

## **FREEDOM OF ONLINE SPEECH**

### **Supreme Court upholds online right to freedom of expression and clarifies instances where intermediary is obliged to take down / block online content**

**In a landmark judgement on the Information Technology Act 2000, the Supreme Court reinforced the strength of Indian democracy and the independence of the Indian judiciary.**

- The provision which empowered the state to punish any person who sent or posted information that was ostensibly offensive through computer resources - *has been struck down as unconstitutional.*
- The right to allow the government to issue orders blocking websites / content in the interest of the nation and the public – *has been upheld.*
- Intermediaries (such as ISPs and search engines) are required to take down or block content upon notification – *the court has clarified that such take down will only be upon receipt of an order from a government agency or a court and not at the discretion of the intermediary.*

### **Background**

The right to freedom of speech and expression on online forums has been recognised as a fundamental right granted under the Constitution of India by the Supreme Court of India (“**Supreme Court**”) in a beautifully elucidated judgement on March 24, 2015<sup>1</sup>. In what has been hailed as a progressive and landmark judgment, the Supreme Court has quashed the controversial, and restrictive Section 66A of the Information Technology Act, 2000 (“**Act**”), while also reading the right to freedom of speech and expression into those provisions of the Act and rules that deal with intermediaries such as ISPs and search engines.

Addressing a number of writ petitions brought before it on the subject, the Supreme Court dealt with three separate provisions of the Act:

- Section 66A that made the sending or posting of communications that were allegedly unacceptable (such as messages which were ‘grossly offensive’) punishable;
- Section 69A and the related rules that permits the government to block for access by the public any online information 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 the above
- Section 79(3)(b) and Rules 3(2) and 3(4) of the Intermediary Rules (as defined below) that dealt with the obligation of intermediary to remove / block access to any content that was deemed unlawful, or violative of the restrictions described under Rule 3(2).

These provisions, and more specifically, Section 66A had become infamous over the past couple of years, with multiple examples of use of these provisions by the police or the central and state

---

<sup>1</sup> Writ Petition (Criminal) No. 167 of 2012.; *Shreya Singhal v Union of India*

governments, for allegedly 'politically motivated' purposes. One of the earliest, and most widely cited example is the arrest of two young students, one of whom made a post, the other 'liked' the post on Facebook, questioning certain actions taken by political parties upon the demise of a popular political leader in the State of Maharashtra. A young law student filed a writ petition in the form of public interest litigation before the Supreme Court of India, asserting the fundamental right of every citizen of India to the freedom of speech and expression and questioning the constitutionality of Section 66A.

There have been other instances of people from different walks of life (such as professors and cartoonists) being arrested for circulating via social media platforms allegedly 'derogatory' comments and pictures in relation to politicians / political parties, places of worship / religious symbols and even the government, across the country.

With each such arrest reported in the media, public outcry against the provisions of the Act, and Section 66A in particular had increased. Lawyers, advocacy organisations and activists argued that the provisions of the Act, as well as the instances of abuse of the Act by authorities, violate the fundamental right to freedom of speech and expression granted under the Constitution of India ("**Constitution**").

As a result, a number of citizens and organisations filed writ petitions before the Supreme Court, asking that restrictive provisions of the Act such as Section 66A are struck down.

**The Supreme Court in this judgment, *Shreya Singhal v. Union of India*, has taken cognisance of all of the writ petitions dealing with this issue together, and addressed the question of constitutionality of Section 66A Section 69A and Section 79 and rules framed under Sections 69A and 79.**

### **CASE OF THE PETITIONERS**

Some of the arguments put forth by the petitioners in the writ petitions are highlighted below:

- **Section 66A: Violation of Article 19 (1) (a) and Article 19(2) of the Constitution:**

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

—Any person who sends, by means of a computer resource or a communication device,—

(a) any information that is grossly offensive or has menacing character; 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.*

The Constitution guarantees certain fundamental rights to its citizens. The fundamental rights guaranteed under Article 19(1) of the Constitution are not absolute and may be restricted by the State only in accordance with parameters set out in Article 19(2) of the Constitution.

**Article 19: Protection of certain rights regarding freedom of speech etc.**

*(1) All citizens shall have the right*

*(a) to freedom of speech and expression;*

.....

*(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, in so far 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 [Emphasis supplied]***

The petitioners argued that Section 66A violates the fundamental right of freedom of expression granted under Article 19(1)(a), and that the provision does **not** fall within the allowances granted to the government under Article 19(2) to impose reasonable restrictions on such a fundamental right.

- **Section 66A: Violation of Article 14 of the Constitution:**

The petitioners have also argued that Section 66A of the Act violates the right to equality as granted under Article 14 of the Constitution:

**Article 14: Equality before law.**

*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*

The petitioners argued that the right to equality as provided for under the Constitution is violated, on the basis that “*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*”.

- **Section 69A: Challenge on Constitutional validity:**

**Section 69A: 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.*

The petitioners have argued that Section 69A of the Act and the rules framed under Section 69A, which provide a detailed procedure for the blocking of websites and content are unconstitutional as they do not provide an opportunity for the 'originator' of the information being blocked to be heard and do not provide for procedural safeguards as seen in other laws such as the Criminal Procedure Code, 1973 for similar offences.

- **Section 79: Vague, over broad and violate Article 19(2) of the Constitution:**

***Section 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.*

Section 79 of the Act provides that 'intermediaries' such as internet service providers and search engines, are exempted from liability for content posted by third parties using the intermediary's services. The exemption is subject to certain conditions, including compliance by the intermediary with the rules notified under Section 79 in 2011 ("**Intermediary Rules**"). Among other things, Section 79 and the Intermediary

Rules provide that the intermediary may, upon receiving knowledge of commission of any unlawful acts or publication / communication<sup>2</sup> of certain types of content<sup>3</sup>, remove access to the information, data / communication link used to commit such unlawful acts / publish restricted content.

The petitioners have argued that Section 79, and the Intermediary Rules violate the Constitution in that they (a) allow the intermediary (as opposed to a court / statute) the discretion to decide upon whether an 'unlawful act' is being committed, or restricted content is being published; and (b) the restrictions under the Intermediary Rules go beyond the permitted restrictions under Article 19(2).

### **UNION OF INDIA'S DEFENSE**

Some of the arguments put forth by the Union of India ("Uoi") as a defence to the writ petitions are highlighted below:

- There is a presumption in favour of constitutionality of a legislation and that the Courts will, only "*interfere with the legislative process only when a statute is clearly violative of the rights conferred on the citizen*" under the Constitution.
- In deciding on the constitutionality of a statute, the court must read the statute and construe it in such a manner as to make it workable.
- With regard to Section 66A of the Act, the Uoi further argued that loose language has been used in the provision, in order to deal with novel methods of commitment of crimes on the internet, and that neither vagueness, nor the mere possibility of abuse of the provision can be seen as a ground to declare the statutory provision constitutionally invalid.
- The Uoi has also argued that Section 66A does fall within the ambit of the reasonable restrictions allowed under Article 19(2), and has been enacted in the interest of ensuring public order, and decency / morality; and prevention of defamation, and incitement to an offence (which are all ingredients contained in Article 19(2)), and is therefore not unconstitutional.
- In response to the argument that the provisions of the Act violate the right to equality under Article 14, the Uoi has argued 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 support this argument, the Uoi cited various grounds on which the internet differs from other media such as (i) the reach of print media is restricted while the internet is not restricted by boundaries, (ii) while print media can be accessed solely by literate persons, content such as videos on the internet may be accessed by illiterate persons as well, (iii) most television programme can be pre-censored while there is no such pre-censorship on the internet.

---

<sup>2</sup> The rules under Section 79 restrict the hosting, display, uploading, modification, publication, transmission, updating or sharing of certain types of information.

<sup>3</sup> The content restricted under the rules under Section 79 includes, among other things, information that is grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, pedophilic, libelous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise harmful in any manner

- In its arguments re Section 79 and the Intermediary Guidelines, the Uol argued that it is common practice worldwide for intermediaries to have end user agreements (on their platforms) which set out the precise terms upon which (i) the intermediary will be assumed to have knowledge of an unlawful action on the platform and (ii) the intermediary will take down content.

### **JUDGEMENT OF THE SUPREME COURT**

We provide a summary the judgement delivered by the Supreme Court and our analysis of the judgement under distinct headings.

- **Whether Section 66A Of The Act Violates The Fundamental Right To Freedom Of Speech And Expression:**

The Supreme Court first analysed the provisions of Section 66A in relation to the fundamental right granted under Article 19(1)(a) of the Constitution. The Supreme Court explained that there are three concepts which are fundamental in understanding the reach of Article 19(1)(a), namely **discussion, advocacy, and incitement**, and that mere discussion or even advocacy of a particular cause howsoever unpopular, is at the heart of the rights granted under Article 19(1)(a). **It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) would trigger and would allow the state to impose restrictions.**

The key term used in Section 66A is 'information' and the Supreme Court examined the definition of 'information'.

*"Information" includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche."*<sup>4</sup>

Noting that the definition of 'information' is inclusive, and restricts itself to the medium of communication as opposed to the content of the information, the Supreme Court found that the definition of 'information' read with Section 66A included within its ambit all kinds of information – even information which may have scientific and artistic value. **The Court held this Section 66A creates an offence against persons who use the internet and therefore "affects the freedom of speech and expression of the citizenry of India at large".**

The Supreme Court then analysed the Uol's contention that Section 66A does fall within the ambit of the reasonable restrictions allowed under Article 19(2), and has been enacted in the interest of ensuring public order, and decency / morality; and prevention of defamation, and incitement to an offence. The Supreme Court analysed each of the elements of Article 19(2) which the Uol raised in its defence. The Supreme Court relied on a number of precedents from Indian and as well as US jurisprudence in coming to its decisions<sup>5</sup>:

---

<sup>4</sup> Section 2(v) of the Act

<sup>5</sup> The Supreme Court has analysed the Fundamental Right To Freedom Of Speech and Expression under the Indian Constitution and the US First Amendment – 'Congress shall make no law which abridges the freedom of speech. Both the US and India protect freedom of speech and expression as well as press freedom. In the US, courts have held that if there is compelling if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. However in India, such law cannot pass muster unless it is covered by one of the eight subject matters set out under Article 19(2).



- (a) *Public Order*: The Supreme Court referred to the test for determining whether public order is affected by a particular act, as laid down in *Kameshwar Prasad & Ors. v. The State of Bihar & Anr.*<sup>6</sup>, and *The Superintendent, Central Prison, Fatehgarh v. Dr. Ram Manohar Lohia*<sup>7</sup>: “**does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquillity of society undisturbed?**”

Noting that Section 66A makes no distinction between dissemination of information to one person, and mass dissemination, and that there is no nexus between the dissemination of the information, and incitement of actions that may act as a threat to public order, **the Supreme Court found that there is no proximate relationship between Section 66A and a threat to public order.**

- (b) *Decency / morality*: The UoI argued that Section 66A should be read together with past judgments of the Supreme Court and international courts, as well as Article 19(2) of the Constitution and interpret Section 66A in such a manner that it is considered to include / provide for the exceptions under Article 19(2) including that relating to ‘decency and morality’. Noting that what is considered ‘grossly offensive’ or ‘annoying’ may not be considered ‘obscene’, the Supreme Court stated that **it would not be possible to read into the provisions of Section 66A, the various principles of obscenity, decency or morality** as established by judgments of the Supreme Court, as well as international courts, as argued by the UoI.

- (c) *Defamation*: The Supreme Court examined the definition of ‘defamation’ under Section 499 of the Indian Penal Code, 1860. Noting that the basic ingredient of ‘defamation’ is ‘injury to reputation’, the Supreme Court expressed the opinion that **Section 66A has no relation to injury to reputation of a person, and that provision is not aimed at defamatory statements at all.**

- (d) *Incitement to an offence*: The Supreme Court highlighted the distinction between the use of information merely for the purpose of discussion, advocacy or highlighting a point of view, and incitement of an offence – and stated that the requirements of Section 66A (i.e. *causing of annoyance, inconvenience, danger, or being grossly offensive, or having a menacing character,*) may be considered ingredients of offences under the Indian Penal Code, but are not offences as defined under the Indian Penal Code in themselves. Any information that is disseminated might be cause an annoyance, or inconvenience or any of the other consequences mentioned under Section 66A, however, this does not automatically mean that such dissemination of information will ‘incite’ a person to commit an offence. On this basis, the Supreme Court found that **there is no proximate connection between Section 66A and incitement to an offence** either.

The Supreme Court also took into account the petitioners’ various arguments on the fact that the reach of **Section 66A is vague, and does not clearly communicate to a citizen what actions would be considered offenses under this provision, and that as a result the restrictions under Section 66A have a chilling effect on free speech on the internet.** The Supreme Court examined various judgments and principles established by both the Supreme Court itself in the past, as well as American courts and relied on the SC’s judgment in the recent case of *S. Khushboo v. Kanniammal*<sup>8</sup> where criminal

---

<sup>6</sup> [1962] Supp. 3 S.C.R. 369

<sup>7</sup> [1960]2SCR821

<sup>8</sup> (2010) 5 SCC 600

proceedings were initiated against a popular actress, in relation to certain statements made by her on the topic of premarital sex. In that case the Supreme Court found that *“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”*** (emphasis supplied).

Relying on such previous judgments, the Supreme Court held that Section 66A is also unconstitutional 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”*.

#### Our Analysis

The provisions of Section 66A have long been felt to be draconian and akin to creating a police state in India. The numerous examples of abuse and misuse of these provisions to protect political and religious interests, and clamp down on content that has even an inclination of dissent, have only reinforced such opinions.

There are various other statutes which impose limitations on constitutional rights. For instance the Supreme Court in this very judgment has stated that Section 69A which also restricts expression is constitutional since it clearly falls within the ambit of the permitted restrictions under Article 19(2) and in addition also provides a number of safeguards against the misuse of such provisions. In addition, a brief look at the Act, and other statutes such as the Indian Penal Code, suggest that certain actions described under Section 66A have already been clarified, defined separately and otherwise declared as offences under these statutes. For instance, Section 66D of the Act provides for punishment for the offense of cheating by personation by using a computer resource; Section 67, 67-A and 67-B provide punishment for publishing or transmitting obscene material or sexually explicit material of varying nature in an electronic form. Similarly, Sections 291, 292 and 293 of the Indian Penal Code provide that actions such as sale, import, public display etc. of obscene books, or objects are punishable.

Section 66A sought to create a restriction on a fundamental right in an arbitrary manner, outside of the constitutional framework, and has as a result been struck down as unconstitutional.

- **Whether Section 66A Of The Act Violates The Fundamental Right To Equality Before Law:**

The petitioners had, *inter alia*, argued that there is no intelligible differentia between the medium of print, broadcast and live speech and speech on the internet and therefore Section 66A violates Article 14 of the Constitution by creating new categories of criminal offence. The Supreme Court accepted the arguments of the UoI that the internet is very different from other media of communication and held 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”*.

#### Our Analysis



The Supreme Court has not examined in great detail the constitutionality of Section 66A, specifically in relation to Article 14 of the Constitution. However, the Supreme Court's observation that there is an 'intelligible differentia' between speech on the internet and other mediums of communication **bears great significance in determining how laws will be created and upheld going forward in a technology and internet driven world.**

In this regard, the Supreme Court has also observed that 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*". Given the observation, as well as this very specific reasoning provided by the Supreme Court, it will be interesting to see how the legislature and the courts take this forward in addressing the various challenges posed to current statutory framework in the country by the advent of the internet and new means of exploiting it – will we have new laws to govern any and all actions on the internet?

- **Whether Section 69A Of The Act and the Rules framed under Section 69A are Unconstitutional:**

Section 69A provides that the UoI may block / order the blocking of any public information that is generated, transmitted, received, stored or hosted in any computer resource, if required 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. Section 69A further provides that the reasons for any such blocking must be recorded in writing, and the rules under Section 69A provide a detailed procedure that is to be followed by the relevant government agencies and officers for the purpose of blocking access to any content under Section 69A.

**The Supreme Court found that Section 69A is a narrowly drawn provision, which falls squarely within the categories of permitted reasonable restrictions under Article 19(2), and on the basis of the checks and balances provided in the provision and the fact that the reasons for blocking are recorded in writing, and therefore may be appealed by way of a writ petition, it held that Section 69A contains several safeguards. The Supreme Court, therefore opined that Section 69A as well as the rules are constitutional.**

#### Our Analysis

Section 69A deals with specific instances where access to online content maybe blocked - 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 – all of which are specified as categories in relation to which reasonable restrictions are allowed under Article 19(2) of the Constitution. While Section 69A also provides power to the state to prevent the public from accessing content and is therefore often perceived to be unacceptable, the Supreme Court's view is that the procedure laid down for such blocking orders is within the framework of the Constitution.

The Petitioners as well as a number of advocacy organisations have argued that despite this fact, Section 69A and the rules under Section 69A are wide in ambit and unconstitutional since they only allow the intermediary / person in charge of the computer resource on which the content is hosted to be heard prior to the decision, and do not provide the person who is the originator of the concerned content an opportunity to be heard. Another concern brought forth by the Petitioners is the fact that the requirements

to maintain confidentiality of the complaints and requests for blocking. Advocacy groups have expressed the concern that read together the above mentioned rules effectively prevent the owner / originator of the blocked content from obtaining any information about the reason behind the blocking of their content, and appealing such orders.

The Supreme Court on the other hand has clearly stated that one of the reasons that Section 69A requires the reasons for blocking content to be recorded in writing, is so that the order may be assailed in a writ petition under Article 226 of the Constitution.

While neither Section 69A nor the rules clearly articulate whether or not the orders and / or the reason for the orders as recorded must be published or made available to the owner / originator of the blocked content, one may assume based on the Supreme Court's observations that such information must be made available in a manner that allows the order to be appealed. Therefore, despite the fact that the Supreme Court has upheld the constitutionality of Section 69A and the rules under this provision, the observations of the Supreme Court may have implications in actual practice and the government may need to issue necessary clarifications.

- **Whether Section 79 of the Act and the Intermediary Guidelines are unconstitutional:**

Section 79 of the Act provides that 'intermediaries' such as internet service providers and search engines, are exempted from liability for content posted by third parties using the intermediary's services subject to certain conditions being fulfilled such as compliance by the intermediary with the Intermediary Rules.

Certain provisions of Section 79 and the Intermediary Rules are important to note while analysing this judgement:

- (i) The Intermediary Rules provide that the intermediary may upon receiving knowledge of commission of any unlawful acts or publication / communication<sup>9</sup> of certain types of content<sup>10</sup>, remove access to the information, data / communication link used to commit such unlawful acts / publish restricted content.
- (ii) The exemption from liability for intermediaries provided by Section 79 is subject to Section 79(3)(b) which provides that the exemption from liability shall not apply if "*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*".
- (iii) Rule 3(4) of the Intermediary Rules provides that an intermediary, upon obtaining knowledge by itself, or from an affected person, in writing or through email, of commission of unlawful acts or publication of restricted content, is required to act within 36 hours and work with the

---

<sup>9</sup> The rules under Section 79 restrict the hosting, display, uploading, modification, publication, transmission, updating or sharing of certain types of information.

<sup>10</sup> The content restricted under the rules under Section 79 includes, among other things, information that is grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, pedophilic, libelous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise harmful in any manner

user or owner of the information to disable the information that is in contravention of the Intermediary Rules (available [here](#)).

The Supreme Court has held here that both Section 79(3)(b) and Rule 3(4) of the Intermediary Rules are to be read down to mean that **the intermediary must receive a court order / notification from a government agency requiring the intermediary to remove specific information**. Further, the Supreme Court has also stated that any such court order or notification must necessarily fall within the ambit of the restrictions under Article 19(2).

### Our Analysis

As it stood, Section 79 and the Intermediary Rules provided that an intermediary would be required to remove / block access to illegal content upon receiving knowledge of such illegality – this knowledge could be obtained by an intermediary on its own (perhaps through monitoring of the content), or communicated to the intermediary by any affected person, or via notification by the government.

This provision (particularly the provision requiring the intermediary to use its own judgement to deem content to be illegal) effectively made an intermediary a gatekeeper to the internet, giving an intermediary the discretion to decide upon whether or not certain content should be blocked.

Further, the wording of the Intermediary Guidelines (i.e. the requirement of the intermediary to “act within 36 hours” of receiving knowledge) caused much speculation in the industry as it was not clear what constituted appropriate action and whether the intermediary was supposed to act on any and all take down notifications (from the government as well as private parties).

**The Supreme Court by reading down the provisions of Section 79 and the Intermediary Rules has clarified that the intermediary must receive a court order / notification from a government agency for removing specific information / content.**

On the flip side, the question is whether such a reading down hampers individual protection as illegal content (that could potentially cause loss or injury) would continue to be viewed in public domain until a court order or administrative order is received, which may take substantial time. Therefore, intermediaries would not be obligated to undertake any take down / removal action upon receipt of third parties complaints (however grave and severe) even if the complaint on its face merits take down. Further, while the Supreme Court has indicated that Section 79 being an exemption provision is closely related with those provisions under the Act which provide for offences, such as Section 69A, it has not clarified which specific administrative agencies would have the authority to issue an order – would the nodal officers or designated officers appointed in accordance with the rules framed under Section 69A also have the authority to act under Section 79 and the Intermediary Rules?

A number of other jurisdictions have adopted methods to provide a legally valid procedure for taking down and blocking content on the internet. For instance,

- In Argentina, the supreme court recently delivered a judgment which not only exempts intermediaries from liabilities, but also provides a two-fold approach to removal of content from the internet – whereas typically, the intermediary will be deemed to have knowledge of and

required to remove any illegal content upon receiving a notice from a competent judicial or administrative authority, a private notice from any individual will suffice for this purpose where there is a manifest illegality such as content depicting child pornography, or promoting genocide<sup>11</sup>.

- In the United States, a takedown mechanism is provided under the Digital Millennium Copyright Act, which provides that upon receiving a notification of infringing content, an intermediary is required to take the content down, and notify the alleged infringer. The alleged infringer is permitted to send a counter notification, which must then be communicated to the individual that sent the original notice. If such individual does not take legal action and notify the intermediary of such action within a specified period of time, the intermediary is permitted to make the content available again.
- Indian copyright law also provides for a similar takedown mechanism – where a complaint regarding infringing content is received, the intermediary is required to take down such content within 36 hours, for a period of 21 days after which access to the content can be made available again, unless such complainant obtains a court order restraining the intermediary from providing access to the content.

It may be beneficial to implement a procedure such as that provided for under Indian copyright law, to ensure that the rights of persons affected by content are also protected, especially in cases where the illegality is not restricted to Rule 3(2), and the content is in violation of other laws.

Based on the above, it is expected that the 'read down' Section 79 and Intermediary Rules may have implications in actual practice and the government may need to issue necessary clarifications.

As seen above, while a few questions do remain unanswered, the Supreme Court in this judgment has examined and articulated in a clear and eloquent manner the origin and development of the fundamental right to freedom of speech and expression under the Indian Constitution, as well as its application to the internet and electronic communication.

An increasing number of cases of alleged misuse of Section 66A of the Act have been brought to the public's attention over the past two years, with the most recent case being that of the arrest of a 17 year old student earlier this month for allegedly making comments in relation to certain political leaders which could incite communal tensions.

The judgment of the Supreme Court however, has upheld the freedom of speech and expression as decreed by the Constitution, all the more so in relation to a new medium of communication – namely the internet, and in doing so in its judgment in a writ petition brought forth by a young student, underscored the democratic values of the Constitution, and the public's faith in the independence of the Indian judiciary.

- *Smitha Krishna Prasad, Huzefa Tavawalla, Rakhi Jindal & Gowree Gokhale*

---

<sup>11</sup> <http://cyberlaw.stanford.edu/blog/2014/11/argentine-supreme-court-decides-landmark-intermediary-liability-case> and <http://www.digitalrightslac.net/en/la-corte-argentina-y-un-fallo-clave-sobre-responsabilidad-de-intermediarios-de-internet/>