranjit D. Udeshi* v. *State of Maharashtra* 147*d-e*

41. 376 US 254 : 11 L Ed 2d 686 (1964), *New York Times Co.* v. *Sullivan* 167*b-c*, 167*g*
42. (1962) 3 SCR 842 : AIR 1962 SC 305, *Sakal Papers (P) Ltd.* v. *Union of India* 128*f-g*, 134*g*
43. (1962) 3 SCR 786 : AIR 1962 SC 316 : (1962) 1 Cri LJ 364, *Collector of Customs* v. *Nathella Sampathu Chetty* 170*b-c*
44. 1962 Supp (3) SCR 369 : AIR 1962 SC 1166, *Kameshwar Prasad* v. *State of Bihar* 132*g-h*, 169*a-b*, 169*b-c*, 169*f-g*
45. 1962 Supp (2) SCR 769 : AIR 1962 SC 955 : (1962) 2 Cri LJ 103, *Kedar Nath Singh* v. *State of Bihar* 146*a-b*, 168*e*
46. (1961) 1 SCR 970 : AIR 1961 SC 293 : (1961) 1 Cri LJ 442, *State of M.P.* v. *Baldeo Prasad* 156*b-c*, 158*a*
47. (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002, *Supt., Central Prison* v. *Ram Manohar Lohia* 135*e*, 142*a*, 168*e-f*, 169*b-c*
48. 1960 AC 490 : (1960) 2 WLR 148 : (1960) 1 All ER 65 (HL), *Belfast Corpn.* v. *O.D. Cars Ltd.* 170*d-e*
49. 1957 SCR 930 : AIR 1957 SC 628, *R.M.D. Chamarbaugwalla* v. *Union of India* 172*b*
50. 1957 SCR 860 : AIR 1957 SC 620 : 1957 Cri LJ 1006, *Ramji Lal Modi* v. *State of U.P.* 146*a-b*
51. 1957 SCR 399 : AIR 1957 SC 297 : 1957 Cri LJ 409, *A.S. Krishna* v. *State of Madras* 176*a*
52. 1953 SCR 1069 : AIR 1953 SC 252, *State of Bombay* v. *United Motors (India) Ltd.* 172*e-f*
53. 1952 SCR 654 : AIR 1952 SC 329 : 1952 Cri LJ 1373, *State of Bihar* v. *Shailabala Devi* 145*d*
54. 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966, *State of Madras* v. *V.G. Row* 136*e*, 166*e*
55. 96 L Ed 1098 : 343 US 495 (1952), *Burstyn* v. *Wilson* 152*e-f*
56. 1951 SCR 682 : AIR 1951 SC 318 : (1951) 52 Cri LJ 1361, *State of Bombay* v. *F.N. Balsara* 172*e-f*
57. 1950 SCR 759 : AIR 1951 SC 118, *Chintaman Rao* v. *State of M.P.* 136*b-c*, 166*e*
58. 1950 SCR 605 : AIR 1950 SC 129 : (1950) 51 Cri LJ 1525, *Brij Bhushan* v. *State of Delhi* 141*g-h*
59. 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514, *Romesh Thappar* v. *State of Madras* 128*f*, 141*f*, 171*d*, 172*b*, 172*b-c*, 172*e*, 172*f*
60. 1950 SCR 519 : AIR 1950 SC 211 : (1951) 52 Cri LJ 550, *N.B. Khare* v. *State of Delhi* 136*e*, 137*f*
61. 94 L Ed 925 : 339 US 382 (1950), *American Communications Assn.* v. *Douds* 134*d-e*
62. 93 L Ed 1131 : 337 US 1 (1949), *Terminiello* v. *Chicago* 144*g-h*, 148*f*
63. 92 L Ed 840 : 333 US 507 (1948), *Winters* v. *New York* 151*a*
64. 92 L Ed 562 : 68 S Ct 397 : 333 US 95 (1948), *Musser* v. *Utah* 150*g-h*
65. 86 L Ed 1031 : 315 US 568 (1942), *Chaplinsky* v. *New Hampshire* 132*a*, 149*a*
66. 310 US 296 : 60 S Ct 900 : 84 L Ed 1213 : 128 ALR 1352 (1940), *Cantwell* v. *Connecticut* 132*d*
67. 306 US 451 : 83 L Ed 888 (1939), *Lanzetta* v. *New Jersey* 155*f*
68. 301 US 242 : 57 S Ct 732 : 81 L Ed 1066 (1937), *Herndon* v. *Lowry* 152*e*
69. 71 L Ed 1095 : 274 US 357 (1927), *Whitney* v. *California* 129*d*, 148*g-h*
70. 269 US 385 : 46 S Ct 126 : 70 L Ed 322 (1926), *Connally* v. *General Construction Co.* 151*d-e*, 155*d-e*
71. 255 US 81 : 41 S Ct 298 : 65 L Ed 516 : 14 ALR 1045 (1921), *United States* v. *L. Cohen Grocery Co.* 152*c*
72. 250 US 616 : 63 L Ed 1173 (1919), *Abrams* v. *United States* 129*b-c*, 144*f-g*
73. 63 L Ed 470 : 249 US 47 (1919), *Schenck* v. *United States* 144*e*
74. 221 US 418 : 31 S Ct 492 : 55 L Ed 797 : 34 LRA (NS) 874 (1911), *Gompers* v. *Buck's Stove & Range Co.* 144*e-f*
75. 92 US 214 : 23 L Ed 563 (1876), *United States* v. *Reese* 153*a-b*
76. (1868) LR 3 QB 360, *R.* v. *Hicklin* 147*e*, 147*g-h*

SUMMARY OF ARGUMENTS

I. Mr Soli J. Sorabjee, Senior Advocate, for the petitioner, Shreya Singhal in WP (Crl.) No. 167/2012

1. Section 66-A of the Information Technology Act, 2000 (the said Act) is unconstitutional because it violates the fundamental rights of freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution.

2. (*a*) "Freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and governments and must be preserved." [See *Sakal Papers (P) Ltd.* v. *Union of India*, (1962) 3 SCR 842 at 866.]

(*b*) "Freedom of the press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions. Never has criticism been more necessary than today, when the weapons of propaganda are so strong and so subtle. But, like other liberties, this also must be limited." [See *Bennett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788 : (1973) 2 SCR 757 at 829.]

(*c*) "Very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organizations...." [See *Romesh Thappar* v. *State of Madras*, 1950 SCR 594 at 602.]

(*d*) "Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the

Summary of Arguments *(contd.)*

I. Mr Soli J. Sorabjee, Senior Advocate, for the petitioner *(contd.)*

possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. … an enactment, which is capable of being applied to cases where no such danger would arise, cannot be held to be constitutional and valid to any extent." [see *Romesh Thappar* v. *State of Madras*, 1950 SCR 594 at 603.]

(*e*) "It is indisputable that by freedom of the press is meant the right of all citizens to speak, publish and express their views. The freedom of the press embodies the right of the people to read. The freedom of the press is not antithetical to the right of the people to speak and express." [See *Bennett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788 : (1973) 2 SCR 757 at 829.]

3. "There is nothing in clause (2) of Article 19 which permits the State, to abridge this right on the ground of conferring benefits upon the public in general or upon a section of the public. It is not open to the State to curtail or infringe the freedom of speech of one for promoting the general welfare of a section or a group of people unless its action could be justified under a law competent under clause (2) of Article 19." [See *Sakal Papers (P) Ltd.* v. *Union of India*, (1962) 3 SCR 842 at 862.]

4. Restrictions which can be imposed on freedom of expression can be only on the heads specified in Article 19(2) and none other. Restrictions cannot be imposed on the ground of "interest of general public" contemplated by Article 19(6). [See *Sakal Papers (P) Ltd.* v. *Union of India*, (1962) 3 SCR 842 at 868.]

5. Section 66-A penalises speech and expression on the ground that it causes annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will. These grounds are outside the purview of Article 19(2). Hence the said section is unconstitutional. [See *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 at 226-27.]

6. Section 66-A also suffers from the vice of vagueness because expressions mentioned therein convey different meanings to different persons and depend on the subjective opinion of the complainant and the statutory authority without any objective standard or norm. [See *State of M.P.* v. *Baldeo Prasad*, (1961) 1 SCR 970 at 979; *Harakchand Ratanchand Banthia* v. *Union of India*, (1969) 2 SCC 166 at 183, para 21; *K.A. Abbas* v. *Union of India*, (1970) 2 SCC 780 at 799, paras 45-46; *Burstyn* v. *Wilson*, 96 L Ed 1098 at 1120-22; *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 at 199-200.]

7. In that context enforcement of the said section is an insidious form of censorship which is not authorised by the Constitution. [See *Hector* v. *Attorney General of Antigua & Barbuda*, (1990) 2 All ER 103.]

8. There are numerous instances about the arbitrary and frequent invocation of the said section which highlight the legal infirmity arising from

Summary of Arguments *(contd.)*

I. Mr Soli J. Sorabjee, Senior Advocate, for the petitioner *(contd.)*

uncertainty and vagueness *which is inherent in the said section*.

(emphasis added)

9. The said section has a chilling effect on freedom of speech and expression and is thus violative of Article 19(1)(*a*). [See *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632 at 647; *S. Khushboo* v. *Kanniammal*, (2010) 5 SCC 600 at 620.]

10. Freedom of speech has to be viewed also as a right of the viewers which has paramount importance, and the said view has significance in a country like ours. [See *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 at 229.]

11. It is not correct to suggest that Section 66-A was necessitated to deal with the medium of the internet. Offences under the Penal Code (IPC) would be attracted even for actions over the internet. In particular, Sections 124-A, 153-A, 153-B, 292, 293, 295-A, 505, 505(2) IPC, it is submitted, suffice to cover the situations which are being used by the Union of India as illustrations to justify the existence of Section 66-A on the statute. The aforesaid IPC offences take into consideration any or every medium of expression. As long as written words are within its ambit, merely because they are written on a public medium on the internet would not take such actions beyond their purview, especially in view of Section 65-B of the Evidence Act, 1872.

12. Furthermore, assuming without admitting that Section 66-A was necessitated to deal with the medium of the internet, the standards for restricting the same would still have to conform to Article 19(2). The standards for every medium cannot be drastically different as that would be violative of Article 14. There is no intelligible differentia between an expression on the internet and that on a newspaper or a magazine, for the purposes of Article 19(1)(*a*) read with Article 19(2).

13. English cases cited by the respondents are based on Articles 10(1) and 10(2) of the European Convention on Human Rights 1950 (ECHR). The heads of restriction in Article 10(2) of ECHR are wider than those prescribed under Article 19(2) of our Constitution.

14. Furthermore, the question of reasonableness of the restrictions arises when restrictions imposed are on heads specified in Article 19(2). If restrictions imposed are outside the prescribed heads they are *per se* unconstitutional and alleged reasonableness of restrictions cannot cure the fundamental constitutional infirmity.

15. Constitutionality of a statute is to be adjudged on its terms and not by reference to the manner in which it is enforced. "The constitutional validity of a provision has to be determined on construing it reasonably. If it passes the test of reasonableness, the possibility of powers conferred being improperly used, is no ground for pronouncing it as invalid, and conversely if the same properly interpreted and tested in the light of the requirements set

Summary of Arguments *(contd.)*

I. Mr Soli J. Sorabjee, Senior Advocate, for the petitioner *(contd.)*

out in Part III of the Constitution, does not pass the test, it cannot be pronounced valid merely because it is being administered in the manner which might not conflict with the constitutional requirements." [See *Kantilal Babulal & Bros.* v. *H.C. Patel*, (1968) 1 SCR 735 at 749; *Collector of Customs* v. *Nathella Sampathu Chetty*, AIR 1962 SC 316 at 331, 332.] "A bad law is not defensible on the ground that it will be judiciously administered." [See *Knuller Ltd.* v. *DPP*, (1972) 2 All ER 898 at 906(*b*).]

16. The crux of the matter is: can the exercise of the invaluable fundamental right of freedom of expression be subject to or be dependent upon the subjective satisfaction of a non-judicial authority and that too in respect of vague and varying notions about "grossly offensive", as "menacing character" and causes "annoyance", inconvenience, insult and injury.

17. The impugned heads of restrictions are inextricably linked with other provisions of the said section and are not severable. Hence, the entire Section 66-A is unconstitutional. [See *R.M.D. Chamarbaugwalla* v. *Union of India*, 1957 SCR 930 at 950-51.]

II. Mr Shyam Divan, Senior Advocate, Ms Mishi Choudhary, Mr Prasanth Sugathan, Mr Biju K. Nair, Ms Shagun Belwal, Mr Arjun J., Advocates for the petitioner, Mouthshut.com (India) Pvt. Ltd. in Writ Petition (C) No. 217 of 2013

A. Introduction

1. These written submissions filed on behalf of the writ petitioners are concise and pointed. Rather than setting out elaborate arguments, the petitioners have chosen to project the thrust of their case in this note to supplement the oral submissions at the Bar.

B. Relevant facts and relief

2. The first petitioner is a private limited company which operates Mouthshut.com, a social networking, user review website. The website provides a platform for consumers to express their opinion on goods and services, facilitating the flow of information and exchange of views with respect to products and services available in the marketplace. Since its founding in 2000, the popularity of this website has grown and an estimated 80 lakh users visit the website every month. Mouthshut.com is a pioneer in this field, predating other review websites and is the subject of academic studies that recognise the immense importance and value of the service it renders. Illustratively, (1) Philip Kotler, *Marketing Management* (2009), extract at *Annexure 1*; (2) Cateora, Philip et al, *International Marketing* (2008), extract at *Annexure 2*.

3. The second petitioner is an Indian citizen and a shareholder of the first petitioner. He is the founder of the first petitioner and its CEO. While at the time of the first petitioner's incorporation, its entire shareholding was held by the second petitioner, it is now held equally amongst the six brothers of the Farooqui family.

Summary of Arguments

II. Mr Shyam Divan, Senior Advocate, for the petitioner *(contd.)*

4. The manner Mouthshut.com works is best understood with reference to the site's screenshots. Some of the essential features of this website are: (*a*) Any reader may visit the website and read its content; (*b*) To post a comment, the user is required to first register by providing an email address, user name and by creating a password. The user may also log in through Facebook or Google accounts (which have an established pre-registration protocol); (*c*) Businesses may respond to reviews and rebut claims and they have the option of paying a nominal fee to create an authorised account; (*d*) When problems are satisfactorily addressed on the Mouthshut.com platform, a "stamp" appears next to the grievance indicating resolution of the issue. Mouthshut.com does not provide any content of its own. It provides a platform that hosts content posted by users. Having regard to the nature of this website, users share their experiences with respect to goods and services in diverse categories such as appliances, automobiles, builders and developers, health and fitness industry, movies, music, restaurants, travel, etc.

5. The petitioners constantly receive threatening calls from police officials across various States in India requiring the petitioners to block comments/content. The petitioners also regularly receive notices under Sections 91 and 160 of the Code of Criminal Procedure, 1973. This is apart from a flood of legal notices from private parties threatening the petitioners with defamation and civil suits instituted in different parts of the country. On several occasions, fabricated orders of courts have been served on the petitioners.

6. The petitioners have thus far resisted the threats since taking down every negative comment in response to every complaint would erode the value and integrity of the website. Consumers visit the website before choosing a product or service because they expect to review genuine experiences of previous users, good or bad. Were the petitioners to yield to every complaint, Mouthshut.com would lose its utility and appeal.

7. As an intermediary, the first petitioner enjoys immunity from liability in terms of Section 79 of the Information Technology Act, 2000 (the IT Act). The continuous barrage of threats and legal actions faced by the petitioners demonstrate that the intended "safe harbour" provided by the legislature simply does not work. The attenuation of Section 79 is due to the Information Technology (Intermediaries Guidelines) Rules, 2011 (the impugned Rules). The impugned Rules conflict with Section 79 and create an unworkable framework for intermediaries that desire to retain immunity.

8. The petition challenges the IT (Intermediaries Guidelines) Rules, 2011 inasmuch as they are *ultra vires* the IT Act and Articles 14, 19(1)(*a*), 19(1)(*g*) and 21 of the Constitution of India.

C. Importance of intermediaries and necessity for immunity

9. The expression "intermediary" is defined in Section 2(1)(*w*) of the IT Act. The relationship between users who access the internet, persons posting content on a website and intermediaries is illustrated in a diagram at *p. 17 of*

Summary of Arguments

II. Mr Shyam Divan, Senior Advocate, for the petitioner *(contd.)*

IA No. 4 of 2014. The first petitioner is an intermediary since it receives, stores and transmits electronic records on behalf of persons posting reviews and also because it is a web-hosting service provider. The distinction between hosting and posting, internet hosting service providers and web hosting service providers is drawn out at *Annexure 3*.

10. Online intermediaries provide significant economic benefits and this is why across the world major economies provide a safe harbour regime to limit liability for online intermediaries when there is unlawful behaviour by intermediary users. Online intermediaries organise information by making it accessible and understandable to users. Intermediaries enhance economic activity, reduce costs and enable market entry for small and medium enterprises, thereby inducing competition, which eventually leads to lower consumer prices and more economic activity. The role of intermediaries and the economic benefits are explained at *pp. 68-75 of IA No. 4 of 2014*.

11. Online intermediaries do not have direct control of information that is exchanged on their platforms. Legal regimes across the world prescribe exemptions from liability for intermediaries and these safe harbour provisions are regarded as a necessary regulatory foundation for intermediaries to operate.

12. In the wake of representations by the information technology industry following the arrest in 2004 of Avnish Bajaj, the CEO of Baazee.com, an auction portal, Parliament with effect from 27-10-2009 substituted Chapter XII of the IT Act comprising Section 79. This new safe harbour protection to intermediaries was introduced to protect intermediaries from burdensome liability that would crush innovation, throttle Indian competiveness and prevent entrepreneurs from deploying new services that would encourage the growth and penetration of the internet in India.

D. Important features of Section 79

13. Section 79 in Chapter XII of the IT Act comprises a self-contained regime with respect to intermediary liability.

14. The object of Section 79 is to exempt an intermediary from liability arising from "third-party information". An intermediary is exempt from all liability (civil and criminal) for any third-party information, data or communication link made available or hosted by him. The purpose of this wide exemption from liability is to protect intermediaries from harassment or liability arising merely out of their activities as an intermediary.

15. The opening words of Section 79 are a widely worded non obstante clause which overrides "anything contained in any law for the time being in force". (Section 81 gives overriding effect to the Act in relation to inconsistent provisions contained in any other law.) The clear intent of Parliament is to insulate intermediaries as a class from civil as well as criminal liability.

16. The exemption from liability granted by Section 79(1) is subject to the provisions of sub-sections (2) and (3) of Section 79.

Summary of Arguments

II. Mr Shyam Divan, Senior Advocate, for the petitioner *(contd.)*

17. Section 79(2)(*c*) provides that in order to ensure exemption from liability under Section 79(1) the intermediary "*observes due diligence* while discharging *his duties under this Act* and also observes *such other guidelines* as the Central Government may prescribe *in this behalf*". The mandate of this provision empowers the Central Government to frame statutory guidelines for a specific objective, that is, to ensure observance by an intermediary of his duties under the IT Act. This is clearly brought out by the underlined expressions, particularly the words "*in this behalf*".

18. The duties of an intermediary under the IT Act include (*i*) the duty to preserve and retain information as set out in Section 67-C; (*ii*) the duty to extend all facilities and technical assistance with respect to interception or monitoring or decryption of any information as envisaged in Section 69; (*iii*) the duty to obey government directions to block public access to any information under Section 69-A; (*iv*) the duty to provide technical assistance and extend all facilities to a government agency to enable online access or to secure or provide online access to computer resources in terms of Section 69-B; (*v*) the duty to provide information to and obey directions from the Indian Computer Emergency Response Team under Section 70-B; (*vi*) the duty to not disclose personal information as envisaged under Section 72-A; and (*vii*) the duty to take down any information, data or communication link, etc. used to commit an unlawful act as envisaged under Section 79(3)(*b*).

19. Section 79(3)(*b*) envisages a "*takedown*" provision where, *inter alia*, the exemption from liability enjoyed by the intermediary under Section 79(1) is lost "*on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful act*" and the intermediary fails to expeditiously remove or disable access.

E. The IT (Intermediaries Guidelines) Rules, 2011

20. Rule 3 of the impugned Rules enumerates various requirements that an intermediary must observe while discharging his duties. These requirements constitute due diligence and are summarised below:

(*a*) Rule 3(1) requires the intermediary to publish rules and regulations, adopt a privacy policy, provide a user agreement for access to the intermediary's computer resource.

(*b*) Rule 3(2) requires that the rules and regulations, terms and conditions or user agreement inform the user not to host, display, upload, modify, publish, transmit, update or share "information" enumerated in sub-clauses (*a*)-(*i*) of Rule 3(2).

(*c*) Rule 3(3) proscribes the intermediary from knowingly hosting or publishing information or initiating transmission in respect of the information specified in sub-clauses (*a*)-(*i*) of Rule 3(2).

(*d*) Rule 3(4) requires the intermediary to take down information within 36 hours of receiving a written intimation from an "affected

Summary of Arguments

II. Mr Shyam Divan, Senior Advocate, for the petitioner *(contd.)*

person" that such information contravenes sub-clauses (*a*)-(*i*) of Rule 3(2).

(*e*) Rule 3(4) requires the intermediary to preserve such contravening information for 90 days for the purpose of investigation.

(*f*) Rule 3(5) requires the intermediary to inform its users that in the event of non-compliance with rules and regulations, user agreement or privacy policy, the intermediary would have a right to immediately terminate the access or usage rights of the users to the computer resource of the intermediary and remove non-compliant information.

(*g*) Rule 3(6) requires the intermediary to strictly follow the provisions of the IT Act "*or any other law for the time being in force*".

(*h*) Rule 3(7) requires the intermediary to provide information or assistance to government agencies.

(*i*) Rule 3(8) requires the intermediary to take all reasonable measures to secure its computer resource.

(*j*) Rule 3(9) requires the intermediary to report cyber security incidents and share information with the Indian Computer Emergency Response Team.

(*k*) Rule 3(10) proscribes the intermediary from knowingly deploying or installing or modifying the technical configuration of a computer resource to circumvent any law;

(*l*) Rule 3(11) requires the intermediary to publish on its website the name of the Grievance Officer as well as contact details and mechanism to redress complaints within one month from the date of the receipt of the complaint.

21. The petitioners' main problem is with Rule 3(4). Rule 3(4), *inter alia*, provides that upon receiving in writing or through email signed with electronic signature from any affected person, any information as mentioned in Rule 3(2), the intermediary shall act within 36 hours to disable such information that is in contravention of Rule 3(2). Further, the intermediary is required to "*work with user or owner of such information*" before disabling the information.

F. Why the impugned Rules are ultra vires

22. The principal points which according to the petitioners render the impugned Rules *ultra vires* are set out in the section. However, before elaborating these points the petitioners seek to highlight their real grievance.

23. As an intermediary, the first petitioner provides a platform and enables users to connect and exchange views through the platform. Mouthshut.com is not providing the content which is supplied by users. The first petitioner has a lean operation in terms of human resources and the website is programmed in a manner by which users can exchange views and business can respond to consumers with ease, without any specific human intervention on the part of the Mouthshut.com team.

Summary of Arguments

II. Mr Shyam Divan, Senior Advocate, for the petitioner *(contd.)*

24. Being an intermediary, the first petitioner is anxious to retain the exemption from liability conferred under Section 79(1) of the IT Act. The petitioners cannot afford to be dragged across the country in response to summons, court cases, etc. that relate to content uploaded by third parties. The petitioners have no objection to taking down the material in response to orders passed by a duly authorised government agency or a court. Indeed, the petitioners submit that on a correct interpretation of the relevant provisions, the IT Act envisages full protection and immunity to intermediaries provided that the intermediary extends cooperation to government agencies and facilitates implementation of duly authorised orders.

25. The problem is that the impugned Rules, specifically Rule 3(4), require the intermediary to (*i*) respond to any "affected person" making a written complaint; (*ii*) contact and work with the user or owner of the information who has posted the information on the first petitioner's website; (*iii*) make a determination or judgment as to whether the information complained about contravenes Rule 3(2); and (*iv*) take down such information. At a practical level, the first petitioner is compelled to set up an adjudicatory machinery or in default take down each and every piece of information complained about. While taking down information within 36 hours is the surest manner of retaining immunity, this would completely compromise the value of the website since users expect genuine product and service reviews, both positive and negative. The petitioners have no difficulty in complying with "takedown" orders passed by a court or government agency, but to cast the burden of adjudicating complaints on the intermediary as part of its duty to retain exemption from liability under Section 79(1) is onerous and unreasonable.

26. Adjudicating on whether or not there is contravention of a particular provision of law, is the quintessential sovereign function to be discharged by the State or its organs. This function cannot be delegated to private parties such as intermediaries. Rule 3(4) of the impugned Rules, by requiring the intermediary to assume the role of a Judge, in place of some State agency, amounts to a wrongful abdication of a fundamental State duty.

27. The petitioners submit that the impugned Rules are *ultra vires* the IT Act as well as the Constitution of India for the following reasons which are set out in point form:

(*a*) The power of the Central Government to frame statutory guidelines with respect to intermediaries is circumscribed by the limits contained in Section 79(2)(*c*). The purpose of the guidelines is to ensure that an intermediary observes due diligence while discharging his duties under the IT Act. This is evident from the expression "*in this behalf*". The statutory duties of an intermediary are set out in Sections 67-C, 69, 69-A, 69-B, 70-B, 72-A and 79(3)(*b*). The "due diligence" guidelines in Rule 3(2) have nothing to do with observance of the statutory duties under the abovementioned sections. Rule 3(2) travels beyond the narrow limit defined with respect to guidelines under Section 79(2)(*c*).

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II. Mr Shyam Divan, Senior Advocate, for the petitioner *(contd.)*

(*b*) Section 79(3)(*b*) contemplates a situation where an intermediary "*on being notified*" by the appropriate Government or its agency must "take down" the offending material. Rule 3(4) directly conflicts with the scheme in the section because (*i*) it requires the intermediary to respond to any "affected person", not just the appropriate government or its agency; (*ii*) it requires the intermediary to work with the user or owner of such information; (*iii*) it requires the intermediary to adjudicate or determine whether there is contravention of Rule 3(2). None of these roles and requirements is envisaged in Section 79 and, indeed, the Rules directly conflict with the parent statute in this regard.

(*c*) The purpose of the non obstante clause in Section 79 is clearly to give overriding effect and grant exemption from liability to intermediaries. Rule 3(6) of the impugned Rules by requiring the intermediary to "*strictly follow the provisions ... or any other laws for the time being in force*" brings about a direct conflict with the non obstante clause. Requiring compliance with all other laws in force as a condition of "due diligence", reintroduces by a back door the very laws that the legislature deemed appropriate to override in the context of intermediary liability.

(*d*) The impugned Rules introduce a censorship regime. The object of Section 79 is to confer immunity on intermediaries, not to introduce censorship by private edict. At a practical level, an intermediary, in its anxiety to retain immunity, will almost always take down material the moment it receives a written intimation from any affected person. This is quite apart from taking down material in response to directions from police departments. The guidelines under the impugned Rules leave an intermediary with a Hobson's choice where it wants to retain protection under the safe harbour provision.

(*e*) The statutory machinery for disabling access to content on a website is through two possible channels, apart from a court order. The statutory channels are under Section 79(3)(*b*) and Section 69-A. The takedown regime triggered by any unspecified private individual (affected person) is beyond the statute and amounts to creating a third mechanism which is not envisaged by the Act.

(*f*) The power of government to impose reasonable restrictions with respect to speech is circumscribed by Article 19(2) of the Constitution of India. By seeking to control speech and expression that is "grossly harmful", "harassing", "blasphemous", "invasive of another's privacy", "hateful", "racially, ethnically objectionable", "disparaging", "otherwise unlawful in any manner whatsoever", "harm minor in any way", "violates any law for the time being in force", etc. the impugned Rules travel beyond Article 19(2) with respect to the aforesaid undefined expressions.

(*g*) The expressions in the previous sub-paragraph are vague. When this vagueness is coupled with a requirement on the part of an intermediary to ensure non-contravention in terms of Rule 3(4), or else

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lose exemption from liability, the statutory scheme is liable to be struck down as unconstitutional under Article 14 on the grounds of vagueness and arbitrariness.

(*h*) The impugned Rules do not make any provision for restoring content that has been taken down. The intermediary, in order to retain immunity, is not only required to take down material within 36 hours, but is also prevented from putting back information. This is because unlike Sections 52(1)(*b*) and (*c*) of the Copyright Act, 1957 which permits restoration of access to the material complained about, there is no corresponding provision in the impugned Rules. The impugned Rules are unconstitutionally over broad because they compel permanent removal of material without determination by a government agency or court.

(*i*) The second petitioner is a citizen of India and is entitled to invoke Article 19(1)(*a*). Article 19(1)(*a*) embraces commercial speech (*Tata Press Ltd.* v. *MTNL*, (1995) 5 SCC 139, paras 24 and 25). The first petitioner's website encourages and enables the exchange of information with respect to a product or service and also enables the manufacturer or service provider to address consumer issues on the platform. This lifts the quality of goods and standard of services in society. The right to rebut or respond is protected under Article 19(1)(*a*) (*LIC* v. *Manubhai D. Shah*, (1992) 3 SCC 637, paras 8, 9 and 12). Moreover, where a person's business is intricately connected with speech as in the case of the importer of books, any illegal restriction not only impinges upon Article 19(1)(*g*) but also amounts to an infraction of Article 19(1)(*a*), (*Gajanan Visheshwar Birjur* v. *Union of India*, (1994) 5 SCC 550, paras 7-9). The impugned Rules, in their operation, through an over broad, "affected person" — triggered takedown mechanism restrict commercial speech and are violative of Articles 14, 19(1)(*a*) and 19(1)(*g*) of the Constitution of India.

(*j*) The first petitioner's servers are all located in India. Unless the intermediary safe harbour provision is meaningfully interpreted as suggested by the petitioners, it will compel an Indian enterprise to relocate geographically to a more intermediary friendly jurisdiction.

G. Miscellaneous material

28. In the course of the oral arguments, the petitioners explained the nature of takedown provisions in other jurisdictions with reference to a report analysing the impugned Rules prepared by SFLC.in.

H. Reply to respondent's note on Section 79

29. In reply to Para 3, the subordinate legislation has to be within the contours permitted by the Constitution and cannot in any way be justified because the clauses are similar to the terms of service of private intermediaries. Terms of service of intermediaries are, at best, terms of a contractual relationship between a service provider and a user. Such terms cannot be equated to statutory rules notified by the Government. The tests for validity of a contract and a statute are different.

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30. In reply to Para 8, the impugned Rules are unique to India and cannot be said to be similar to provisions followed all over the world. E.g. in USA, under Section 230 of the Communications Decency Act, 1996, no provider or user of interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider. This gives an intermediary complete immunity from liability arising out of user generated content. The safe harbour protection given to intermediaries in USA is provided in detail at *Annexure 4*. Other jurisdictions like Finland and Canada follow a takedown and put-back regime and notice-and-notice regime respectively, wherein the content creator is given an opportunity of being heard. Additional information about the practice in these jurisdictions is provided at *Annexure 5*.

31. Contrary to the respondent's account of legislative history (enumerated in Paras 10-40), the enactment of Section 230 was not the culmination of protracted legislative and judicial debates surrounding the imposition of strict liability on intermediaries with respect to copyright infringing content. In fact, Congress' intention behind enacting Section 230 was discussed extensively in a 4th Circuit Court of Appeals judgment in *Zeran* v. *AOL* [139 F 3d 327 (1997)], where the Court observed that the section had evidently been enacted to maintain the robust nature of internet communications and to keep Government interference in the medium to a minimum. A true copy of the judgment of the 4th Circuit Court of Appeals in *Zeran* v. *AOL*, [139 F 3d 327 (1997)] is provided at *Annexure 6*.

32. In reply to Para 46, the Special Rapporteur emphasises that censorship measures should never be delegated to private entities, and that intermediaries should not be held liable for refusing to take action that infringes individuals' human rights. Any requests submitted to intermediaries to prevent access to certain content, or to disclose private information for strictly limited purposes such as administration of criminal justice, should be done through an order issued by a court or a competent body which is independent of any political, commercial or other unwarranted influences. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue is provided at *Annexure 7*.

33. In reply to Para 49, the judgment in *Delfi AS* v. *Estonia* (No. 64569/09) is under consideration at the Grand Chamber of European Court of Human Rights consequent to a referral made on 17-2-2014 and cannot be relied upon for the purpose of the present writ petition.

34. In the course of oral arguments the respondent clarified that the intermediary will have to acknowledge a complaint within 36 hours and will have to take action within 30 days as provided under Rule 3(11). However, the problem with the impugned Rules is that the intermediary still has to perform an adjudicatory role and if its decision is in variance with the Court's decision at a later stage, the intermediary could be made secondarily liable.

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35. The respondent's argument that Section 69-A has limited application and an individual user does not have a redressal mechanism under Section 69-A is not true. The Rules notified under Section 69-A list an elaborate procedure, including a form for filing a complaint, for a person to complain if he is aggrieved by any content. Objectionable content under Section 69-A falls within the ambit of Article 19(2), much unlike the vague expressions used under Rule 3(2) of the impugned Rules.

III. Mr Sajan Poovayya, Senior Advocate, for the petitioner, Rajeev Chandrasekhar in Writ Petition (Civil) No. 23 of 2013

1. The instant writ petition is filed under Article 32 of the Constitution of India, in public interest, challenging the constitutionality of Section 66-A of the Information Technology Act, 2000 (the "IT Act"), as inserted by the Information Technology (Amendment) Act, 2008, and the Information Technology (Intermediaries Guidelines) Rules, 2011 (the Rules) for being arbitrary and vague; *ultra vires* the Constitution of India and the IT Act, respectively; for being violative of the fundamental rights of free speech and expression guaranteed by Article 19(1)(*a*) of the Constitution of India; and for protection against arbitrary State action under Article 14.

A. Section 66-A of the IT Act and Article 14 of the Constitution

2. Section 66-A is a penal provision which criminalises expression on grounds of being "grossly offensive" or for "causing annoyance, inconvenience, danger, obstruction, insult", etc. Section 66-A creates three sets of standalone offences under clauses (*a*), (*b*) and (*c*). Whilst the requirement of *mens rea* is contained in Section 66-A (*b*), Sections 66-A(*a*) and (*c*), proceeds to criminalise a wide range of activities, independent of the mental state of the person sending the message. A juxtaposition of Section 66-A with the other penal sections of the Act i.e. Sections 66-B, 66-C, 66-D, 66-E, 66-F, all of which require intent i.e. *mens rea*, clearly demonstrates its overreaching import. The usage of vague terminology in Section 66-A, such as "causing inconvenience", "causing annoyance", etc.; further compounds the problem. It admits of no certain construction and persons applying the section would be in a boundless sea of uncertainty. The absence of requirement of *mens rea* in Sections 66-A(*a*) and (*c*), would lead to criminalising the action of a citizen on an electronic platform, which are otherwise completely legitimate.

3. Section 66-A suffers from the vice of vagueness because the expressions mentioned therein convey different meanings to different persons and depend on the subjective opinion of the complainant and the statutory authority without any objective standard or norm. In the context of the internet, the enforcement of Section 66-A, is an insidious form of censorship which is not authorised by the Constitution and therefore Section 66-A must be struck down by this Hon'ble Court as unconstitutional.

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4. Section 66-A is so wide in its import that even private communications through cellular telephony are covered. Defining the offence with reference to the medium employed for communication leads to arbitrariness. For example, an identical communication in a physical form would not be subjected to penal action. However, the same communication over an electronic platform exposes the person to criminal liability. That such speech is actionable is apparent from the text of Section 66-A. Moreover, it has been interpreted in the manner demonstrated above, with arrests having been made for forwarding of emails supposedly containing offensive content to a closed group, as well as, remarks on a social network that could be viewed only by a group of selected recipients.

5. The terms deployed in Section 66-A are undefined and no standards or principles have been laid down by the statute to guide and control the exercise of such power, either in terms of law enforcement or in terms of justiciability. Therefore, inasmuch as Section 66-A lays down no guidelines for exercise of power under that provision, it is violative of Article 14 of the Constitution because it would permit arbitrary and capricious exercise of such power which is the very antithesis of equality before law. [*Ref.*: *Naraindas Indurkhya* v. *State of M.P.*, (1974) 4 SCC 788, at Para 21]

6. Due to the vague, undefined terms/phrases employed in Section 66-A, it remains uncertain as to what act is criminalised under the provision. Criminal law should with certainty indicate the acts that are permissible to a citizen. When such vague terms are used which permit arbitrary exercise of power, and further, when such uncanalised power is vested in an authority, the law would suffer from the vice of discrimination, since it would leave it open to an authority to discriminate between persons and things similarly situated. [*Ref.*: *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248, at Para 16]

7. The unconstitutionality in Section 66-A arises not because there is a mere possibility of abuse of the provision. The uncontrolled or unguided power which is vested in the administrative agencies without any reasonable and proper standards being laid down in the enactment, makes the discrimination evident. This factum is further buttressed by the multiple arrests made under the provision for political discussion, dissent and criticism of administration. In such circumstances, not merely the administrative act but Section 66-A itself is liable to be struck down as unconstitutional. [*Ref.*: *State of W.B.* v. *Anwar Ali Sarkar*, (1952) 1 SCR 284, at Para 75(a) and 75(c)]

8. The expressions used in Section 66-A, such as, "grossly offensive", "menacing character", "annoyance", "inconvenience", "danger", "obstruction", etc., does not admit of any precise definition and no guidance is provided for interpreting these terms; this renders Section 66-A unconstitutional for vagueness. The Union has, by its actions, admitted that Section 66-A is vague. This is demonstrated by the issuance of the advisory

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dated 9-1-2013 by the Union of India laying down certain guidelines for arresting individuals for offences committed under Section 66-A. It is trite that if a law does not pass the test of Part III of the Constitution, it is termed invalid. The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow, that a statute which is otherwise invalid as being unreasonable cannot be saved by it being administered in a reasonable manner. Therefore, if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test, it cannot be pronounced valid, merely because it is administered in a manner which might not conflict with the constitutional requirements. The provision which cannot independently pass the test of Part III of the Constitution, cannot be saved by such a device attempting to administer Section 66-A in a manner not to conflict with the constitutional mandates, does not save the unconstitutionality of the law. [*Ref.*: *Collector of Customs* v. *Nathella Sampathu Chetty*, (1961) 3 SCR 786]

9. A law can be considered bad and unconstitutional for sheer vagueness. [*Ref.*: *K.A. Abbas* v. *Union of India*, (1970) 2 SCC 780]. For example, when the definition of "goonda" in the Central Provinces and Berar Goondas Act, 1946 indicated no tests for deciding which person fell within the definition, the entire statute was struck down as unconstitutional. [*Ref.*: *State of M.P.* v. *Baldeo Prasad*, (1961) 1 SCR 970.] The expressions used in Section 66-A are not supplied with any definition. There are no thresholds indicated as to whether the terms that have been employed in the provision are to be interpreted based on community standards or individual sensitivities. Therefore, Section 66-A is liable to be declared unconstitutional by this Hon'ble Court.

B. Section 66-A of the IT Act and Article 19(1)(a) of the Constitution

10. Any restriction on free speech and expression, as guaranteed under Article 19(1)(*a*) of the Constitution, can be imposed only under the specified buckets enumerated in Article 19(2) of the Constitution viz. (*i*) sovereignty and integrity of India, (*ii*) security of the State, (*iii*) friendly relations with foreign States, (*iv*) public order, (*v*) decency or morality, (*vi*) contempt of Court, (*vii*) defamation, and (*viii*) incitement to an offence. In addition to falling within the buckets, such restrictions must also satisfy the test of reasonableness. Any such restriction must be reasonable and the least intrusive or restrictive upon a citizen's rights. [*Ref.*: *Her Majesty the Queen in Right of the Province of Alberta* v. *Hutterian Brethren of Wilson Colony*, (2009) 2 SCR 567, Supreme Court of Canada; *Ramlila Maidan Incident, In re*, (2012) 5 SCC 1, at Para 44] Therefore, for a restriction to pass the constitutional muster of Article 19(2), it should satisfy a dual test: (*i*) it must qualify under one of the enumerated buckets under Article 19(2); and (*ii*) it must be least intrusive and most reasonable to achieve the purpose. [*Ref.*: *Supt., Central Prison* v. *Ram Manohar Lohia*, (1960) 2 SCR 821 at Para 13.]

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However, the restrictions imposed by Section 66-A travel far beyond these permissible limits. Therefore, Section 66-A is liable to be struck down.

11. Section 66-A has a chilling effect on free speech. The terms used in the section, for example, "grossly offensive", "menacing character", "annoyance", "inconvenience", "danger", "obstruction", etc., are vague and fail to provide any reasonable standard of application or adjudication. Additionally, these undefined expressions, do not comport to any of the permissible grounds mentioned in Article 19(2), under which the freedom of speech and expression may be legitimately restricted by the State.

12. The provision effectively adds a new offence to the penal law of India i.e. criminalising speech by reason of subjective annoyance or inconvenience it causes to intended or unintended recipients. It creates a new offence simply on the basis of medium adopted for communication. An identical communication in a physical form continues to not be an offence, even if it causes "annoyance" or "inconvenience". Such a provision lends itself to abuse by authorities to control certain content or censor certain views. On its plain language, as well as in its operation till date, the provision criminalises speech that cannot be regarded as actionable under any existing penal provision, including Section 499 of the Penal Code, 1860, which defines defamation.

13. While administrative guidelines such as requiring the approval of a senior police official prior to registering complaints under Section 66-A may be issued, the same does not cure the facial unconstitutionality of Section 66-A, on its very language. Firstly, such directives are of uncertain legal provenance and require to be harmonised with Sections 78 and 79 of the IT Act. Secondly, the threat of criminal prosecution, even if purportedly muted to a certain extent, nevertheless exists and will doubtless serve to "chill" speech on the internet, till such time as clarity is obtained with regard to the contours of actionable speech. Determination of the validity of all restrictions on the exercise of free speech should be made on a case-by-case basis. Any provision of law that fails to satisfy the exacting standard prescribed will be declared invalid. This protection should equally be accorded to free speech on the internet. [*Ref.*: *Ajay Goswami* v. *Union of India*, (2007) 1 SCC 143]

14. A provision of law that forces people to self-censor their views for fear of criminal sanction violates the constitutional guarantee of free speech and as such it is unconstitutional. That such censorship may also take place at the level of the intermediary, who provides the user the means to connect to the internet and communicate on an electronic platform, is also a very real prospect with Section 79 of the Act laying down an uncertain exemption from liability for such entities. That either a user or an intermediary would err in favour of suppressing content for fear of criminal sanction is incompatible with the values of a constitutional democracy. The overhanging threat of criminal prosecution merely for the exercise of civil liberties, guaranteed by the Constitution, by virtue of a vague and widely worded law

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is in violation of Article 21 of the Constitution of India. Therefore, Section 66-A has a chilling effect on freedom of speech and expression and is thus violative of Article 19(1)(*a*). [*Ref.*: *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632 at p. 647; *S. Khushboo* v. *Kanniammal*, (2010) 5 SCC 600 at p. 620]

15. Article 19(1)(*a*) protects not only the right of primary expression but also freedom of secondary propagation of ideas and the freedom of circulation. The freedom of speech and expression includes the right to acquire information and to disseminate it. It is submitted that freedom of speech and expression is necessary for self-expression, which is an important means of attaining free conscience and self-fulfilment. [*Ref.*: *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161; See also *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124 at para 4]

16. Freedom of speech and expression of opinion are of paramount importance to a democracy. There is nothing in Article 19(2) which permits the State to abridge this right on the ground of conferring benefits upon the public in general. It is also not open to the State to curtail or infringe the freedom of speech of one for promoting the general welfare of a section or a group of people, unless such action could be justified under a law contemplated under one of the heads of Article 19(2). [*Ref.*: *Sakal Papers (P) Ltd.* v. *Union of India*, (1962) 3 SCR 842 at pp. 862, 866 and 868]

17. Statutes that are vague and criminalise content transmission over the internet have been declared to be invalid as abrogating free speech. Section 66-A can be broadly compared to Section 501 (*indecent transmission*) and Section 502 (*patently offensive display*) of the US Communications Decency Act, 1996. The United States Supreme Court has struck down the two provisions of the US Communications Decency Act, 1996 by holding that they abridge the freedom of speech, protected by the First Amendment. Interpretation of law cannot be based on community standards. [*Ref.*: *Reno* v. *American Civil Liberties Union*, 521 US 844 (1997) at pp. 859, 862, 872, 874, 877 and 878]

18. The Child Online Protection Act (COPA) was enacted by the United States Congress on 21-10-1998 in response to the decision of the Supreme Court of United States in 1997 in *Reno* v. *American Civil Liberties Union*, 521 US 844, in which the Court declared certain provisions of the Communications Decency Act, 1996 as unconstitutional, because it was not narrowly tailored to serve a compelling governmental interest, without impinging on the First and Fifth Amendments. However, the Congress' attempt to legislatively overrule the decision in *Reno* was thwarted by the judiciary at the stage of both preliminary injunction as well as upon trial. [*Ref.*: *Ashcroft* v. *American Civil Liberties Union*, 535 US 564 and *Ashcroft* v. *American Civil Liberties Union*, 542 US 656] COPA was struck down as unconstitutional for not being narrowly tailored to serve the compelling interest of the Congress and that it facially violates the First and Fifth

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Amendment, rights of the plaintiff. Subsequently, the Court of Appeal affirmed the District Court's order, holding that COPA does not withstand strict scrutiny, and pass the tests of vagueness or overbreadth analysis and thus is unconstitutional. [*Ref.*: *American Civil Liberties Union* v. *Michael B. Mukasey*, 534 F 3d 181] The United States Supreme Court refused to hear the appeal from the Court of Appeal's order.

C. No compelling State interest in enacting Section 66-A

19. The argument of the State that Section 66-A has been enacted to battle typical offences arising out of the use of the internet and by the use of computer resources (such as phishing attacks, viruses, data theft, etc.) is fallacious and deserves to be rejected. The existing provisions of the Penal Code and the other provisions of the IT Act i.e. Sections 67 and 66-B, 66-C, D, E and F, adequately cover various offences that may arise on the internet or on an electronic platform. A table demonstrating the various offences under the Information Technology Act and the Penal Code, is annexed hereto:

Nature of offence	*Information Technology Act (as amended)*	*Indian Penal Code*
Mobile phone lost/stolen		Section 379 — up to 3 years' imprisonment or fine or both
Receiving stolen computer/mobile phone /data (data or computer or mobile phone owned by you is found in the hands of someone else)	Section 66-B — up to 3 years' imprisonment or Rs 1 lakh fine or both	Section 411 — up to 3 years' imprisonment or fine or both
Data owned by you or your company in any form is stolen	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both	Section 379 — up to 3 years' imprisonment or fine or both
A password is stolen and used by someone else for fraudulent purpose	Section 66-C — up to 3 years' imprisonment and fine up to Rs 1 lakh Section 66-D — up to 3 years' imprisonment and find up to Rs 1 lakh	Section 419 — up to 3 years' imprisonment or fine Section 420 — up to 7 years' imprisonment and fine
An email is read by someone else by fraudulently making use of password	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both Section 66-C — up to 3 years' imprisonment and fine up to Rs 1 lakh	
A biometric thumb impression is misused	Section 66-C — up to 3 years' imprisonment and fine up to Rs 1 lakh	

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a	An electronic signature or digital signature is misused	Section 66-C — up to 3 years' imprisonment and fine up to Rs 1 lakh	
	A phishing email is sent out in your name, asking for login credentials	Section 66-D — up to 3 years' imprisonment and fine up to Rs 1 lakh	Section 419 — up to 3 years' imprisonment or fine or both
b	Capturing, publishing or transmitting the image of the private area without any person's consent or knowledge	Section 66-E — up to 3 years' imprisonment or fine not exceeding Rs 2 lakhs or both	Section 292 — up to 2 years' imprisonment and fine Rs 2000 and up to 5 years' imprisonment and fine Rs 5000 for second and subsequent conviction
c	Tampering with computer source documents	Section 65 — up to 3 years' imprisonment or fine up to Rs 2 lakhs or both Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both	
d	Data modification	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakh or both	
e	Sending offensive messages through communication service, etc.	Section 66-A — up to 3 years' imprisonment and fine	Section 500 — up to 2 years' imprisonment or fine or both
			Section 504 — up to 2 years' imprisonment or fine or both
f			Section 506 — up to 2 years' imprisonment or fine or both if threat be to cause death or grievous hurt, etc. — up to 7 years' imprisonment or fine or both
g			Section 507 — up to 2 years' imprisonment along with punishment under Section 506
			Section 508 — up to 1 year's imprisonment or fine or both
h			Section 509 — up to 1 year's imprisonment or fine or both of IPC as applicable

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Publishing or transmitting obscene material in electronic form	Section 67 — first conviction up to 3 years' imprisonment and fine Rs 5 lakhs. Second or subsequent conviction — up to 5 years' imprisonment and fine up to Rs 10 lakhs	Section 292 — up to 2 years' imprisonment and fine Rs. 2000 and up to 5 years' imprisonment and Rs 5000 for second and subsequent conviction
Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form	Section 67-B — first conviction — up to 5 years' imprisonment and fine up to Rs 10 lakh. Second or subsequent conviction — up to 7 years' imprisonment and fine up to Rs 10 lakh	Section 292 — up to 2 years' imprisonment and fine Rs 2000 and up to 5 years' imprisonment and Rs 5000 for second and subsequent conviction
Misusing a wifi connection if done against the State	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both Section 66-F — life imprisonment	
Planting a computer virus if done against the State	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both Section 66-F — life imprisonment	
Conducting a denial of service attack against a government computer	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both Section 66-F — life imprisonment	
Stealing data from a government computer that has significance from national security perspective	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both Section 66-F — life imprisonment	
Not allowing authorities to decrypt all communication that passes through computer or network	Section 69 — imprisonment up to 7 years and fine	
Intermediaries not providing access to information stored on their computer to the relevant authorities	Section 69 — imprisonment up to 7 years and fine	

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a	Failure to block websites, when ordered	Section 69-A — imprisonment up to 7 years and fine	
	Sending threatening messages by email	Section 66-A — up to 3 years imprisonment and fine	Section 504 — up to 2 years' imprisonment or fine or both
b	Word, gesture or act intended to insult the modesty of a woman		Section 509 — up to 1 year's imprisonment or fine or both — IPC as applicable
	Sending defamatory messages by email	Section 66-A — up to 3 years' imprisonment and fine	Section 500 — up to 2 years' imprisonment or fine or both
c	Bogus websites, cyber frauds	Section 66-D — up to 3 years' imprisonment and fine up to Rs 1 lakh	Section 419 — up to 3 years' imprisonment or fine Section 420 — up to 7 years' imprisonment and fine
d	Email spoofing	Section 66-C — up to 3 years' imprisonment and fine up to Rs 1 lakh	Section 465 — up to 2 years' imprisonment or fine or both Section 468 — up to 7 years' imprisonment and fine
	Making a false document	Section 66-D — up to 3 years' imprisonment and fine up to Rs 1 lakh	Section 465 — up to 2 years' or fine or both
e	Forgery for purpose of cheating	Section 66-D — up to 3 years' imprisonment and fine up to Rs 1 lakh	Section 468 — up to 7 years' imprisonment and fine
	Forgery for purpose of harming reputation	Section 66-D — up to 3 years' imprisonment and fine up to Rs 1 lakh	Section 469 — up to 3 years' imprisonment and fine
f	Email abuse	Section 66-A — up to 3 years' imprisonment and fine	Section 500 — up to 2 years' imprisonment or fine or both
g	Punishment for criminal intimidation	Section 66-A — up to 3 years' imprisonment and fine	Section 506 — up to 2 years' imprisonment or fine or both, if threat be to cause death or grievous hurt, etc. — up to 7 years' imprisonment or fine or both
	Criminal intimidation by an anonymous communication	Section 66-A — up to 3 years' imprisonment and fine	Section 507 — up to 2 years' imprisonment along with punishment under Section 506 IPC
h	Copyright infringement	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both	Sections 63, 63-B of Copyright Act, 1957

Summary of Arguments

III. Mr Sajan Poovayya, Senior Advocate, for the petitioner *(contd.)*

20. A reading of Section 43 read with Section 66 of the IT Act contemplates all such circumstances/offences which the State purports to guard against by enacting Section 66-A i.e. destruction of information/data on a computer resource, virus contamination, disruption of computer network, data theft, etc., if done fraudulently, dishonestly, constitutes an offence, and makes it punishable with imprisonment up to three years or with fine which may extend to five lakh rupees or with both. Therefore, the enactment of a patently vague provision such as Section 66-A is wholly unjustified and the same deserves to be struck down by this Hon'ble Court as unconstitutional.

D. The Information Technology (Intermediaries Guidelines) Rules, 2011 are ultra vires and unconstitutional

21. Rules 3(2) read with 3(3), 3(4) and 3(7) of the Information Technology (Intermediaries Guidelines) Rules, 2011 also suffer from the vice of vagueness. Rule 3(2) employs undefined expressions such as "grossly harmful", "blasphemous", "ethnically objectionable", "grossly offensive", "menacing in nature", etc., which are subjective expressions and no guidance is provided for their interpretation, either in the Rules or in the IT Act. Rule 3(2) lists the various types of information that ought not to be carried on a computer system. Only clause (*i*) may be traced to Article 19(2) of the Constitution which contains the permissible grounds to restrict the exercise of free speech. Even clause (*i*) is a subordinate legislation and it does not qualify to be a law imposing restrictions pursuant to Article 19(2). Content that is "invasive of another's privacy", "ethnically objectionable", "disparaging", "harms minors in any way", are all considered objectionable and steps are required to be taken by the intermediary for their removal as soon as the intermediary is notified. This Rule violates Article 14 as it is arbitrary and overboard by granting the private intermediary the right to subjectively assess such content. It breaches Article 19(1)(*a*) in creating restrictions which are alien to the constitutional framework and is also beyond the scope of the Act which is restrictive in administering such regulation.

22. Rule 3(3) bars the intermediary from hosting any of the contents referred to in Rule 3(2). Section 79 makes it clear that the intermediary is free of liability if it does not actively participate in the transmission. As a result of the subordinate legislation, this protection is watered down to expose the intermediary to prosecution even if it merely "hosts" such content. Apart from being *ultra vires* the Act, Rule 3(3) provides for an objective test to assess the objectionable content under Rule 3(2) against which the subjective judgment of the intermediary will be tested. As a result, it is arbitrary and violates Article 14 of the Constitution.

23. Rule 3(4) provides for the intermediary to disable the information that is in contravention of Rule 3(2), either on its own or on the basis of

Summary of Arguments

III. Mr Sajan Poovayya, Senior Advocate, for the petitioner *(contd.)*

information received within 36 hours. It is submitted that the turnaround period of thirty-six (36) hours for removal of content is completely impractical and infeasible for intermediaries to implement as they process enormous quanta of data, especially taking into account that an incredibly large number of takedown notices would be issued to large and popular intermediaries. A theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred is not workable and consequently is unconstitutional. [*Ref.*: *Religious Technology Service Centre* v. *Netcom*, 907 F Supp 1361]

24. Rule 3(4) permits an unguided application of mind by the intermediary as to whether Rule 3(2) has in fact been violated, and then leads to initiation of taking punitive action without even granting the alleged offender the right to be heard. This provision endows uncanalised power on the intermediary, and violates the user's valuable natural justice rights, and is therefore in breach of Article 14 of the Constitution.

25. Rule 3(2) also creates discrimination between the internet and other media like television, newspapers and magazines. Parameters for being dubbed offensive content ought to be consistent across these various modes of disseminating information, but in laying down several additional factors, the internet as a medium is singled out for greater restraint. In being arbitrary, this is violative of Article 14 of the Constitution, in affecting internet entrepreneurs, it breaches Article 19(1)(*g*), and in depriving users of the right to share and access such otherwise unobjectionable content, it impacts Article 19(1)(*a*).

26. The Rules essentially endow the intermediary with the power of determining what information is objectionable, and then allowing it to both disable access to the information and terminate access of the user to the intermediary's computer system. This is a delegation of a State function to a private entity, which is impermissible and violative of constitutional norms, as it amounts to an abdication of an essential governmental function.

27. The Rules create a legal and logical inconsistency, inasmuch as an intermediary which in any manner selects or modifies the information contained in a transmission is not entitled to the exemption granted by Section 79 of the IT Act; and by virtue of abdication of power to the intermediary by the State, the intermediary is forced under the Rules, to select and modify information by removing information objected to by "affected parties".

28. For the reasons aforesaid, it is most respectfully prayed that Section 66-A of the IT Act and Rules 3(2), 3(3), 3(4) and 3(7) of the Information Technology (Intermediaries Guidelines) Rules, 2011 be declared as unconstitutional for being violative of Articles 14 and 19(1)(*a*) of the Constitution of India.

Summary of Arguments *(contd.)*

IV. Mr Prashant Bhushan and Mr Pranav Sachdeva, Advocates for the petitioner, Common Cause in Writ Petition (Civil) No. 21 of 2013

1. These submissions are being filed limited on the issue of the constitutional validity of Section 66-A of the Information Technology Act, 2000. The petitioner seeks liberty to address the other issues raised in the writ petition separately. There is considerable evidence of the gross human rights violations in the form of arrests and threats under this section, as well as its chilling effect on free speech. Various petitioners have already placed a few such instances on record in the instant proceedings. These submissions, however, are limited to the issue of unconstitutionality of the section from a reading of its bare provisions.

Restrictions under Section 66-A are vague, general and elastic

2. The issue of vagueness rendering a statute unconstitutional was considered by this Hon'ble Court in *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271 : AIR 1982 SC 710. While determining whether the expressions in the law were vague, general and elastic, this Hon'ble Court observed: "The impossibility of framing a definition with mathematical precision cannot either justify the use of vague expressions or the total failure to frame any definition at all which can furnish, by its inclusiveness at least, a safe guideline for understanding the meaning of the expressions used by the legislature… *The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution* since the decision in *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 : (1978) 2 SCR 621. The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity…"

3. In *State of M.P.* v. *Baldeo Prasad*, AIR 1961 SC 293, this Hon'ble Court has held that Sections 4 and 4-A of the Central Provinces and Berar Goondas Act suffer from infirmities as the definition of the word "goonda" affords no assistance in deciding which citizen can be put under that category, the result of such an infirmity is that the Act has left to the unguided and unfettered discretion of the authority concerned to treat any citizen as a goonda, and in holding so has declared the Act to be unconstitutional due to the serious nature of the infirmities in the operative sections (i.e. Sections 4 and 4-A) of the Act. This Hon'ble Court in *K.A. Abbas* v. *Union of India*, (1970) 2 SCC 780 : AIR 1971 SC 481 has in passing observed that "*it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered*."

4. In the United States any criminal statue which lacks clarity or is uncertain is held to be void on grounds of vagueness as it offends the Due Process Clause. "… vagueness may be from uncertainty in regard to persons

Summary of Arguments *(contd.)*

IV. Mr Prashant Bhushan and Mr Pranav Sachdeva, Advocates for the petitioner *(contd.)*

within the scope of the act ... or in regard to the applicable tests to ascertain guilt." [*Musser* v. *Utah*, 333 US 95, 97 (1948)]. A statue limiting the right to free speech and expression if found to be vague would be declared void. *Winters* v. *New York*, 333 US 507 (1948). "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." [*Chicago* v. *Morales*, 527 US 41 (1999)] "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone'... than if the boundaries of the forbidden areas were clearly marked." [*Grayned* v. *City of Rockford*, 408 US 104 (1972).]

5. In light of law laid down above it is submitted that the expressions used in Section 66-A — "grossly offensive", "menacing character", "annoyance", "inconvenience", "danger", "obstruction", "insult", "injury", "enmity", "hatred", or "ill will" — are vague, elastic and general. In the absence of any precise definition, limitation or clarification as to the extent and the scope of each of the expressions, it is impossible for a man of reasonable intelligence to precisely ascertain what conduct is prohibited under Section 66-A.

6. The grievance herein is not uncertainty about the common meaning of these words but as to the clear determination of what conduct is covered under each of these expressions given the general nature of these expressions. It is the legislature's failure to distinguish between innocent conduct and conduct which is sought to be penalised under this clause that is sought to be remedied. The dictionary definition of each of the expressions gives them a far and wide reach which necessitates that the statute should limit their applicability by defining clear and precise standards of conduct. Given that the standard of certainty ought to be the highest in a criminal statute, Section 66-A should be declared void as it does not provide precise and clear definitions for each of the expressions.

Summary of Arguments

IV. Mr Prashant Bhushan and Mr Pranav Sachdeva, Advocates for the petitioner *(contd.)*

7. Something that might be "grossly offensive" to one person need not be so to another person, similarly what might cause annoyance to one person need not affect another person in the same way. The conduct specified herein depends entirely on each complainant's sensitivity. This further buttresses the argument that the expressions used in the clause are vague and ambiguous. Further, the statute fails to specify on whose sensitivity the violation depends — whether the sensitivity of the Judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man.

8. It is true that most of these expressions have also been used in the Penal Code, however, it is submitted that the IPC unlike Section 66-A provides greater specificity to each of these expressions by limiting their scope by prescribing clear standards by which the prohibited conduct is to be determined. For e.g. Section 124-A which is the offence relating to sedition, it seeks to penalise any action that "attempts to bring into hatred or contempt or excites or attempts to excite disaffection", and it limits the scope of the said expressions such as "hatred" by placing an additional qualification that only when the same is directed "towards the Government established by law" that it is considered an offence.

9. Section 153-A IPC deals with "promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony". For any act to be regarded as an offence under this section, the act must necessarily promote "feelings of enmity, hatred or ill will" and the additional qualification that limits the applicability of the section is that, the enmity, hatred or ill will should be between "different religious, racial, language or regional groups or castes or communities" and only on grounds of "of religion, race, place of birth, residence, language, caste or community". Lastly, Section 268 IPC which deals with nuisance, prescribes that a person is guilty of public nuisance if an act causes "annoyance to the public" only to the extent that it interferes with a person's right to enjoy his/her private property or any public right. It is submitted that in each of the above sections of IPC a concrete harm requirement is prescribed. Further the expressions such as "hatred", "enmity", "annoyance" are defined by who are the persons affected and reaction or sensibilities of the affected persons; it is submitted that this removes any kind of uncertainty or ambiguity.

10. Section 66-A(*a*) is patently illegal on grounds of vagueness as no specific intent is prescribed, it simply seeks to penalise any information that is "grossly offensive" or has a "menacing character". The requirement of mens rea to do a prohibited act is necessary in all criminal statutes and the same is absent in clause (*a*) of Section 66-A. For e.g. under this sub-section a friend playing a prank simply in jest which as per the complainant's sensitivity qualifies to be "grossly offensive" might be penalised. It is submitted that right to offend is a basic part of free speech. A provision which states that there is a right to free speech provided a person does not

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IV. Mr Prashant Bhushan and Mr Pranav Sachdeva, Advocates for the petitioner *(contd.)*

cause any annoyance to any other person, makes the right to free speech absolutely meaningless.

Restriction under Section 66-A falls outside the ambit of Article 19(2)

11. It is submitted that any restriction to freedom of speech and expressions is only valid if it meets the touchstone of Article 19(2). Article 19(2) lays down that the State can impose reasonable restrictions on the exercise of right provided under Article 19(1)(*a*) in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

12. This Hon'ble Court in numerous judgments has held that when the Constitution provides for a distinct category of permissible restrictions, any law of the State which does not satisfy the requirements laid down in Article 19(2) is unconstitutional. In *Brij Bhushan* v. *State of Delhi*, AIR 1950 SC 129 and *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124 wherein the constitutional validity of Section 7(1)(*c*) of the East Punjab Public Safety Act, 1949 and Section 9(1-A) of the Madras Maintenance of Public Order Act, 1949 respectively were challenged. This Hon'ble Court in both the above cases has held that since both the sections impose wider restrictions then the restrictions authorised under Section 19(2) were held to be unconstitutional.

13. Section 66-A is unconstitutional as the restraints placed on the freedom of speech and expression are far excessive than the restrictions under Article 19(2). Section 66-A seeks to punish anyone who by means of a computer resource or a communication device sends any information that is "grossly offensive" or has a "menacing character" or seeks to cause "annoyance or inconvenience" causing "danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will".

14. It is submitted that terms such as "menacing character", causing "annoyance", "inconvenience", "obstruction" or "ill will" cannot be taken to mean as something which results in consequences counter to the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States; or that it affects public order, decency or morality; or is in relation to contempt of court, defamation or incitement to an offence. Casual conversation may be intended to "annoy" or cause "inconvenience"; this might be light-hearted banter or the earnest expression of personal opinion or emotion. But unless speech presents a clear and present danger of some serious substantive evil, it should not be forbidden nor penalised.

15. Further, it is submitted that there is a difference between the restrictions enumerated in Section 66-A and that which is enumerated in Article 19(2). In serious or aggravated forms communication which is grossly offensive or causes danger, insult, injury, enmity or hatred might lead to consequences enumerated under Article 19(2). However, this Hon'ble Court

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IV. Mr Prashant Bhushan and Mr Pranav Sachdeva, Advocates for the petitioner *(contd.)*

in *Romesh Thappar* v. *State of Madras* (supra), wherein while dealing with the contention that the expression "public safety" in the impugned Act, which is a statute relating to law and order, means the security of the Province, and, therefore, "the security of the State" under Article 19(2) as it was prior to the Constitution (First Amendment) Act, 1951 has observed the following:

> "*The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind.*"

Therefore, there being a significant difference in degree between the restriction enumerated under Section 66-A and Article 19(2), it cannot be said that the restrictions under Section 66-A can be construed to mean restrictions under Article 19(2).

16. There could be many instances where say, without breaching public order or defaming anyone, one may communicate with another with the possible intention of causing a slight annoyance or insulting them in order to emphasise an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek. This section has the effect of making criminal a communication made by a consumer to the service provider or a manufacturer expressing his dissatisfaction with the product or the service; or a communication made by an irate citizen to a public official expressing his dissatisfaction over the current state of public affairs. Mere intolerance or animosity cannot be the basis for abridgment of the constitutional freedom under Article 19(1)(*a*).

17. Therefore, the petitioner respectfully submits that Section 66-A of the Information Technology Act, 2000 is unconstitutional.

V. Mr Sanjay Parikh, Advocate, for the petitioner, PUCL in WP (Crl.) No. 199/2013

1. The phrase "freedom of speech and expression" contained in Article 19(1)(*a*) has been given a very wide interpretation by this Hon'ble Court in several judgments. The freedom of speech and expression includes "freedom of propagation of ideas", "right to circulate one's ideas, opinion and views", "right of citizens to speak, publish and express their views as well as right of people to read" as well as the right to know about the affairs of the Government. Case law for the above proposition is given below:

(*a*) Vide *People's Union of Civil Liberties* v. *Union of India*, (2003) 4 SCC 399 in paras 16, 24-27, 38-45. In para 44 (p. 440) this Hon'ble Court has given a list of decisions in which the meaning to the phrase, "freedom of speech and expression", has been given.

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V. Mr Sanjay Parikh, Advocate, for the petitioner *(contd.)*

2. Freedom of speech can be restricted only in the interest of the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. [The only restriction which may be imposed on the rights of an individual under Article 19(1)(*a*) are those which clause (2) of Article 19 permits and no other.] Case law for the above proposition is given below:

(*a*) Vide *Sakal Papers (P) Ltd.* v. *Union of India*, (1962) 3 SCR 842 at pp. 857, 862, 863 and 868

"*At p. 863*

For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore, for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom."

"*At p. 868*

To repeat, the only restrictions which may be imposed on the rights of an individual under Article 19(1)(*a*) are those which clause (2) of Article 19 permits and no other"

(*b*) *People's Union of Civil Liberties* v. *Union of India*, (2003) 4 SCC 399 at p. 438, para 39

"So legislative competence to interfere with a fundamental right guaranteed under Article 19(1)(*a*) is limited as provided under Article 19(2)."

3. To bring a challenge within the exceptions contained under Article 19(2) it must be established:

(*a*) Impugned legal provision must have proximate and reasonable nexus;

(*b*) The connection should be immediate, real and rational;

(*c*) Impugned legal provision has to be clear, unambiguous and not vague;

(*d*) The expression contained in the impugned provision must itself constitute an offence.

Case law for the above proposition is given below:

(*a*) Vide *Kameshwar Prasad* v. *State of Bihar*, 1962 Supp (3) SCR 369 at pp. 371, 373, 374, 378, 380 till 385. The question considered by this Hon'ble Court was whether Rule 4-A as far as it lays an embargo on

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V. Mr Sanjay Parikh, Advocate, for the petitioner *(contd.)*

any form of demonstration could be sustained as falling within the scope of Articles 19(2) and (3). Reliance was placed on the judgment in *Supt., Central Prison* v. *Ram Manohar Lohia*, [(1960) 2 SCR 821] and after acknowledging the connection has to be intimate, real and rational it was observed:

"*At pp. 383-84*

The threat to public order should therefore arise from the nature of the demonstration prohibited. No doubt, if the rule were so framed as to single out those types of demonstration which were likely to lead to a disturbance of public tranquillity or which would fall under the other limiting criteria specified in Article 19(2) the validity of the rule could have been sustained. The vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration—be the same however innocent and however incapable of causing a breach of public tranquillity and does not confine itself to those forms of demonstrations which might lead to that result."

(*b*) Vide *Supt., Central Prison* v. *Ram Manohar Lohia*, [(1960) 2 SCR 821, at pp. 826, 827, 830, 832-36] Section 3 of the U.P. Special Powers Act, 1932 was under challenge in this case. After referring to the judgment of the Federal Court in *R.* v. *Vasudeva*, AIR 1950 FC 67, this Hon'ble Court observed that, "the decision in our view lays down the correct test. The limitation imposed in the interest of public order to be a reasonable restriction, is one which should have a proximate connection or nexus with public order. But not far-fetched, or hypothetical or problematic or too remote in the chain of its relation to public order." That is why it has been submitted that the phrase itself in an impugned provision should constitute the offence. For example, the expression, "annoyance", should result in the incitement of an offence or public disorder.

Finally while examining the impugned provision, this Hon'ble Court very clearly laid down the test to bring in an expression within Article 19(2). It stated:

"*At pp. 836-37*

We shall now test the impugned section, having regard to the aforesaid principles. Have the acts prohibited under Section 3 any proximate connection with public safety or tranquility? We have already analysed the provisions of Section 3 of the Act. In an attempt to indicate its wide sweep, we pointed out that any instigation by word or visible representation not to pay or defer payment of any exaction or even contractual dues to Government, authority or a landowner is made an offence. Even innocuous speeches are prohibited by threat of punishment. There is no proximate or even foreseeable connection between such instigation and the public order

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V. Mr Sanjay Parikh, Advocate, for the petitioner *(contd.)*

sought to be protected under this section. We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite a revolutionary movement destroying public order. We can only say that fundamental rights cannot be controlled on such hypothetical and imaginary considerations. It is said that in a democratic set-up there is no scope for agitational approach and that if a law is bad the only course is to get it modified by democratic process and that any instigation to break the law is in itself a disturbance of the public order. If this argument without obvious limitations be accepted, it would destroy the right to freedom of speech which is the very foundation of democratic way of life. Unless there is a proximate connection between the instigation and the public order, the restriction, in our view, is neither reasonable nor is it in the interest of public order. In this view, we must strike down Section 3 of the Act as infringing the fundamental right guaranteed under Article 19(1)(a) of the Constitution."

In support of the above finding, reliance was also placed on another Constitution Bench judgment, *Chintaman Rao* v. *State of M.P.*, (1950 SCR 759 at 756). In this case, this Hon'ble Court also held that the entire section being void as infringing Article 19(1)(*a*) of the Constitution must be struck down as the doctrine of severability is inapplicable—to enable the Court to affirm the validity of a part and reject the rest.

(*c*) Vide *S. Rangarajan* v. *P. Jagjivan Ram*, (1989) 2 SCC 574 (at p. 586) (paras 21, 41, 45 and 53). In para 45 this Hon'ble Court observed that the anticipated danger should not be remote, conjectural or far-fetched and that it should have a proximate and direct nexus with the expression. Thereafter, it was observed that "in other words, the expression should be inseparably locked up with the action, contemplated like the equivalent of, 'spark in a powder keg'." In para 51 this Hon'ble Court emphasised that, "freedom of expression cannot be suppressed on account of threats of demonstration and violence and that is the obligatory duty of the State to protect the freedom of expression". While concluding, the Court further stated in para 53, content of Articles 19(1)(*a*) and 19(2), was summarised in para 53.

4. Merely because the internet has a wider reach and speed in publishing information and also implication, the content of Article 19(1)(*a*) cannot be diluted. The restriction has to fulfil the parameters under Article 19(2). Case law for the above proposition is given below:

(*a*) Vide *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 at pp. 195, 208, 213, 226, 228. In this case, this Hon'ble Court was considering what telecasting means and what are its

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V. Mr Sanjay Parikh, Advocate, for the petitioner *(contd.)*

legal dimensions and consequences. After considering the judgments on Article 19, in para 37 the following question was posed:

> "*The next question which is required to be answered, is whether there is any distinction between the freedom of the print media, that of the electronic media such as radio and television and if so, whether it necessitates more restrictions on the latter media.*"

There is a detailed discussion on Eric Brandt's book titled, *Broadcasting Law*" as well as the judgment of the US Supreme Court in *Red Lion Broadcasting case*, 395 US 367. In para 43 the law on freedom of speech and expression under Article 19(1)(*a*) as restricted by Article 19(2) was summarised. It was also held that (vide para 45), burden is on the authority to justify the restriction. The question which was posed in para 37 was answered in para 78, where the Court stated that (at p. 227):

> "*But to contend that on that account the restrictions to be imposed on the right under Article 19(1)(a) should be in addition to those permissible under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media. If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures.*"

5. By a general or vague provision the right of speech and expression cannot be curtailed. Section 66-A is general and vague, therefore, arbitrary and unreasonable, and violative of Articles 14 and 21 of the Constitution. The basic principle of legal jurisprudence is that a law is void for vagueness if its prohibitions are not clearly defined. Such laws result in unfairness and are attendant with dangers of arbitrary and discriminatory applications. Case law in support of the above proposition is given below:

(*a*) Vide *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 at p. 644 (para 112) and p. 648 (para 130).

6. The intelligible differentia between the medium and of print/broadcast, real life speech and speech on the internet, is that speech on the internet

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V. Mr Sanjay Parikh, Advocate, for the petitioner *(contd.)*

travels faster. There is however no rational nexus between creating new categories of criminal offences and any permissible aim sought to be achieved under Article 19(2). This is especially noticeable in the case of Section 66-A, rather than other offences such as cyber terrorism or hacking as covered under the Information Technology Act, 2000.

(*a*) *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 at 195.

7. Section 66-A is also bad in law inasmuch as it mixes up minor and major offences and does not contain any differentiation between the penalties for them. It includes, "criminal intimidation" and, "annoyance" both as bundled together within it and violates the principles of proportionality. Similar offences already exist under the Penal Code, 1860 which applies to online content equally. These offences have definitions and ingredients providing adequate notice. This is not so in the case of Section 66-A which merely contains phrases. Hence, this also leads to a mixing up of major and minor offences, in a bundle of phrases under Section 66-A leading to the same penal consequences. In support of the above proposition, case law is cited below:

(*a*) Vide *Om Kumar* v. *Union of India*, (2001) 2 SCC 386 : 2000 Supp (4) SCR 693]

> "On account of a chapter on Fundamental Rights in Part III of our Constitution right from 1950, Indian courts did not suffer from the disability similar to the one experienced by English courts for declaring as unconstitutional legislation on the principles of proportionality or reading them in a manner consistent with the charter of rights. Ever since 1950, the principle of "proportionality" has indeed been applied vigorously to legislative (and administrative) action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India—such as freedom of speech and expression, freedom to assemble peacefully, freedom to form associations and unions...."

8. International covenants to which India is a party such as ICCPR have been interpreted with respect to the access on the internet. Specific reference is made to the summary of recommendations of the Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, dated 6-5-2011, which are quoted at length:

> "The Special Rapporteur believes that the internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies. Indeed, the recent wave of demonstrations in countries across the Middle East and

Summary of Arguments

V. Mr Sanjay Parikh, Advocate, for the petitioner *(contd.)*

North African region has shown the key role that the internet can play in mobilising the population to call for justice, equality, accountability and better respect for human rights. As such, facilitating access to the internet for all individuals, with as little restriction to online content as possible, should be a priority for all States."

9. The expressions which have been used in Section 66-A have not been defined. This can be compared with Section 66 where the terms "dishonestly" and "fraudulently" have been defined and given them the same meaning as provided in IPC. In Sections 66-B, 66-C, 66-D, 66-E, 66-F, 67, 67-A and 67-B the offence for which punishment has been provided has been defined. However, in Section 66-A, the expression "grossly offensive, menacing character, annoyance, inconvenience, danger, obstruction, insult, etc. have not been defined. These expressions are absolutely vague and are subjected to different interpretations. None of these expressions can be extended to the logical conclusion mainly that an information which is grossly offensive or has menacing character will either cause incitement of an offence or public disorder. It is only by imaginations and subjective inputs that a nexus will have to be established with the exceptions contained in Article 19(2). What can cause annoyance to a person may not cause annoyance to another; the subject-matter which is alleged to cause annoyance can be totally innocuous. It can also be meaningful and objectionable. But Article 19(1)(*a*) does not allow the distant, imaginative interpretations to bring an expression within Article 19(2). It is for this reason that Section 66-A violates Article 19(1)(*a*). It is not permissible to bring in the definitions given in different IPC offences for upholding Section 66-A.

VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner, Anoop M.K. in WP (Crl.) No. 196/2014

The challenge

1. This petition impugns Sections 66-A, 69-A and 80 of the IT Act, 2000 as well as Section 118(*d*) of the Kerala Police Act, 2011. Two FIRs dated 25-1-2014 and 13-6-2014 were registered against the petitioner for separate instances of using social media as an activist platform. The petitioner has been arrested separately in connection with both FIRs.

Propositions

2. (*I*) Section 66-A violates Articles 19, 14 and 21 of the Constitution.

(*II*) Section 69-A violates Articles 14 and 19 of the Constitution.

(*III*) Section 80 violates Article 21 of the Constitution and derogates from the safeguards offered by Section 41-A CrPC.

(*IV*) Section 118(*d*) of the Kerala Police Act lacks legislative competence and is also violative of Articles 14 and 21 of the Constitution.

Summary of Arguments

VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner *(contd.)*

I. The validity of Section 66-A, IT Act

3. Section 66-A is not traceable to any of the grounds laid down in Article 19(2):

3.1. If the law is not traceable to the grounds under Article 19(2), then it falls foul of Article 19(1)(*a*). (See Note 1]

3.2. Decency is based on "current standards of behaviour or propriety" (See Note 2)

3.3. Public order is in any case an exclusive State subject being Entry I, List II of Schedule VII. If the provision is sought to be justified on this ground, then it is void for competence. (See Note 2)

3.4. The onus is hence on the respondent to show any other ground to which the legislation is traceable.

4. Without prejudice, Section 66-A imposes restrictions that are not reasonable: (See Note 2)

4.1. The threshold is low, subjective and undefined.

4.2. The punishment is disproportionate.

4.3. If the same provisions were applied to the non-online media, the consequences would be egregious. (See Note 5)

5. Section 66-A is over broad and endows uncanalised powers of determination on the authorised police officer, thereby violating Article 14. (See Note 3)

6. Section 66-A creates a penal offence without the ingredients of *mens rea*, thereby breaching Article 21. This provision also makes no distinction between those who maliciously offend and those who innocently do so. (See *Mithu* v. *State of Punjab*, (1983) 2 SCC 277)

II. The validity of Section 69-A, IT Act

7. As far as Section 69-A is concerned, it impinges not only the owner/author's right to speech and expression but also the right to information of users under Article 19(1)(*a*) is deprived when access is taken away. Particularly in the context of foreign sites and websites, owners/authors of such content may not be particularly concerned about the block. (See Note 6)

8. Section 69-A endows uncanalised powers on the Central Government which violates Article 14: (See Note 3)

8.1. "Satisfied" that it is "necessary" is entirely subjective and leaves the determination solely to the Central Government or its authorised officer without an objective standard.

8.2. There is a complete departure from the principles of natural justice as the blocking direction follows immediately upon the subjective satisfaction of the officer without any notice or advertence to the author/uploader of the content. (See *State of Madras* v. *V.G. Row*, 1952 SCR 597)

Summary of Arguments

VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner *(contd.)*

9. Section 69-A merely reproduces the grounds in Article 19(2) without providing guidance regarding their interpretation or application:

9.1. The grounds under Article 19(2) are the basis for justifying a law that infringes free speech. The same cannot also be a parameter for determining the grounds for blocking without some objective parameters or guidelines that clarify exactly the scope of *security of the State, public order, friendly relations with States*, etc.

9.2. These terms are not exhaustive or interpreted by settled enumeration. When the occasion arises, the judiciary is regularly called upon to adjudicate their meaning.

9.3. It is Parliament's essential function to provide guidance to the executive on the manner of their interpretation. This includes setting down a legislative policy in sufficient clearness (lacking in Section 69-A), or laying down a standard to be followed (also lacking).

9.4. The "reasonableness" test under Article 19(2) is wholly lost sight of, with Parliament presuming that the arbitrary and uncanalised exercise of such determination by an authorised officer would be, for some reason, reasonable.

9.5. If the same provision were applied to the non-online media, the consequences would again be egregious. (See Note 5)

10. As far as online transactions are concerned, a separate argument under Article 19(1)(*g*) may also be canvassed by those who run online trades and businesses.

III. The validity of Section 80, IT Act

11. There has been a substantial evolution on the law governing arrest in the country, which has involved Reports of the Law Commission, Guidelines of this Hon'ble Court and Amendments to CrPC. Parliament has lost sight of all these facts in enacting the present provision. (See Note 4)

12. The power of arrest and search is gratuitously endowed without any safeguards as is available in the Code of Criminal Procedure, 1973. In fact, CrPC is explicitly referred to courtesy the non obstante clause.

13. The procedure is not just, fair and reasonable and hence violates Article 21.

14. The provision is inconsistent with the Guidelines laid down by this Hon'ble Court in *Joginder Kumar* v. *State of U.P.*, (1994) 4 SCC 260.

15. Anomalies are likely with different laws for different media.

IV. The validity of Section 118(d), Kerala Police Act

16. The Kerala State Legislature lacked the legislative competence to enact Section 118(*d*) as it is covered by Entries 31 and 93 of List I.

Summary of Arguments

VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner *(contd.)*

17. In any event, the field is occupied by the Central legislation, the IT Act, where Section 66-A came into effect on 27-10-2009 via Amendment Act 10 of 2009. The Kerala Police Act came into effect on 27-4-2011.

18. Without prejudice, the section must either be read down or the offending portions severed. See *State of Karnataka* v. *Ranganatha Reddy*, (1977) 4 SCC 471 [7-JJ]

19. The provision creates a penal offence without the ingredients of *mens rea*, thereby breaching Articles 19 and 21.

V. Scope of Article 19(2)

Must be traced to the grounds in Article 19(2)

20. *Sakal Papers (P) Ltd.* v. *Union of India*, (1962) 3 SCR 842 (5-Judge Bench) — Regulating and prescribing the number of pages and advertisements in a newspaper on the grounds of welfare of the public rejected as not traceable to Article 19(2).

21. *Bennett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788 (5-Judge Bench) — Object of newspaper restrictions had nothing to do with availability of newsprint or foreign exchange. Hence, restrictions outside Article 19(2).

22. *Supt., Central Prison* v. *Ram Manohar Lohia*, (1960) 2 SCR 821 (5-Judge Bench) — Section 3 of the U.P. Special Powers Act proscribed even innocuous speeches and held not to be justified under "public order" and in any case not reasonable.

Must be reasonable

23. *State of Madras* v. *V.G. Row*, 1952 SCR 597 (5-Judge Bench) — The Criminal Law Amendment Act of Madras allowed the provincial Government to unilaterally declare any association as unlawful and declare as such in the Gazette. The challenge succeeded as unreasonable in its restraint of Article 19(1)(*c*) as it excluded judicial enquiry, *did not communicate to the affected party* to enable a representation and did not provide a time-limit.

24. *Virendra* v. *State of Punjab*, 1958 SCR 308 (5-Judge Bench) — No time-limit for the operation of the order nor for representation to the State Government makes Section 3 of the Punjab Special Powers (Press) Act unreasonable.

25. *State of M.P.* v. *Baldeo Prasad*, (1961) 1 SCR 970 — Definition of "goonda" is over broad and unguided, and hence unreasonable in its restraint of Articles 19(1)(*d*) and (*e*) of the Constitution.

26. *Kishan Chand Arora* v. *Commr. of Police*, (1961) 3 SCR 135 — Licences for eating houses endowed the Commissioner with unreasonable powers which the majority held was invalid as violating Section 19(1)(*g*).

27. *Dwarka Prasad Lakshmi Narain* v. *State of U.P.*, 1954 SCR 803 — Power over licences under the U.P. Coal Control Order were held to be

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VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner *(contd.)*

unreasonable and violating Article 19(1)(*g*) *even though reasons were to be recorded in writing*.

VI. On Decency and Public Order

28. *Ramesh Yeshwant Prabhoo* v. *Prabhakar Kashinath Kunte*, (1996) 1 SCC 130 — Section 123(3) of the Representation of the People Act challenged as violating Article 19(1)(*a*) as it prohibited seeking of votes on the ground of religion.

> "*28*. The expression 'in the interests of' used in clause (2) of Article 19 indicates a wide amplitude of the permissible law which can be enacted to provide for reasonable restrictions on the exercise of this right under one of the heads specified therein, in conformity with the constitutional scheme. Two of the heads mentioned are: decency or morality. Thus, any law which imposes reasonable restrictions on the exercise of this right in the interests of decency or morality is also saved by clause (2) of Article 19. Shri Jethmalani contended that the words 'decency or morality' relate to sexual morality alone. In view of the expression 'in the interests of' and the context of election campaign for a free and fair poll, the right to contest the election being statutory and subject to the provisions of the statute, the words 'decency or morality' do not require a narrow or pedantic meaning to be given to these words. The dictionary meaning of 'decency' is 'correct and tasteful standards of behaviour as generally accepted; conformity with current standards of behaviour or propriety; avoidance of obscenity; and the requirements of correct behaviour' (*The Oxford Encyclopaedic English Dictionary*); 'conformity to the prevailing standards of propriety, morality, modesty, etc.: and the quality of being decent' (*Collins English Dictionary*)
>
> *29. Thus, the ordinary dictionary meaning of 'decency' indicates that the action must be in conformity with the current standards of behaviour or propriety, etc. In a secular polity, the requirement of correct behaviour or propriety is that an appeal for votes should not be made on the ground of the candidate's religion which by itself is no index of the suitability of a candidate for membership of the House*. In *Knuller (Publishing, Printing and Promotions) Ltd.* v. *Director of Public Prosecutions*, (1972) 2 All ER 898, the meaning of 'indecency' was indicated as under: (All ER p. 905)
>
> > '... Indecency is not confined to sexual indecency; indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting....'
>
> Thus, seeking votes at an election on the ground of the candidate's religion in a secular State, is against the norms of decency and propriety of the society."

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VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner *(contd.)*

29. *Rev. Stainislaus* v. *State of M.P.*, (1977) 1 SCC 677 (5-Judge Bench) — Constitutionality of the M.P. and Orissa Acts was challenged on the ground that legislatures lack the legislative competence to enact such provisions as they relate to matters of religion falling within the residuary Entry 97 of List I.

"*24*. The expression "public order" is of wide connotation. It must have the connotation which it is meant to provide as the very first Entry in List II. It has been held by this Court in *Romesh Thappar* v. *State of Madras*, 1950 SCR 594, that 'public order' is an expression of wide connotation and signifies state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the Government which they have established.

25. Reference may also be made to the decision in *Ramjilal Modi* v. *State of U.P.*, 1957 SCR 860, where this Court has held that the right of freedom of religion guaranteed by Articles 25 and 26 of the Constitution is expressly made subject to public order, morality and health, and that

'it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order.'

It has been held that these two articles in terms contemplate that restrictions may be imposed on the rights guaranteed by them in the interests of public order. Reference may as well be made to the decision in *Arun Ghosh* v. *State of W.B.*, (1970) 1 SCC 98, where it has been held that if a thing disturbs the current of the life of the community, and does not merely affect an individual, it would amount to disturbance of the public order. Thus, if an attempt is made to raise communal passions, e.g. on the ground that someone has been 'forcibly' converted to another religion, it would, in all probability, give rise to an apprehension of a breach of the public order, affecting the community at large. *The impugned Acts, therefore, fall within the purview of Entry 1 of List II of the Seventh Schedule as they are meant to avoid disturbances to the public order by prohibiting conversion from one religion to another in a manner reprehensible to the conscience of the community*. The two Acts do not provide for the regulation of religion and we do not find any justification for the argument that they fall under Entry 97 of List I of the Seventh Schedule."

VII. Uncanalised power

30. *Delhi Laws Act case*, AIR 1951 SC 332 (7-Judge Bench) — Empowering the Central Government to extend Part A State laws to Part C States with any modification as it deems fit

(Kania, C.J., Mahajan, Mukherjea, JJ's opinions)

Summary of Arguments

VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner *(contd.)*

31. *State of W.B.* v. *Anwar Ali Sarkar*, 1952 SCR 284 (7-Judge Bench) — Discretion given to the State Government to direct a case or class of cases to be tried by the Special Court.

(Fazl Ali, Mahajan, Mukherjea, Aiyar and Bose, JJ. in Majority)

32. *Air India* v. *Nergesh Meerza*, (1981) 4 SCC 335 — Retirement age of air hostesses to be extended at the will of the Managing Director

(Paras 115-20)

33. *District Registrar & Collector* v. *Canara Bank*, (2005) 1 SCC 496 — Amended Section 73 of the A.P. Stamp Act permits inspection and seizure of documents which may even be in private custody.

(*Paras 54, 57-58*)

34. *Subramanian Swamy* v. *CBI*, (2014) 8 SCC 682 (5-Judge Bench) — The validity of Section 6-A of the DSPE Act

(Paras 46 and 49)

VIII. The evolution of the arrest safeguards

A. *The 177th Report of the Law Commission*

35. Section 41-A in its present form came into being on the recommendations of the 177th Report of the Law Commission submitted in December 2001. Repeatedly, the Report seeks to maintain a balance between individual liberty and societal order while exploring the manner in which the police exercises the power of arrest, provisions of which are contained in Chapter V of the Code.

36. The Law Commission at pp. 33-38 discussed the well-settled propositions enunciated by this Hon'ble Court in *Joginder Kumar* v. *State of U.P.*, (1994) 4 SCC 260 which referred to the recommendations of the *Third Report of the National Police Commission (1980)* at Paras 12 and 20 and incorporated them as directions to be followed in all cases of arrest.

37. The Commission then considers at pp. 38-41 the decision in *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416 where further directions are given to ensure transparency and accountability when arrests are carried out. These directions and the consequences of their non-observance are laid down at paras 34 to 39 of the judgment.

Note.—For the purposes of the present case, the directions in *Joginder Kumar* would be more relevant as it concerns the criteria for arrest, while *D.K. Basu* deals with the circumstances once the decision to arrest has been taken [A'la Miranda].

38. Interestingly, the Commission notes that Section 41-A was recommended as an insertion by the earlier 152nd and 154th Reports of the Law Commission in 1994, which sought to give the *Joginder Kumar* directions a statutory flavour.

39. The Commission invites detailed comments from practitioners, academics, police officers and other experts before considering the flaws in

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VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner *(contd.)*

Section 41 and the lack of safeguards therein. Specifically at pp. 92 and 93 the Commission questions the silence in the statute with regard to safeguards against arbitrary exercise of arrest powers by the police.

40. In pursuance of its recommendations, the Commission appends as Annexure I (pp. 130-46) a Draft CrPC Amendment Act which inter alia provides for an amended Section 41 and the insertion of new Sections 41-A to 41-D.

B. The amendments to CrPC — 2008 and 2010

41. Although the 177th Report was submitted to the Government in 2001, it was not until 7th January 2009 that the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009) was passed, inter alia, amending Section 41 and inserting new Sections 41-A, 41-B, 41-C and 41-D.

42. Not long thereafter, the Government passed the Code of Criminal Procedure (Amendment) Act, 2010 (Act 41 of 2010) which amended Section 41 to add the requirement that a police officer would record the reasons for *not* making an arrest as well. Also, Section 41-A was amended by substituting "shall" for "may", thereby making the issue of notice mandatory where an arrest was not being made under Section 41(1)(*b*).

43. Pursuant to this, the police headquarters in the various State Governments have issued directives to its personnel in compliance with the new provisions. This includes the circulation of a pro forma notice under Section 41-A of the Code.

C. Judicial interpretation

44. Being of recent vintage, the newly inserted sections have fallen for consideration before this Hon'ble Court only in January 2014:

44.1. *Hema Mishra* v. *State of U.P.*, (2014) 4 SCC 453: While ruling that the powers under Article 226 ought to be exercised exceptionally in granting pre-arrest bail in Uttar Pradesh, and in cautioning that this ought not to be converted into the hitherto omitted Section 438 jurisdiction, the concurring judgment of Sikri, J. states as follows at para 31:

> "*31*. The purposes for which the provisions of anticipatory bail are made are quite obvious. One of the purposes of the arrest is that the accused should be available to the investigating machinery for further investigation and questioning whenever he is required. Another purpose is that the trial should not be jeopardized and for this purpose the restrictions on the movements of the accused are necessary. The genuineness of the alleged need for police custody has to be examined and it must be balanced against the duty of courts to uphold the dignity of every man and to vigilantly guard the right to liberty without jeopardizing the State objective of maintenance of law and order."

In addition, there are two earlier decisions which have a bearing on the exercise of discretion by the police officer as to whether an arrest should be made.

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VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner *(contd.)*

44.2. *Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694: In describing irrational arrests as a violation of human rights, the Court suggested certain other avenues of averting arrest at paras 115-18:

> "*115*. In *Joginder Kumar case* a three-Judge Bench of this Court has referred to the 3rd Report of the National Police Commission, in which it is mentioned that the quality of arrests by the police in India mentioned the power of arrest as one of the chief sources of corruption in the police. The Report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails.
>
> *116*. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.
>
> *117. In case, the State considers the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive*:
>
> (*1*) *Direct the accused to join the investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.*
>
> (*2*) *Seize either the passport or such other related documents, such as, the title deeds of properties or the fixed deposit receipts/ share certificates of the accused.*
>
> (*3*) *Direct the accused to execute bonds.*
>
> (*4*) *The accused may be directed to furnish sureties of a number of persons which according to the prosecution are necessary in view of the facts of the particular case.*
>
> (*5*) *The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided.*
>
> (*6*) *Bank accounts be frozen for small duration during the investigation.*
>
> *118*. In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer."

44.3. *Lalita Kumari* v. *State of U.P.*, (2014) 2 SCC 1: While considering whether registration of FIRs in cognizable cases is compulsory, the

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VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner *(contd.)*

Constitution Bench dealt with the argument that compulsory registration will lead to compulsory arrest in the following manner:

> "*106*. Another stimulating argument raised in support of preliminary inquiry is that mandatory registration of FIRs will lead to arbitrary arrest, which will directly be in contravention of Article 21 of the Constitution.
>
> *107*. While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for 'anticipatory bail' under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the court.
>
> *108*. It is also relevant to note that in *Joginder Kumar* v. *State of U.P.*, this Court has held that arrest cannot be made by the police in a routine manner. Some important observations are reproduced as under:
>
> > "*20*. … No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."
>
> *109*. The registration of FIR under Section 154 of the Code and arrest of an accused person under Section 41 are two entirely different things. It is not correct to say that just because FIR is registered, the accused person can be arrested immediately.[1] It is the imaginary fear that 'merely because FIR has been registered, it would require arrest of the

1 This had earlier been the view of the 7-Judge Allahabad High Court Full Bench in *Amarawati* v. *State of U.P.*, 2005 Cri LJ 755 at paras 18-20 after following the judgment in *Joginder Kumar*. This Full Bench decision was approved and followed by this Hon'ble Court in *Lal Kamlendra Pratap Singh* v. *State of U.P.*, (2009) 4 SCC 437.

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accused and thereby leading to loss of his reputation' and it should not be allowed by this Court to hold that registration of FIR is not mandatory to avoid such inconvenience to some persons. *The remedy lies in strictly enforcing the safeguards available against arbitrary arrests made by the police and not in allowing the police to avoid mandatory registration of FIR when the information discloses commission of a cognizable offence*."

D. Narrowing the scope of Section 41

45. The *cognizability* of an offence and the need to arrest the perpetrator of that offence are essentially two sides of the same coin. The reasons why certain offences are categorised as cognizable is so that the police officer may incapacitate the offender (through arrest) from either continuing to offend (recidivism), causing the disappearance of evidence, the intimidation of witnesses or flight from justice.

46. *Cognizability* has little to do with the quantum of punishment prescribed by the Code. An apposite illustration is available in the form of Chapters XX and XXI of the IPC dealing with offences concerning marriage and cruelty by husband and kin. While Sections 494 to 497 prescribe punishments of between 5 and 10 years, they are all non-cognizable and bailable. However, Section 66-A of the IT Act prescribes only a 3-year punishment, but is cognizable.

47. The discretion of the police officer under Section 41 must therefore be infused with the relevant considerations for cognizability i.e. the likelihood of recidivism, the unlikelihood of securing his presence and to prevent him from tampering with evidence or influence witnesses. It is these factors that continue to be the bulwark of bail jurisprudence, thereby offering integrity to the criminal justice process. However, it is Section 41(1)(*b*)(*ii*)(*b*) alone that offers avenues of abuse with its over broad wording — "for proper investigation of the offence". Unless this sub-clause is interpreted narrowly to be limited to the requirement for custodial interrogation, several of the accused would find themselves incarcerated for collateral purposes, with the onus on the police officer in question merely to parrot the phrase — "arrest required for proper investigation of the case".

48. Such an interpretation would also encourage Section 41 being invoked in very few cases, with the softer option peddled by Section 41-A being given priority.

E. The UK experience

49. Due to concerns about the prosecution of offences under Section 127(1)(*a*) of the Malicious Communication Act, 2003, following *Chambers* v. *DPP*, (2012) 1 WLR 1833 the CPS issued "interim guidelines on prosecuting cases involving communications sent via social media".

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VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner *(contd.)*

IX. The IT Act — Contrast with the real world

Impugned provision	*Real World Illustration*
Section 66-A, IT Act	(*i*) *A* writes a particularly passionate letter to his sweetheart *B* and posts it to her address. Unfortunately, *B*'s father *C* opens the envelope and reads the letter. Unsurprisingly, he is grossly offended by it. *A* is arrested forthwith on a complaint by *C* and upon conviction, sentenced to 3 years in prison. (*ii*) Candidate *D* has been piqued by his rival *E*'s stranglehold over a particular constituency. In order to make inroads at the coming elections, he distributes leaflets falsely claiming that *E*, despite projecting himself as a frugal vegetarian eats chicken on the sly. On *E*'s complaint, *D* is arrested and upon conviction faces 3 years in jail. (*iii*) A company *F* has a stall at the trade fair to which it seeks to attract visitors. It distributes unsolicited letters at houses across New Delhi inviting residents to visit the trade fair, but provides a wrong sender's address. On a resident's complaint, the Managing Director of *F* is arrested and faces 3 years in prison.
Section 69-A, IT Act	(*i*) *J*, an Event Manager for an international concert buys television airtime to advertise the grand show to be held the following weekend. *K*, the Minister for Youth Affairs who has for long despised *J*, gives instructions to Prasar Bharati to block the advertisement on all channels. The show has a poor response and *J* suffers huge losses. (*ii*) *M*, a respected political commentator is to have the book launch of his new work on human rights violations in the Gaza Strip. *N*, the Minister for External Affairs directs the publishers to immediately stop printing and has all copies of the book confiscated claiming that it would affect friendly relations with Israel. *M* goes into depression and commits suicide.

Summary of Arguments

VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner *(contd.)*

X. Select list of blocked links in 2012

[Source: The Centre for Internet and Society, Bangalore]

Domain	*Total number of entries*	*Tuesday, 21-8-2012*	*Monday, 20-8-2012*	*Sunday, 19-8-2012*	*Saturday, 18-8-2012*
ABC.net.au	1				1
AlJazeera.com	4		4		
AllVoices.com	1				1
WN.com	1				1
AtjehCyber.net	1				1
BDCBurma.org	1	1			
Bhaskar.com	1			1	
Blogspot.com	4			3	1
Blogspot.in	7	1	3		3
Catholic.org	1			1	
CentreRight.in	2	2			
ColumnPK.com	1			1	
Defence.pk	4		2	1	1
EthioMuslimsMedia.com	1				1
Facebook.com (HTTP)	75	36	7	18	14
Facebook.com (HTTPS)	27		3	23	1
Farazahmed.com	5	1			4
Firstpost.com	2		1	1	
HaindavaKerelam.com	1			1	
HiddenHarmonies.org	1		1		
HinduJagruti.org	2		1	1	
Hotklix.com	1			1	
HumanRights-Iran.ir	2				2
Intichat.com	1	1			
Irrawady.org	1			1	
IslamabadTimesOnline.com	1				1
Issuu.com	1				1
JafriaNews.com	1				1
JihadWatch.org	2		2		
KavkazCenter	1			1	
MwmJawan.com	1				1
My.Opera.com	1	1			
Njuice.com	1		1		
OnIslam.net	1				1
PakAlertPress.com	1	1			

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Plus.Google.com	4				4
Reddit.com	1		1		
Rina.in	1				1
SandeepWeb.com	1		1		
SEAYouthSaySo.com	1				1
Sheikyermami.com	1				1
StormFront.org	1				1
Telegraph.co.uk	1				1
TheDailyNewsEgypt.com	1				1
TheFaultLines.com	1				1
ThePetitionSite.com	1	1			
TheUnity.org	1				1
TimesofIndia.Indiatimes.com	1		1		
TimesOfUmmah.com	1				1
Tribune.com.pk	1	1			
Twitter.com (HTTP)	1			1	
Twitter.com (HTTPS)	11			1	10
Twitter account	18		16	2	
TwoCircles.net	2			2	
Typepad.com	1		1		
Vidiov.info	1		1		
Wikipedia.org	3			3	
Wordpress.com	8	1	3	2	2
YouTube.com	85	18	39	14	14
YouTu.be	1			1	
Totals	**309**	**65**	**88**	**80**	**75**

The above analysis has been cross-posted/quoted in the following places:

1. *LiveMint* (4-9-2012)
2. *The Hindu* (26-8-2012)
3. *Wall Street Journal* (25-8-2012)
4. *tech 2* (25-8-2012)
5. *China Post* (25-8-2012)
6. *The Hindu* (24-8-2012)
7. *LiveMint* (24-8-2012)
8. *Global Voices* (24-8-2012)
9. *Reuters* (24-8-2012)
10. *Outlook* (23-8-2012)
11. *FirstPost.India* (23-8-2012)

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12. IBN Live (23-8-2012)

13. News Click (23-8-2012)

14. Medianama (23-8-2012)

15. KAFILA (23-8-2012)

16. CIOL (23-8-2012)

XI. The proclaimed aim of the IT Amendment Act, 2008

Objects and Reasons of the IT (Amendment) Act, 2008

50. The Information Technology Act was enacted in the year 2000 with a view to give a fillip to the growth of electronic based transactions, to provide legal recognition for e-commerce and e-transactions, to facilitate e-governance, to prevent computer based crimes and ensure security practices and procedures in the context of widest possible use of information technology worldwide.

51. With proliferation of information technology enabled services such as e-governance, e-commerce and e-transactions; data security, data privacy and implementation of security practices and procedures relating to these applications of electronic communications have assumed greater importance and they required harmonisation with the provisions of the Information Technology Act. Further, protection of Critical Information Infrastructure is pivotal to national security, economy, public health and safety, thus, it had become necessary to declare such infrastructure as protected system, so as to restrict unauthorised access.

52. Further, a rapid increase in the use of computer and internet has given rise to new forms of crimes like, sending offensive emails and multimedia messages, child pornography, cyber terrorism, publishing sexually explicit materials in electronic form, video voyeurism, breach of confidentiality and leakage of data by intermediary, e-commerce frauds like cheating by personation—commonly known as phishing, identity theft, frauds on online auction sites, etc. So, penal provisions were required to be included in the Information Technology Act, 2000. Also, the Act needed to be technology-neutral to provide for alternative technology of electronic signature for bringing harmonisation with Model Law on Electronic Signatures adopted by United Nations Commission on International Trade Law (UNCITRAL).

53. Keeping in view the above, the Government had introduced the Information Technology (Amendment) Bill, 2006 in the Lok Sabha on 15-12-2006. Both Houses of Parliament passed the Bill on 23-12-2008. Subsequently the Information Technology (Amendment) Act, 2008 received the assent of President on 5-2-2009 and was notified in the Gazette of India.

Summary of Arguments

VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner *(contd.)*

XII. Cyber crime units in India

54. The 2011 NASSCOM Cyber Crime Investigation Manual lists out the major cyber crime units in India and their jurisdictions. 22 States and 2 Union Territories are covered by this.

55. A Notification of Karnataka State dated 13-9-2001 suggests that the designation of a particular office of the police is notified under Section 2(*s*) CrPC as the cyber crime police station for offences under the IT Act in the specified areas falling thereunder.

Brief supplementary submissions

Section 66-A

56. Is not traceable to the grounds[2] under Article 19(2), and hence falls foul of *Article 19(1)(a)*. Public order is a State subject[3] and cannot be a justification.

57. Is not reasonable[4] as the threshold is *subjective and undefined*[5]; as it creates a *criminal* offence; as it is based on the *subjective sensitivity* of 1.25 billion people; has *no mens rea* requirement; offers *no safeguards* unlike the 10 exceptions in Section 499 IPC; and carries *no procedural protection* unlike the complaint mechanism in Section 199 CrPC.

58. Is violative of *Article 14* as it *unreasonably classifies*[6] internet users (about 150 million) and their content from the non-internet with no rational nexus to the harm to be caused (presumably defamation and hurting of sentiments). The punishment for internet users is 3 years and cognizable, while for non-internet users is 2 years and non-cognizable. Under the present regime, prosecutions may be initiated under both statutes for the same act, and culminate in separate convictions, thereby infringing *Article 20(2)* as well.

59. Is also in breach of *Article 14* as it is over broad and endows uncanalised powers[7] of determination on the authorised police officer.

60. Is not being abused in its exercise, but when strictly applied by the police has egregious consequences.

Section 69-A

61. Is violative of *Article 19(1)(a)* as it merely reproduces the grounds of Article 19(2) but does not satisfy the reasonableness requirement. Mere recording of reasons in writing does not satisfy the reasonableness threshold[8].

2 *Sakal Papers (P) Ltd.* v. *Union of India*, (1962) 3 SCR 842 and *Bennett Coleman and Co.* v. *Union of India*, (1972) 2 SCC 788

3 Entry 1, List II, Schedule VII

4 *State of Madras* v. *V.G. Row*, 1952 SCR 597

5 *State of M.P.* v. *Baldeo Prasad*, (1961) 1 SCR 970

6 *Ram Krishna Dalmia* v. *S.R. Tendolkar*, 1959 SCR 279; *Subramanian Swamy* v. *CBI*, (2014) 8 SCC 682

7 *State of W.B.* v. *Anwar Ali Sarkar*, 1952 SCR 284 (Per Fazl Ali, Mahajan, Mukherjea, Aiyar & Bose, JJ.); *Air India* v. *Nergesh Meerza*, (1981) 4 SCC 335;

8 *Dwarka Prasad Lakshmi Narain* v. *State of U.P.*, 1954 SCR 803

Summary of Arguments

VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner *(contd.)*

62. Is in breach of *Article 14* as it endows *uncanalised and unguided powers* on the Central Government to be "satisfied" that it is "necessary or expedient" to block a site; does *not offer notice or communication* to the owner of the content; does *not follow the principle of audi alteram partum* and does *not provide an avenue of appeal*.

63. Is also an infringement of *Article 14* as it *unreasonably classifies* internet users by blocking their content while non-internet users suffer no such consequences. In addition, Sections 95 and 96 CrPC lay down strict and limited circumstances in which content may be forfeited, and with a detailed procedure of applying to the Special Bench of the High Court for redress.

Section 80

64. Is a clear infringement of *Articles 14 and 21* as it provides for no safeguards from the exercise of arrest power unlike Sections 41 and 41-A CrPC. Once again it provides for unreasonable classification.

65. Is a throwback to the past, rolling back several decades of progress in arrest jurisprudence. Contrary to observations on safeguards in *Lalita Kumari* v. *State of U.P.*, (2014) 2 SCC 1 at paras 106-109.

66. Is inconsistent with the Guidelines laid down in *Joginder Kumar* v. *State of U.P.*, (1994) 4 SCC 260.

67. Due to concerns about the prosecution of offences under Section 127(1)(*a*) of the Malicious Communication Act, 2003, following *Chambers* v. *DPP*, (2012) 1 WLR 1833 the CPS issued "interim guidelines on prosecuting cases involving communications sent via social media".

Section 118(d), Kerala Police Act

68. Is void under Article 254 as it is a provision pursuant to Entry 1, List III of Schedule VII, which is repugnant to Section 66-A of the IT Act. Section 66-A came into effect on 27-10-2009 via Amendment Act 10 of 2009. The Kerala Police Act came into effect on 27-4-2011 and has not been granted Presidential assent.[9]

69. Is without prejudice void, as the Kerala State Legislature lacked the legislative competence to enact the law because violations (*offences*) through the medium (*means of communication*) are covered by Entries 31 and 93 of List I.

70. Without prejudice, the section must either be read down or the offending portions severed.[10]

9 *Deep Chand* v. *State of U.P.*, 1959 Supp (2) SCR 8

10 *State of Karnataka* v. *Ranganatha Reddy*, (1977) 4 SCC 471 at para 36

Summary of Arguments *(contd.)*

VII. Mr Tushar Mehta, Additional Solicitor General, for the Union of India

I. On Freedom of Speech and Expression as contemplated under Article 19(1)(a) read with Article 19(2) in the context of Information Technology Act

1. The first judgments in the point of time were judgments in *Romesh Thappar* v. *State of Madras*, (1950 SCR 595)[1] (Constitution Bench judgment) and *Brij Bhushan* v. *State of Delhi*, (1950 SCR 605)[2] (Constitution Bench judgment). These judgments were in the context of Article 19(2) as it stood before the Constitution (First Amendment) Act, 1951.

2. On 18-6-1951, the Constitution (First Amendment) Act, 1951 was brought in, amending Article 19(2) of the Constitution of India. Both the above judgments of the Constitution Bench and amendment in Article 19(2) was first considered by the High Court of Patna in the judgment in *AIR 1954 Pat 254*,[3] more particularly in the context of the term "in the interest of" used in the amended Article 19(2).

3. In the said judgment, the Patna High Court (through Das, C.J. who thereafter delivered the judgment presiding over a Constitution Bench of this Hon'ble Court) considered the judgment of this Hon'ble Court in *State of Madras* v. *V.G. Row* (AIR 1952 SC 196) and quoted from the said judgment as under:

> "*It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.* In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."[4] (emphasis supplied)

1 Pp. 1-12, *Compilation of Judgments*, Vol. VI
2 Pp. 13-28, *Compilation of Judgments*, Vol. VI
3 Pp. 50-65, *Compilation of Judgments*, Vol. VI
4 P. 60, *Compilation of Judgments*, Vol. VI

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VII. Mr Tushar Mehta, Additional Solicitor General, for the Union of India *(contd.)*

4. All the above-referred judgments came to be considered by this Hon'ble Court in *Ramji Lal Modi* v. *State of U.P.*, (1957 SCR 860)[5] (Constitution Bench judgment). The following important facets emerged from the said judgment:

(*i*) This judgment pertained to a magazine as a medium;

(*ii*) This Hon'ble Court held that that term "in the interest of" would apply to each phrase used in Article 19(2);

(*iii*) This Hon'ble Court rejected the argument that so long as the possibility of the law being applied for the purposes not sanctioned by the Constitution, cannot be ruled out, the entire law should be held to be unconstitutional;

(*iv*) This Hon'ble Court held that Section 295-A to be constitutional since it is made "*in the interest of*" public order.

5. In the judgment in *Virendra* v. *State of Punjab*, (1957 SCR 308)[6] (Constitution Bench judgment), this Hon'ble Court considered the previous judgments, in the context of print media vis-à-vis Article 19(1)(*a*). Important facets of the said judgment are as under:

(*i*) In this case the contention under Article 19(1)(*a*) arose in case of newspaper which was banned in one State.

(*ii*) This Hon'ble Court reiterated that the term "*in the interest of*" are words of great amplitude and are much wider than the words "*for the maintenance of*" used in Article 19(2) prior to the first amendment.

(*iii*) This Hon'ble Court, inter alia, has observed as under:

> "It cannot be overlooked that the Press is a mighty institution wielding enormous powers which are expected to be exercised for the protection and the good of the people but which, may conceivably be abused and exercised for anti-social purposes by exciting the passions and prejudices of a section of the people against another section and thereby disturbing the public order and tranquillity or in support of a policy which may be of a subversive character. *The powerful influence of the newspapers, for good or evil, on the minds of the readers, the wide sweep of their reach, the modern facilities for their swift circulation to territories, distant and near, must all enter into the judicial verdict and the reasonableness of the restrictions imposed upon the Press has to be tested against this background.* It is certainly a serious encroachment on the valuable and cherished right to freedom of speech and expression if a newspaper is prevented from publishing its own views or the views of its correspondents relating to or concerning what may be the burning topic of the day. *Our social interest ordinarily demands the*

5 Pp. 66-74, *Compilation of Judgments*, Vol. VI

6 Pp. 75-95, *Compilation of Judgments*, Vol. VI

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free propagation and interchange of views but circumstances may arise when the social interest in public order may require a reasonable subordination of the social interest in free speech and expression to the needs of our social interest in public order. Our Constitution recognises this necessity and has attempted to strike a balance between the two social interests. It permits the imposition of reasonable restrictions on the freedom of speech and expression in the interest of public order and on the freedom of carrying on trade or business in the interest of the general public."[7]

(*iv*) This Court again considered the width and amplitude of Article 19(2) in the judgment in *Supt., Central Prison* v. *Ram Manohar Lohia*, (AIR 1960 SC 633)[8]. In the said judgment, the Hon'ble Court considered its earlier views from *Romesh Thappar* judgment down the line. The salient features of this judgment are as under:

(*a*) This Hon'ble Court again considered the amplitude "in the interest of". This was a case in which an oral speech, per se, was the medium.

(*b*) This Hon'ble Court construed all phrases used in Article 19(2) and held that all the grounds mentioned therein can be brought under the general head "public order" in its most comprehensive sense though ordinarily they are intended to exclude each other. Relevant parts of the judgments are as under:

"*11. But in India under Article 19(2) this wide concept of 'public order' is split up under different heads*. It enables the imposition of reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. *All the grounds mentioned therein can be brought under the general head 'public order' in its most comprehensive sense*. But the juxtaposition of the different grounds indicates that, though sometimes they tend to overlap, they must be ordinarily intended to exclude each other. 'Public order' is therefore something which is demarcated from the others. In that limited sense, particularly in view of the history of the amendment, it can be postulated that 'public order' is synonymous with public peace, safety and tranquillity.[9]

* * *

18. The foregoing discussion yields the following results: (1) 'Public order' is synonymous with public safety and tranquillity:

7 Pp. 85-86, *Compilation of Judgments*, Vol. VI
8 Pp. 96-105, *Compilation of Judgments*, Vol. VI
9 P. 102, *Compilation of Judgments*, Vol. VI

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VII. Mr Tushar Mehta, Additional Solicitor General, for the Union of India *(contd.)*

it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State; (2) there must be proximate and reasonable nexus between the speech and the public order; (3) Section 3, as it now stands, does not establish in most of the cases comprehended by it, any such nexus; (4) there is a conflict of decision on the question of severability in the context of an offending provision the language whereof is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislation; one view is that it cannot be split up if there is possibility of its being applied for purposes not sanctioned by the Constitution and the other view is that such a provision is valid if it is severable in its application to an object which is clearly demarcated from other object or objects falling outside the limits of constitutionally permissible legislation; and (5) the provisions of the section are so inextricably mixed up that it is not possible to apply the doctrine of severability so as to enable us to affirm the validity of a part of it and reject the rest."[10]

6. The next judgment is *Hamdard Dawakhana [Wakf], Lalkuan* v. *Union of India* [(1960) 2 SCR 671][11] which pertained to commercial advertisements and this Hon'ble Court held that the same would not fall under Article 19(1)(*a*) of the Constitution. This was a case of what is known in US jurisprudence as "commercial speech".

7. The next judgment is *Sakal Papers (P) Ltd.* v. *Union of India*, [(1962) 3 SCR 842][12] which pertained to regulating the prices of newspapers in relation to their pages and size and also to regulate the allocation of space for advertising matters. This Hon'ble Court held that the said restriction offends freedom of speech and expression. This was also a case where this Hon'ble Court was dealing with Article 19(1)(*a*) vis-à-vis print media, namely, a newspaper.

8. The next case in which this Hon'ble Court considered the scope of Articles 19(1)(*a*) and 19(2) was by the Constitution Bench in *K.A. Abbas* v. *Union of India*, [(1970) 2 SCC 780][13]. In this case, this Hon'ble Court was considering the question of validity of pre-censorship essentially apart from the question of obscenity as well as vagueness as a ground to declare the provision invalid. The medium, in this case, was films.

10 P. 104, *Compilation of Judgments*, Vol. VI

11 P. 188 of *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

12 P. 189 of *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal,* (1995) 2 SCC 161 (separately tendered)

13 Pp. 103-126, *Compilation of Judgments*, Vol. II

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9. In *Bennett Coleman & Co.* v. *Union of India*, [(1972) 2 SCC 788][14] (Constitution Bench judgment), this Hon'ble Court again considered Article 19(1)(*a*) in the context of *print media* and the majority opinion took the view that compulsory reduction of any newspaper to 10 pages offends Article 19(1)(*a*).

10. The next case came up for consideration before this Hon'ble Court in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, [(1985) 1 SCC 641]. This case again related to *print media*, namely, newspaper. This Hon'ble Court explained the freedom of speech and expression in the following terms :

> "The freedom of expression has four broad social purposes to serve: (*i*) it helps an individual to attain self-fulfilment, (*ii*) it assists in the discovery of truth, (*iii*) it strengthens the capacity of an individual in participating in decision-making, and (*iv*) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change."

11. On the question of reasonable restrictions, this Hon'ble Court held as under:

> "In deciding the reasonableness of restrictions imposed on any fundamental right the court should take into consideration the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the disproportion of the imposition and the prevailing conditions including the social values whose needs are sought to be satisfied by means of the restrictions."[15]

12. The next decision is *S. Rangarajan* v. *P. Jagjivan Ram*, [(1989) 2 SCC 574][16]. In this judgment, this Hon'ble Court held that the term "freedom of speech" under Article 19(1)(*a*) means the right to express one's opinion by words of mouth, writing, printing, picture or in any other manner and *through any medium — newspaper, magazine or movie*. The salient features of the said judgment are as under:

> (*i*) The medium of speech and expression in this case was a film/ movie.
>
> (*ii*) This Hon'ble Court held that there should be a compromise between the interest of freedom of expression and social interests.
>
> (*iii*) This Hon'ble Court held that the Court's commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the

14 P. 191 of *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

15 P. 192 (placita *b* to *f*) of *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, [(1995) 2 SCC 161] (separately tendered)

16 Pp. 185-210, *Compilation of Judgments*, Vol. VI

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community interest is endangered. It also held that anticipated danger should not be remote, conjectural or far-fetched.

(*iv*) This Hon'ble Court held that it should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. It should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg".

13. While taking a decision based upon a different medium with reference to freedom of speech and expression through medium of movies this Court held, inter alia, as under:

"Movie motivates thought and action and assures a high degree of attention and retention. In view of the scientific improvements in photography and production, the present movie is a powerful means of communication. It has a unique capacity to disturb and arouse feelings. It has much potential for evil as it has for good. With these qualities and since it caters for mass audience who are generally not selective about what they watch, a movie cannot be equated with other modes of communication. It cannot be allowed to function in a free marketplace just as does the newspaper or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary."[17]

14. While considering the standards to be applied by the Film Censor Board, this Hon'ble Court laid down the test as under:

"The standard to be applied by the Board or courts for judging the film should be that of an ordinary man of common sense and prudence and not that of an out-of-the-ordinary or hypersensitive man. The Board should exercise considerable circumspection on movies affecting the morality or decency of our people and cultural heritage of the country. The moral values in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation. The path of right conduct shown by the great sages and thinkers of India and the concept of 'Dharma' (righteousness in every respect) which are the bedrock of our civilisation should not be allowed to be shaken by unethical standards."[18]

15. This Hon'ble Court also analysed a possibility of infringements of Article 19(1)(*a*) on an anticipation of threat of demonstration, processions or violence and held as under:

"Whether this view is right or wrong is another matter altogether and at any rate, the court is not concerned with its correctness or usefulness to the people. The court is only concerned whether such a view could be

17 P. 194 (placitum *d*) of *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

18 P. 194 (placitum *f*) of *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

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advocated in a film. To say that one should not be permitted to advocate that view goes against the first principle of our democracy. If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. *The State cannot plead its inability to handle the hostile audience problem. Freedom of expression which is legitimate and constitutionally protected cannot be held to ransom by an intolerant group of people. The fundamental freedom under Article 19(1)(a) can be reasonably restricted only for the purposes mentioned in Article 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency.* Open criticism of government policies and operations is not a ground for restricting expression."[19]

16. Next judgment was *Printers (Mysore) Ltd.* v. *CTO*, [(1994) 2 SCC 434] wherein this Hon'ble Court quoted the opinion of Douglas, J. in *Terminiello* v. *Chicago*, [337 US 1 (1949)] that "*acceptance by Government of a dissident press is a measure of the maturity of the nation*"[20].

17. The next judgment is *LIC* v. *Manubhai D. Shah*, [(1992) 3 SCC 637]. While upholding the freedom of speech and expression and analysed Article 19(1)(*a*) in the context of Article 19(2) in the following words:

"The words 'freedom of speech and expression' must be broadly construed to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one's views through the print media i.e. periodicals, magazines or journals or through any other communication channel e.g. the radio and the television. The right extends to the citizen being permitted to use the media to answer the criticism levelled against the view propagated by him. The print media, the radio and the tiny screen play the role of public educators, so vital to the growth of a healthy democracy. These communication channels are great purveyors of news and views and make considerable impact on the minds of the readers and viewers and are known to mould public opinion on vital issues of national importance. Modern communication mediums advance public interest by informing the public of the events and developments that have taken place and thereby educating the voters, a role considered significant for the vibrant functioning of a democracy. Therefore, in any set-up, more so in a democratic set-up like ours,

19 P. 195 (placita *f* to *h*) of *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

20 P. 196 para 19 of *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

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dissemination of news and views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Article 19(2). This freedom must, however, be exercised with circumspection and care must be taken not to trench on the rights of other citizens or to jeopardise public interest."[21]

18. This Hon'ble Court also further strengthened the concept of freedom of speech and expression in the following terms:

"A constitutional provision is never static, it is ever-evolving and ever-changing and, therefore, does not admit of a narrow, pedantic or syllogistic approach. The Constitution-makers employed a broad phraseology while drafting the fundamental rights so that they may be able to cater to the needs of a changing society. Therefore, constitutional provisions must receive a broad interpretation and the scope and ambit of such provisions, in particular the fundamental rights, should not be cut down by too astute or too restricted an approach, unless the context otherwise requires."

19. At this juncture, it is necessary to quote the observations of the US Supreme Court in *Pacifica case*, [438 US 726 (1978)][22]. In the said judgment, the US Supreme Court was dealing with *broadcasting through television*. The US Supreme Court in the year 1978 construed, television, as a medium and held that television is a uniquely pervasive presence in the lives of most people. More time is spent watching television than reading. The presence of sound and picture in any home makes it an exceptional potent medium. It may also be harder to stop children having access to "adult material" on television than to pornographic magazines.

20. Having considered the freedom of speech and expression in the context of print media, namely, newspapers/magazines and cinema and television, this Hon'ble Court was confronted with another dimension of the medium raised by the broadcasters claiming "right to broadcast" to be a fundamental right under Article 19(1)(*a*) of the Constitution.

21. In *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161, the law on the freedom of speech and expression was summarised as under:

"*43*. We may now summarise the law on the freedom of speech and expression under Article 19(1)(*a*) as restricted by Article 19(2). The freedom of speech and expression includes the right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find the truest model of

21 Pp. 197-198 of *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

22 P. 210 (placitum *f*) of *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

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anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. *The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech, etc.* That is why freedom of speech and expression includes freedom of the Press. The freedom of the Press in terms includes the right to circulate and also to determine the volume of such circulation. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach."[23]

22. This Hon'ble Court also considered electronic media as a medium of free speech and expression in the following terms:

"*46.* What distinguishes the electronic media like the television from the print media or other media is that it has both audio and visual appeal and has a more pervasive presence. It has a greater impact on the minds of the viewers and is also more readily accessible to all including children at home. Unlike the print media, however, there is a built-in limitation on the use of electronic media because the airwaves are a public property and hence are owned or controlled by the Government or a central national authority or they are not available on account of the scarcity, costs and competition."[24]

23. This judgment is also useful to contend that intermediaries cannot assert any right based upon Article 19(1)(*a*) (See paras 53-82).

24. In the aforesaid judgment, this Hon'ble Court, inter alia, held as under:

"*122.* We, therefore, hold as follows:

(i) The airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an inbuilt restriction on its use as in the case of any other public property.

(ii) The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of

23 P. 213 of *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

24 P. 213 of *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal* (1995) 2 SCC 161 (separately tendered)

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the public property, viz., the airwaves, involved in the exercise of the right and can .be controlled and regulated by the public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Article 19(2) of the Constitution."

25. It is important to note that for the first time this Hon'ble Court introduced the concept of airwaves or frequency being a "public property" and recognized the right/power of public authorities to control and regulate the same in the interest of public and also to prevent invasion of rights of the public.

26. In the aforesaid decision, B.P. Jeevan Reddy, J. gave a separate but concurring judgment and, inter alia, held as under:

"*150.* There may be no difficulty in agreeing that a game of cricket like any other sports event provides entertainment — and entertainment is a facet, a part, of free speech[25], *subject to the caveat that where speech and conduct are joined in a single course of action, the free speech values must be balanced against competing societal interests.*"

27. In the said concurring judgment, this Hon'ble Court analysed the concept of "broadcasting freedom" in the following four facets:

(*i*) Freedom of the broadcasters;

(*ii*) Freedom of the listeners/viewers to a variety of view and plurality of opinion;

(*iii*) Rights of the citizens and group of citizens to have access to the broadcasting media; and

(*iv*) Right to establish private radio/TV stations.

28. This Hon'ble Court recognised and accepted reasonable interference in such rights in the interest of the audience by way of safeguards by imposition of programme standards:

"*176.* Broadcasting freedom involves and includes the right of the viewers and listeners who retain their interest in free speech. It is on this basis that the European courts have taken the view that restraints on freedom of broadcasters are justifiable on the very ground of free speech. It has been held that freedom of expression includes the right to receive information and ideas as well as freedom to impart them:

'The free speech interests of viewers and listeners in exposure to a wide variety of material can best be safeguarded by the imposition of programme standards, limiting the freedom of radio and television companies. What is important according to this perspective is that the broadcasting institutions are free to discharge their responsibilities of providing the public with a balanced range of programmes and a variety of views. These free speech goals require positive legislative

25 *Joseph Burstyn* v. *Wilson*, 96 L Ed 1098 : 343 US 495 (1952)

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provision to prevent the domination of the broadcasting authorities by the Government or by private corporations and advertisers, and perhaps for securing impartiality….'

* * *

178. The third facet of broadcasting freedom is the freedom of individuals and groups of individuals to have access to broadcasting media to express their views. The first argument in support of this theory is that public is entitled to hear range of opinions held by different groups so that it can make sensible choices on political and social issues. *In particular, these views should be exposed on television, the most important contemporary medium. It is indeed the interest of audience that justified the imposition of impartiality rules and positive programme standards upon the broadcasters*. The theoretical foundation for the claim for access to broadcasting is that freedom of speech means the freedom to communicate effectively to a mass audience which means through mass media. This is also the view taken by our Court as pointed out supra."

29. His Lordship also accepted that airwaves are public property in the following terms:

"*185*. It is true that with the advances in technology, the argument of few or limited number of frequencies has become weak. Now, it is claimed that an unlimited number of frequencies are available. We shall assume that it is so. Yet the fact remains that airwaves are public property, and that they are to be utilised to the greatest public good; that they cannot be allowed to be monopolised or hijacked by a few privileged persons or groups; that granting licence to everyone who asks for it would reduce the right to nothing and that such a licensing system would end up in creation of oligopolies as the experience in Italy has shown—where the limited experiment of permitting private broadcasting at the local level though not at the national level, has resulted in creation of giant media empires and media magnates, a development not conducive to free speech right of the citizens."

30. On the question of nature of grounds specified in Article 19(2), His Lordship observed as under:

"*187*. A look at the grounds in clause (2) of Article 19, in the interests of which a law can be made placing reasonable restrictions upon the freedom of speech and expression goes to show that they are all conceived in the national interest as well as in the interest of society. The first set of grounds viz. the sovereignty and integrity of India, the security of the State, friendly relations with foreign States and public order are grounds referable to national interest whereas the second set of grounds viz. decency, morality, contempt of court, defamation and incitement to offence are conceived in the interest of society. The interconnection and

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the interdependence of freedom of speech and the stability of society is undeniable. They indeed contribute to and promote each other. Freedom of speech and expression in a democracy ensures that the change desired by the people, whether in political, economic or social sphere, is brought about peacefully and through law. That change desired by the people can be brought about in an orderly, legal and peaceful manner is by itself an assurance of stability and an insurance against violent upheavals which are the hallmark of societies ruled by dictatorships, which do not permit this freedom. The stability of, say, the British nation and the periodic convulsions witnessed in the dictatorships around the world is ample proof of this truism. The converse is equally true. The more stable the society is, the more scope it provides for exercise of right of free speech and expression. A society which feels secure can and does permit a greater latitude than a society whose stability is in constant peril. As observed by *Lord Sumner in Bowman* v. *Secular Society Ltd.*[26]:

> "The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day, meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before.... After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact. I desire to say nothing that would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right may be, but only to say that, experience having proved dangers once thought real to be now negligible, and dangers once very possibly imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion ... which prevents us from varying their application to the particular circumstances of our time in accordance with that experience."

188. It is for this reason that our Founding Fathers while guaranteeing the freedom of speech and expression provided simultaneously that the said right cannot be so exercised as to endanger the interest of the nation or the interest of the society, as the case may be. This is not merely in the interest of nation and society but equally in the interest of the freedom of speech and expression itself, the reason being the mutual relevance and interdependence aforesaid."

31. His Lordship also analysed the importance and significance of television in the modern world (as in 1995) in the following terms:

> "*192.* The importance and significance of television in the modern world needs no emphasis. Most people obtain the bulk of their

26 1917 AC 406 : (1916-17) All ER Rep 1 (HL)

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information on matters of contemporary interest from the broadcasting medium. The television is unique in the way in which it intrudes into our homes. The combination of picture and voice makes it an irresistibly attractive medium of presentation. Call it the idiot box or by any other pejorative name, it has a tremendous appeal and influence over millions of people. Many of them are glued to it for hours on end each day. Television is shaping the food habits, cultural values, social mores and what not of the society in a manner no other medium has done so far. Younger generation is particularly addicted to it. It is a powerful instrument, which can be used for greater good as also for doing immense harm to the society. It depends upon how it is used. With the advance of technology, the number of channels available has grown enormously. National borders have become meaningless. The reach of some of the major networks is international; they are not confined to one country or one region. It is no longer possible for any government to control or manipulate the news, views and information available to its people. In a manner of speaking, the technological revolution is forcing internationalism upon the world. No nation can remain a fortress or an island in itself any longer. Without a doubt, this technological revolution is presenting new issues, complex in nature — in the words of Burger, C.J. "complex problems with many hard questions and few easy answers". Broadcasting media by its very nature is different from press. Airwaves are public property. The fact that a large number of frequencies/channels are available does not make them anytheless public property. It is the obligation of the State under our constitutional system to ensure that they are used for public good."

32. His Lordship also considered the questions of permitting the private broadcasting and held as under:

"Allowing private broadcasting would be to open the door for powerful economic, commercial and political interests, which may not prove beneficial to free speech right of the citizens—and certainly so, if strict programme controls and other controls are not prescribed. The analogy with press is wholly inapt. Above all, airwaves constitute public property. While, the freedom guaranteed by Article 19(1)(*a*) does include the right to receive and impart information, no one can claim the fundamental right to do so by using or employing public property. Only where the statute permits him to use the public property, then only—and subject to such conditions and restrictions as the law may impose—he can use the public property viz. airwaves. In other words, Article 19(1)(*a*) does not enable a citizen to impart his information, views and opinions by using the airwaves. He can do so without using the airwaves. It need not be emphasised that while broadcasting cannot be effected without using airwaves, receiving the broadcast does not involve any such use. Airwaves, being public property must be utilised to advance public good.

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Public good lies in ensuring plurality of opinions, views and ideas and that would scarcely be served by private broadcasters, who would be and who are bound to be actuated by profit motive. There is a far greater likelihood of these private broadcasters indulging in misinformation, disinformation and manipulation of news and views than the government-controlled media, which is at least subject to public and parliamentary scrutiny. The experience in Italy, where the Constitutional Court allowed private broadcasting at the local level while denying it at the national level should serve as a lesson; this limited opening has given rise to giant media oligopolies as mentioned supra. Even with the best of programme controls it may prove counterproductive at the present juncture of our development; the implementation machinery in our country leaves much to be desired which is shown by the ineffectiveness of the several enactments made with the best of the intentions and with most laudable provisions; this is a reality which cannot be ignored. It is true that even if private broadcasting is not allowed from Indian soil, such stations may spring up on the periphery of or outside our territory, catering exclusively to the Indian public. Indeed, some like stations have already come into existence. The space, it is said, is saturated with communication satellites and that they are providing and are able to provide any number of channels and frequencies. *More technological developments must be in the offing. But that cannot be a ground for enlarging the scope of Article 19(1)(a). It may be a factor in favour of allowing private broadcasting—or it may not be.* It may also be that Parliament decides to increase the number of channels under Doordarshan, diversifying them into various fields, commercial, educational, sports and so on. Or Parliament may decide to permit private broadcasting, but if it does so permit, it should not only keep in mind the experience of the countries where such a course has been permitted but also the conditions in this country and the compulsions of technological developments and the realities of situations resulting from technological developments. We have no doubt in our mind that it will so bear in mind the above factors and all other relevant circumstances. *We make it clear, we are not concerned with matters of policy but with the content of Article 19(1)(a) and we say that while public broadcasting is implicit in it, private broadcasting is not.* Matters of policy are for Parliament to consider and not for courts. On account of historical factors, radio and television have remained in the hands of the State exclusively. Both the networks have been built up over the years with public funds. They represent the wealth and property of the nation. It may even be said that they represent the material resources of the community within the meaning of Article 39(*b*). They may also be said to be 'facilities' within the meaning of Article 38. They must be employed consistent with the above articles and consistent with the constitutional policy as adumbrated

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in the Preamble to the Constitution and Parts III and IV. We must reiterate that the press whose freedom is implicit in Article 19(1)(*a*) stands on a different footing. The petitioners—or the potential applicants for private broadcasting licences—cannot invoke the analogy of the press. *To repeat, airwaves are public property and better remain in public hands in the interest of the very freedom of speech and expression of the citizens of this country*."[27]

33. In case of internet, apart from large-scale technological advancement during the period between television and internet, the question of use of airwaves/spectrum, which is a public property, is involved whenever an internet user uses internet through a medium of cell phones, I-pads and in case where V-Sat connection is used. It may be mentioned that "ATM machines" is a "computer network" as defined under Section 2(*j*) of the Act. The entire network of ATMs is connected through V-Sat network using airwaves. Whenever, wifi connections are available, the net connectivity is provided through airwaves only.

34. In view of the above discussion and the analysis of Section 66-A, the submissions are as under:

34.1. The internet as a medium of free speech and expression is totally different from print media, television and cinemas and, therefore, the threshold of permissive regulation under Article 19(2) shall have to be different.

34.2. The caution citied by this Hon'ble Court in *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal* in allowing *private broadcasting* has now become a reality as each person using internet has now become a "private broadcaster" and does not need any regulated airwaves or a broadcasting licence from any statutory authority after qualifying for the same based upon eligibility criteria. Neither, he nor she is required to follow any regulatory regime of conduct or under any obligation to follow any rules of ethical conduct which are applicable on other modes like press and cinematograph. Further, considering the fact that one person (while maintaining his own anonymity) can spread whatever he uploads in the borderless virtual world which can be accessed by trillions of people in a nano second and throughout the globe, regulations are needed in the interest of sovereignty and integrity of India, in the interest of security of State, in the interest of friendly relations with foreign States, in the interest of public order, in the interest of decency or morality or in relation to defamation or incitement to an offence.

34.3. The relevant threshold of reasonableness of restriction would differ from other mediums to the medium of internet on the following grounds:

(*i*) The reach of print media is restricted to one State or at the most one country while internet has no boundaries and its reach is global;

27 P. 293 of *Ministry of I&B, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

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(*ii*) the recipient of the free speech and expression used in a print media can only be literate persons while internet can be accessed by literate and illiterate both since one click is needed to download an objectionable post or a video;

(*iii*) In case of television serials (except live shows) and movies, there is a permitted pre-censorship which ensures right of viewers not to receive any information which is dangerous to or not in conformity with the social interest. While in the case of internet, no such pre-censorship is possible and each individual is publisher, printer, producer, director and broadcaster of the content without any statutory regulation;

(*iv*) In case of print media or medium of television and films whatever is truly recorded can only be published or broadcasted/ televised/viewed. While in case of an internet, morphing of images, change of voices and many other technologically advanced methods to create serious potential social disorder can be applied.

(*v*) By the medium of internet, rumours having a serious potential of creating a serious social disorder can be spread to trillions of people without any check which is not possible in case of other mediums.

(*vi*) In case of mediums like print media, television and films, it is broadly not possible to invade privacy of unwilling persons. While in case of an internet, it is very easy to invade upon the privacy of any individual and thereby violating his right under Article 21 of the Constitution of India.

(*vii*) By its very nature, in the mediums like newspaper, magazine, television or a movie, it is not possible to sexually harass someone, outrage the modesty of anyone, use unacceptable filthy language and evoke communal frenzy which would lead to serious social disorder. While in the case of an internet, it is easily possible to do so by a mere click of a button without any geographical limitations and almost in all cases while ensuring anonymity of the offender.

(*viii*) By the very nature of the medium, the width and reach of internet is manifold as against newspaper and films. The said mediums have inbuilt limitations i.e. a person will have to buy/borrow a newspaper and/or will have to go to a theatre to watch a movie. For television also one needs at least a room where a television is placed and can only watch those channels which he has subscribed to and that too only at a time when it is being telecast. While in case of internet a person abusing the internet, can commit an offence at any place at the time of his choice and maintaining his anonymity in almost all cases.

(*ix*) In case of other mediums, it is impossible to maintain anonymity as a result of which speech/idea/opinions/films having serious potential of creating a social disorder never gets generated since its origin is bound

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to be known. While in case of an internet mostly its abuse takes place under the garb of anonymity which can be unveiled only after thorough investigation.

(*x*) In case of other mediums like newspapers, television or films, the approach is always institutionalised approach governed by industry specific ethical norms of self conduct. Each newspaper/magazine/movie production house/TV channel will have its own institutionalised policies in-house which would generally obviate any possibility of the medium being abused. As against that use of internet is solely based upon individualistic approach of each individual without any check, balance or regulatory ethical norms for exercising freedom of speech and expression under Article 19(1)(*a*).

(*xi*) In the era limited to print media and cinematograph; or even in case of publication through airwaves, the chances of abuse of freedom of expression was less due to inherent infrastructural and logistical constraints. In the case of said mediums, it was almost impossible for an individual to create and publish an abusive content and make it available to trillions of people. Whereas, in the present internet age the said infrastructural and logistical constraints have disappeared as any individual using even a smart mobile phone or a portable computer device can create and publish abusive material on its own, without seeking help of anyone else and make it available to trillions of people by just one click.

35. From the above, it is clear that any statute concerning freedom of speech and expression and the reasonableness of the restrictions imposed under it will have to be considered based upon the medium which is being used for exercising the said freedom. From the above evolution of law on the said point, it becomes clear that more the reach of the medium, more restrictions are found to be not only constitutionally permitted but to have been mandated to protect the freedom of speech and expression itself. In the present context, there can be no faster medium having global reach than the internet, posing a serious threat of serious public order problems or social disintegration in a nano second by a mere click of a button. The freedom of speech and expression can never encompass within its sweep the freedom to convey "information" which are either "grossly offensive" or of "menacing character" as contemplated under Section 66-A(*a*) of the Act or any "information" sent for the purpose of causing "danger", "obstruction", "insult", "injury", "criminal intimidation", "enmity", "hatred" or "ill will" as contemplated under Section 66(*b*) of the Act.

36. The threshold of reasonable restrictions differs based upon the medium. Apart from the above-referred Indian judgments which incidentally deal with the question of medium vis-à-vis reasonableness of restriction on fundamental rights, the following judgments of the US Supreme Court deals

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with the question specifically in the context of the First and Fourteenth Amendments. In *Metromedia, Inc.* v. *City of San Diego*, [453 US 490 (1981)] the US Supreme Court held as under:

> "The uniqueness of each medium of expression has been a frequent refrain: see e.g. *South-eastern Promotions, Ltd.* v. *Conrad*, 420 US 546, 420 US 557 (1975) ('Each medium of expression … must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.'); *FCC* v. *Pacifica Foundation*, 438 US 726, 438 US 748 (1978) ('We have long recognized that each medium of expression presents special First Amendment problems.'); *Joseph Burstyn, Inc.* v. *Wilson*, 343 US 495, 343 US 503 (1952) ('Each method tends to present its own peculiar problems.')"

A similar view was taken as far as in the year 1949 by the US Supreme Court in *Kovacs* v. *Cooper*, [336 US 77 (1949)].

37. As already submitted the terms "annoyance" and "inconvenience" as used in Section 66-A(*b*) refer to "annoyance" and "inconvenience" as understood in the parlance of internet usage and accepted internet jargon. Causing "annoyance" and/or "inconvenience" as understood linguistically by sending "information", while exercising freedom of speech and expression is not a punishable offence under Section 66-A(*b*) of the Act. It becomes a penal act only when any "information" is sent which causes "annoyance" and/or "inconvenience" by any other mode other than exercising freedom of speech and expression.

38. So far as Section 66-A(*c*) is concerned, it is elaborately dealt with in the submissions earlier tendered and, therefore, not reiterated here.

Conclusion

39. While deciding the constitutional validity of Section 66-A, this Hon'ble Court may give an appropriate threshold of reasonableness based upon:

(*a*) The nature of the right alleged to have been infringed;

(*b*) The underlying purpose of the restrictions imposed;

(*c*) The extent and urgency of the evil sought to be remedied;

(*d*) The prevailing conditions at the time when the section came to be introduced.

(*e*) Right of the recipient and others who may be affected by use of internet under Article 21 of the Constitution of India.

II. On the question of vagueness to be a ground for declaring a provision unconstitutional

40. It is a settled law that no provision in a statute may be declared unconstitutional on an allegation that same is vague if there are no other grounds like legislative competence, arbitrariness, etc.

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41. In the context of new emerging areas of technology and in the context of Article 10(1) and Article 10(2) of the European Convention of Human Rights [which is akin to Articles 19(1)(*a*) and 19(2) of the Indian Constitution) the European Court of Human Rights in *Lindon, Otchakovsky-Laurens and July* v. *France [GC]*, nos. 21279/02 and 36448/02, Section 41, ECHR 2007-IV[28], held that whilst certainty in a statute is desirable, however it may bring with its excessive rigidity, and on the other hand the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice. The relevant text of the said judgment reads as under:

> "*41*. The Court reiterates that a norm cannot be regarded as a 'law' within the meaning of Articles 10 and 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able — if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice.
>
> The Court further reiterates that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover, and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails."

42. Furthermore in England there is a concept of certain words as "*Elephant words*" i.e. there are certain things which you know only when you see it but you cannot describe it in words. In *Aerotel Ltd.* v. *Telco Holdings Ltd.*, (2007) 1 All ER 225,[29] the Court observed as under:

> "*24*. It is clear that a whole range of approaches have been adopted over the years both by EPO and national courts. Often they lead or would lead to the same result, but the reasoning varies. One is tempted to say

28 Judgment in the compilation with heading "Additional Judgments Referred in Note on the Question of Vagueness to be a Ground for Declaring a Provision Unconstitutional".

29 Judgment in the compilation with heading "Additional Judgments Referred in Note on the Question of Vagueness to be a Ground for Declaring a Provision Unconstitutional".

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that an Article 52(2) exclusion is like an elephant, you know it when you see it, but you cannot describe it in words. Actually we do not think that is right—there are likely to be real differences depending on what the right approach is. Billions [euros, pounds or dollars] turn on it."

43. Similar view is taken in *Frances Muriel Street* v. *Derbyshire Unemployed Workers' Centre*, [(2004) 4 All ER 839][30] where the Court observed as under:

"*54*. When I first drafted this judgment I was of the view that, in the case of the requirement of 'in good faith' (I say nothing in this respect about motivation of personal gain because it is not an issue in the appeal), such an assessment should not, in my view, be cluttered with notions of predominance or degrees of predominance, as suggested by public concern and adopted by Mr Donovan as a "fall-back" submission. In each case the answer one way or the other might be a 'judicial elephant' emerging from the Tribunal's consideration of all the evidence. I considered that it could be unhelpful, often unreal when the countervailing considerations are of quite a different nature, and unduly prescriptive to introduce into the exercise an explicit formula of the sort suggested by public concern that an ulterior motive should only negative good faith when it is so wicked and/or malicious as to be or to approach dishonesty and is the predominant motive for the disclosure."

44. It is submitted that there are certain expressions which have:

(*a*) an inbuilt impossibility of being precisely defined;

(*b*) the legislative intent is to keep them undefined considering the ever changing technology and the laudable object which it seeks to achieve.

45. A similar view is taken by the Privy Council in *Salmon* v. *Duncombe*, [(1886) LR 11 AC 627][31] as under:

"Where the main object and intention of a statute are clear it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used."

46. In India, the said question arose in *Municipal Committee, Amritsar* v. *State of Punjab*, [(1969) 1 SCC 475][32], where this Hon'ble Court held as under:

"*3*. Validity of the Punjab Cattle Fairs (Regulation) Act, 1968, was challenged in a group of petitions moved before the High Court of Punjab by persons interested in holding cattle fairs; *Mohinder Singh*

30 Judgment in the compilation with heading "Additional Judgments Referred in Note on the Question of Vagueness to be a Ground for Declaring a Provision Unconstitutional".

31 Pp. 1-12 at pp. 1 & 8 of *Compilation of Judgments*, Vol. II

32 Pp. 13-23 at pp. 16-17 of *Compilation of Judgments*, Vol. II

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Sawhney v. *State of Punjab*[33]. *Before the High Court one of the contentions raised by the petitioners was that the provisions of the Act were 'vague and ambiguous', and on that account the Act was ultra vires*. The Court accepted that contention. The Court observed that there was a distinction between a 'cattle market' and a 'cattle fair' and since no definition of 'cattle fair' was supplied by the Act, it was left to the executive authorities to determine what a 'cattle fair' was, and on that account 'the infirmity went to the root of the matter, and the Act was liable to be struck down in its entirety on the ground of vagueness, even if some of its provisions were unexceptionable in themselves.'.

4. The State Legislature then enacted the Punjab Cattle Fairs (Regulation) Amendment Act 18 of 1968 which introduced by Section 2(*bb*) a definition of the expression 'cattle fair' as meaning 'a gathering of more than twenty-five persons for the purpose of general sale or purchase of cattle'. Fair Officers were appointed by the State Government and they issued notifications declaring certain areas as 'fair areas'.

5. A number of petitions were again moved in the High Court of Punjab for an order declaring invalid the Act as amended. The High Court of Punjab dismissed the petitions, upholding the validity of the Act; *Kehar Singh* v. *State of Punjab*[34]. The Court in that case held that the definition of 'cattle fair' was not intended to bring within its compass sales by private individuals outside fair areas; it was intended only to apply where in general, people assemble at some place for the purpose of buying and selling cattle and the number of persons exceeds twenty-five, and that Act 6 of 1968, as amended by Act 18 of 1968, 'does not contravene the provisions of Articles 19(1)(*f*) and (*g*) of the Constitution'.

6. Certain persons interested in conducting cattle fairs have filed writ petitions in this Court. Arguments which are common in all the petitions may first be considered.

7. We are unable to accept the argument that since the High Court of Punjab by their judgment in *Mohinder Singh Sawhney case* struck down the Act, Act 6 of 1968 had ceased to have any existence in law, and that in any event, assuming that, the judgment of the Punjab High Court in *Mohinder Singh Sawhney case* did not make the Act non-existent, as between the parties in whose favour the order was passed in the earlier writ petition, the order operated as res judicata, and on that account the Act could not be enforced without re-enactment. The High Court of Punjab in *Mohinder Singh Sawhney case* observed at p. 396:

> '... in our opinion the petitions must succeed on the ground that the legislation is vague, uncertain and ambiguous',

and also (at p. 394) that—

33 AIR 1968 Punj 391
34 (1969) 71 PLR 24

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'... as the infirmity of vagueness goes to the root of the matter, legislative enactment has to be struck down as a whole even if some of its provisions are unexceptionable in themselves.'

But the rule that an Act of a competent legislature may be 'struck down' by the courts on the ground of vagueness is alien to our constitutional system. The legislature of the State of Punjab was competent to enact legislation in respect of 'fairs', vide Entry 28 of List II of the Seventh Schedule to the Constitution. A law may be declared invalid by the superior courts in India if the legislature has no power to enact the law or that the law violates any of the fundamental rights guaranteed in Part III of the Constitution or is inconsistent with any constitutional provision, but not on the ground that it is vague. It is true that in *Connally* v. *General Construction Co.*[35], it was held by the Supreme Court of the United States of America that:

'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'

But the rule enunciated by the American courts has no application under our constitutional set-up. The rule is regarded as an essential of the 'due process clauses' incorporated in the American Constitution by the 5th and the 14th Amendments. The courts in India have no authority to declare a statute invalid on the ground that it violates the 'due process of law'. Under our Constitution, the test of due process of law cannot be applied to statutes enacted by Parliament or the State Legislatures. This Court has definitely ruled that the doctrine of due process of law has no place in our constitutional system. *A.K. Gopalan* v. *State of Madras*[36]. Kania, C.J., observed (SCR at p. 120):

'There is considerable authority for the statement that the courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words ... it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment.'

The order made by the High Court in *Mohinder Singh Sawhney case*, striking down the Act was passed on the assumption that the validity of the Act was liable to be adjudged by the test of 'due process of law'. The Court was plainly in error in so assuming. We are also unable to hold that the previous decision operates as res judicata even in favour of the petitioners in whose petitions an order was made by the High Court in

35 70 L Ed 322 : 269 US 385 (1926)
36 AIR 1950 SC 27 : 1950 SCR 88

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the first group of petitions. The effect of that decision was only that the Act was in law, non-existent, so long as there was no definition of the expression 'cattle fair' in the Act. That defect has been remedied by Punjab Act 18 of 1968.

8. We may hasten to observe that we are unable to agree that the Act as originally enacted was unenforceable even on the ground of vagueness. It is true that the expression 'cattle fair' was not defined in the Act. The legislature when it did not furnish the definition of the expression 'cattle fair' must be deemed to have used the expression in its ordinary signification, as meaning a periodical concourse of buyers and sellers in a place generally for sale and purchase of cattle at times or on occasions ordained by custom."

47. The said judgment came to be considered in *K.A. Abbas* v. *Union of India*, [(1970) 2 SCC 780][37]. The Constitution Bench analysed the concept of vagueness to be a ground of declaring a provision to be unconstitutional in the following terms:

40. It would appear from this that censorship of films, their classification according to age groups and their suitability for unrestricted exhibition with or without excisions is regarded as a valid exercise of power in the interests of public morality, decency, etc. This is not to be construed as necessarily offending the freedom of speech and expression. This has, however, happened in the United States and therefore decisions, as Justice Douglas said in his *Tagore Law Lectures* (1939), have the flavour of due process rather than what was conceived as the purpose of the First Amendment. This is because social interest of the people override individual freedom. Whether we regard the state as the parens patriae or as guardian and promoter of general welfare, we have to concede, that these restraints on liberty may be justified by their absolute necessity and clear purpose. Social interests take in not only the interests of the community but also individual interests which cannot be ignored. A balance has therefore to be struck between the rival claims by reconciling them. The larger interests of the community require the formulation of policies and regulations to combat dishonesty, corruption, gambling, vice and other things of immoral tendency and things which affect the security of the State and the preservation of public order and tranquillity. As Ahrens said the question calls for a good philosophical compass and strict logical methods.

41. With this preliminary discussion we say that censorship in India (and pre-censorship is not different in quality) has full justification in the field of the exhibition of cinema firms. We need not generalise about other forms of speech and expression here for each such fundamental right has a different content and importance. The censorship imposed on the making and exhibition of films is in the interests of society. If the

37 Pp. 103-206 at pp. 121-23 of *Compilation of Judgments*, Vol. II

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regulations venture into something which goes beyond this legitimate opening to restrictions, they can be questioned on the ground that a legitimate power is being abused. We hold, therefore, that censorship of films including prior restraint is justified under our Constitution.

42. This brings us to the next questions: how far can these restrictions go? and how are they to be imposed? This leads to an examination of the provisions contained in Section 5-B(2). That provision authorises the Central Government to issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under the Act in sanctioning films for public exhibition.

43. The first question raised before us is that the legislature has not indicated any guidance to the Central Government. We do not think that this is a fair reading of the section as a whole. The first sub-section states the principles and read with the second clause of the nineteenth article it is quite clearly indicated that the copies of films or their content should not offend certain matters there set down. The Central Government in dealing with the problem of censorship will have to bear in mind those principles and they will be the philosophical compass and the logical methods of Ahrens. Of course, Parliament can adopt the directions and put them in schedule to the Act (and that may still be done), it cannot be said that there is any delegation of legislative function. If Parliament made a law giving power to close certain roads for certain vehicular traffic at stated times to be determined by the executive authorities and they made regulations in the exercise of that power, it cannot for a moment be argued that this is insufficient to take away the right of locomotion. Of course, everything may be done by legislation but it is not necessary to do so if the policy underlying regulations is clearly indicated. The Central Government's regulations are there for consideration in the light of the guaranteed freedom and if they offend substantially against that freedom, they may be struck down. But as they stand they cannot be challenged on the ground that any recondite theory of law-making or a critical approach to the separation of powers is infringed. We are accordingly of the opinion that Section 5-B(2) cannot be challenged on this ground.

48. This brings us to the manner of the exercise of control and restriction by the directions. *Here the argument is that most of the regulations are vague and further that they leave no scope for the exercise of creative genius in the field of art. This poses the first question before us whether the 'void for vagueness' doctrine is applicable*. Reliance in this connection is placed on *Municipal Committee, Amritsar* v. *State of Punjab*[38]. In that case a Division Bench of this Court lays down that an Indian Act cannot be declared invalid

38 (1969) 1 SCC 475

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on the ground that it violates the due process clause or that it is vague. Shah, J., speaking for the Division Bench, observes:

> '*... the rule that an Act of a competent legislature maybe "struck down" by the courts on the ground of vagueness is alien to our constitutional system*. The legislature of the State of Punjab was competent to enact legislation in respect of "fairs", vide Entry 28 of List II of the VIIth Schedule to the Constitution. A law may be declared invalid by the superior courts in India if the legislature has no power to enact the law or that the law violates any of the fundamental rights guaranteed in Part III of the Constitution or is inconsistent with any constitutional provision, but not on the ground that it is vague.'

The learned Judge refers to the practice of the Supreme Court of the United States in Connally v. *General Construction Co.*[39] *where it was observed*:

> 'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'

The learned Judge observes in relation to this as follows:

> 'But the rule enunciated by the American courts has no application under our constitutional set-up. This rule is regarded as an essential of the "due process clause" incorporated in the American Constitution by the 5th and 14th Amendments. The courts in India have no authority to declare a statute invalid on the ground that it violates "the due process of law". Under our Constitution, the test of due process of law cannot be applied to the statutes enacted by Parliament or the State Legislature.'

Relying on the observations of Kania, C.J., in *A.K. Gopalan* v. *State of Madras*[40] to the effect that a law cannot be declared void because it is opposed to the spirit supposed to pervade the Constitution but not expressed in words, the conclusion above set out is reiterated. The learned Judge, however, adds that the words 'cattle fair' in act there considered, are sufficiently clear and there is no vagueness.

45. These observations which are clearly obiter are apt to be too generally applied and need to be explained. While it is true that the principles evolved by the Supreme Court of the United States of America in the application of the Fourteenth Amendment were eschewed in our Constitution and instead the limits of restrictions on each fundamental right were indicated in the clauses that follow the first clause of the nineteenth article, it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so

39 70 L Ed 322 : 269 US 385 (1926)
40 AIR 1950 SC 27 : 1950 SCR 88

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considered. A very pertinent example is to be found in *State of M.P.* v. *Baldeo Prasad*[41] where the Central Provinces and Berar Goondas Act, 1946 was declared void for uncertainty. The condition for the application of Sections 4 and 4-A was that the person sought to be proceeded against must be a Goonda but the definition of Goonda in the Act indicated no tests for deciding which person fell within the definition. The provisions were therefore held to be uncertain and vague.

46. The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus, if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases.

49. The question then came up for consideration before the Constitution Bench by this Hon'ble Court in *A.K. Roy* v. *Union of India*, [(1982) 1 SCC 271][42].

"61. In making these submissions counsel seem to us to have overstated their case by adopting an unrealistic attitude. It is true that the vagueness and the consequent uncertainty of a law of preventive detention bears upon the unreasonableness of that law as much as the uncertainty of a punitive law like the Penal Code does. A person cannot be deprived of his liberty by a law which is nebulous and uncertain in its definition and application. *But in considering the question whether the expressions aforesaid which are used in Section 3 of the Act are of that character, we must have regard to the consideration whether the concepts embodied in those expressions are at all capable of a precise definition. The fact that some definition or the other can be formulated of an expression does not mean that the definition can necessarily give certainty to that expression.* The British Parliament has defined the term 'terrorism' in Section 28 of the Act of 1973 to mean 'the use of violence for political ends', which, by definition, includes 'any use of violence for the purpose of putting the public or any section of the public in fear'. The phrase 'political ends' is itself of an uncertain character and comprehends within its scope a variety of nebulous situations. Similarly, the definitions

41 AIR 1961 SC 293

42 Pp. 24-102 at pp. 70-73 of *Compilation of Judgments*, Vol. II

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contained in Section 8(3) of the Jammu and Kashmir Act, 1978 themselves depend upon the meaning of concepts like 'overawe the Government'. The formulation of definitions cannot be a panacea to the evil of vagueness and uncertainty. We do not, of course, suggest that the legislature should not attempt to define or at least to indicate the contours of expressions, by the use of which people are sought to be deprived of their liberty. The impossibility of framing a definition with mathematical precision cannot either justify the use of vague expressions or the total failure to frame any definition at all which can furnish, by its inclusiveness at least, a safe guideline for understanding the meaning of the expressions used by the legislature. *But the point to note is that there are expressions which inherently comprehend such an infinite variety of situations that definitions, instead of lending to them a definite meaning, can only succeed either in robbing them of their intended amplitude or in making it necessary to frame further definitions of the terms defined. Acts prejudicial to the 'defence of India', 'security of India', 'security of the State', and 'relations of India with foreign powers' are concepts of that nature which are difficult to encase within the straitjacket of a definition. If it is permissible to the legislature to enact laws of preventive detention, a certain amount of minimal latitude has to be conceded to it in order to make those laws effective. That we consider to be a realistic approach to the situation. An administrator acting bona fide, or a court faced with the question as to whether certain acts fall within the mischief of the aforesaid expressions used in Section 3, will be able to find an acceptable answer either way. In other words, though an expression may appear in cold print to be vague and uncertain, it may not be difficult to apply it to life's practical realities. This process undoubtedly involves the possibility of error but then, there is hardly any area of adjudicative process which does not involve that possibility.*

62. The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution since the decision in *Maneka Gandhi*[43]. The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity. However, even in the domain of criminal law, the processes of which can result in the taking away of life itself, no more than a reasonable degree of certainty has to be accepted as a fact. Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct which may fall within the proscribed area, when measured by common understanding. In criminal law, the legislature frequently uses vague expressions like 'bring into hatred or contempt', or 'maintenance of harmony between different

43 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

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religious groups', or 'likely to cause disharmony or ... hatred or ill will', or 'annoyance to the public' (see Sections 124-A, 153-A(1)(*b*), 153-B(1)(*c*) and 268 of the Penal Code). These expressions, though they are difficult to define, do not elude a just application to practical situations. The use of language carries with it the inconvenience of the imperfections of language.

63. We see that the concepts aforesaid, namely, 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers', which are mentioned in Section 3 of the Act, are not of any great certainty or definiteness. But in the very nature of things they are difficult to define. We cannot therefore strike down these provisions of Section 3 of the Act on the ground of their vagueness and uncertainty. We must, however, utter a word of caution that since the concepts are not defined, undoubtedly because they are not capable of a precise definition, courts must strive to give to those concepts a narrower construction than what the literal words suggest. While construing laws of preventive detention like the National Security Act, care must be taken to restrict their application to as few situations as possible. Indeed, that can well be the unstated premise for upholding the constitutionality of clauses like those in Section 3, which are fraught with grave consequences to personal liberty, if construed liberally."

50. There appears to be no deviation from the said view so far.

51. Furthermore, expressions used in Section 66-A are not the expressions which are alien to Indian system of law and are found in various penal provisions under the Indian Penal Code as well as the Criminal Procedure Code. The details of such provisions in a tabular form are reproduced hereunder:

	Word	*IPC*	*CrPC*
1.	Annoyance	182, 188, 209, 268, 294, 350, 441, 510	144
2.	Inconvenience		284, 299, 384
3.	Danger	102, 105, 188, 268, 283, 284, 285, 286, 287, 288, 289, 364, 367, 498-A	133, 137, 142, 144, 338
4.	Obstruction	188, 224, 225, 225-B, 268, 283, 339	133
5.	Insult	228, 295, 295-A, 297, 441, 504, 509	260, 348
6.	Injury	44, 90, 166, 167, 182, 188, 189, 190, 211, 218, 268, 279, 280, 283	37, 125, 130, 133, 142, 144, 152, 174, 220 (Explanation) 330, 335, 338, 339, 357
7.	Criminal intimidation	366, 503, 506.	106, 108, 211 (Explanation) 260, 456
8.	Enmity, hatred or ill will	124-A, 153-A, 153-B, 505(2)	

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52. It may be true that wherever penal provisions in IPC or CrPC use the above-referred expressions there are certain qualifications used by the legislature. However, there are some provisions where the expressions are used without any qualifications. In the said provisions the offence is causing obstruction, annoyance or injury, etc. it is only the different medium or mode through which it is caused is provided in different sections. The said sections are as under:

	Word	*IPC*
1.	Annoyance	182, 188, 209, 268, 294, 350, 441, 510
2.	Danger	283, 285, 286, 287
3.	Obstruction	188
4.	Insult	441, 504
5.	Injury	44, 90, 166, 167, 182, 188, 189, 190, 211, 218, 268, 279, 280, 283
6.	Criminal intimidation	503
7.	Enmity, hatred or ill will	124-A

53. Further this Hon'ble Court has considered certain expressions and has accepted that they are incapable of any precise definition. A list of the said expressions is provided hereinbelow for convenience of this Hon'ble Court:

Sl. No.	*Judgment*	*Word*
1.	(2006) 4 SCC 558 at paras 56-58 *Naveen Kohli* v. *Neelu Kohli*	"Cruelty" appearing in the Hindu Marriage Act, 1955 — Section 13(1)(*i-a*)
2.	(2005) 8 SCC 351 at para 15 *M.M. Malhotra* v. *Union of India*	"Misconduct"
3.	(2012) 4 SCC 407 at paras 8-15 *Ravi Yashwant Bhoir* v. *Collector*	"Misconduct" "Disgraceful Conduct"
4.	(2012) 5 SCC 342 at paras 15, 22, 23 *Marcel Martins* v. *M. Printer*	"Fiduciary capacity" which was not defined in Section 4, Benami Transactions (Prohibition) Act, 1988
5.	(2004) 4 SCC 622 *Madan Singh* v. *State of Bihar*	"Terrorism" which was not defined under TADA
6.	(2008) 16 SCC 109 at para 5 *Hari Singh Gond* v. *State of M.P.*	"Insanity"
7.	(2014) 3 SCC 210 at para 14 *Sanjay Verma* v. *Haryana Roadways*	"Exceptional and extraordinary circumstances"

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8.	(2012) 9 SCC 460 at para 16 *Amit Kapoor* v. *Ramesh Chander*	"Inherent jurisdiction", "to prevent abuse of process" and "to secure the ends of justice" appearing in IPC/CrPC
9.	(2010) 5 SCC 246 at paras 23-26 *Zameer Ahmed Latifur Rehman Sheikh* v. *State of Maharashtra*	"Insurgency"
10.	(2011) 11 SCC 347 at para 15 *Ram Singh* v. *Central Bureau of Narcotics*	"Possession" used in Section 8 r/w Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985
11.	(2005) 6 SCC 1 at para 11 *Jacob Mathew* v. *State of Punjab*	"Negligence"
12.	(2003) 5 SCC 315 at para 9 *Rajni Kumar* v. *Suresh Kumar Malhotra*	"Special circumstances"
13.	(2004) 3 SCC 297 at paras 21-25 *National Insurance Co. Ltd.* v. *Swaran Singh*	"Accident"
14.	(1962) 3 SCR 49 *Corpn. of Calcutta* v. *Padma Debi*	"Reasonably"
15.	(2003) 7 SCC 389, para 8 *State of M.P.* v. *Kedia Leather & Liquor Ltd.*	"Nuisance"
16.	(2004) 12 SCC 770 at para 89 *Commr. of Police* v. *Acharya Jagadishwarananda Avadhuta*	"Religion"
17.	(2003) 9 SCC 193 *State* v. *Kulwant Singh*	"Department"
18.	1989 Supp (2) SCC 52 *Jiyajeerao Cotton Mills Ltd.* v. *M.P. Electricity Board*	"Regulate"
19.	(1994) 3 SCC 1 at 28 *S.R. Bommai.* v. *Union of India*	"Secular"
20.	1992 Supp (3) SCC 217 at paras 793-795 *Indra Sawhney* v. *Union of India*	"Caste"
21.	1995 Supp (4) SCC 469 at 18 *State of Karnataka* v. *Appa Balu Ingale*	'Untouchability'
22.	(1974) 1 SCC 683 at para 11 *Municipal Council, Tirupathi* v. *Tirumalai Tirupathi Devasthanam*	"Choultries"
23.	(1964) 1 SCR 809 *K.M. Shanmugam* v. *S.R.V.S. (P) Ltd.*	"Error of law and error of fact" and "Error of law apparent on the face of the record"

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24.	(1962) 2 SCR 24 *Abhayanand Mishra* v. *State of Bihar*	"Attempt to commit an offence"
25.	(1951) 2 SCR 1125 *Angurbala Mullick* v. *Debabrata Mullick*	"Shebait"
26.	(1982) 3 SCC 235 *People's Union for Democratic Rights* v. *Union of India*	"Beggar"
27.	Further, in a catena of judgments this Hon'ble Court has held that words "public interest", "public purpose", "natural justice", "employer and employee" principle of "just and equitable" clause are incapable of *precise definition*.	

54. Furthermore, in a catena of judgment this Hon'ble Court held that expression "public interest", like "public purpose", is not capable of any *precise definition*.

55. Similarly, this Hon'ble Court has again held in a series of judgments that the phrase "natural justice" is also not capable of a *precise definition*.

56. Likewise, this Hon'ble Court has also held that words "employer and employee" must necessarily vary form business to business and is by its very nature incapable of *precise definition*. ...

57. Also this Hon'ble Court has held that the principle of "just and equitable" clause baffles a *precise definition*. It must rest with the judicial discretion of the court depending upon the facts and circumstances of each case.

III. On Application of Millers Obscenity Test and Strict Scrutiny Test to test the vires of Section 66-A of the IT Act

58. It is respectfully submitted that while contending that the words "grossly offensive" appearing in Section 66-A are vague, sufficient reliance was placed by the petitioner in WP (C) No. 23 of 2013, on the judgments rendered by the US courts in the following cases:

(*i*) *Reno, Attorney general of United States* v. *AUCL*, 521 US 844 (1997)[44];

(*ii*) *Ashcroft* v. *American Civil Liberties Union*, 542 US 656[45]; and

(*iii*) *ACLU* v. *Mukasey*, 534 F 3d 181[46]

59. It is submitted that the said judgments were referred because a similarly worded phrase "patently offensive" used in Section 223(*d*) of the Communication Decency Act (CDA) and Section 231(*a*)(1) of the Child Online Protection Act (COPA) was held to be vague and overly broad. Accordingly, it was sought to be argued that by applying the test referred to in the said judgments i.e. "relevant community standard test", the words

44 Pp. 114-168 Vol. IV of Compilation
45 Pp. 169-204 Vol. IV of Compilation
46 Pp. 205-230 Vol. IV of Compilation

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"grossly offensive" appearing in Section 66-A would also have to be held as vague and overly broad and hence liable to be struck down.

60. It is respectfully submitted that reliance on the said judgments to test the validity of the Section 66-A is completely misplaced.

61. It is submitted that Section 223(*d*) of CDA and Section 231(*a*)(1) of the COPA (as impugned in the said cases) were enacted to protect the minors from gaining access to pornographic material available on cyberspace. Thus in pith and substance the said sections covered only a limited field of "obscenity" and accordingly the relevant "community standard test" i.e. "Millers Test'[47] which governs that limited field in US was applied.

62. However, as opposed to the context of the said judgments, Section 66-A not only places restriction on mere obscene material but also places a restriction on other "information" in the interests of the sovereignty and integrity of India, in the interest of the security of the State, in the interest of the friendly relations with foreign States, in the interest of the public order and in relation to defamation and incitement to an offence.

63. Thus, in view thereof, it is respectfully submitted that the vagueness challenge to Section 66-A cannot be determined solely on the basis of Millers Obscenity Test (as applicable in US) which has a limited or no application in India. Accordingly, for this reason alone, the said judgments are not relevant to adjudicate the controversy raised in the present batch of petitions.

64. Without prejudice to the above, it is submitted that even following the American standards, restriction on freedom of speech and expression can be placed inter alia on the following grounds and in the following manner:

(*i*) Fighting words and true threats

(*ii*) Content-based restrictions

(*iii*) Prior restraint

(*iv*) Forum doctrine

(*v*) Time, place, and manner restrictions

65. Thus, if the validity of Section 66-A, in its entirety, has to be tested by applying American standards then all the aforesaid tests are required to be applied and not the limited tests applied in above judgments.

66. Even otherwise, the American standards of obscenity, as applied in the above judgments dealing with Section 223(*d*) of CDA and Section 231(*a*)(1) of COPA, cannot be *mutatis mutandis* applied in Indian social context. It is submitted that in US creating, distributing and receiving sexually explicit material i.e. pornography between consenting adults is held to be a facet of speech and expression protected by the First Amendment, which can never be a protected freedom in the Indian context.

47 Pp. 65-89 at 77 Vol. IV of Compilation

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67. It is submitted that in one of the first landmark judgments rendered by the US Supreme Court in *Roth*[48], it was held that generally obscenity was not a protected speech under the First Amendment. However, it carved out a distinction between obscenity and sex, to hold that only such sexually explicit (obscene) material which deals with sex in a manner appealing to prurient interest was not protected under the First Amendment. Whereas, portrayal of sex, in art, literature and scientific works, was constitutionally protected freedom of speech and press. The relevant paras of the said judgment are quoted hereinbelow for ready reference of this Hon'ble Court:

> "At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press. (P. 26)
>
> * * *
>
> However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not in itself sufficient reason to deny material the constitutional protection of freedom of speech and press." (Pp. 27 -28)

68. Thereafter, the struggle of US Congress to prohibit distribution and possession of pornographic material was further abridged when the US Supreme Court, speaking through Marshall, J., in *Stanley* v. *Georgia*, 394 US 557 (1969)[49] held that the statute, insofar as it made mere private possession of obscene matter a crime, was unconstitutional under the First and Fourteenth Amendments. In a concurring opinion by Black, J. it was held that mere possession of reading matter or movie film, whether labelled as obscene or not cannot be made a crime by a State without violating the First and Fourteenth Amendments.

69. Finally, the US Supreme Court in *Miller* v. *California*, 413 US 15 (1972)[50], while defining the standards which must be used to identify obscene material which the State may regulate without infringing on the First Amendment rights of the citizen held that:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a State statute could define for regulation under Part (b) of the standard announced in this opinion, supra:
>
> (*a*) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

48 *Roth* v. *United States*, 354 US 476 (1957) — (Pp. 13-41 Vol. IV of compilation)
49 Pp. 52-64 of Vol. IV of Compilation
50 Pp. 65-89 Vol. IV of Compilation

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(*b*) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." (P. 78)

70. The US Supreme Court further held that:

"Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. (P. 78)

* * *

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed."

71. Further, in the context of the contemporary standard test, the US Supreme Court refused to lay down any uniform national standards of precisely what appeals to the "prurient interest" or would be patently offensive and held as under:

"Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive'. These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient' it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate fact finders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility."

72. Thus, it is respectfully submitted that the above series of judgments of the US Supreme Court have conferred a licence to US citizens to produce, distribute and sell sexually explicit material with a distinction that only the said patently offensive "hard core" sexual conduct specifically defined by the regulating State law would not get the protection of the First Amendment. However, in contrast there is complete prohibition in producing, distribution and sale of sexually explicit material and pornography in India and the same

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is completely banned. As such the "relevant community standard" applicable in US cannot be at all made applicable in the Indian social context.

73. Furthermore, experience shows that even the distinction carved out by the US Supreme Court in *Miller* v. *California* (supra), between the unprotected hard core pornography and protected expression of sex having serious literary, artistic, political, or scientific value has also dissipated with passage of time. The same is evident from the fact that in guise of protected expression of sex, having serious literary, artistic, political, or scientific value, the annexed sub-categories of sexual expression is legally permitted to be created, distributed and/or sold. This in turn has conferred the status of industry to porn business which presently generating revenues to the tune of billions of dollars per year. A list of pornographic sub-categories which has found its way in expression of free speech protected by First Amendment in US is annexed hereto and marked as *Annexure A*.

74. Thus, vagueness challenge raised in *Reno*[51] and *Ashcroft*[52] has to been seen in the aforesaid context wherein the issue was that of circulation of pornographic material which was protected under the First Amendment; there were less restrictive means i.e. filtering system available to the Government through which access of pornographic material to children can be restricted; that filtering system was more effective than the statute; and the main ground of vagueness challenge was that the statue sweeps more broadly than necessary and thereby chills the speech of an adult.

75. It is respectfully submitted that the said distinction between "adult speech" and "minor speech" is unavailable in India, wherein power has been conferred on the legislature under Article 19(2) to place blanket ban on the pornographic material in the interests of "decency and morality".

76. Thus, in Indian context the words "grossly offensive and menacing in character" in the context of decency and morality have to take colour from the test laid down by this Hon'ble Court. It is submitted that this Hon'ble Court in *Aveek Sarkar* v. *State of W.B.*, (2014) 4 SCC 257[53], after referring to all the prior judgment rendered by this Hon'ble Court at para 23 held as under:

> "*23*... A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of a depraved mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in

51 521 US 844 (1997) *Reno, Attorney General of United States* v. *AUCL*, pp. 114-168 of Vol. IV of Compilation

52 542 US 656 *Ashcroft* v. *American Civil Liberties Union* (pp. 169-204 of Vol. IV of Compilation) 534 F 3d 181 *ACLU* v. *Mukasey* (pp. 205-230 of Vol. IV of Compilation)

53 (Pp. 273-286 Vol. IV of Compilation — paras 13 to 26, para 23 at p. 284 of compilation)

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which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of 'exciting lustful thoughts' can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards."

Applicability of "Strict Scrutiny Test" to adjudge the vires of Section 66-A of the IT Act

77. It is further respectfully submitted that while raising a challenge to the vires of Section 66-A, the petitioners in WP (C) No. 23/2013 have also referred to the strict scrutiny test applied in the *Reno* and *Ashcroft* judgments and have contended that Section 66-A is ultra vires as it fails to muster the said test.

78. It is submitted that applicability of the strict scrutiny test in India has been considered by this Hon'ble Court in a catena of cases. Recently this Hon'ble Court in *Subhash Chandra* v. *Delhi Subordinate Services Selection Board*, (2009) 15 SCC 458, after referring to all the previous judgments rendered by this Hon'ble Court has held as under:

"*80*. It is commonly believed amongst a section of academicians that strict scrutiny test in view of the Constitution Bench decision of this Court in *Ashoka Kumar Thakur* (supra) is not applicable in India at all. Therein reliance has been placed on *Saurabh Chaudri* v. *Union of India*, (2003) 11 SCC 146 wherein this Court stated:

'*36*. The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by Shri Salve cannot be applied in this case. Such a test is not applied in Indian courts. In any event, such a test may be applied in a case where a legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. This Court since its inception apart from a few cases where the legislation was found to be ex facie wholly unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove contra is on him who asserts the same.'

In a concurrent opinion, one of us, S.B. Sinha, J., stated, thus:

'*92*. Mr Nariman contended that provision for reservation being a suspect legislation, the strict scrutiny test should be applied. Even applying such a test, we do not think that the institutional reservation should be done away with having regard to the present day scenario....'

81. Saurabh Chaudri (supra) read as a whole therefor refused to apply the strict scrutiny test in the case of reservation evidently having regard to clauses (1) and (4) of Articles 15 and 16 of the Constitution of India. It is noteworthy to point out that the facts of this case did not bear

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out an ex facie unreasonableness and therefore the Court did not employ the strict scrutiny test.

82. The Constitution Bench in *Ashoka Kumar Thakur* (supra), itself, held:

> "*252*. It has been rightly contended by Mr Vahanvati and Mr Gopal Subramanium that there is a conceptual difference between the cases decided by the American Supreme Court and the cases at hand. In *Saurabh Chaudri* v. *Union of India* it was held that the logic of strict classification and strict scrutiny does not have much relevance in the cases of the nature at hand." (emphasis supplied)

Saurabh Chaudri (supra) itself, therefore, points out some category of cases where strict scrutiny test would be applicable. *Ashoka Kumar Thakur* (supra) solely relies upon *Saurabh Chaudri* to clarify the applicability of strict scrutiny and does not make an independent sweeping observation in that regard. We are of the opinion that in respect of the following categories of cases, the said test may be applied:

> *1*. Where a statute or an action is patently unreasonable or arbitrary. (See *Mithu* v. *State of Punjab*, (1983) 2 SCC 277.
>
> *2*. Where a statute is contrary to the constitutional scheme. [See *E.V. Chinniah* (supra)].
>
> *3*. Where the general presumption as regards the constitutionality of the statute or action cannot be invoked.
>
> *4*. Where a statute or execution action causes reverse discrimination.
>
> *5*. Where a statute has been enacted restricting the rights of a citizen under Article 14 or Article 19 as for example clauses (1) to (6) of Article 19 of the Constitution of India as in those cases, it would be for the State to justify the reasonableness thereof.
>
> *6*. Where a statute seeks to take away a person's life and liberty which is protected under Article 21 of the Constitution of India or otherwise infringes the core human right.
>
> *7*. Where a statute is 'expropriatory' or 'confiscatory' in nature.
>
> *8*. Where a statute prima facie seeks to interfere with sovereignty and integrity of India.

However, by no means, the list is exhaustive or may be held to be applicable in all situations."

79. It is submitted that it is not the case of the petitioners that (*a*) State has no compelling interest in enacting Section 66-A and that (*b*) other least restrictive means are available to advance the said interest. The only ground is that the said section is not narrowly tailored.

80. In this context, it is respectfully submitted that in view of the submission made by UOI that the words used in Section 66-A are not

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arrangement of words "expressed as rules" but an arrangement of words "expressed as principles or standards"[54], hence requires purposive interpretation, it is submitted that Section 66-A is narrowly tailored and hence *intra vires* the Constitution of India.

81. In case if there is any further ambiguity found in the language of Section 66-A, it is respectfully submitted that by applying the principle of "*ut res magis valeat quam pereat*", this Hon'ble Court can narrowly tailor the language of Section 66-A by reading into the test referred by UOI in the judgments contained in *Compilation of Judgments* Vol. I and VI and make the statute workable. The said tests are summarised as under:

(*i*) Information which would appear highly abusive, insulting, pejorative, offensive by reasonable person in general, judged by the standards of an open and just multi-caste, multi-religious, multi-racial society.

Director of Public Prosecutions v. *Collins* — (2006) 1 WLR 2223 at paras 9 and 21

Connolly v. *Director of Public Prosecutions* — (2008) 1 WLR 276/(2007) 1 All ER 1012

House of Lords Select Committee 1st Report of Session 2014-2015 on Communications titled as "Social Media and Criminal Offences" at p. 260 of *Compilation of Judgments*, Vol. I, Part B.

(*ii*) Information which is directed to incite or can produce imminent lawless action. *Brandenburg* v. *Ohio*, 395 US 444 (1969);

(*iii*) Information which may constitute credible threats of violence to the person or damage;[55]

(*iv*) Information which stirs the public to anger, invites violent disputes brings about condition of violent unrest and disturbances;

Terminiello v. *Chicago*, 337 US 1 (1949)

(*v*) Information which advocates or teaches the duty, necessity or propriety of violence as a means of accomplishing political, social or religious reform and/or justifies commissioning of violent acts with an intent to exemplify/glorify such violent means to accomplish political, social, economical or religious reforms. (*Whitney* v. *California*, 274 US 357)

(*vi*) Information which contains fighting or abusive material.

Chaplinsky v. *New Hampshire*, 315 US 568 (1942)

(*vii*) Information which promotes hate speech i.e.

54 Purposive Interpretation in Law — Ahraron Barak, p. 197

55 House of Lords Select Committee 1st Report of Session 2014-2015 on Communications titled as "Social Media and Criminal Offences" at p. 268, *Compilation of Judgments*, Vol. 1, Part B

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(*a*) Information which propagates hatred towards an individual or a group, on the basis of race, religion, casteism, ethnicity.

(*b*) Information which is intended to show the supremacy of one particular religion/race/caste by making disparaging, abusive and/or highly inflammatory remarks against religion/race/caste.

(*c*) Information depicting religious deities, holy persons, holy symbols, holy books which are created to insult or to show contempt or lack of reverence for such religious deities, holy persons, holy symbols, holy books or towards something which is considered sacred or inviolable.

(*viii*) Satirical or iconoclastic cartoons and caricatures which fail the test laid down in *Hustler Magazine, Inc.* v. *Falwell*, 485 US 46 (1988)

(*ix*) Information which glorifies terrorism and use of drugs;

(*x*) Information which infringes right of privacy of the others and includes acts of cyber bullying, harassment or stalking.[56]

(*xi*) Information which is obscene and has the tendency to arouse feeling or revealing an overt sexual desire and should be suggestive of a depraved mind and designed to excite sexual passion in persons who are likely to see it.

Aveek Sarkar v. *State of W.B.*, (2014) 4 SCC 257

(*xii*) Context and background test of obscenity. Information which is posted in such a context or background which has a consequential effect of outraging the modesty of the pictured individual.

Aveek Sarkar v. *State of W.B.*, (2014) 4 SCC 257

IV. On Section 66-A

82. The very fundamental foundation of the petitioner's case that provisions contained in Section 66-A of the Information Technology Act, 2000 scuttle freedom of speech and expression as enshrined under Article 19(1)(*a*), is misconceived since the said provisions neither intend to nor can be interpreted to scuttle freedom of speech and expression of any citizen.

83. *At the outset, it is clarified that if any provision of the Information Technology Act, 2000 is found to be in conflict with the freedom guaranteed in Article 19(1)(a) of the Constitution of India, the same will have to be read in the context of and subject to Article 19(2) of the Constitution.*

84. However, from the following true statutory interpretation emerging from the scheme of the Act, it may not be necessary to dwell much on the question as to whether the provisions offend Article 19(1)(*a*) or not since it is the case of the Central Government that if any of the provisions are offending

56 House of Lords Select Committee 1st Report of Session 2014-2015 on Communications titled as "Social Media and Criminal Offences" at p. 268, *Compilation of Judgments*, Vol. 1 Part B

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the freedom of speech and expression, the Central Government does not defend that part of the provision.

Cyber crimes

85. The Act in the question deals with the cyber world and the technology specific criminal offences committed in the cyber world which have no physical form but have only virtual existence. The element of anonymity and complete absence of territorial borders in cyberspace makes the internet an attractive medium for criminals to commit various cyber offences using new technologies which are being evolved rapidly.

86. On true construction, the penal provisions contained in the Act necessarily deal with such cyber offences which has nothing to do with any citizens' freedom of speech and expression or any other fundamental or constitutional rights. In fact the said penal provisions seek to protect the rights of citizens of India guaranteed under Article 21 of the Constitution as would be clear from the following discussion.

87. The use of cyberspace is rampant not only for committing conventional crimes such as theft, extortion, forgery through the use of computers, etc. but with continuously evolving technology, various new forms of crimes are emerging such as hacking, phishing, vishing, spamming, Trojan and other malware attacks, etc. The penal provisions essentially deal with such online criminal offences which have a serious potential not only to damage an individual but also to damage and destroy not the computer system of an individual citizen and can potentially lead to bringing the functioning of vital organisations and, in extreme cases, the country to a standstill as explained hereunder.

88. Due to the recent advent of internet technology and simultaneous growth of criminal activities in this virtual world, several countries have made statutory penal provisions. Realising the extreme need for special laws for such technology specific crimes, where newer methods are invented by techno-savvy offenders, large number of legislations are made in other countries, though in India, the IT Act, 2000 is the only legislation which seeks to encompass every form of cyber activities to protect the citizens:

(*i*) The Information Technology Act, 2000 and amendments is equivalent to at least 45 (and counting) US Federal enactments;

(*ii*) The Information Technology Act, 2000 and amendments is equivalent to at least 598 (and counting) US State enactments; and

(*iii*) The Information Technology Act and amendments is equivalent to at least 16 (and counting) UK enactments.

89. The cyber crimes can broadly be classified into the following two categories:

(*i*) Crimes committed by using computer or computer network;

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(*ii*) the computer or computer network itself is the target of the crime.

90. As explained hereunder, the scheme contained in *Chapter XI* of the Information Technology Act, 2000 deals with cyber crimes in the below mentioned three broad categories:

(*i*) Crime against the nation — cyber terrorism, etc.

(*ii*) Crime against citizens — cyber stocking, data theft, intimidation, extortion, etc.

(*iii*) Crime against property — credit card frauds, intellectual property theft, etc.

Analysis of Chapter XI

91. The following analysis of various provisions contained in Chapter XI of the Act requires to be considered so as to derive the real legislative intent in penal provisions contained in Section 66-A of the Act. Section 65 of the Information Technology Act, 2000 reads as under:

> "**65.** ***Tampering with computer source documents***.—Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy, or alter any computer source code used for a computer, computer program, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.
>
> *Explanation*.—For the purposes of this section, 'computer source code' means the listing of programs, computer commands, design and layout and program analysis of computer resource in any form."

The said section, for its proper understanding, can be bifurcated in a tabular form.

92. To understand the real purport and meaning of the said penal offence, it is necessary to understand the term "computer source cord" since any concealment, destruction or alteration in "computer source code" is made a penal offence. To understand "computer source code", it is necessary to understand the term "computer programming" upon which the definition of "computer source code" is based which is explained under:

> "*Computer programming*
>
> Programming is a way of sending instructions to the computer. These instructions are relayed to the computer by using 'programming languages'. These languages are:
>
> (*a*) Machine languages,
>
> (*b*) Assembly languages, and
>
> (*c*) High-level languages.

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Machine language	*Assembly language*	*High-level language*
First generation language	Second general language	Third/Fourth/Fifty generation language
Difficult to understand. It is a machine code consisting entirely of the 0s and 1s of the binary number system.	Easier to understand. English-like abbreviations replacing strings of 0s and 1s, creating source files	Much easier to understand. Language's syntax is much closer to human language.
The only language that a computer understands.	Needs translator programs called assemblers (or compilers) to translate source files (or commands) into machine language.	Needs translator programs called assemblers (or compilers) to translate source files (or commands) into machine language.

The programming, thus, is a complex process of building blocks of information systems. It involves five steps to create individual programs:

(*a*) Needs analysis,

(*b*) Systems design,

(*c*) Development,

(*d*) Implementation, and

(*e*) Maintenance

These five steps represent 'life cycle' of a programme. It all begins with identification and understanding of a need or a problem of the end users. It is followed by the design phase to 'articulate' the logical steps in solving the proposed problem using techniques like flow charts, circles and message pipes and pseudocodes. The next step [development] involves writing the instructions to the computer, called source code, as well as testing those statements after they are written. It is the most time-consuming phase of the entire 'life cycle' as it includes writing code, compiling, correcting and rewriting. Once, the programme is tested successfully without 'syntax' and 'logical' errors, it is installed on the hardware for use (implementation). The work of the programmer continues as the installed programme may require fixing of new errors (bugs), addition, deletion or modification of certain functionalities (maintenance).

The computer programme whether written in machine language, assembly language or high-level language is known as the source code."

93. Having explained the term "computer programming", the statutory definition of "computer source code" as envisaged in Section 65 requires to be examined which makes it comprehensive as it includes the listing of programs, computer commands, design and layout and programme analysis of computer resource in any form. The term "computer source code" as

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defined in the Act incorporates the entire gamut of programming process. It includes computer commands/programming codes (machine, assembly and high-level), design prototypes, flow charts/diagrams, technical documentation, design and layout of the necessary hardware, program-testing details etc. Furthermore, it is important to know that the Act makes no mention whether the source code exists in tangible (on paper) or intangible (electrical impulses) form. The Act accepts the computer source code in both tangible and intangible form. Importantly, by virtue of the Explanation, the term "computer source code" also includes the software program's "object code" as well.

94. To illustrate, it may be stated that if any program is designed for preparation of Class XII results, the entire programming would depend upon the relevant "computer source code".

95. To give an extreme example, if anyone wants to indulge into cyber warfare, he will have to understand the "computer source code" of the computer system of "critical information infrastructure"; amending/altering of which would produce catastrophic results. Power systems, nuclear systems, etc. are critical infrastructure systems.

96. Similarly, the term "computer programme" [as defined under Section 2(i)], "computer system" [as defined under Section 2(*i*)] or "computer network" [as defined under Section 2(*j*)] which is substituted while amending the Act [vide Act 10 of 2009] requires to be examined.

97. Though the above-referred terminology may not fall out of consideration of and adjudication of this Hon'ble Court directly, however, it would be crucial to examine the same since *it is the case of the Central Government that Section 66-A which uses the expressions like "causing annoyance", "causing inconvenience", etc. essentially and mainly intend to deal with such cyber crimes and has no relation with freedom to speech and expression of any of the citizens* as explained hereinunder.

98. Section 66 reads as under:

> "**66.** ***Computer related offences***.—If any person, dishonestly or fraudulently, does any act referred to in Section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.
>
> *Explanation*.—For the purposes of this section—
>
> (*a*) The word 'dishonestly' shall have the meaning assigned to it in Section 24 of the Indian Penal Code (45 of 1860).
>
> (*b*) The word 'fraudulently' shall have the meaning assigned to it by Section 25 of the Indian Penal Code (45 of 1860).

99. Section 66 necessarily penalises the civil contraventions contemplated under Section 43 of the Act.

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100. Section 66-A reads as under:

"**66-A.** ***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; or

(*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 purpose of this section, terms 'electronic mail' and 'electronic mail message' mean 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."

101. On a proper interpretation of Section 66-A, the following broad essential ingredients appear and they have a specific purpose in the context of technology specific cyber crimes and keeping the new evolving technologies almost everyday in mind:

(*i*) mere "sending" is an offence;

(*ii*) sending of an "information" is an offence;

(*iii*) the medium of sending should be either (*a*) computer source, or (*b*) a communication device.

102. Each of the penal provisions contained in sub-sections (*a*), (*b*) and (*c*) of Section 66-A seek to target and take into consideration different nature of offences and depending upon the technology and techniques used, the legislature has used phrases accordingly. These provisions, however, can never be construed as scuttling the freedom of speech and expression of any citizen.

103. To be an offence under Section 66-A, the accused must have sent any "information" or "electronic mail" or "electronic mail message" as contained in Sections 66-A (*a*), (*b*) and (*c*). The entire case of the petitioner proceeds with reference to hypothetical examples of some "posts" made by the citizens either on Facebook, Twitter or other social media sites and an attempt is made to link such posts with terms like "annoyance", "inconvenience", etc. as used in Section 66-A.

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104. As a matter of fact, while dealing with cyber crimes and while considering the validity of a legislation concerning cyber crimes, the traditional doctrines of interpretation and conventional jurisprudence may not render much assistance as each word has a different connotation and meaning in the context of cyber crimes.

105. As explained above, under Sections 66-A(*a*) and (*b*) of the Act sending "information" is an offence. *The term "information" has a different connotation in the context of cyber crimes and is defined under Section 2(v) of the Act* which reads as under:

> "2. (*v*) 'information' includes data, text, images, sound, voice, codes, computer programs, software and databases or micro film or computer generated micro fiche;"

106. The information may include message, text, images, etc. but it essentially includes, in the parlance of cyber crimes, (*1*) data, (*2*) computer programs, (*3*) software and databases, or (*4*) micro film or computer generated micro fiche.

107. The term "data" as used in Section 2(*v*) of the Act has again a different connotation in the parlance of cyber law and is statutorily defined under Section 2(*o*) of the Act which reads as under:

> "2. (*o*) 'data' means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer."

108. In the above context, when anyone sends, by means of "computer source" [as defined under Section 2(*k*) of the Act] or a "communication device" [as defined under amended Section 2(*ha*) of the Act] any "information" [as defined under Section 2(*v*) of the Act] which includes "data" as defined under Section 2(*o*) of the Act for the purpose of committing technology specific offences that Section 66-A would be attracted which has no co-relation with any citizens' freedom of speech and expression so far as "causing annoyance", "causing inconvenience" or "causing obstruction", etc. are concerned.

109. It is the specific case of the Central Government that Chapter XI requires to be read as a complete code providing for each category of cyber crime wherein the legislature has sought to take into account all cyber crimes most of which have no connection with the citizens' right under Article 19(1)(*a*) of the Constitution of India since they are technology specific crimes and the target of the crime can either be an individual, or a computer system of an individual, a particular section of people or in gross cases, the entire country.

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110. The Central Government makes it very clear that the phrases "annoyance", "inconvenience", "danger" or "obstruction" as used in Section 66-A of the Act has no co relation or connection with any citizen's freedom of speech and expression. In other words, if as a result of a citizen exercising his freedom of speech and expression, he causes "annoyance", "inconvenience", "danger" or "obstruction" while sending anything by way of computer resource or communication device, it will not be a penal offence either under Section 66-A(*b*) or 66-A(*c*) of the Act.

Analysis of Section 66-A and its applicability

111. To appreciate the legislative intent behind use of expression like "annoyance", "inconvenience", "danger", "obstruction" and "injury" as used in clause (*b*) of Section 66-A and to correctly comprehend offences under clause (*c*) of Section 66-A, the following types of cyber crimes are required to be briefly kept in mind. The illustration given hereinunder are only illustrative and cyber crimes take many forms other than illustrated below:

(*a*) *Phishing*— In phishing, the criminal poses as a genuine service provider or institution, etc. and sends "information" (like emails) requesting for updating records such as credit card details, etc. and thereby acquires passwords and personal details of an innocent victim viz. internet user. This is also known as "spoofing" (i.e. concealing one's true identity). The details so gathered are misused for committing financial and other frauds/offences.

(*b*) *Vishing*— When phishing is conducted using "telecalling", it is known as "vishing" (i.e. "verbal phishing"). A criminal makes a phone call posing to be either a bank representative or any other authority, making his target innocent and unaware internet users who will feel duty-bound to reveal his internet PIN, credit card details, password, bank account number, etc. and misuses the same either to commit financial frauds or to commit other offences.

There are software available using which the caller can change his voice to the voice of any known/unknown persons and the recipient would genuinely believe that he is talking to either a known person or to a representative of some organisation. Millions of dollars/rupees are lost and other offences committed world over by these using vishing software.

(*c*) *Spoofing*—Spoofing denotes a crime where a person on the internet disguises his identity. Hackers and crackers commit offences of spying, data thefts, steal sensitive information, commit credit card frauds and identity thefts using spoofing techniques.

(*d*) *Spamming*—Sending unsolicited information, mainly through emails and flooding the recipient's mail box for committing various offences and also for sending some contaminated viruses.

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(*e*) *Viruses*—Viruses are programs that damage a computer system by deleting data and/or replicating itself to other computers or damage the disk of the computer. They are also used to transfer data from one computer to another computer without the knowledge and consent of the victim. Different viruses perform different functions. Some viruses even take control of command of a victim's computer which commands can be operated by the accused who has sent such virus. Some viruses can continuously spy on the victim's activities, etc.

112. The following basic viruses are found in vogue though new and new viruses are formulated by cyber criminals rapidly. On a rough estimate, world over more than 10,000 new viruses are formulated per day by cyber criminals.

113. ***Types of viruses in vogue***:

(*i*) *Melisa Virus*.—This virus can be circulated through emails which, when accessed, would lead to mailing the first 50 emails addresses on a recipient's Microsoft outlook address book automatically and all would be infected with the virus.

The ultimate goal/offence/effect of this depends upon the programme sent through this virus. All major companies including Microsoft, Intel and Lucent technologies were severally affected which is known to have caused a loss of more than USD 400 million to entities in North America.

(*ii*) *Love Bug Virus*: This is a virus which is spread as an attachment to an email message with the special header "I love you". If a person accesses the attachment the virus transmits some email to persons mentioned in the address book of the recipient which deletes contents of the recipients and overrides all the files residing in the respective computers. These viruses have damaged many computer systems across the world and had even damaged critical government computer networks in other parts of the world.

(*iii*) *Trojan Horse*.—There are several kinds of "Trojan Horse" (a category of virus) categorised according to the harm they cause to a computer system of the unaware internet user including remote access Trojan, data sending Trojan, destructive Trojan, proxy Trojan, ftp Trojan, denial of service attacks Trojan, security software disabler Trojan, etc. A Trojan can even infect a "computer" and unauthorisedly activate its webcam and microphone attached to a system and click/record the private life of a person's bedroom or record personal and confidential conversations. It is required to be kept in mind that Smart LED TVs used everywhere are also within the statutory definition of "computer".

(*iv*) *Logic Bomb*: Logic Bomb is a programme which remains inactive till the time some part of the programme is activated by the criminal as per his need through a code at his chosen date or time.

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Illustrative cases which would fall within the statutory meaning of the terms "annoyance", "inconvenience", "danger", "obstruction", "injury" in cyber crime parlance under Section 66-A(b) and/or may fall under Section 66-A(c)

114. In a recent true case one person created a fake email account showing his user name as "DSOI Delhi". "DSOI" stands for "Defence Service Officers Institute". It is a club whose members are senior defence officials of the rank of Lt. Col. and above. The accused in this case sent spam mails to all members of the Club repeatedly which required the recipients to download one application (mobile app). The mail ID is created in New Delhi but the mails are sent from a US-based server. Since the matter is under investigation, further details are not mentioned.

115. In all illustrative cases pointed out hereinunder, depending upon which malware/virus is sent by the cyber criminal and what is the effect of such "information" being sent either upon the victim individual or upon his computer/computer system, it can be decided whether the offence would fall either within the meaning of "annoyance", "inconvenience", "danger", "obstruction", etc. as used in Section 66-A in the parlance of cyber laws.

116. In another case the accused had the mail account having "<bijoa@tele2.se>" as his email ID. The accused disguised his username to be "Microsoft Account Team". He sent spam mails to a large section of society. A message contained in the said mail would clearly indicate to all unaware recipients that it has come from 'Microsoft' and, therefore, would feel obliged to click as desired in the said mail since there is a "criminal intimidation" contained therein that if the mail is not responded by "clicking", the recipients' Microsoft account will be terminated permanently. When a recipient clicks as mentioned in the said mail, a computer virus enters into their respective systems. Since the accused did not take care to create even a fake ID, he could be traced and arrested. This case may fall both under Sections 66-A(*b*) and (*c*).

117. Similarly, one spam mail was sent in the name of Reserve Bank of India. The mail clearly gave an impression to an unaware net user that it has come from RBI. The moment the recipient would click "update here"', the site would open and would demand personal credentials and account details of the recipient which were being used for committing offences. A similar mail was sent in the name of Governor of Reserve Bank of India. Similar is the case of an email purported to be from Tax Refund Department of Income Tax Department.

118. Another mail purported to be sent from outside the country by accessing computer system in India, the sender i.e. cyber criminal spoofed his account to show that the mail is originated from the office of the Indian

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Embassy located in China. The mail was sent to senior officers of MEA, Government of India at New Delhi. The mail contained a document which had embedded Trojan virus. The purpose of the mail was to infect, steal and monitor the information residing in the computer systems of the senior officers of MEA, India.

119. A classic case of "criminal intimidation" as defined under Section 66-A(*b*) is the case of "Ransomware" sent through a spam mail. The moment the recipient i.e. unaware victim net user accesses the mail, all his data residing in his computer system gets encrypted. Such important data becomes unusable trash for the victim. The recipient would thereafter receive another mail demanding huge money to decrypt the data and permit the net user to access the data residing in his computer. This would fall both under "obstruction" and "criminal intimidation" as contemplated under Section 66-A(*b*) and if the ransom is not paid, the victim's entire data would be destroyed and would cause "damage" as contemplated under Section 66-A(*b*).

120. It is submitted that considering the rapid pace with which new techniques of cyber crimes resulting into different adverse affects on honest internet users and/or their computer/computer systems, it is desirable that any expression used in penal provisions concerning cyber laws are not put in any straitjacket definitions. The conventional doctrine that expressions used in a penal statute must have specific connotation requires to be liberally applied while interpreting a penal provision concerning cyber offences failing which the law cannot keep pace with ever-changing techniques and ever-expanding technologies of commission of crimes in the world.

121. The above illustrations are the cases which are contemplated by the legislature under Sections 66-A(*b*) and (*c*). However, a possibility of a criminal using "information" in the form of "message", "text", "images", "sound" cannot be ruled out which can virtually cause either "annoyance" or "inconvenience" depending upon the facts of each case.

122. Similarly there are malwares having a feature of auto-generated download of "information" into the recipient's computer which would jam recipient's computer causing not only annoyance but tremendous "inconvenience" since he will not be able to use his "computer" due to the jamming of the system by unsolicited and unwarranted downloading of "information".

123. However, such instances would be exceptional instances resulting from gross cases and desirability of investigation based upon such allegations will have to be determined based upon facts of each case. If some individual chooses to misuse the provisions for the purpose for which it is not intended or resorts to the expressions "inconvenience" or "annoyance" in a casual

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manner, it would be a case of abuse of process of law and can be remedied either under Section 482 or Article 226. The same, however, would not be a ground for declaring the provisions to be unconstitutional if they are otherwise found to be constitutional.

124. The terms "inconvenience" and "annoyance" in the context of cyber crime would also take a different meaning than their conventional linguistic meaning if an offender floods an individual email account with 500 mails a day blocking all genuine incoming mails and if such an act continues persistently, it can be a penal offence since it would result into both "annoyance" and "inconvenience".

125. At the first glance, the demarcating line between the provisions of Sections 66-A(*b*) and (*c*), apparently, may appear to be blurred. However, the main distinction is that Section 66-A(*b*) applies to all "information" which is a wider term as defined under Section 2(*v*), while Section 66-A(*c*) applies only to emails. The penal provisions are bifurcated in three categories so as to ensure that each and every future contingency can be taken care of and for every newly invented cyber crime, the citizens get protection of a penal provision.

Distinction between Section 66-A(c) and Section 66-D

126. A perusal of Sections 66-A(*c*) and 66-D prima facie gives an impression that there is duplication or overlapping of the same criminal act in two different penal provisions. However, on a closer scrutiny, it can be easily shown that they provide for different contingencies. While in an offence under Section 66-A(*c*), it is not necessary that recipient of the mail is actually cheated but under Section 66-D, it is necessary that cheating takes place resulting into loss to the recipient. There can be cases in which the recipient is not "cheated" viz. divested of any tangible or intangible property. For example, a virus sent through email may only "spy" on the recipient or "monitor" his computer system and the contents being uploaded in the system. In such a case, since ingredients of Section 420 are not attracted, Section 66-A(*c*) provides for a separate category of offence.

127. In most cases, stage of Section 66-A(*c*) is the beginning of the offence and if not prevented, Section 66-D is the outcome of that beginning. The word "cheating" is defined under Section 420 IPC which reads as under:

> "**420.** ***Cheating and dishonestly inducing delivery of property.***— Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

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128. To give a very basic illustration, it may be pointed out that one accused has created a fake website i.e. "delhijalboard.in" in which he has created a "payment gateway" to accept water utility payments by residents of Delhi. If the recipient makes the payment, the ingredients of "cheating" would be found and the offence would be both under Sections 66-A(*c*) and 66-D.

129. Under Section 66-D, the words used are "cheating by impersonation" which necessarily imply impersonating an individual. On the other hand, Section 66-A(*c*) is worded in such a way that it deals with only the origin which may be from an institution or an individual.

130. Another distinction between Sections 66-A(*c*) and 66-D is the medium used. While Section 66-A(*c*) is confined only to emails as a mode of communication, Section 66-D takes within its sweep other modes also, namely, use of "computer resource" for an act of cheating by impersonation. The term "computer resource" is defined under Section 2(*k*) which reads as under:

> "**2. (k) 'computer resource**' means computer, computer system, computer network, data, computer database or software;"

131. Thus "computer database" covers sites like "shadi.com" containing profiles of prospective brides and grooms. If an individual uses his impersonated profile in the said computer resource, he would fall only under Section 66-D and not under Section 66-A(*c*). Since the medium of impersonation is not an email but computer database.

VIII. Mr P.S. Narasimha, Senior Advocate on behalf of the State of Kerala, Writ Petition (Criminal) No. 196 of 2014

1. It has been contended by the petitioners that the State of Kerala lacked the legislative competence while enacting Section 118(*d*) of the Kerala Police Act, 2011 (hereinafter "the Act") as the subject-matter covered under clause (*d*) of Section 118 is relatable to Entry 31 read with Schedule VII List I Entry 93.

2. It has further been contended that Section 118(*d*) is relatable to List III Entry 1 and is, hence, repugnant to Central legislations like the Information Technology Act, 2000 and the Penal Code, 1860.

3. The above submission is fallacious for the following reasons:

(*I*) The Act was enacted by the State Legislature in exercise of its legislative powers under Article 246 read with Entries 1, 2 and 64 of Schedule VII, being matters relating to "public order" and "police".

(*II*) The contention of the alleged incompetence of the legislature to enact the said statute is against established principles of examining the legislation in its pith and substance.

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(*III*) The Act is relatable to Entries 1, 2 and 64 of Schedule VII and as such there is no question of repugnancy as the same would arise only in context of State and Central legislations arising out of the same Entries of the Concurrent List alone.

Re: Submission I

4. The Act was enacted to "*consolidate and amend the law relating to the establishment, regulation, powers and duties of the police force in the State of Kerala and for matters concerned therewith and incidental thereto*". Chapter II of the Act deals with the duties and functions of the police; Chapter III deals with police stations and their establishment; Chapter IV deals with the general structure of the police force; Chapter V deals with duties and responsibilities of a police officer; Chapter VI deals with police regulations; Chapter VII deals with service conditions; Chapter VIII deals with offences and punishments.

5. It must be noted that statutes like the Karnataka Police Act, 1963 (Chapter VIII), the Bombay Police Act, 1951 (Chapter VII) and the Bihar Police Act, 2007 (Chapter XI), to name a few, which pertain to creation of a police force, also contain provisions relating to offences. Similarly, in Chapter VIII of the Act, Section 118 in particular deals with penalty for causing grave violation of public order or danger. Section 118(*d*) makes it an offence if any person "causes annoyance to any person in an indecent manner by statements or verbal comments or telephone calls or calls of any type or by chasing or sending messages or mails by any means". The need for such a provision arises due to the advancement in technology and methods of commission of offences. With the advent of wireless and mobile technology, crimes can be committed through highly advanced communication devices. Therefore, in order to curb and punish such crimes and in order to ensure maintenance of public order, Section 118(*d*) has been enacted.

6. It has been time and again held by this Hon'ble Court that the expression "public order" is of a wide connotation. (See *Supt., Central Prison* v. *Ram Manohar Lohia*, AIR 1960 SC 633; *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124; *Brij Bhushan* v. *State of Delhi*, AIR 1950 SC 129.) It must be noted that clauses (*a*) to (*c*) and (*e*) to (*i*) deal with offences having a public order dimension. Under such circumstances, it is submitted that clause (*d*) will have to be read *ejusdem generis* with the other sub-sections. In other words, the word "annoyance" in clause (*d*) must assume sufficiently grave proportions to bring the matter within interests of public order. [See *Madhu Limaye* v. *Sub-Divisional Magistrate*, (1970) 3 SCC 746 at 24.]

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7. Viewing the enactment as a whole, it can be seen that the main purpose of the Act is to provide for the setting up of a police force to protect and preserve, inter alia, public order, which is traceable to Schedule VII List II Entries 1 and 2.

Re: Submission II

8. It is submitted that it would indeed be an erroneous approach to view a statute not as an organic whole, but as a collection of sections and then proceeding to examine which of the sections fall under the respective Lists of Schedule VII and accordingly determine the vires of the Act in question. The courts ought to, it is submitted, determine the true purport of the legislation and examine the statute as a whole. According to this Hon'ble Court in *A.S. Krishna* v. *State of Madras*, 1957 SCR 399:

> "The position, then, might thus be summed up: When a law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, *one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence*. It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are intra vires, and what are not." (At p. 410)

9. Furthermore, in *K.C. Gajapati Narayan Deo* v. *State of Orissa*, 1954 SCR 1, a judgment which was also relied upon by the petitioner, this Hon'ble Court has held that it is the substance of *the Act* and not merely the form or outward appearance that is material. (see p. 12). It must be noted that the said judgment, as well as *State of Karnataka* v. *Ranganatha Reddy*, (1977) 4 SCC 471, which was also cited by the petitioner, are authorities on the proposition that an enactment has to be examined as a whole when the competence of the legislature to enact the same has been challenged.

10. It is submitted that the pith and substance of the Act, read as a whole, is to provide a statutory framework governing the powers and functions of the police, in order to preserve and protect public order, in the State of Kerala. The doctrine of pith and substance postulates that the impugned law is substantially within the legislative competence of the particular legislature that made it, and has only incidentally encroached upon the legislative field

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of another legislature. As observed by this Hon'ble Court in *State of Bombay* v. *Narottamdas Jethabhai*, 1951 SCR 51:

> "The doctrine saves this incidental encroachment if only the law is in pith and substance within the legislative field of the particular Legislature which made it." (At p. 125)

11. The aforesaid principle was further reiterated in *Girnar Traders (3)* v. *State of Maharashtra*, (2011) 3 SCC 1, wherein the Court held:

> "The primary object of applying these principles is not limited to determining the reference of legislation to an Entry in either of the Lists, but there is a greater legal requirement to be satisfied in this interpretative process. *A statute should be construed so as to make it effective and operative on the principle expressed in the maxim ut res magis valeat quam pereat. Once it is found that in pith and substance, an Act is a law on a permitted field then any incidental encroachment, even on a forbidden field, does not affect the competence of the legislature to enact that law*." (at para 181)

12. Assuming, but not conceding, that Section 118(*d*) per se falls within the realms of List I, after examining the section divorced from the rest of the Act (which is impermissible in law), it is submitted that such an encroachment cannot affect the validity of a statute on the grounds of competence. The encroachment in the domain of Central laws, if any, is merely incidental in nature, which is permissible as held in a catena of decisions of this Hon'ble Court, as already submitted.

Re: Submission III

13. The petitioner has tried to argue that Section 118(*d*), in isolation, is "repugnant" to Central legislations like the Information Technology Act, 2000 and the Penal Code as the Act falls within the ambit of either List I Entry 31 or List III Entry I. It is contended that the argument on behalf of the petitioner regarding repugnancy is erroneous, as stated earlier. The Act and Section 118(*d*) clearly falls within the ambit of Schedule VII Entries 1, 2 and 64.

14. Further, it is submitted that the said doctrine would apply only if both laws fall under the Concurrent List [*K.T. Plantation (P) Ltd.* v. *State of Karnataka*, (2011) 9 SCC 1 at para 107]. As mentioned above, the provision clearly falls under the relevant Entries of List II [Entry 1 (read with Entry 64) and Entry 2] and not under any Entries mentioned in List III.

15. Taking the aforementioned submissions into account, it is contended that the legislature is competent to enact the said statute and the Act, as well as the provision in question, is within the vires of the Constitution.

The Judgment of the Court was delivered by

ROHINTON FALI NARIMAN, J.— This batch of writ petitions filed under Article 32 of the Constitution of India raises very important and far-reaching questions relatable primarily to the fundamental right of free speech and expression guaranteed by Article 19(1)(*a*) of the Constitution of India. The immediate cause for concern in these petitions is Section 66-A of the Information Technology Act of 2000. This section was not in the Act as originally enacted, but came into force by virtue of an Amendment Act of 2009 with effect from 27-10-2009. Since all the arguments raised by several counsel for the petitioners deal with the unconstitutionality of this section, it is set out hereinbelow:

> "**66-A.** ***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; or
>
> (*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; or
>
> (*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, image, audio, video and any other electronic record, which may be transmitted with the message."[1]

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1 The genealogy of this section may be traced back to Section 10(2)(*a*) of the U.K. 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. This section was substantially reproduced by Section 66 of the U.K. Post Office Act, 1953 as follows:

> "**66.** ***Prohibition of sending offensive or false telephone messages or false telegrams, etc.***—If any person—
>
> (*a*) sends any message by telephone which is grossly offensive or of an indecent, obscene or menacing character;
>
> (*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 purpose as aforesaid,
>
> he shall be liable on summary conviction to a fine not exceeding ten pounds, or to imprisonment for a term not exceeding one month, or to both."

2. A related challenge is also made to Section 69-A introduced by the same amendment which reads as follows:

"**69-A.** ***Power to issue directions for blocking for public access of any information through any computer resource***.—(1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.

(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine."

3. The Statement of Objects and Reasons appended to the Bill which introduced the Amendment Act stated in Para 3 that:

"**3.** A rapid increase in the use of computer and internet has given rise to new forms of crimes like publishing sexually explicit materials in electronic

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(Footnote 1 contd.)

This section in turn was replaced by Section 49 of the British Telecommunication Act, 1981 and Section 43 of the British Telecommunication Act, 1984. In its present form in the U.K., it is Section 127 of the Communications Act, 2003 which is relevant and which is as follows:

"**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) Sub-sections (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)]."

form, video voyeurism and breach of confidentiality and leakage of data by intermediary, e-commerce frauds like personation commonly known as phishing, identity theft and offensive messages through communication services. So, penal provisions are required to be included in the Information Technology Act, the Penal Code, the Indian Evidence Act and the Code of Criminal Procedure to prevent such crimes."

4. The petitioners contend that the very basis of Section 66-A—that it has given rise to new forms of crimes—is incorrect, and that Sections 66-B to 67-C and various sections of the Penal Code, 1860 (which will be referred to hereinafter) are good enough to deal with all these crimes.

5. The petitioners' various counsel raised a large number of points as to the constitutionality of Section 66-A. According to them, first and foremost Section 66-A infringes the fundamental right to free speech and expression and is not saved by any of the eight subjects covered in Article 19(2). According to them, the causing of annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will are all outside the purview of Article 19(2). Further, in creating an offence, Section 66-A suffers from the vice of vagueness because unlike the offence created by Section 66 of the same Act, none of the aforesaid terms are even attempted to be defined and cannot be defined, the result being that innocent persons are roped in as well as those who are not. Such persons are not told clearly on which side of the line they fall; and it would be open to the authorities to be as arbitrary and whimsical as they like in booking such persons under the said section. In fact, a large number of innocent persons have been booked and many instances have been given in the form of a note to the Court. The enforcement of the said section would really be an insidious form of censorship which impairs a core value contained in Article 19(1)(*a*). In addition, the said section has a chilling effect on the freedom of speech and expression. Also, the right of viewers is infringed as such chilling effect would not give them the benefit of many shades of grey in terms of various points of view that could be viewed over the internet. The petitioners also contend that their rights under Articles 14 and 21 are breached inasmuch as there is no intelligible differentia between those who use the internet and those who by words spoken or written use other mediums of communication. To punish somebody because he uses a particular medium of communication is itself a discriminatory object and would fall foul of Article 14 in any case.

6. In reply, Mr Tushar Mehta, learned Additional Solicitor General defended the constitutionality of Section 66-A. He argued that the legislature is in the best position to understand and appreciate the needs of the people. The Court will, therefore, interfere with the legislative process only when a statute is clearly violative of the rights conferred on the citizen under Part III of the Constitution. There is a presumption in favour of the constitutionality of an enactment. Further, the Court would so construe a statute to make it workable and in doing so can read into it or read down the provisions that are impugned. The Constitution does not impose impossible standards of

determining validity. Mere possibility of abuse of a provision cannot be a ground to declare a provision invalid. Loose language may have been used in Section 66-A to deal with novel methods of disturbing other people's rights by using the internet as a tool to do so. Further, vagueness is not a ground to declare a statute unconstitutional if the statute is otherwise legislatively competent and non-arbitrary. He cited a large number of judgments before us both from this Court and from overseas to buttress his submissions.

Freedom of speech and expression

7. Article 19(1)(*a*) of the Constitution of India states as follows:

> "**19.** ***Protection of certain rights regarding freedom of speech, etc.***— (1) All citizens shall have the right—
>
> (*a*) to freedom of speech and expression;"

Article 19(2) states:

> (2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

8. The Preamble of the Constitution of India inter alia speaks of liberty of thought, expression, belief, faith and worship. It also says that India is a sovereign democratic republic. It cannot be overemphasised that when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme.

9. Various judgments of this Court have referred to the importance of freedom of speech and expression both from the point of view of the liberty of the individual and from the point of view of our democratic form of government. For example, in the early case of *Romesh Thappar* v. *State of Madras*[2], SCR at p. 602, this Court stated that freedom of speech lay at the foundation of all democratic organisations. In *Sakal Papers (P) Ltd.* v. *Union of India*[3], SCR at p. 866, a Constitution Bench of this Court said that freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved. In a separate concurring judgment Beg, J. said, in *Bennett Coleman & Co.* v. *Union of India*[4], SCC p. 828, para 98 : SCR at p. 829, that the freedom of speech and of the press is

2 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514
3 (1962) 3 SCR 842 : AIR 1962 SC 305
4 (1972) 2 SCC 788 : (1973) 2 SCR 757

the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions.[5]

10. Equally, in *S. Khushboo* v. *Kanniammal*[6] this Court stated, in para 45 that the importance of freedom of speech and expression, though not absolute, was necessary as we need to tolerate unpopular views. This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a precondition for meaningful governance, the culture of open dialogue is generally of great societal importance.

11. This last judgment is important in that it refers to the "marketplace of ideas" concept that has permeated American law. This was put in the felicitous words of Holmes, J. in his famous dissent in *Abrams* v. *United States*[7], thus: (L Ed p. 1180)

> "... But when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That at any rate, is the theory of our Constitution."

12. Brandeis, J. in his famous concurring judgment in *Whitney* v. *California*[8], said: (L Ed pp. 1105-06)

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its Government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American Government. They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and

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5 *Incidentally, the Ark of the Covenant is perhaps the single most important focal point in Judaism.* The original Ten Commandments which the Lord himself gave to Moses was housed in a wooden chest which was gold-plated and called the Ark of the Covenant and carried by the Jews from place to place until it found its final repose in the first temple—that is the temple built by Solomon.

6 (2010) 5 SCC 600 : (2010) 2 SCC (Cri) 1299

7 250 US 616 : 63 L Ed 1173 (1919)

8 71 L Ed 1095 : 274 US 357 (1927)

imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable Government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. *To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.* There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated." (emphasis supplied)

13. This leads us to a discussion of what is the content of the expression "freedom of speech and expression". There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(*a*). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in.[9] It is at this stage

9 A good example of the difference between advocacy and incitement is Mark Antony's speech in Shakespeare's immortal classic Julius Caesar. Mark Antony begins cautiously. Brutus is chastised for calling Julius Caesar ambitious and is repeatedly said to be an "honourable man". He then shows the crowd Caesar's mantle and describes who struck Caesar where. It is at this point, after the interjection of two citizens from the crowd, that Antony says:

that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, etc. Why it is important to have these three concepts in mind is because most of the arguments of both petitioners and respondents tended to veer around the expression "public order".

14. It is at this point that a word needs to be said about the use of American judgments in the context of Article 19(1)(*a*). In virtually every significant judgment of this Court, reference has been made to judgments from across the Atlantic. Is it safe to do so?

15. It is significant to notice first the differences between the US First Amendment and Article 19(1)(*a*) read with Article 19(2). The first important difference is the absoluteness of the US First Amendment—Congress shall make *no law* which abridges the freedom of speech. Second, whereas the US First Amendment speaks of freedom of speech and of the press, without any reference to "expression", Article 19(1)(*a*) speaks of freedom of speech and expression without any reference to "the press". Third, under the US Constitution, speech may be abridged, whereas under our Constitution, reasonable restrictions may be imposed. Fourth, under our Constitution such restrictions have to be in the interest of eight designated subject-matters—that is, any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject-matters set out in Article 19(2).

16. Insofar as the first apparent difference is concerned, the US Supreme Court has never given literal effect to the declaration that Congress shall

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(Footnote 9 contd.)

"*Antony*—Good friends, sweet friends, let me not stir you up
To such a sudden flood of mutiny.
They that have done this deed are honourable:
What private griefs they have, alas, I know not,
That made them do it: they are wise and honourable,
And will, no doubt, with reasons answer you.
I come not, friends, to steal away your hearts:
I am no orator, as Brutus is;
But, as you know me all, a plain blunt man,
That love my friend; and that they know full well
That gave me public leave to speak of him:
For I have neither wit, nor words, nor worth,
Action, nor utterance, nor the power of speech,
To stir men's blood: I only speak right on;
I tell you that which you yourselves do know;
Show you sweet Caesar's wounds, poor poor dumb mouths,
And bid them speak for me: but were I Brutus,
And Brutus Antony, there were an Antony
Would ruffle up your spirits and put a tongue
In every wound of Caesar that should move
The stones of Rome to rise and mutiny.
All—We'll mutiny."

make no law abridging the freedom of speech. The approach of the Court which is succinctly stated in one of the early US Supreme Court judgments, continues even today. In *Chaplinsky* v. *New Hampshire*[10], Murphy, J. who delivered the opinion of the Court put it thus: (L Ed p. 1035)

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell* v. *Connecticut*[11], US pp. 309, 310 : S Ct p. 906."

17. So far as the second apparent difference is concerned, the American Supreme Court has included "expression" as part of freedom of speech and this Court has included "the press" as being covered under Article 19(1)(*a*), so that, as a matter of judicial interpretation, both the US and India protect the freedom of speech and expression as well as press freedom. Insofar as abridgement and reasonable restrictions are concerned, both the US Supreme Court and this Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. It is only when it comes to the eight subject-matters that there is a vast difference. In the US, if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject-matters set out under Article 19(2). If it does not, and is outside the pale of Article 19(2), Indian courts will strike down such law.

18. Viewed from the above perspective, American judgments have great persuasive value on the content of freedom of speech and expression and the tests laid down for its infringement. It is only when it comes to subserving the general public interest that there is the world of a difference. This is perhaps why in *Kameshwar Prasad* v. *State of Bihar*[12], this Court held: (SCR p. 378 : AIR pp. 1169-70, para 8)

10 86 L Ed 1031 : 315 US 568 (1942)
11 310 US 296 : 60 S Ct 900 : 84 L Ed 1213 : 128 ALR 1352 (1940)
12 1962 Supp (3) SCR 369 : AIR 1962 SC 1166

"As regards these decisions of the American Courts, it should be borne in mind that though the First Amendment to the Constitution of the United State reading 'Congress shall make no law ... abridging the freedom of speech ...' appears to confer no power on the Congress to impose any restriction on the exercise of the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power—the scope of which however has not been defined with precision or uniformly. It is on the basis of the police power to abridge that freedom that the constitutional validity of laws penalising libels, and those relating to sedition, or to obscene publications, etc., has been sustained. The resultant flexibility of the restrictions that could be validly imposed renders the American decisions inapplicable to and without much use for resolving the questions arising under Article 19(1)(*a*) or (*b*) of our Constitution wherein the grounds on which limitations might be placed on the guaranteed right are set out with definiteness and precision."

19. But when it comes to understanding the impact and content of freedom of speech, in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[13], Venkataramiah, J. stated: (SCC p. 671, para 44 : SCR pp. 324F-325A)

"While examining the constitutionality of a law which is alleged to contravene Article 19(1)(*a*) of the Constitution, we cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration. The pattern of Article 19(1)(*a*) and of Article 19(1)(*g*) of our Constitution is different from the pattern of the First Amendment to the American Constitution which is almost absolute in its terms. The rights guaranteed under Article 19(1)(*a*) and Article 19(1)(*g*) of the Constitution are to be read along with clauses (2) and (6) of Article 19 which carve out areas in respect of which valid legislation can be made."

20. With these prefatory remarks, we will now go to the other aspects of the challenge made in these writ petitions and argued before us.

A. ***Article 19(1)(a)***

21. Section 66-A has been challenged on the ground that it casts the net very wide—"all information" that is disseminated over the internet is included within its reach. It will be useful to note that Section 2(*v*) of the Information Technology Act, 2000 defines "information" as follows:

"**2.** ***Definitions***.—(1) In this Act, unless the context otherwise requires—

(*v*) '**information**' includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche."

13 (1985) 1 SCC 641 : 1985 SCC (Tax) 121 : (1985) 2 SCR 287

Two things will be noticed. The first is that the definition is an inclusive one. Second, the definition does not refer to what the content of information can be. In fact, it refers only to the medium through which such information is disseminated. It is clear, therefore, that the petitioners are correct in saying that the public's right to know is directly affected by Section 66-A. Information of all kinds is roped in—such information may have scientific, literary or artistic value, it may refer to current events, it may be obscene or seditious. That such information may cause annoyance or inconvenience to some is how the offence is made out. It is clear that the right of the people to know—the marketplace of ideas—which the internet provides to persons of all kinds is what attracts Section 66-A. That the information sent has to be annoying, inconvenient, grossly offensive, etc., also shows that no distinction is made between mere discussion or advocacy of a particular point of view which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of State, etc. The petitioners are right in saying that Section 66-A in creating an offence against persons who use the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66-A.

22. In this regard, the observations of Jackson, J. in *American Communications Assn.* v. *Douds*[14] are apposite: (L Ed p. 967)

> "… Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored."

B. ***Article 19(2)***

23. One challenge to Section 66-A made by the petitioners' counsel is that the offence created by the said section has no proximate relation with any of the eight subject-matters contained in Article 19(2). We may incidentally mention that the State has claimed that the said section can be supported under the heads of public order, defamation, incitement to an offence and decency or morality.

24. Under our constitutional scheme, as stated earlier, it is not open to the State to curtail freedom of speech to promote the general public interest. In *Sakal Papers (P) Ltd.* v. *Union of India*[3], this Court said: (SCR p. 863 : AIR pp. 313-14, para 37)

> "It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on

14 94 L Ed 925 : 339 US 382 (1950)
3 (1962) 3 SCR 842 : AIR 1962 SC 305

business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgment on the same grounds as are set out in clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore, for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom."

25. Before we come to each of these expressions, we must understand what is meant by the expression "in the interests of". In *Supt., Central Prison* v. *Ram Manohar Lohia*[15], this Court laid down: (SCR pp. 834-36 : AIR pp. 639-40, paras 12-14)

> "... We do not understand the observations of the Chief Justice to mean that any remote or fanciful connection between the impugned Act and the public order would be sufficient to sustain its validity. The learned Chief Justice was only making a distinction between an Act which expressly and directly purported to maintain public order and one which did not expressly state the said purpose but left it to be implied therefrom; and between an Act that directly maintained public order and that indirectly brought about the same result. *The distinction does not ignore the necessity for intimate connection between the Act and the public order sought to be maintained by the Act.*
>
> ... The restriction made 'in the interests of public order' must also have reasonable relation to the object to be achieved i.e. the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause. ... The decision, in our view, lays down the correct test. The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a

15 (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002

proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.

... There is no proximate or even foreseeable connection between such instigation and the public order sought to be protected under this section. We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite a revolutionary movement destroying public order." (emphasis supplied)

Reasonable restrictions

26. This Court has laid down what "reasonable restrictions" means in several cases. In *Chintaman Rao* v. *State of M.P.*[16] this Court said: (SCR p. 763 : AIR p. 119, para 7)

"The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."

27. In *State of Madras* v. *V.G. Row*[17], this Court said: (SCR pp. 606-07 : AIR pp. 199-200, para 15)

"This Court had occasion in *Khare case*[18] to define the scope of the judicial review under clause (5) of Article19 where the phrase 'imposing reasonable restrictions on the exercise of the right' also occurs and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent

16 1950 SCR 759 : AIR 1951 SC 118
17 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966
18 *N.B. Khare* v. *State of Delhi*, 1950 SCR 519 : AIR 1950 SC 211 : (1951) 52 Cri LJ 550

and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

28. Similarly, in *Mohd. Faruk* v. *State of M.P.*[19], this Court said: (SCC p. 857, para 10 : SCR p. 161 E-G)

"... The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency national or local—or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved."

29. In *N.B. Khare* v. *State of Delhi*[18], a Constitution Bench also spoke of reasonable restrictions when it comes to procedure. It said: (SCR p. 524 : AIR p. 214, para 4)

"... While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law. It is obvious that if the law prescribes five years' externment or ten years' externment, the question whether such period of externment is reasonable, being the substantive part, is necessarily for the consideration of the Court under clause (5). Similarly, if the law provides the procedure under which the exercise of the right may be restricted, the same is also for the consideration of the Court, as it

19 (1969) 1 SCC 853 : (1970) 1 SCR 156
18 1950 SCR 519 : AIR 1950 SC 211 : (1951) 52 Cri LJ 550

has to determine if the exercise of the right has been reasonably restricted."

30. It was argued by the learned Additional Solicitor General that a relaxed standard of reasonableness of restriction should apply regard being had to the fact that the medium of speech being the internet differs from other mediums on several grounds. To appreciate the width and scope of his submissions, we are setting out his written submission verbatim:

"(*i*) The reach of print media is restricted to one State or at the most one country while internet has no boundaries and its reach is global;

(*ii*) The recipient of the free speech and expression used in a print media can only be literate persons while internet can be accessed by literate and illiterate both since one click is needed to download an objectionable post or a video;

(*iii*) In case of televisions serials (except live shows) and movies, there is a permitted pre-censorship which ensures right of viewers not to receive any information which is dangerous to or not in conformity with the social interest. While in the case of an internet, no such pre-censorship is possible and each individual is publisher, printer, producer, director and broadcaster of the content without any statutory regulation;

(*iv*) In case of print media or medium of television and films whatever is truly recorded can only be published or broadcasted/televised/viewed. While in case of an internet, morphing of images, change of voices and many other technologically advance methods to create serious potential social disorder can be applied.

(*v*) By the medium of internet, rumours having a serious potential of creating a serious social disorder can be spread to trillions of people without any check which is not possible in case of other mediums.

(*vi*) In case of mediums like print media, television and films, it is broadly not possible to invade privacy of unwilling persons. While in case of an internet, it is very easy to invade upon the privacy of any individual and thereby violating his right under Article 21 of the Constitution of India.

(*vii*) By its very nature, in the mediums like newspaper, magazine, television or a movie, it is not possible to sexually harass someone, outrage the modesty of anyone, use unacceptable filthy language and evoke communal frenzy which would lead to serious social disorder. While in the case of an internet, it is easily possible to do so by a mere click of a button without any geographical limitations and almost in all cases while ensuring anonymity of the offender.

(*viii*) By the very nature of the medium, the width and reach of internet is manifold as against newspaper and films. The said mediums have inbuilt limitations i.e. a person will have to buy/borrow a newspaper

and/or will have to go to a theatre to watch a movie. For television also one needs at least a room where a television is placed and can only watch those channels which he has subscribed and that too only at a time where it is being telecast. While in case of an internet a person abusing the internet, can commit an offence at any place at the time of his choice and maintaining his anonymity in almost all cases.

(*ix*) In case of other mediums, it is impossible to maintain anonymity as a result of which speech/idea/opinions/films having serious potential of creating a social disorder never gets generated since its origin is bound to be known. While in case of an internet mostly its abuse takes place under the garb of anonymity which can be unveiled only after thorough investigation.

(*x*) In case of other mediums like newspapers, television or films, the approach is always institutionalised approach governed by industry specific ethical norms of self conduct. Each newspaper/magazine/movie production house/TV channel will have its own institutionalised policies in-house which would generally obviate any possibility of the medium being abused. As against that use of internet is solely based upon individualistic approach of each individual without any check, balance or regulatory ethical norms for exercising freedom of speech and expression under Article 19(1)(*a*).

(*xi*) In the era limited to print media and cinematograph; or even in case of publication through airwaves, the chances of abuse of freedom of expression was less due to inherent infrastructural and logistical constraints. In the case of said mediums, it was almost impossible for an individual to create and publish an abusive content and make it available to trillions of people. Whereas, in the present internet age the said infrastructural and logistical constraints have disappeared as any individual using even a smart mobile phone or a portable computer device can create and publish abusive material on its own, without seeking help of anyone else and make it available to trillions of people by just one click."

31. As stated, all the above factors may make a distinction between the print and other media as opposed to the internet and the legislature may well, therefore, provide for separate offences so far as free speech over the internet is concerned. There is, therefore, an intelligible differentia having a rational relation to the object sought to be achieved—that there can be creation of offences which are applied to free speech over the internet alone as opposed to other mediums of communication. Thus, an Article 14 challenge has been repelled by us on this ground later in this judgment. But we do not find anything in the features outlined by the learned Additional Solicitor General to relax the Court's scrutiny of the curbing of the content of free speech over the internet. While it may be possible to narrowly draw a section creating a new offence, such as Section 69-A for instance, relatable only to speech over

the internet, yet the validity of such a law will have to be tested on the touchstone of the tests already indicated above.

32. In fact, this aspect was considered in *Ministry of Information & Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*[20] in para 37, where the following question was posed: (SCC p. 208)

> "*37*. The next question which is required to be answered is whether there is any distinction between the freedom of the print media and that of the electronic media such as radio and television, and if so, whether it necessitates more restrictions on the latter media."

This question was answered in para 78 thus: (SCC pp. 226-27)

> "*78*. There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-visual impact and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes, therefore, needs regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society. This is not disputed. But to contend that on that account the restrictions to be imposed on the right under Article 19(1)(*a*) should be in addition to those permissible under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media. *If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial.* The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures. It is

20 (1995) 2 SCC 161

further difficult to appreciate such contention on the part of the Government in this country when they have a complete control over the frequencies and the content of the programme to be telecast. They control the sole agency of telecasting. They are also armed with the provisions of Article 19(2) and the powers of pre-censorship under the Cinematograph Act and Rules. The only limitation on the said right is, therefore, the limitation of resources and the need to use them for the benefit of all. When, however, there are surplus or unlimited resources and the public interests so demand or in any case do not prevent telecasting, the validity of the argument based on limitation of resources disappears. It is true that to own a frequency for the purposes of broadcasting is a costly affair and even when there are surplus or unlimited frequencies, only the affluent few will own them and will be in a position to use it to subserve their own interest by manipulating news and views. That also poses a danger to the freedom of speech and expression of the have-nots by denying them the truthful information on all sides of an issue which is so necessary to form a sound view on any subject. That is why the doctrine of fairness has been evolved in the US in the context of the private broadcasters licensed to share the limited frequencies with the central agency like FCC to regulate the programming. But this phenomenon occurs even in the case of the print media of all the countries. Hence the body like the Press Council of India which is empowered to enforce, however imperfectly, the right to reply. The print media further enjoys as in our country, freedom from pre-censorship unlike the electronic media." (emphasis supplied)

Public order

33. In Article 19(2) (as it originally stood) this sub-head was conspicuously absent. Because of its absence, challenges made to an order made under Section 7 of the Punjab Maintenance of Public Order Act and to an order made under Section 9(1)(*a*) of the Madras Maintenance of Public Order Act were allowed in two early judgments by this Court. Thus, in *Romesh Thappar* v. *State of Madras*[2], this Court held that an order made under Section 9(1)(*a*) of the Madras Maintenance of Public Order Act (23 of 1949) was unconstitutional and void in that it could not be justified as a measure connected with security of the State. While dealing with the expression "public order", this Court held that "public order" is an expression which signifies a state of tranquility which prevails amongst the members of a political society as a result of the internal regulations enforced by the Government which they have established.

34. Similarly, in *Brij Bhushan* v. *State of Delhi*[21], an order made under Section 7 of the East Punjab Public Safety Act, 1949, was held to be unconstitutional and void for the self-same reason.

2 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514
21 1950 SCR 605 : AIR 1950 SC 129 : (1950) 51 Cri LJ 1525

35. As an aftermath of these judgments, the Constitution First Amendment added the words "public order" to Article 19(2).

36. In *Supt., Central Prison* v. *Ram Manohar Lohia*[15], this Court held that public order is synonymous with public safety and tranquility; it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State. This definition was further refined in *Ram Manohar Lohia* v. *State of Bihar*[22], where this Court held: (SCR p. 746 D-E : AIR pp. 758-59, para 52)

> "It will thus appear that just as 'public order' in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting 'security of State', 'law and order' also comprehends disorders of less gravity than those affecting 'public order'. One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State."

37. In *Arun Ghosh* v. *State of W.B.*[23], *Ram Manohar Lohia case*[22] was referred to with approval in the following terms: (SCC pp. 99-100, para 3 : SCR pp. 290-91)

> "... In *Ram Manohar Lohia case*[22] this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardised because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take

15 (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002
22 (1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608
23 (1970) 1 SCC 98 : 1970 SCC (Cri) 67 : (1970) 3 SCR 288

the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. *He may annoy them and also the management but he does not cause disturbance of public order.* He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the public tranquillity there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French distinguish law and order and public order by designating the latter as order publique. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in *Pushkar Mukherjee* v. *State of W.B.*[24] drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In *Ram Manohar Lohia case*[22] examples were given by Sarkar, and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another." (emphasis supplied)

38. This decision lays down the test that has to be formulated in all these cases. We have to ask ourselves the question: does a particular act lead to disturbance of the current life of the community or does it merely affect an

24 (1969) 1 SCC 10

22 *Ram Manohar Lohia* v. *State of Bihar*, (1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608

individual leaving the tranquility of society undisturbed? Going by this test, it is clear that Section 66-A is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66-A. It will be immediately noticed that the recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this section is concerned. (Save and except where under sub-clause (*c*) the addressee or recipient is deceived or misled about the origin of a particular message.) It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. The section makes no distinction between mass dissemination and dissemination to one person. Further, the section does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent—there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquillity. On all these counts, it is clear that the section has no proximate relationship to public order whatsoever. The example of a guest at a hotel "annoying" girls is telling—this Court has held that mere "annoyance" need not cause disturbance of public order. Under Section 66-A, the offence is complete by sending a message for the purpose of causing annoyance, either "persistently" or otherwise without in any manner impacting public order.

Clear and present danger — Tendency to affect

39. It will be remembered that Holmes, J. in *Schenck* v. *United States*[25], enunciated the clear and present danger test as follows: (L Ed pp. 473-74)

> "... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers* v. *Buck's Stove & Range Co.*[26], US p. 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

40. This was further refined in *Abrams* v. *United States*[7], this time in a Holmesian dissent, to be clear and imminent danger. However, in most of the subsequent judgments of the US Supreme Court, the test has been understood to mean to be "clear and present danger". The test of "clear and present danger" has been used by the US Supreme Court in many varying situations and has been adjusted according to varying fact situations. It appears to have been repeatedly applied, see *Terminiello* v. *Chicago*[27], L Ed at pp. 1134-35,

25 63 L Ed 470 : 249 US 47 (1919)
26 221 US 418 : 31 S Ct 492 : 55 L Ed 797 : 34 LRA (NS) 874 (1911)
7 250 US 616 : 63 L Ed 1173 (1919)
27 93 L Ed 1131 : 337 US 1 (1949)

Brandenburg v. *Ohio*[28], L Ed 2d at pp. 434-35 & 436, *Virginia* v. *Black*[29], L Ed 2d at pp. 551, 552 and 553[30].

41. We have echoes of it in our law as well—*S. Rangarajan* v. *P. Jagjivan Ram*[31], SCC at para 45: (SCC pp. 595-96)

> "*45*. The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. *Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered*. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a power keg'." (emphasis supplied)

42. This Court has used the expression "tendency" to a particular act. Thus, in *State of Bihar* v. *Shailabala Devi*[32], an early decision of this Court said that an article, in order to be banned must have a tendency to excite persons to acts of violence (SCR at pp. 662-63). The test laid down in the

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28 23 L Ed 2d 430 : 395 US 444 (1969)

29 155 L Ed 2d 535 : 538 US 343 (2003)

30 In its present form the clear and present danger test has been reformulated to say that:

> "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."
>
> Interestingly, the US Courts have gone on to make a further refinement. The State may ban what is called a "true threat".
>
> " 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."
>
> "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."
>
> [See *Virginia* v. *Black*, 155 L Ed 2d 535 : 538 US 343 (2003) and *Watts* v. *United States*, 22 L Ed 2d 664 at p. 667 : 394 US 705 (1969)]

31 (1989) 2 SCC 574

32 1952 SCR 654 : AIR 1952 SC 329 : 1952 Cri LJ 1373

said decision was that the article should be considered as a whole in a fair free liberal spirit and then it must be decided what effect it would have on the mind of a reasonable reader (SCR at pp. 664-65).

43. In *Ramji Lal Modi* v. *State of U.P.*[33], SCR at p. 867, this Court upheld Section 295-A of the Penal Code only because it was read down to mean that aggravated forms of insults to religion must have a tendency to disrupt public order. Similarly, in *Kedar Nath Singh* v. *State of Bihar*[34], Section 124-A of the Penal Code, 1860 was upheld by construing it narrowly and stating that the offence would only be complete if the words complained of have a tendency of creating public disorder by violence. It was added that merely creating disaffection or *creating feelings of enmity* in certain people was not good enough or else it would violate the fundamental right of free speech under Article 19(1)(*a*). Again, in *Ramesh Yeshwant Prabhoo* v. *Prabhakar Kashinath Kunte*[35], Section 123(3-A) of the Representation of the People Act was upheld only if the enmity or hatred that was spoken about in the section would tend to create immediate public disorder and not otherwise.

44. Viewed at, either by the standpoint of the clear and present danger test or the tendency to create public disorder, Section 66-A would not pass muster as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates.

Defamation

45. "Defamation" is defined in Section 499 of the Penal Code as follows:

> "**499.** ***Defamation***.—Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.
>
> *Explanation 1*.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.
>
> *Explanation 2*.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.
>
> *Explanation 3*.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.
>
> *Explanation 4*.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful."

33 1957 SCR 860 : AIR 1957 SC 620 : 1957 Cri LJ 1006
34 1962 Supp (2) SCR 769 : AIR 1962 SC 955 : (1962) 2 Cri LJ 103
35 (1996) 1 SCC 130

46. It will be noticed that for something to be defamatory, injury to reputation is a basic ingredient. Section 66-A does not concern itself with injury to reputation. Something may be grossly offensive and may annoy or be inconvenient to somebody without at all affecting his reputation. It is clear, therefore, that the section is not aimed at defamatory statements at all.

Incitement to an offence

47. Equally, Section 66-A has no proximate connection with incitement to commit an offence. Firstly, the information disseminated over the internet need not be information which "incites" anybody at all. Written words may be sent that may be purely in the realm of "discussion" or "advocacy" of a "particular point of view". Further, the mere causing of annoyance, inconvenience, danger, etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all. They may be ingredients of certain offences under the Penal Code but are not offences in themselves. For these reasons, Section 66-A has nothing to do with "incitement to an offence". As Section 66-A severely curtails information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject-matters under Article 19(2) must, therefore, fall foul of Article 19(1)(*a*), and not being saved under Article 19(2), is declared as unconstitutional.

Decency or morality

48. This Court in *Ranjit D. Udeshi* v. *State of Maharashtra*[36] took a rather restrictive view of what would pass muster as not being obscene. The Court followed the test laid down in the old English judgment in *Hicklin case*[37] which was whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. Great strides have been made since this decision in the U.K., the United States as well as in our country. Thus, in *Directorate General of Doordarshan* v. *Anand Patwardhan*[38] this Court noticed the law in the United States and said that a material may be regarded as obscene if the average person applying contemporary community standards would find that the subject-matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary, artistic, political, educational or scientific value (see para 31).

49. In a recent judgment of this Court, *Aveek Sarkar* v. *State of W.B.*[39], this Court referred to English, US and Canadian judgments and moved away from the *Hicklin*[37] test and applied the contemporary community standards test.

36 (1965) 1 SCR 65 : AIR 1965 SC 881 : (1965) 2 Cri LJ 8
37 *R.* v. *Hicklin*, (1868) LR 3 QB 360
38 (2006) 8 SCC 433
39 (2014) 4 SCC 257 : (2014) 2 SCC (Cri) 291

50. What has been said with regard to public order and incitement to an offence equally applies here. Section 66-A cannot possibly be said to create an offence which falls within the expression "decency" or "morality" in that what may be grossly offensive or annoying under the section need not be obscene at all—in fact the word "obscene" is conspicuous by its absence in Section 66-A.

51. However, the learned Additional Solicitor General asked us to read into Section 66-A each of the subject-matters contained in Article 19(2) in order to save the constitutionality of the provision. We are afraid that such an exercise is not possible for the simple reason that when the legislature intended to do so, it provided for some of the subject-matters contained in Article 19(2) in Section 69-A. We would be doing complete violence to the language of Section 66-A if we were to read into it something that was never intended to be read into it. Further, he argued that the statute should be made workable, and the following should be read into Section 66-A:

"(*i*) Information which would appear highly abusive, insulting, pejorative, offensive by reasonable person in general, judged by the standards of an open and just multi-caste, multi-religious, multi-racial society;

— *Director of Public Prosecutions* v. *Collins*[40], WLR paras 9 and 21

— *Connolly* v. *Director of Public Prosecutions*[41]

— House of Lords Select Committee 1st Report of Session 2014-2015 on Communications titled as "Social Media And Criminal Offences" at p. 260 of Compilation of Judgments, Vol. 1, Part B

(*ii*) Information which is directed to incite or can produce imminent lawless action;

(*Brandenburg* v. *Ohio*[28])

(*iii*) Information which may constitute credible threats of violence to the person or damage;

(*iv*) Information which stirs the public to anger, invites violent disputes brings about condition of violent unrest and disturbances;

(*Terminiello* v. *Chicago*[27])

(*v*) Information which advocates or teaches the duty, necessity or proprietary of violence as a means of accomplishing political, social or religious reform and/or justifies commissioning of violent acts with an intent to exemplify or glorify such violent means to accomplish political, social, economical or religious reforms;

(*Whitney* v. *California*[8])

40 (2006) 1 WLR 2223 : (2006) 4 All ER 602 (HL)
41 (2008) 1 WLR 276 : (2007) 2 All ER 1012
28 23 L Ed 2d 430 : 395 US 444 (1969)
27 93 L Ed 1131 : 337 US 1 (1949)
8 71 L Ed 1095 : 274 US 357 (1927)

(*vi*) Information which contains fighting or abusive material;

Chaplinsky v. *New Hampshire*[10]

(*vii*) Information which promotes hate speech i.e.

(*a*) Information which propagates hatred towards individual or a group, on the basis of race, religion, religion, casteism, ethnicity.

(*b*) Information which is intended to show the supremacy of one particular religion/race/caste by making disparaging, abusive and/or highly inflammatory remarks against religion/race/caste.

(*c*) Information depicting religious deities, holy persons, holy symbols, holy books which are created to insult or to show contempt or lack of reverence for such religious deities, holy persons, holy symbols, holy books or towards something which is considered sacred or inviolable.

(*viii*) Satirical or iconoclastic cartoon and caricature which fails the test laid down in *Hustler Magazine Inc.* v. *Falwell*[42];

(*ix*) Information which glorifies terrorism and use of drugs;

(*x*) Information which infringes right of privacy of the others and includes acts of cyber bullying, harassment or stalking;

(*xi*) Information which is obscene and has the tendency to arouse feeling or revealing an overt sexual desire and should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it;

(*Aveek Sarkar* v. *State of W.B.*[39])

(*xii*) Context and background test of obscenity. Information which is posted in such a context or background which has a consequential effect of outraging the modesty of the pictured individual.

(*Aveek Sarkar* v. *State of W.B.*[39])"

52. What the learned Additional Solicitor General is asking us to do is not to read down Section 66-A—he is asking for a wholesale substitution of the provision which is obviously not possible.

Vagueness

53. Counsel for the petitioners argued that the language used in Section 66-A is so vague that neither would an accused person be put on notice as to what exactly is the offence which has been committed nor would the authorities administering the section be clear as to on which side of a clearly drawn line a particular communication will fall.

10 86 L Ed 1031 : 315 US 568 (1942)
42 485 US 46 : 99 L Ed 2d 41 (1988)
39 (2014) 4 SCC 257 : (2014) 2 SCC (Cri) 291

54. We were given *Collin's Dictionary*, which defined most of the terms used in Section 66-A, as follows:

"*Offensive.*—
(*1*) unpleasant or disgusting, as to the senses
(*2*) causing anger or annoyance; insulting
(*3*) for the purpose of attack rather than defence.
Menace.—
(*1*) to threaten with violence, danger, etc.
(*2*) a threat of the act of threatening
(*3*) something menacing; a source of danger
(*4*) a nuisance.
Annoy.—
(*1*) to irritate or displease
(*2*) to harass with repeated attacks.
Annoyance.—
(*1*) the feeling of being annoyed
(*2*) the act of annoying.
Inconvenience.—
(*1*) the state of quality of being inconvenient
(*2*) something inconvenient; a hindrance, trouble, or difficulty.
Danger.—
(*1*) the state of being vulnerable to injury, loss, or evil; risk
(*2*) a person or a thing that may cause injury, pain, etc.
Obstruct.—
(*1*) to block (a road, a passageway, etc.) with an obstacle
(*2*) to make (progress or activity) difficult
(*3*) to impede or block a clear view of.
Obstruction.—a person or a thing that obstructs.
Insult.—
(*1*) to treat, mention, or speak to rudely; offend; affront
(*2*) to assault; attack
(*3*) an offensive or contemptuous remark or action; affront; slight
(*4*) a person or thing producing the effect of an affront ⇒ some television is an insult to intelligence
(*5*) an injury or trauma."

55. The US Supreme Court has repeatedly held in a series of judgments that where no reasonable standards are laid down to define guilt in a section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable. Thus, in *Musser* v. *Utah*[43], a Utah statute which outlawed conspiracy to commit acts injurious to public morals was struck down.

43 92 L Ed 562 : 68 S Ct 397 : 333 US 95 (1948)

56. In *Winters* v. *New York*[44], a New York penal law read as follows: (L Ed p. 846)

> "1141. *Obscene prints and articles.*—(1) A person ... who,
>
> (2) Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime;
>
> * * *
>
> Is guilty of a misdemeanor...."

The Court in striking down the said statute held: (L Ed pp. 851-52)

> "The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime—has resulted in three arguments of this case in this Court. The legislative bodies in draftsmanship obviously have the same difficulty as do the judicial in interpretation. Nevertheless despite the difficulties, courts must do their best to determine whether or not the vagueness is of such a character 'that men of common intelligence must necessarily guess at its meaning'. *Connally* v. *General Construction Co.*[45], US p. 391 : S Ct p. 127. The entire text of the statute or the subjects dealt with may furnish an adequate standard. The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities.
>
> The sub-section of the New York Penal Law, as now interpreted by the Court of Appeals prohibits distribution of a magazine principally made up of criminal news or stories of deeds of bloodshed, or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person. But even considering the gloss put upon the literal meaning by the Court of Appeals' restriction of the statute to collections of stories 'so massed as to become vehicles for inciting violent and depraved crimes against the person ... not necessarily ... sexual passion', we find the specification of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this petitioner. Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterised by bloodshed or lust are omitted from the interpretation of the Court of Appeals, we think fair use of collections of pictures and

44 92 L Ed 840 : 333 US 507 (1948)
45 269 US 385 : 46 S Ct 126 : 70 L Ed 322 (1926)

stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications. No intent or purpose is required—no indecency or obscenity in any sense heretofore known to the law. 'So massed as to incite to crime' can become meaningful only by concrete instances. This one example is not enough. The clause proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crimes of violence against the person. No conspiracy to commit a crime is required. See *Musser* v. *Utah*, this term. It is not an effective notice of new crime. The clause has no technical or common law meaning. Nor can light as to the meaning be gained from the section as a whole or the article of the Penal Law under which it appears. As said in *Cohen Grocery Co. case*[46], (US at p. 89 : S Ct at p. 300): (L Ed p. 520)

> '… It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.'

The statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. When stories of deeds of bloodshed, such as many in the accused magazines, are massed so as to incite to violent crimes, the statute is violated. It does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable, might well be found to be 'massed' so as to become 'vehicles for inciting violent and depraved crimes'. Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Herndon* v. *Lowry*[47], US p. 259 : S Ct p. 739."

57. In *Burstyn* v. *Wilson*[48], sacrilegious writings and utterances were outlawed. Here again, the US Supreme Court stepped in to strike down the offending section stating: (L Ed p. 1121)

> "… It is not a sufficient answer to say that 'sacrilegious' is definite, because all subjects that in any way might be interpreted as offending the religious beliefs of any one of the 300 sects of the United States are banned in New York. To allow such vague, undefinable powers of censorship to be exercised is bound to have stultifying consequences on the creative process of literature and art—for the films are derived largely from literature. History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men. We not only do not know but cannot know what is condemnable by 'sacrilegious'. And if we cannot tell, how are those to be governed by the statute to tell?"

46 *United States* v. *L. Cohen Grocery Co.*, 255 US 81 : 41 S Ct 298 : 65 L Ed 516 : 14 ALR 1045 (1921)

47 301 US 242 : 57 S Ct 732 : 81 L Ed 1066 (1937)

48 96 L Ed 1098 : 343 US 495 (1952)

58. In *Chicago* v. *Morales*[49], a Chicago Gang Congregation Ordinance prohibited criminal street gang members from loitering with one another or with other persons in any public place for no apparent purpose. The Court referred to an earlier judgment in *United States* v. *Reese*[50], US at p. 221 in which it was stated that *the Constitution does not permit a legislature to set a net large enough to catch all possible offenders and leave it to the Court to step in and say who could be rightfully detained and who should be set at liberty*. It was held that the broad sweep of the Ordinance violated the requirement that a legislature needs to meet: to establish minimum guidelines to govern law enforcement. As the impugned Ordinance did not have any such guidelines, a substantial amount of innocent conduct would also be brought within its net, leading to its unconstitutionality.

59. It was further held that a penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness. Ordinary people should be able to understand what conduct is prohibited and what is permitted. Also, those who administer the law must know what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place.

60. Similarly, in *Grayned* v. *Rockford*[51], the State of Illinois provided in an anti-noise Ordinance as follows: (L Ed p. 227)

> " '[N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof….' Code of Ordinances, c 28, § 19.2(*a*)."

The law on the subject of vagueness was clearly stated thus: (*Grayned case*[51], L Ed pp. 227-28)

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, Judges, and Juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms'. Uncertain meanings inevitably lead citizens to ' "steer far wider of the

49 527 US 41 : 144 L Ed 2d 67 (1999)
50 92 US 214 : 23 L Ed 563 (1876)
51 33 L Ed 2d 222 : 408 US 104 (1972)

unlawful zone" ... than if the boundaries of the forbidden areas were clearly marked.' "

61. The anti-noise Ordinance was upheld on facts in that case because it fixed the time at which noise disrupts school activity—while the school is in session—and at a fixed place—"adjacent" to the school.

62. Secondly, there had to be demonstrated a causality between disturbance that occurs and the noise or diversion. Thirdly, acts have to be wilfully done. *It is important to notice that the Supreme Court specifically held that "undesirables" or their "annoying conduct" may not be punished.* It is only on these limited grounds that the said Ordinance was considered not to be impermissibly vague.

63. In *Reno* v. *American Civil Liberties Union*[52], two provisions of the Communications Decency Act, 1996 which sought to protect minors from harmful material on the internet were adjudged unconstitutional. This judgment is a little important for two basic reasons—that it deals with a penal offence created for persons who use the internet as also for the reason that the statute which was adjudged unconstitutional uses the expression "patently offensive" which comes extremely close to the expression "grossly offensive" used by the impugned Section 66-A. Section 223(*d*), which was adjudged unconstitutional, is set out hereinbelow: (US p. 860)

"**223. (*d*)** Whoever—

(1) in interstate or foreign communications knowingly—

(*A*) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(*B*) uses any interactive computer service to display in a manner available to a person under 18 years of age, 'any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by para (1) with the intent that it be used for such activity,

shall be fined under Title 18, or imprisoned not more than two years, or both."

Interestingly, the District Court Judge writing of the internet said:

"[I]t is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—as yet seen. The plaintiffs in these actions correctly describe the 'democratizing' effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and anti-federalists may debate the structure of their government nightly, but

52 521 US 844 : 138 L Ed 2d 874 (1997)

these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen." *American Civil Liberties Union* v. *Reno*[53], F Supp at p. 881. (at p. 425)

64. The Supreme Court held that the impugned statute lacked the precision that the First Amendment required when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the impugned Act effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.

65. Such a burden on adult speech is unacceptable if less restrictive alternatives would be as effective in achieving the legitimate purpose that the statute was enacted to serve. *It was held that the general undefined term "patently offensive" covers large amounts of non-pornographic material with serious educational or other value and was both vague and over broad.* It was, thus, held that the impugned statute was not narrowly tailored and would fall foul of the first amendment.

66. In *Federal Communications Commission* v. *Fox Television Stations Inc.*[54], it was held: (S Ct p. 2317)

> "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally* v. *General Construction Co.*[45], US 391 ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou* v. *Jacksonville*[55], US 162 {"Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids'" [quoting *Lanzetta* v. *New Jersey*[56], US 453 (alteration in original)]}. This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See *United States* v. *Williams*[57], US 304. It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* As this Court has explained,

53 929 F Supp 824 (3d Cir 1996)
54 132 S Ct 2307 : 183 L Ed 2d 234 (2012)
45 *Connally* v. *General Construction Co.*, 269 US 385 : 46 S Ct 126 : 70 L Ed 322 (1926)
55 405 US 156 : 31 L Ed 2d 110 (1972)
56 306 US 451 : 83 L Ed 888 (1939)
57 553 US 285 : 170 L Ed 2d 650 (2008)

a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See *id.*, at 306.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See *Grayned* v. *Rockford*[51], US 108-109. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."

67. Coming to this Court's judgments, in *State of M.P.* v. *Baldeo Prasad*[58], an inclusive definition of the word "goonda" was held to be vague and the offence created by Section 4-A of the Goondas Act was, therefore, violative of Articles 19(1)(*d*) and (*e*) of the Constitution. It was stated: (SCR pp. 979-80 : AIR pp. 297-98, paras 9-10)

"Incidentally it would also be relevant to point out that the definition of the word 'goonda' affords no assistance in deciding which citizen can be put under that category. It is an inclusive definition and it does not indicate which tests have to be applied in deciding whether a person falls in the first part of the definition. Recourse to the dictionary meaning of the word would hardly be of any assistance in this matter. After all it must be borne in mind that the Act authorises the District Magistrate to deprive a citizen of his fundamental right under Articles 19(1)(*d*) and (*e*), and though the object of the Act and its purpose would undoubtedly attract the provisions of Article 19(5) care must always be taken in passing such Acts that they provide sufficient safeguards against casual, capricious or even malicious exercise of the powers conferred by them. It is well known that the relevant provisions of the Act are initially put in motion against a person at a lower level than the District Magistrate, and so it is always necessary that sufficient safeguards should be provided by the Act to protect the fundamental rights of innocent citizens and to save them from unnecessary harassment. That is why we think the definition of the word 'goonda' should have given necessary assistance to the District Magistrate in deciding whether a particular citizen falls under the category of goonda or not; that is another infirmity in the Act. As we have already pointed out Section 4-A suffers from the same infirmities as Section 4.

Having regard to the two infirmities in Sections 4, 4-A respectively we do not think it would be possible to accede to the argument of the learned Advocate General that the operative portion of the Act can fall under Article 19(5) of the Constitution. The person against whom action can be taken under the Act is not entitled to know the source of the

51 33 L Ed 2d 222 : 408 US 104 (1972)
58 (1961) 1 SCR 970 : AIR 1961 SC 293 : (1961) 1 Cri LJ 442

information received by the District Magistrate; he is only told about his prejudicial activities on which the satisfaction of the District Magistrate is based that action should be taken against him under Section 4 or Section 4-A. In such a case it is absolutely essential that the Act must clearly indicate by a proper definition or otherwise when and under what circumstances a person can be called a goonda, and it must impose an obligation on the District Magistrate to apply his mind to the question as to whether the person against whom complaints are received is such a goonda or not. It has been urged before us that such an obligation is implicit in Sections 4 and 4-A. We are, however, not impressed by this argument. Where a statute empowers the specified authorities to take preventive action against the citizens it is essential that it should expressly make it a part of the duty of the said authorities to satisfy themselves about the existence of what the statute regards as conditions precedent to the exercise of the said authority. If the statute is silent in respect of one of such conditions precedent it undoubtedly constitutes a serious infirmity which would inevitably take it out of the provisions of Article 19(5). The result of this infirmity is that it has left to the unguided and unfettered discretion of the authority concerned to treat any citizen as a goonda. In other words, the restrictions which it allows to be imposed on the exercise of the fundamental right of a citizen guaranteed by Articles 19(1)(*d*) and (*e*) must in the circumstances be held to be unreasonable. That is the view taken by the High court and we see no reason to differ from it."

68. At one time this Court seemed to suggest that the doctrine of vagueness was no part of the Constitutional Law of India. That was dispelled in no uncertain terms in *K.A. Abbas* v. *Union of India*[59]: (SCC pp. 798-99 paras 44-46 : SCR pp. 469-71)

'*44*. This brings us to the manner of the exercise of control and restriction by the directions. Here the argument is that most of the regulations are vague and further that they leave no scope for the exercise of creative genius in the field of art. This poses the first question before us whether the 'void for vagueness' doctrine is applicable. Reliance in this connection is placed on *Municipal Committee, Amritsar* v. *State of Punjab*[60]. In that case a Division Bench of this Court lays down that an Indian Act cannot be declared invalid on the ground that it violates the due process clause or that it is vague. …

These observations which are clearly obiter are apt to be too generally applied and need to be explained. While it is true that the principles evolved by the Supreme Court of the United States of America in the application of the Fourteenth Amendment were eschewed in our Constitution and instead the limits of restrictions on each fundamental right were indicated in the clauses that follow the first clause of the

59 (1970) 2 SCC 780 : (1971) 2 SCR 446
60 (1969) 1 SCC 475

nineteenth article, it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered. A very pertinent example is to be found in *State of M.P.* v. *Baldeo Prasad*[58], where the Central Provinces and Berar Goondas Act, 1946 was declared void for uncertainty. The condition for the application of Sections 4 and 4-A was that the person sought to be proceeded against must be a goonda but the definition of goonda in the Act indicated no tests for deciding which person fell within the definition. The provisions were therefore held to be uncertain and vague.

The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. *Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act.* This is not application of the doctrine of due process. *The invalidity arises from the probability of the misuse of the law to the detriment of the individual.* If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases." (emphasis supplied)

69. Similarly, in *Harakchand Ratanchand Banthia* v. *Union of India*[61], Section 27 of the Gold Control Act was struck down on the ground that the conditions imposed by it for the grant of renewal of licences are uncertain, vague and unintelligible. The Court held: (SCC p. 183, para 21)

"*21.* We now come to Section 27 of the Act which relates to licensing of dealers. It was stated on behalf of the petitioners that the conditions imposed by sub-section (6) of Section 27 for the grant or renewal of licences are uncertain, vague and unintelligible and consequently wide and unfettered power was conferred upon the statutory authorities in the matter of grant or renewal of licence. In our opinion this contention is well founded and must be accepted as correct. Section 27(6)(*a*) states that in the matter of issue or renewal of licences the administrator shall have regard to 'the number of dealers existing in the region in which the applicant intends to carry on business as a dealer'. But the word 'region' is nowhere defined in the Act. Similarly Section 27(6)(*b*) requires the Administrator to have regard to 'the anticipated demand, as estimated by him, for ornaments in that region'. The expression 'anticipated demand' is a vague expression which is not capable of objective assessment and is

58 (1961) 1 SCR 970 : AIR 1961 SC 293 : (1961) 1 Cri LJ 442
61 (1969) 2 SCC 166

bound to lead to a great deal of uncertainty. Similarly the expression 'suitability of the applicant' in Section 27(6)(*e*) and 'public interest' in Section 27(6)(*g*) do not provide any objective standard or norm or guidance. For these reasons it must be held that clauses (*a*), (*d*), (*e*) and (*g*) of Section 27(6) impose unreasonable restrictions on the fundamental right of the petitioner to carry on business and are constitutionally invalid. It was also contended that there was no reason why the conditions for renewal of licence should be as rigorous as the conditions for initial grant of licence. The requirement of strict conditions for the renewal of licence renders the entire future of the business of the dealer uncertain and subjects it to the caprice and arbitrary will of the administrative authorities. There is justification for this argument and the requirement of Section 26 of the Act imposing the same conditions for the renewal of the licence as for the initial grant appears to be unreasonable. In our opinion clauses (*a*), (*b*), (*e*) and (*g*) are inextricably bound up with the other clauses of Section 27(6) and form part of a single scheme. The result is that clauses (*a*), (*b*), (*c*), (*e*) and (*g*) are not severable and the entire Section 27(6) of the Act must be held invalid. Section 27(2)(*d*) of the Act states that a valid licence issued by the administrator 'may contain such conditions, limitations and restrictions as the administrator may think fit to impose and different conditions, limitations and restrictions may be imposed for different classes of dealers'. On the face of it, this sub-section confers such wide and vague power upon the administrator that it is difficult to limit its scope. In our opinion Section 27(2)(*d*) of the Act must be struck down as an unreasonable restriction on the fundamental right of the petitioners to carry on business. It appears, however, to us that if Section 27(2)(*d*) and Section 27(6) of the Act are invalid the licensing scheme contemplated by the rest of Section 27 of the Act cannot be worked in practice. It is, therefore, necessary for Parliament to enact fresh legislation imposing appropriate conditions and restrictions for the grant and renewal of licences to dealers. In the alternative the Central Government may make appropriate rules for the same purpose in exercise of its rule-making power under Section 114 of the Act."

70. In *A.K. Roy* v. *Union of India*[62], a part of Section 3 of the National Security Ordinance was read down on the ground that "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" is an expression so vague that it is capable of wanton abuse. The Court held: (SCC pp. 318-19, paras 64-65 : SCR pp. 325-26)

> "What we have said above in regard to the expressions 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers' cannot apply to the expression 'acting in any manner prejudicial to the maintenance of supplies and services essential to the community' which occurs in Section 3(2) of the Act. Which

62 (1982) 1 SCC 271 : 1982 SCC (Cri) 152 : (1982) 2 SCR 272

supplies and services are essential to the community can easily be defined by the legislature and indeed, legislations which regulate the prices and possession of essential commodities either enumerate those commodities or confer upon the appropriate Government the power to do so. In the absence of a definition of 'supplies and services essential to the community', the detaining authority will be free to extend the application of this clause of sub-section (2) to any commodities or services the maintenance of supply of which, according to him, is essential to the community.

But that is not all. The Explanation to sub-section (2) gives to the particular phrase in that sub-section a meaning which is not only uncertain but which, at any given point of time, will be difficult to ascertain or fasten upon. According to the Explanation, no order of detention can be made under the National Security Act on any ground on which an order of detention may be made under the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980. The reason for this, which is stated in the Explanation itself, is that for the purposes of sub-section (2), 'acting in any manner prejudicial to the maintenance of supplies essential to the community' does not include 'acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community' as defined in the Explanation to sub-section (1) of Section 3 of the 1980 Act. Clauses (*a*) and (*b*) of the Explanation to Section 3(1) of the 1980 Act exhaust almost the entire range of essential commodities. Clause (*a*) relates to committing or instigating any person to commit any offence punishable under the Essential Commodities Act, 10 of 1955, or under any other law for the time being in force relating to the control of the production, supply or distribution of, or trade and commerce in, any commodity essential to the community. Clause (*b*) of the Explanation to Section 3(1) of the 1980 Act relates to dealing in any commodity which is an essential commodity as defined in the Essential Commodities Act, 1955, or with respect to which provisions have been made in any such other law as is referred to in clause (*a*). We find it quite difficult to understand as to which are the remaining commodities outside the scope of the 1980 Act, in respect of which it can be said that the maintenance of their supplies is essential to the community. The particular clause in sub-section (2) of Section 3 of the National Security Act is, therefore, capable of wanton abuse in that, the detaining authority can place under detention any person for possession of any commodity on the basis that the authority is of the opinion that the maintenance of supply of that commodity is essential to the community. We consider the particular clause not only vague and uncertain but, in the context of the Explanation, capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community. To allow the personal liberty of the people to be taken away by the application of that clause would be a flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21."

71. Similarly, in *Kartar Singh* v. *State of Punjab*[63], SCC at paras 130-31, it was held: (SCC pp. 648-49)

"*130*. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to 'steer far wider of the unlawful zone … than if the boundaries of the forbidden areas were clearly marked.

131. Let us examine clause (*i*) of Section 2(1)(*a*). This section is shown to be blissfully and impermissibly vague and imprecise. As rightly pointed out by the learned counsel, even an innocent person who ingenuously and undefiledly communicates or associates without any knowledge or having no reason to believe or suspect that the person or class of persons with whom he has communicated or associated is engaged in assisting in any manner terrorists or disruptionists, can be arrested and prosecuted by abusing or misusing or misapplying this definition. In ultimate consummation of the proceedings, perhaps that guiltless and innoxious innocent person may also be convicted."

72. Judged by the standards laid down in the aforesaid judgments, it is quite clear that the expressions used in Section 66-A are completely open-ended and undefined. Section 66 in stark contrast to Section 66-A states:

"**66.** ***Computer related offences***.—If any person, dishonestly or fraudulently, does any act referred to in Section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.

Explanation.—For the purposes of this section—

(*a*) the word 'dishonestly' shall have the meaning assigned to it in Section 24 of the Indian Penal Code (45 of 1860);

(*b*) the word 'fraudulently' shall have the meaning assigned to it in Section 25 of the Indian Penal Code (45 of 1860)."

73. It will be clear that in all computer related offences that are spoken of by Section 66, mens rea is an ingredient and the expressions "dishonestly" and "fraudulently" are defined with some degree of specificity, unlike the expressions used in Section 66-A.

74. The provisions contained in Sections 66-B up to 67-B also provide for various punishments for offences that are clearly made out. For example, under Section 66-B, whoever dishonestly receives or retains any stolen computer resource or communication device is punished with imprisonment. Under Section 66-C, whoever fraudulently or dishonestly makes use of any

63 (1994) 3 SCC 569 : 1994 SCC (Cri) 899

identification feature of another person is liable to punishment with imprisonment. Under Section 66-D, whoever cheats by personating becomes liable to punishment with imprisonment. Section 66-F again is a narrowly drawn section which inflicts punishment which may extend to imprisonment for life for persons who threaten the unity, integrity, security or sovereignty of India. Sections 67 to 67-B deal with punishment for offences for publishing or transmitting obscene material including depicting children in sexually explicit acts in electronic form.

75. In the Penal Code, 1860 a number of the expressions that occur in Section 66-A occur in Section 268.

> "**268.** ***Public nuisance***.—A person is guilty of a public nuisance who does any act or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.
>
> A common nuisance is not excused on the ground that it causes some convenience or advantage."

76. It is important to notice the distinction between Sections 268 and 66-A. Whereas, in Section 268 the various expressions used are ingredients for the offence of a public nuisance, these ingredients now become offences in themselves when it comes to Section 66-A. Further, under Section 268, the person should be guilty of an act or omission which is illegal in nature—legal acts are not within its net. A further ingredient is that injury, danger or annoyance must be to the public in general. Injury, danger or annoyance are not offences by themselves howsoever made and to whomsoever made. The expression "annoyance" appears also in Sections 294 and 510 IPC:

> "**294.** ***Obscene acts and songs***.—Whoever, to the annoyance of others,
>
> (*a*) does any obscene act in any public place, or
>
> (*b*) sings, recites or utters any obscene songs, ballad or words, in or near any public place,
>
> shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.
>
> * * *
>
> **510.** ***Misconduct in public by a drunken person***.—Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both."

77. If one looks at Section 294 IPC, the annoyance that is spoken of is clearly defined—that is, it has to be caused by obscene utterances or acts. Equally, under Section 510, the annoyance that is caused to a person must only be by another person who is in a state of intoxication and who annoys such person only in a public place or in a place for which it is a trespass for him to enter. Such narrowly and closely defined contours of offences made out under the Penal Code are conspicuous by their absence in Section 66-A

which in stark contrast uses completely open-ended, undefined and vague language.

78. Incidentally, none of the expressions used in Section 66-A are defined. Even "criminal intimidation" is not defined—and the definition clause of the Information Technology Act, Section 2 does not say that words and expressions that are defined in the Penal Code will apply to this Act.

79. Quite apart from this, as has been pointed out above, every expression used is nebulous in meaning. What may be offensive to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another. Even the expression "persistently" is completely imprecise—suppose a message is sent thrice, can it be said that it was sent "persistently"? Does a message have to be sent (say) at least eight times, before it can be said that such message is "persistently" sent? There is no demarcating line conveyed by any of these expressions—and that is what renders the section unconstitutionally vague.

80. However, the learned Additional Solicitor General argued before us that expressions that are used in Section 66-A may be incapable of any precise definition but for that reason they are not constitutionally vulnerable. He cited a large number of judgments in support of this submission. None of the cited judgments dealt with a section creating an offence which is saved despite its being vague and incapable of any precise definition. In fact, most of the judgments cited before us did not deal with criminal law at all. The few that did are dealt with hereinbelow. For instance, *Madan Singh* v. *State of Bihar*[64], was cited before us. The passage cited from the aforesaid judgment is contained in para 19 of the judgment. The cited passage is not in the context of an argument that the word "terrorism" not being separately defined would, therefore, be struck down on the ground of vagueness. The cited passage was only in the context of upholding the conviction of the accused in that case. Similarly, in *Zameer Ahmed Latifur Rehman Sheikh* v. *State of Maharashtra*[65], the expression "insurgency" was said to be undefined and would defy a precise definition, yet it could be understood to mean breakdown of peace and tranquility as also a grave disturbance of public order so as to endanger the security of the State and its sovereignty. This again was said in the context of a challenge on the ground of legislative competence. The provisions of the Maharashtra Control of Organised Crime Act were challenged on the ground that they were outside the expression "public order" contained in Schedule VII List I Entry I of the Constitution of India. This contention was repelled by saying that the expression "public order" was wide enough to encompass cases of "insurgency". This case again had nothing to do with a challenge raised on the ground of vagueness.

81. Similarly, in *State of M.P.* v. *Kedia Leather & Liquor Ltd.*[66], SCC para 8 was cited to show that the expression "nuisance" appearing in Section

64 (2004) 4 SCC 622 : 2004 SCC (Cri) 1360
65 (2010) 5 SCC 246
66 (2003) 7 SCC 389 : 2003 SCC (Cri) 1642

133 of the Code of Criminal Procedure was also not capable of precise definition. This again was said in the context of an argument that Section 133 of the Code of Criminal Procedure was impliedly repealed by the Water (Prevention and Control of Pollution) Act, 1974. This contention was repelled by saying that the areas of operation of the two provisions were completely different and they existed side by side being mutually exclusive. This case again did not contain any argument that the provision contained in Section 133 was vague and, therefore, unconstitutional. Similarly, in *State of Karnataka* v. *Appa Balu Ingale*[67], the word "untouchability" was said not to be capable of precise definition. Here again, there was no constitutional challenge on the ground of vagueness.

82. In fact, two English judgments cited by the learned Additional Solicitor General would demonstrate how vague the words used in Section 66-A are. In *Director of Public Prosecutions* v. *Collins*[40], the very expression "grossly offensive" is contained in Section 127(1)(1) of the U.K. Communications Act, 2003. A 61 year old man made a number of telephone calls over two years to the office of a Member of Parliament. In these telephone calls and recorded messages Mr Collins who held strong views on immigration made a reference to "Wogs", "Pakis", "Black bastards" and "Niggers". Mr Collins was charged with sending messages which were grossly offensive. The Leicestershire Justices dismissed the case against Mr Collins on the ground that the telephone calls were offensive but not grossly offensive. A reasonable person would not so find the calls to be grossly offensive. The Queen's Bench agreed and dismissed[68] the appeal filed by the Director of Public Prosecutions. The House of Lords reversed[40] the Queen's Bench decision stating: (*Collins case*[40], WLR p. 2228, paras 9-10)

> "*9*. The parties agreed with the rulings of the Divisional Court that it is for the justices to determine as a question of fact whether a message is grossly offensive, that in making this determination the justices must apply the standards of an open and just multi-racial society, and that the words must be judged taking account of their context and all relevant circumstances. I would agree also. Usages and sensitivities may change over time. Language otherwise insulting may be used in an unpejorative, even affectionate, way, or may be adopted as a badge of honour ('Old Contemptibles'). There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates.
>
> *10*. In contrast with Section 127(2)(*a*) and its predecessor sub-sections, which require proof of an unlawful purpose and a degree of knowledge, Section 127(1)(*a*) provides no explicit guidance on the state of mind which must be proved against a defendant to establish an offence against the sub-section."

67 1995 Supp (4) SCC 469 : 1994 SCC (Cri) 1762
40 (2006) 1 WLR 2223 : (2006) 4 All ER 602 (HL)
68 *Director of Public Prosecutions* v. *Collins*, (2006) 1 WLR 308 : (2005) 3 All ER 326

83. Similarly in *Chambers* v. *Director of Public Prosecutions*[69], the Queen's Bench was faced with the following facts: (WLR p. 1833)

> "Following an alert on the internet social network, Twitter, the defendant became aware that, due to adverse weather conditions, an airport from which he was due to travel nine days later was closed. He responded by posting several 'tweets' on Twitter in his own name, including the following: 'Crap! Robin Hood Airport is closed. You have got a week and a bit to get your shit together otherwise I am blowing the airport sky high!!' None of the defendant's 'followers' who read the posting was alarmed by it at the time. Some five days after its posting the defendant's tweet was read by the duty manager responsible for security at the airport on a general internet search for tweets relating to the airport. Though not believed to be a credible threat the matter was reported to the police. In interview the defendant asserted that the tweet was a joke and not intended to be menacing. The defendant was charged with sending by a public electronic communications network a message of a menacing character contrary to Section 127(1)(*a*) of the Communications Act, 2003. He was convicted in a Magistrates' Court and, on appeal, the Crown Court upheld the conviction, being satisfied that the message was 'menacing per se' and that the defendant was, at the very least, aware that his message was of a menacing character."

84. The Crown Court was satisfied that the message in question was "menacing" stating that an ordinary person seeing the tweet would be alarmed and, therefore, such message would be "menacing". The Queen's Bench Division reversed the Crown Court stating: (*Director of Public Prosecutions case*[69], WLR p. 1842, para 31)

> "*31*. Before concluding that a message is criminal on the basis that it represents a menace, its precise terms, and any inferences to be drawn from its precise terms, need to be examined in the context in and the means by which the message was sent. The Crown Court was understandably concerned that this message was sent at a time when, as we all know, there is public concern about acts of terrorism and the continuing threat to the security of the country from possible further terrorist attacks. That is plainly relevant to context, but the offence is not directed to the inconvenience which may be caused by the message. In any event, the more one reflects on it, the clearer it becomes that this message did not represent a terrorist threat, or indeed any other form of threat. It was posted on 'Twitter' for widespread reading, a conversation piece for the defendant's followers, drawing attention to himself and his predicament. Much more significantly, although it purports to address 'you', meaning those responsible for the airport, it was not sent to anyone at the airport or anyone responsible for airport security, or indeed any form of public security. The grievance addressed by the message is that the airport is closed when the writer wants it to be open. The

69 (2013) 1 WLR 1833

language and punctuation are inconsistent with the writer intending it to be or it to be taken as a serious warning. Moreover, as Mr Armson noted, it is unusual for a threat of a terrorist nature to invite the person making it to be readily identified, as this message did. Finally, although we are accustomed to very brief messages by terrorists to indicate that a bomb or explosive device has been put in place and will detonate shortly, it is difficult to imagine a serious threat in which warning of it is given to a large number of tweet 'followers' in ample time for the threat to be reported and extinguished."

85. These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is "grossly offensive" or "menacing". In *Collins case*, both the Leicestershire Justices and two Judges of the Queen's Bench would have acquitted Collins whereas the House of Lords convicted him. Similarly, in the Chambers case, the Crown Court would have convicted Chambers whereas the Queen's Bench acquitted him. If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66-A and the authorities who are to enforce Section 66-A have absolutely no manageable standard by which to book a person for an offence under Section 66-A. This being the case, having regard also to the two English precedents cited by the learned Additional Solicitor General, it is clear that Section 66-A is unconstitutionally vague.

86. Ultimately, applying the tests referred to in *Chintaman Rao*[16] and *V.G. Row*[17] case, referred to earlier in the judgment, it is clear that Section 66-A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right.

Chilling Effect And Overbreadth

87. Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by "liberal views"—such as the emancipation of women or the abolition of the caste system or whether certain members of a non-proselytizing religion should be allowed to bring

16 *Chintaman Rao* v. *State of M.P.*, 1950 SCR 759 : AIR 1951 SC 118
17 *State of Madras* v. *V.G. Row*, 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966

persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66-A. In point of fact, Section 66-A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total.

88. Incidentally, some of our judgments have recognised this chilling effect of free speech. In *R. Rajagopal* v. *State of T.N.*[70], this Court held: (SCC pp. 646-47, para 19)

> "*19*. The principle of *Sullivan*[71] was carried forward—and this is relevant to the second question arising in this case—in *Derbyshire County Council* v. *Times Newspapers Ltd.*[72], a decision rendered by the House of Lords. The plaintiff, a local authority brought an action for damages for libel against the defendants in respect of two articles published in *Sunday Times* questioning the propriety of investments made for its superannuation fund. The articles were headed '*Revealed: Socialist tycoon deals with Labour Chief*' and '*Bizarre deals of a council leader and the media tycoon*'. A preliminary issue was raised whether the plaintiff has a cause of action against the defendant. The trial Judge held that such an action was maintainable but on appeal the Court of Appeal held to the contrary. When the matter reached the House of Lords, it affirmed the decision of the Court of Appeal but on a different ground. Lord Keith delivered the judgment agreed to by all other learned Law Lords. In his opinion, Lord Keith recalled that in *Attorney General* v. *Guardian Newspapers Ltd. (No. 2)*[73] popularly known as '*Spycatcher case*', the House of Lords had opined that 'there are rights available to private citizens which institutions of ... Government are not in a position to exercise unless they can show that it is in the public interest to do so'. It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was 'contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech' and further that action for defamation or threat of such action 'inevitably have an inhibiting effect on freedom of speech'. The learned Law Lord referred to the decision of the United States Supreme Court in *New York Times Co.* v. *Sullivan*[71] and certain other decisions of American Courts and observed—and this is significant for our purposes—
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> > 'while these decisions were related most directly to the provisions of the American Constitution concerned with securing

70 (1994) 6 SCC 632
71 *New York Times Co.* v. *Sullivan*, 376 US 254 : 11 L Ed 2d 686 (1964)
72 1993 AC 534 : (1993) 2 WLR 449 : (1993) 1 All ER 1011 (HL)
73 (1990) 1 AC 109 : (1988) 3 WLR 776 : (1988) 3 All ER 545 (HL)

> freedom of speech, *the public interest considerations which underlaid them are no less valid in this country. What has been described as "the chilling effect"* induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available.'
>
> Accordingly, it was held that the action was not maintainable in law."
>
> (emphasis in original)

89. Also in *S. Khushboo* v. *Kanniammal*[6], this Court said: (SCC p. 620, para 47)

> "*47.* In the present case, the substance of the controversy does not really touch on whether premarital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to the appellant's remarks. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the 'freedom of speech and expression'."

90. That the content of the right under Article 19(1)(*a*) remains the same whatever the means of communication including internet communication is clearly established by *Reno case*[52] and by *Ministry of Information & Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*[20], SCC at para 78 already referred to. It is thus clear that not only are the expressions used in Section 66-A expressions of inexactitude but they are also over broad and would fall foul of the repeated injunctions of this Court that restrictions on the freedom of speech must be couched in the narrowest possible terms. For example, see, *Kedar Nath Singh* v. *State of Bihar*[34], SCR at pp. 808-09. In point of fact, judgments of the Constitution Bench of this Court have struck down sections which are similar in nature. A prime example is the section struck down in the first *Ram Manohar Lohia case*[15], namely, Section 3 of the U.P. Special Powers Act, where the persons who "instigated" expressly or by implication any person or class of persons not to pay or to defer payment of any liability were punishable. This Court specifically held that under the section a wide net was cast to catch a variety of acts of instigation ranging from friendly advice to systematic propaganda. It was held that in its wide amplitude, the section takes in the innocent as well as the guilty, bona fide and mala fide advice and whether the person be a legal adviser, a friend or a well-wisher of the person instigated, he cannot escape the tentacles of the section. The Court held that it was not possible to predicate with some kind of precision the different categories of instigation falling within or without

6 (2010) 5 SCC 600 : (2010) 2 SCC (Cri) 1299

52 *Reno* v. *American Civil Liberties Union*, 521 US 844 : 138 L Ed 2d 874 (1997)

20 (1995) 2 SCC 161

34 1962 Supp (2) SCR 769 : AIR 1962 SC 955 : (1962) 2 Cri LJ 103

15 *Supt., Central Prison* v. *Ram Manohar Lohia*, (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002

the field of constitutional prohibitions. It further held that the section must be declared unconstitutional as the offence made out would depend upon factors which are uncertain.

91. In *Kameshwar Prasad* v. *State of Bihar*[12], Rule 4-A of the Bihar Government Servants Conduct Rules, 1956 was challenged. The Rule states, "No government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service."

92. The aforesaid Rule was challenged under Articles 19(1)(*a*) and (*b*) of the Constitution. The Court followed the law laid down in *Ram Manohar Lohia case*[15] and accepted the challenge. It first held that demonstrations are a form of speech and then held: (*Kameshwar Prasad case*[12], SCR p. 374 : AIR p. 1168, para 5)

> "... The approach to the question regarding the constitutionality of the rule should be whether the ban that it imposes on demonstrations would be covered by the limitation of the guaranteed rights contained in Articles 19(2) and 19(3). In regard to both these clauses the only relevant criteria which has been suggested by the respondent State is that the rule is framed 'in the interest of public order'. A demonstration may be defined as 'an expression of one's feelings by outward signs'. A demonstration such as is prohibited by, the rule may be of the most innocent type—peaceful orderly such as the mere wearing of a badge by a government servant or even by a silent assembly say outside office hours—demonstrations which could in no sense be suggested to involve any breach of tranquility, or of a type involving incitement to or capable of leading to disorder. If the rule had confined itself to demonstrations of the type which would lead to disorder then the validity of that rule could have been sustained but what the rule does is the imposition of a blanket-ban on all demonstrations of whatever type—innocent as well as otherwise—and in consequence its validity cannot be upheld."

93. The Court further went on to hold that remote disturbances of public order by demonstration would fall outside Article 19(2). The connection with public order has to be intimate, real and rational and should arise directly from the demonstration that is sought to be prohibited. Finally, the Court held: (*Kameshwar Prasad case*[12], SCR p. 384 : AIR p. 1172, para 17)

> "... The vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration—be the same however innocent and however incapable of causing a breach of public tranquility and does not confine itself to those forms of demonstrations which might lead to that result."

94. These two Constitution Bench decisions bind us and would apply directly on Section 66-A. We, therefore, hold that the section is

12 1962 Supp (3) SCR 369 : AIR 1962 SC 1166

15 *Supt., Central Prison* v. *Ram Manohar Lohia*, (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002

unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth.

Possibility of an Act being abused is not a ground to test its validity

95. The learned Additional Solicitor General cited a large number of judgments on the proposition that the fact that Section 66-A is capable of being abused by the persons who administer it is not a ground to test its validity if it is otherwise valid. He further assured us that this Government was committed to free speech and that Section 66-A would not be used to curb free speech, but would be used only when excesses are perpetrated by persons on the rights of others. In *Collector of Customs* v. *Nathella Sampathu Chetty*[74], this Court observed: (SCR pp. 825-26 : AIR p. 332, para 33)

> "... This Court has held in numerous rulings, to which it is unnecessary to refer, that the possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void. Commenting on a passage in the judgment of the Court of Appeal of Northern Ireland which stated:
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> > 'If such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably'
>
> and treating this as a ground for holding the statute invalid Viscount Simonds observed in *Belfast Corpn.* v. *O.D. Cars Ltd.*[75], AC at pp. 520-21:
>
> > '... it appears to me that the short answer to this contention (and I hope its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases. ... If it is not so exercised [i.e. if the powers are abused], it is open to challenge, and there is no need for express provision for its challenge in the statute.'
>
> The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements."

74 (1962) 3 SCR 786 : AIR 1962 SC 316 : (1962) 1 Cri LJ 364
75 1960 AC 490 : (1960) 2 WLR 148 : (1960) 1 All ER 65 (HL)

96. In this case, it is the converse proposition which would really apply if the learned Additional Solicitor General's argument is to be accepted. If Section 66-A is otherwise invalid, it cannot be saved by an assurance from the learned Additional Solicitor General that it will be administered in a reasonable manner. Governments may come and Governments may go but Section 66-A goes on forever. An assurance from the present Government even if carried out faithfully would not bind any successor Government. It must, therefore, be held that Section 66-A must be judged on its own merits without any reference to how well it may be administered.

Severability

97. The argument of the learned Additional Solicitor General on this score is reproduced by us verbatim from one of his written submissions:

> "Furthermore it is respectfully submitted that in the event of Hon'ble Court not being satisfied about the constitutional validity of either any expression or a part of the provision, the Doctrine of Severability as enshrined under Article 13 may be resorted to."

98. The submission is vague: the learned Additional Solicitor General does not indicate which part or parts of Section 66-A can possibly be saved. This Court in *Romesh Thappar* v. *State of Madras*[2] repelled a contention of severability when it came to the courts enforcing the fundamental right under Article 19(1)(*a*) in the following terms: (SCR p. 603 : AIR p. 129, para 13)

> "... It was, however, argued that Section 9(1-A) could not be considered wholly void, as, under Article 13(1), an existing law inconsistent with a fundamental right is void only to the extent of the inconsistency and no more. Insofar as the securing of the public safety or the maintenance of public order would include the security of the State, the impugned provision, as applied to the latter purpose, was covered by clause (2) of Article 19 and must, it was said, be held to be valid. We are unable to accede to this contention. Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent."

2 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514

99. It has been held by us that Section 66-A purports to authorise the imposition of restrictions on the fundamental right contained in Article 19(1)(*a*) in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action. We have held following *K.A. Abbas case*[59] that the possibility of Section 66-A being applied for purposes not sanctioned by the Constitution cannot be ruled out. It must, therefore, be held to be wholly unconstitutional and void. *Romesh Thappar case*[2] was distinguished in *R.M.D. Chamarbaugwalla* v. *Union of India*[76] in the context of a right under Article 19(1)(*g*) as follows: (SCR pp. 948-49 : AIR p. 636, para 20)

> "*20.* In *Romesh Thappar* v. *State of Madras*[2], the question was as to the validity of Section 9(1-A) of the Madras Maintenance of Public Order Act 23 of 1949. That section authorised the Provincial Government to prohibit the entry and circulation within the State of a newspaper 'for the purpose of securing the public safety or the maintenance of public order'. Subsequent to the enactment of this statute, the Constitution came into force, and the validity of the impugned provision depended on whether it was protected by Article 19(2), which saved 'existing law insofar as it relates to any matter which undermines the security of or tends to overthrow the State.' It was held by this Court that as the purposes mentioned in Section 9(1-A) of the Madras Act were wider in amplitude than those specified in Article 19(2), and as it was not possible to split up Section 9(1-A) into what was within and what was without the protection of Article 19(2), the provision must fail in its entirety. That is really a decision that the impugned provision was on its own contents inseverable. It is not an authority for the position that even when a provision is severable, it must be struck down on the ground that the principle of severability is inadmissible when the invalidity of a statute arises by reason of its contravening constitutional prohibitions. It should be mentioned that the decision in *Romesh Thappar* v. *State of Madras*[2] was referred to in *State of Bombay* v. *F.N. Balsara*[77] and *State of Bombay* v. *United Motors (India) Ltd.*[78] (SCR at pp. 1098-99) and distinguished."

100. The present being a case of an Article 19(1)(*a*) violation, *Romesh Thappar*[2] judgment would apply on all fours. In an Article 19(1)(*g*) challenge, there is no question of a law being applied for purposes not sanctioned by the Constitution for the simple reason that the eight subject-matters of Article 19(2) are conspicuous by their absence in Article 19(6) which only speaks of reasonable restrictions in the interests of the general public. The present is a case where, as has been held above, Section 66-A does not fall within any of the subject-matters contained in Article 19(2) and the possibility of its being applied for purposes outside those subject-matters is clear. We, therefore, hold that no part of Section 66-A is severable and the provision as a whole must be declared unconstitutional.

59 *K.A. Abbas* v. *Union of India*, (1970) 2 SCC 780
2 *Romesh Thappar* v. *State of Madras*, 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514
76 1957 SCR 930 : AIR 1957 SC 628
77 1951 SCR 682 : AIR 1951 SC 318 : (1951) 52 Cri LJ 1361
78 1953 SCR 1069 : AIR 1953 SC 252

Article 14

101. The counsel for the petitioners have argued that Article 14 is also infringed in that an offence whose ingredients are vague in nature is arbitrary and unreasonable and would result in arbitrary and discriminatory application of the criminal law. Further, there is no intelligible differentia between the medium of print, broadcast, and real live speech as opposed to speech on the internet and, therefore, new categories of criminal offences cannot be made on this ground. Similar offences which are committed on the internet have a three-year maximum sentence under Section 66-A as opposed to defamation which has a two-year maximum sentence. Also, defamation is a non-cognizable offence whereas under Section 66-A the offence is cognizable.

102. We have already held that Section 66-A creates an offence which is vague and over broad, and, therefore, unconstitutional under Article 19(1)(*a*) and not saved by Article 19(2). We have also held that the wider range of circulation over the internet cannot restrict the content of the right under Article 19(1)(*a*) nor can it justify its denial. However, when we come to discrimination under Article 14, we are unable to agree with the counsel for the petitioners that there is no intelligible differentia between the medium of print, broadcast and real live speech as opposed to speech on the internet. The intelligible differentia is clear—the internet gives any individual a platform which requires very little or no payment through which to air his views. The learned Additional Solicitor General has correctly said that something posted on a site or website travels like lightning and can reach millions of persons all over the world. If the petitioners were right, this Article 14 argument would apply equally to all other offences created by the Information Technology Act which are not the subject-matter of challenge in these petitions. We make it clear that there is an intelligible differentia between speech on the internet and other mediums of communication for which separate offences can certainly be created by legislation. We find, therefore, that the challenge on the ground of Article 14 must fail.

Procedural unreasonableness

103. One other argument must now be considered. According to the petitioners, Section 66-A also suffers from the vice of procedural unreasonableness. In that, if, for example, criminal defamation is alleged, the safeguards available under Section 199 CrPC would not be available for a like offence committed under Section 66-A. Such safeguards are that no court shall take cognizance of such an offence except upon a complaint made by some person aggrieved by the offence and that such complaint will have to be made within six months from the date on which the offence is alleged to have been committed. Further, safeguards that are to be found in Sections 95 and 96 CrPC are also absent when it comes to Section 66-A. For example, where any newspaper, book or document wherever printed appears to contain matter which is obscene, hurts the religious feelings of some community, is seditious in nature, causes enmity or hatred to a certain section of the public, or is against national integration, such book, newspaper or document may be

seized but under Section 96 any person having any interest in such newspaper, book or document may within two months from the date of a publication seizing such documents, books or newspapers apply to the High Court to set aside such declaration. Such matter is to be heard by a Bench consisting of at least three Judges or in High Courts which consist of less than three Judges, such special Bench as may be composed of all the Judges of that High Court.

104. It is clear that Sections 95 and 96 of the Criminal Procedure Code reveal a certain degree of sensitivity to the fundamental right to free speech and expression. If matter is to be seized on specific grounds which are relatable to the subject-matters contained in Article 19(2), it would be open for persons affected by such seizure to get a declaration from a High Court consisting of at least three Judges that in fact publication of the so-called offensive matter does not in fact relate to any of the specified subjects contained in Article 19(2). Further, Section 196 CrPC states:

> "**196.** ***Prosecution for offences against the State and for criminal conspiracy to commit such offence.***—(1) No Court shall take cognizance of—
>
> (*a*) any offence punishable under Chapter VI or under Section 153-A, Section 295-A or sub-section (1) of Section 505 of the Indian Penal Code, 1860 (45 of 1860), or
>
> (*b*) a criminal conspiracy to commit such offence, or
>
> (*c*) any such abetment, as is described in Section 108-A of the Indian Penal Code (45 of 1860),
>
> except with the previous sanction of the Central Government or of the State Government.
>
> (1-A) No Court shall take cognizance of—
>
> (*a*) any offence punishable under Section 153-B or sub-section (2) or sub-section (3) of Section 505 of the Indian Penal Code, 1860 (45 of 1860), or
>
> (*b*) a criminal conspiracy to commit such offence,
>
> except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.
>
> (2) No court shall take cognizance of the offence of any criminal conspiracy punishable under Section 120-B of the Indian Penal Code (45 of 1860), other than a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings:
>
> Provided that where the criminal conspiracy is one to which the provisions of Section 195 apply, no such consent shall be necessary.
>
> (3) The Central Government or the State Government may, before according sanction under sub-section (1) or sub-section (1-A) and the District Magistrate may, before according sanction under sub-section (1-A) and the State Government or the District Magistrate may, before giving consent under sub-section (2), order a preliminary investigation by a police

officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of Section 155."

105. Again, for offences in the nature of promoting enmity between different groups on grounds of religion, etc. or offences relatable to deliberate and malicious acts intending to outrage religious feelings or statements that create or promote enmity, hatred or ill will between classes can only be taken cognizance of by courts with the previous sanction of the Central Government or the State Government. This procedural safeguard does not apply even when a similar offence may be committed over the internet where a person is booked under Section 66-A instead of the aforesaid sections.

106. Having struck down Section 66-A on substantive grounds, we need not decide the procedural unreasonableness aspect of the section.

Section 118 of the Kerala Police Act

107. The learned counsel for the petitioner in Writ Petition No. 196 of 2014 assailed clause (*d*) of Section 118 which is set out hereinbelow:

"**118.** ***Penalty for causing grave violation of public order or danger***.—Any person who—

* * *

(*d*) causes annoyance to any person in an indecent manner by statements or verbal or comments or telephone calls or calls of any type or by chasing or sending messages or mails by any means; or

* * *

shall, on conviction be punishable with imprisonment for a term which may extend to three years or with fine not exceeding ten thousand rupees or with both."

108. The learned counsel first assailed the section on the ground of legislative competence stating that this being a Kerala Act, it would fall outside Entries 1 and 2 of List II and fall within Entry 31 of List I. In order to appreciate the argument we set out the relevant entries:

"LIST I

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

LIST II

1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).

2. Police (including railway and village police) subject to the provisions of Entry 2-A of List I."

The Kerala Police Act as a whole would necessarily fall under Entry 2 of List II. In addition, Section 118 would also fall within Entry 1 of List II in that as its marginal note tells us it deals with penalties for causing grave violation of public order or danger.

109. It is well settled that a statute cannot be dissected and then examined as to under what field of legislation each part would separately fall. In *A.S. Krishna* v. *State of Madras*[79], the law is stated thus: (SCR p. 410 : AIR p. 303, para 12)

> "The position, then, might thus be summed up: when a law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are intra vires, and what are not."

110. It is, therefore, clear that the Kerala Police Act as a whole and Section 118 as part thereof falls in pith and substance within List II Entry 2, notwithstanding any incidental encroachment that it may have made on any other Entry in List I. Even otherwise, the penalty created for causing annoyance in an indecent manner in pith and substance would fall within List III Entry 1 which speaks of criminal law and would thus be within the competence of the State Legislature in any case.

111. However, what has been said about Section 66-A would apply directly to Section 118(*d*) of the Kerala Police Act, as causing annoyance in an indecent manner suffers from the same type of vagueness and over breadth, that led to the invalidity of Section 66-A, and for the reasons given for striking down Section 66-A, Section 118(*d*) also violates Article 19(1)(*a*) and not being a reasonable restriction on the said right and not being saved under any of the subject-matters contained in Article 19(2) is hereby declared to be unconstitutional.

Section 69-A and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009

112. Section 69-A of the Information Technology Act has already been set out in para 2 of the judgment. Under sub-section (2) thereof, the 2009 Rules have been framed. Under Rule 3, the Central Government shall designate by notification in the Official Gazette an officer of the Central Government not below the rank of a Joint Secretary as the Designated Officer for the purpose of issuing direction for blocking for access by the public any information referable to Section 69-A of the Act. Under Rule 4, every organisation as defined under Rule 2(*g*) (which refers to the Government of India, State Governments, Union Territories and agencies of the Central

79 1957 SCR 399 : AIR 1957 SC 297 : 1957 Cri LJ 409

Government as may be notified in the Official Gazette by the Central Government)—is to designate one of its officers as the "Nodal Officer". Under Rule 6, any person may send their complaint to the "Nodal Officer" of the organisation concerned for blocking, which complaint will then have to be examined by the organisation concerned regard being had to the parameters laid down in Section 69-A(1) and after being so satisfied, shall transmit such complaint through its Nodal Officer to the Designated Officer in a format specified by the Rules. The Designated Officer is not to entertain any complaint or request for blocking directly from any person. Under Rule 5, the Designated Officer may on receiving any such request or complaint from the Nodal Officer of an organisation or from a competent court, by order direct any intermediary or agency of the Government to block any information or part thereof for the reasons specified in Section 69-A(1). Under Rule 7 thereof, the request/complaint shall then be examined by a Committee of Government Personnel who under Rule 8 are first to make all reasonable efforts to identify the originator or intermediary who has hosted the information. If so identified, a notice shall issue to appear and submit their reply at a specified date and time which shall not be less than 48 hours from the date and time of receipt of notice by such person or intermediary. The Committee then examines the request and is to consider whether the request is covered by Section 69-A(1) and is then to give a specific recommendation in writing to the Nodal Officer of the organisation concerned. It is only thereafter that the Designated Officer is to submit the Committee's recommendation to the Secretary, Department of Information Technology who is to approve such requests or complaints. Upon such approval, the Designated Officer shall then direct any agency of Government or intermediary to block the offending information. Rule 9 provides for blocking of information in cases of emergency where delay caused would be fatal in which case the blocking may take place without any opportunity of hearing. The Designated Officer shall then, not later than 48 hours of the issue of the interim direction, bring the request before the Committee referred to earlier, and only on the recommendation of the Committee, is the Secretary Department of Information Technology to pass the final order. Under Rule 10, in the case of an order of a competent court in India, the Designated Officer shall, on receipt of a certified copy of a court order, submit it to the Secretary, Department of Information Technology and then initiate action as directed by the Court. In addition to the above safeguards, under Rule 14 a Review Committee shall meet at least once in two months and record its findings as to whether directions issued are in accordance with Section 69-A(1) and if it is of the contrary opinion, the Review Committee may set aside such directions and issue orders to unblock the said information. Under Rule 16, strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof.

113. The learned counsel for the petitioners assailed the constitutional validity of Section 69-A, and assailed the validity of the 2009 Rules. According to the learned counsel, there is no pre-decisional hearing afforded

by the Rules particularly to the "originator" of information, which is defined under Section 2(*za*) of the Act to mean a person who sends, generates, stores or transmits any electronic message; or causes any electronic message to be sent, generated, stored or transmitted to any other person. Further, procedural safeguards such as which are provided under Sections 95 and 96 of the Code of Criminal Procedure are not available here. Also, the confidentiality provision was assailed stating that it affects the fundamental rights of the petitioners.

114. It will be noticed that Section 69-A unlike Section 66-A is a narrowly drawn provision with several safeguards. First and foremost, blocking can only be resorted to where the Central Government is satisfied that it is necessary so to do. Secondly, such necessity is relatable only to some of the subjects set out in Article 19(2). Thirdly, reasons have to be recorded in writing in such blocking order so that they may be assailed in a writ petition under Article 226 of the Constitution.

115. The Rules further provide for a hearing before the Committee set up—which Committee then looks into whether or not it is necessary to block such information. It is only when the Committee finds that there is such a necessity that a blocking order is made. It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the "person" i.e. the originator is identified he is also to be heard before a blocking order is passed. Above all, it is only after these procedural safeguards are met that blocking orders are made and in case there is a certified copy of a court order, only then can such blocking order also be made. It is only an intermediary who finally fails to comply with the directions issued who is punishable under sub-section (3) of Section 69-A.

116. Merely because certain additional safeguards such as those found in Sections 95 and 96 CrPC are not available does not make the Rules constitutionally infirm. We are of the view that the Rules are not constitutionally infirm in any manner.

Section 79 and the Information Technology (Intermediary Guidelines) Rules, 2011

117. Section 79 belongs to Chapter XII of the Act in which intermediaries are exempt from liability if they fulfil the conditions of the section. Section 79 states:

> "**79.** ***Exemption from liability of intermediary in certain cases.***—(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.
>
> (2) The provisions of sub-section (1) shall apply if—
>
> (*a*) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or
>
> (*b*) the intermediary does not—
>
> (*i*) initiate the transmission,

(*ii*) select the receiver of the transmission, and

(*iii*) select or modify the information contained in the transmission;

(*c*) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if—

(*a*) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(*b*) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.—For the purposes of this section, the expression 'third party information' means any information dealt with by an intermediary in his capacity as an intermediary."

118. Under the 2011 Rules, by Rule 3 an intermediary has not only to publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource but he has also to inform all users of the various matters set out in Rule 3(2). Since Rules 3(2) and 3(4) are important, they are set out hereinbelow:

"**3.** ***Due diligence to be observed by intermediary***.—The intermediary shall observe following due diligence while discharging his duties, namely—

* * *

(2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that—

(*a*) belongs to another person and to which the user does not have any right to;

(*b*) is grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;

(*c*) harm minors in any way;

(*d*) infringes any patent, trademark, copyright or other proprietary rights;

(*e*) violates any law for the time being in force;

(*f*) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;

(*g*) impersonate another person;

(*h*) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource;

(*i*) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation.

* * *

(4) The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through e-mail signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty-six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes."

119. The learned counsel for the petitioners assailed Rules 3(2) and 3(4) on two basic grounds. Firstly, the intermediary is called upon to exercise its own judgment under sub-rule (4) and then disable information that is in contravention of sub-rule (2), when intermediaries by their very definition are only persons who offer a neutral platform through which persons may interact with each other over the internet. Further, no safeguards are provided as in the 2009 Rules made under Section 69-A. Also, for the very reasons that Section 66-A is bad, the petitioners assailed sub-rule (2) of Rule 3 saying that it is vague and over broad and has no relation with the subjects specified under Article 19(2).

120. One of the petitioners' counsel also assailed Section 79(3)(*b*) to the extent that it makes the intermediary exercise its own judgment upon receiving actual knowledge that any information is being used to commit unlawful acts. Further, the expression "unlawful acts" also goes way beyond the specified subjects delineated in Article 19(2).

121. It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69-A. We have seen how under Section 69-A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed—one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69-A read with the 2009 Rules.

122. Section 79(3)(*b*) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook, etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(*b*).

123. The learned Additional Solicitor General informed us that it is a common practice worldwide for intermediaries to have user agreements containing what is stated in Rule 3(2). However, Rule 3(4) needs to be read down in the same manner as Section 79(3)(*b*). The knowledge spoken of in the said sub-rule must only be through the medium of a court order. Subject to this, the Information Technology (Intermediaries Guidelines) Rules, 2011 are valid.

124. In conclusion, we may summarise what has been held by us above:

124.1. Section 66-A of the Information Technology Act, 2000 is struck down in its entirety being violative of Article 19(1)(*a*) and not saved under Article 19(2).

124.2. Section 69-A and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 are constitutionally valid.

124.3. Section 79 is valid subject to Section 79(3)(*b*) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology "Intermediary Guidelines" Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.

124.4. Section 118(*d*) of the Kerala Police Act is struck down being violative of Article 19(1)(*a*) and not saved by Article 19(2).

125. All the writ petitions are disposed in the above terms.

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