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RESURRECTING A DEAD LAW

Relevant for: Science & Technology | Topic: IT, Internet and Communications

Shreya Singhal addresses the media after the Supreme Court struck down Section 66A, in New Delhi, in 2015. | Photo Credit: R.V. Moorthy

Section 66A of the Information Technology Act, 2000, which the Supreme Court had declared unconstitutional in 2015 in *Shreya Singhal v. Union of India* for having a “chilling effect on free speech”, is back in the news. As part of the ongoing negotiations at the United Nations for a proposed international treaty on combating cybercrime, India made a formal submission for criminalising “offensive messages”. The language in the submission is similar to what was used in Section 66A. Many contend that this amounts to a ‘backdoor’ attempt at legislation — that is, if India’s submission becomes part of the proposed treaty, it would result in Section 66A springing back to life and being used by the state to curb free speech once again. However, it is not so simple.

First, international treaty negotiations are complex. It is premature to believe that India’s suggestion of criminalising “offensive messages” will be readily accepted. The U.K. and many countries in the European Union have reportedly already contested India’s submission because they see this as an undue impediment to the freedom of speech.

But suppose we assume that India’s proposal is accepted, would that mean that the provision will have a direct effect on the Indian legal system? Arguably, India is a dualist state. Therefore, international law does not become a part of the domestic legal system unless it is specifically transformed into domestic law by Parliament, which will be required to enact legislation to implement the international law. This is different from the theory of monism, wherein international law is automatically incorporated into the domestic legal system of the country even without Parliament enacting an enabling legislation. However, over the years, the Supreme Court of India has moved away from this traditional dualist approach towards monism. In cases such as *Vishakha v. State of Rajasthan* (1997), *National Legal Services Authority v. Union of India* (2014), and *K.S. Puttaswamy v. Union of India* (2018), the court followed an approach of judicial incorporation by reading international law into domestic law in the absence of any specific prohibition in municipal law. In other words, the emerging principle is that courts will respect international law unless it can be shown that it is inconsistent with municipal law.

If we do get an international treaty combating cybercrime with a provision similar to Section 66A, the Indian courts will not read this provision as part of domestic law because of the ratio in the *Shreya Singhal* case. It will be a classic case of an international law being in conflict with domestic law. Thus, the Indian courts will give primacy to the domestic law, not the international treaty provision criminalising “offensive speech”.

However, things may become convoluted if Parliament enacts legislation or amends existing legislation to implement the international treaty that criminalises “offensive messages”. The government may get a law passed in Parliament using Article 253 of the Constitution, which states that Parliament has the “power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention”, and place a provision similar to Section 66A back on the statute book. Legally, such a law can be justified as a necessary action to comply with India’s international law obligations. It will then give the executive the power to book people for alleged “offensive messages” as was the practice earlier.

But what if the constitutionality of the re-introduced version of Section 66A is challenged? The

courts will then examine the constitutionality of the reintroduced version of Section 66A in light of the fact that it was enacted to comply with India's international law obligations. But the constitutional court will still strike down the re-introduced version of Section 66A because the grounds on which this law was pronounced unconstitutional will still be valid in light of the fundamental right to free speech. In other words, just because Parliament enacts a law to give effect to an international treaty obligation, that does not mean that the law so enacted will not need to meet the test of constitutionality. Therefore, the possibility of Section 66A coming back on the statute book is bleak unless a bigger Supreme Court bench overrules *Shreya Singhal*.

But this issue is not just about legal technicalities. The alarming point is that the Indian government proposed the inclusion of a provision in an international treaty which was struck down by its own apex court for breaching fundamental rights. This mindset does not augur well for constitutionally protected fundamental freedoms in India.

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