To:

The Member-Secretary,
Law Commission of India,
Hindustan Times House, 14th Floor,
Kasturba Gandhi Marg,
New Delhi – 110 001

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New Delhi, 13 August 2014

Dear Sir,

The Internet Democracy Project welcomes the opportunity provided by the Law Commission of India to comment on its Consultation Paper on Media Law.

The Internet Democracy Project (www.internetdemocracy.in) is a Delhi-based initiative of women's rights organisation Point of View (www.pointofview.org), and examines the challenges that the Internet provides for democracy in India and beyond, through research, debate and advocacy. Our work has centred around topics such as women and online abuse; the impact of criminal law in India on freedom of expression on the Internet; and how to tackle hate speech while strengthening the right to freedom of expression.

In response to the Law Commission's call, we would like to make the submission below, which comments on one of the central areas of the Consultation Paper that touch on freedom of expression on the Internet in India, which is one of our core areas of expertise: **Social Media and Section 66A of the Information Technology Act, 2000.**

We hope that the Law Commission will kindly consider our submissions. We would be happy to provide any further inputs or clarifications to the Law Commission, either in writing or in person, on its request.

Thanking you once again for being offered the opportunity to share our inputs,

Yours sincerely,
Dr. Anja Kovacs
Project Director, Internet Democracy Project

Comments by the Internet Democracy Project on Social Media and Section 66A of the Information Technology Act, 2000 as invited by the Law Commission in its Consultation Paper on Media Law

August 2014

Introduction

The Internet has undoubtedly posed new challenges for balancing the right to freedom of expression on the one hand and the right to equality or non-discrimination on the other. Regardless of their national origin, social, ethnic, caste or religious background, disability, gender or sexuality, every single person has the same dignity and should enjoy the same rights. While overall, freedom of expression facilitates the exercise of other human rights, it is clear that the new possibilities for free speech provided by the Internet have also been used to undermine people's human rights. Seeing the speed and scale with which messages can spread on the Internet, the question of under which conditions freedom of expression can be legitimately restricted has consequently been raised with renewed urgency and concern.

It is important to underscore at the outset, however, that freedom of expression remains one of the essential foundations of a democratic and pluralistic society. While this right can be restricted in exceptional cases, it has to be remembered that overall, freedom of expression facilitates the exercise of other human rights. Fighting against hate speech, or for equality, and strengthening freedom of expression are, thus, not simply compatible with each other; instead, they exist in an affirming, mutually reinforcing relationship as they make complementary yet essential contributions to the securing and safeguarding of human dignity.

Moreover, it is also important to underscore at the outset that human rights apply online as they apply offline. This was recognised in UN Human Rights Council Resolution 20/8, of which India was a co-sponsor[1]. The Government of India has restated its commitment to this principle repeatedly.

It is with these observations in mind that we make the following submissions:

[1] "The Promotion, protection, and enjoyment of human rights on the Internet". Resolution A/HRC/RES/20/8, adopted by the UN Human Rights Council at its 31st meeting, on 5 July 2012.

1. Should the existing law be amended to define what constitutes "objectionable content"?

We believe that defining "objectionable content" as a broad category under the law would not be beneficial, for two reasons.

First, in order for freedom of expression to be criminalised, it is not sufficient that content is merely "objectionable" in the eyes of the public. Important social changes such as those advocated for by India's social reformers of the late nineteenth and early twentieth century were possible only because of this recognition. It is precisely where we have strong disagreements about dearly-held habits, practices, beliefs and values that the protection of freedom of expression matters the most: the right to shock, offend and disturb is integral to the right to freedom of expression, not contradictory to it.

Any attempt to define "objectionable content" thus has to recognise from the outset that there is a crucial distinction between what society may consider as objectionable and what is or should be legally objectionable. Article 19 (1) of the Constitution of India recognises the right to freedom of speech and expression. Article 19(2) provides for a number of grounds for imposing reasonable restrictions on this right. These are 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. Only content that falls within these parameters as authorised by law could legitimately be considered "objectionable".

Rather than defining a new category of "objectionable speech", what therefore would be useful is to assess all of India's laws and policies as they relate to freedom of expression against these standards set by the Constitution. This would ensure that the distinction between content that is socially objectionable and that is legally objectionable remains firmly in place, as it should be. It would at the same time also help to ensure that the Constitution is operationalised as intended by its authors

In addition, however, and with this we come to our second point, the Supreme Court of India has ruled, in line with the three-part test provided for in international law[2], that any

[2] As UN Special Rapporteur on Freedom of Expression, Frank La Rue, has stated: "any limitation to the right to freedom of expression must pass the following three-part, cumulative test: (a) It must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency); and (b) It must

restrictions must not be excessive or disproportionate. Where public order is used as a ground to restrict speech, it has stipulated that this means that there needs to be a "proximate and reasonable nexus between the speech and the public order"[3]. This means that **the definition of content that is "objectionable" in a legal sense can never be static: what is excessive and disproportionate is situation-dependent.**

Indeed, while it is often difficult to provide precise definitions even for categories of expression that are widely considered to be illegal, such as incitement to hatred, it is possible to establish thresholds that are robust and high and thus allow for the effective application of reasonable restrictions while minimising the chances of abuse or arbitrary application of national legal standards for political reasons or otherwise. The higher the threshold and the more precise its wording and conceptualisation, the more effective the application of the law.

Rather than defining "objectionable content", therefore, it would be desirable to see greater elaboration of the thresholds to be used to assess speech in a court of law, either by the Courts themselves or in the law[4]. In cases coming under criminal law, thresholds for the prohibition of hate speech should be particularly high if the reasonable restrictions provided for by the Indian Constitution are indeed to be proportionate. They should include at the very minimum the real and present danger test: there should be a real possibility of danger or violence and such danger or violence should be imminent. The act of incitement has to be public. And the intention to commit an offence, to offend, harm or discriminate needs to be demonstrated and malice needs to be manifest. Only by establishing high thresholds in each of these areas can it be ensured that hate speech laws do not have a chilling effect on the free flow of information.

While the specification of such thresholds in law would be helpful, it deserves to be noted that the examination of each of these thresholds should take place on an ad hoc basis as, from a legal perspective, each set of facts is particular and can only be assessed and adjudicated,

pursue one of the purposes set out in article 19, paragraph 3, of the Covenant, namely (i) to protect the rights or reputations of others, or (ii) to protect national security or of public order, or of public health or morals (principle of legitimacy); and (c) It must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality). See La Rue, Frank (2011). Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (A/HRC/17/27). Geneva, United Nations Human Rights Council, 16 May 2011.

3 *The Superintendent, Central ... vs Ram Manohar Lohia*, 1960 AIR 633, 1960 SCR (2) 821.

4 The importance and value of establishing clear thresholds in battling hate speech is further discussed in Kovacs, Anja (2012). Hate Speech and Freedom of Expression: How to Battle the Former while Strengthening the Latter – Recommendations for Governments, Media, People. New Delhi, Internet Democracy Project, August 2012.

whether by a judge or another impartial body, according to its own circumstances and taking into account the specific context and patterns of vulnerability[5]. For example, where the test of extent is concerned, a statement released by an individual to a small and restricted group of Facebook users does not carry the same weight as a statement published on a mainstream news site. Similarly, where the test of content is concerned, artistic expressions should not be judged by the same measure as political speech.

2. ***Should Section 66A of the IT Act be retained in its present form or should it be modified/ repealed?***

Because the right to freedom of speech and expression is a foundational pillar of any democracy, stifling the free flow of expression and information by criminalising it can be legitimate only in the most exceptional of cases. **We recommend that Section 66A of the IT Act be repealed, or at the very least modified extensively, as it does not adhere to the high standards laid down in this regard by India's Constitution, India's Supreme Court and international human rights standards.**

What is pointed out most commonly is that section 66A's broad and vague wording leaves it open to arbitrary application and hence misuse, consequently leading to a chilling effect on free speech. We argue that this problem is constituted by three more concrete aspects in particular.

First, as noted above, Article 19(2) of the Constitution of India provides for a number of grounds for imposing reasonable restrictions on this right. These are 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.

With this, the Indian Constitution broadly reflects international human rights standards. Under these standards, **restricting speech can be considered a necessary and**

[5] This is strongly emphasised by UN Special Rapporteur Frank La Rue in his report on hate speech. See La Rue, Frank (2012). Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (A/67/357). New York, United Nations General Assembly, 7 September 2012.

proportionate measure only when the speech in question presents a serious danger for other people or for other human rights[6].

The current framing of section 66A goes well beyond this brief, as it also criminalises speech that is "grossly offensive" or that aims to merely cause, for example, "annoyance", "inconvenience", "obstruction" or "ill will". As none of these instances constitute a serious danger for others or for human rights, their criminalisation cannot be considered legitimate under any circumstances.

Second, **section 66A can be argued to weaken online the protections of the right to freedom of expression that Indians enjoy offline** and thus to violate the principle that "the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice"[7].

Indeed, as it includes several grounds for restriction that do not have a parallel provision in the Indian Penal Code (e.g "menacing", "annoyance", "inconvenience"), **section 66A in effect creates new offences** in each of these cases. **Such offences can come into existence, however, only when speech is expressed online**. If annoying or inconvenient information is published offline, it remains outside of the ambit of Indian law, as it should be in all cases.

Where similar criminal offences do exist elsewhere in Indian law, **section 66A in some cases** (e.g. criminal intimidation) **provides a higher penalty**, again indicating that freedom of expression online is treated with a different yardstick than freedom of expression offline in India. Moreover, **where section 66A repeats existing offences, it also does so without incorporating "the legislative and judicially evolved checks and balances guiding their interpretation to specific acts as also guiding prosecutions**, including the existence of ingredients of the offence warranting invoking the law as well as the safeguards and exceptions which safeguard the liberties and fundamental rights of persons alleged to have committed the crimes"[8]. Section 66A thus undermines the protection of the right to freedom of expression that Indians are accorded in the Constitution and elsewhere in Indian law in myriad fundamental ways.

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6 See in particular Art. 19(3), ICCPR, on what constitute reasonable restrictions.

7 Resolution A/HRC/RES/20/8, Op. Cit., p. 2.

8 See Writ Petition filed by PUCL on 19 September 2013, challenging the constitutional validity of the provisions of the Information Technology Act, 2000 and the rules the framed thereunder,

Third, the above shortcomings of section 66A are further compounded by the fact that the section is cognizable, meaning that the police can make arrests without requiring a warrant. **Leaving to the police the interpretation of an overly-broad law to restrict freedom of expression, one which brings into existence entirely new offences and does not recall checks and balances for existing ones, only further aggravates the potential for inappropriate and arbitrary application of the law**. In the absence of clearly defined thresholds for criminalisation, police have no yardstick to assess a situation by but their own.

It deserves to be noted again, however, as we also already did in section 1 of this submission, that even when the law is appropriately specific and high and robust thresholds have been articulated, the assessment and adjudication of each set of facts should, as UN Special Rapporteur on Freedom of Expression Frank La Rue has reminded us, be done by "a body that is independent of political, commercial or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse"[9]. Because of the far-reaching consequences of inappropriate applications of restrictions on freedom of expression, including a possible rippling chilling effect on free speech, **it is therefore advisable that any law that seeks to impose restrictions on the right to freedom of speech and expression in India be classified as a non-cognizable offence.**

Finally, we would like to close this assessment of section 66A by noting that we are aware that the Supreme Court is currently assessing the constitutionality of section 66A and may, in its ruling, provide for a reading of the section that alleviates one or more of the concerns that we have outlined above. However, even then we would recommend that section 66A is either substantially revised or repealed altogether by Parliament.

As the Internet has opened up new avenues for freedom of expression, and will continue to do so for ever-growing numbers of Indians over the coming few years, it is important for all users to know what is and what isn't acceptable speech under the law, so that they can orient their online behaviour accordingly. Only where the text and the interpretation of the law closely overlap does the law provide this important guidance for every day users. Seeing the importance of the right to freedom of expression as a foundational right that enables and supports the enjoyment of other human rights as well, we therefore hope that our lawmakers will take up this important responsibility and make sure that India's freedom of expression

[9] La Rue (2012), Op. Cit., p. 12.

laws in the Internet age are intelligible to all to the greatest extent possible. In the absence of such a correction, the inappropriate framing of the law can continue to constitute a chilling factor on free speech even if our Courts narrow down the scope of the law in its actual application.

3. Is there a need for a regulatory authority with powers to ban/suspend coverage of objectionable material? If yes, should the regulatory authority be self-regulatory or should it have statutory powers?

As our submission restricts itself to the matter of objectionable content on the Internet, we will not comment on the possible need for a regulatory authority for the print and electronic media. However, **we believe that it will be wholly inappropriate to grant a regulatory authority with powers to ban/suspend coverage of objectionable material on social media and on the Internet more broadly, be this a self-regulatory authority or one with statutory powers.**

For one thing, such a move would erroneously elide the distinction between traditional media and the speech of ordinary people on social media as it would by default treat their role in society and the weight of their speech acts as the same. As explained above, where censorship is considered, the facts of the situation should always be assessed against clearly defined thresholds. These thresholds include the extent or reach of the speech and the likelihood or probability of action in response to the speech – apart from the severity, intent, content, imminence and context. In the large majority of cases, the impact of the speech of ordinary individuals will not be the same as that of mainstream media when assessed according to these criteria.

Indeed, it is important to also remember that where social media is concerned, it is the users, not the platform owners, who are the authors of the messages. In other words, Internet intermediaries such as Facebook, Twitter and Wordpress, on which ordinary people rely to publish their messages, are fundamentally different from traditional media: while traditional media *produces content*, Internet intermediaries are merely *messengers*, much as telecommunication companies are of voice messages delivered over landlines and mobile phones. Although a regulatory authority would inevitably require the cooperation of Internet intermediaries to be effective, its prime targets would thus have to be ordinary people. Such

non-judicial regulation of the speech of ordinary people is wholly inappropriate in a democratic country.

Indeed, as explained above, while there may be content on the Internet that is seen as socially objectionable, much of it is not objectionable in the legal sense by any means. However, the determination of whether or not a specific set of facts violates the law can only be made by the judiciary or by an independent body that is free of political, commercial and other unwarranted influences. Where discretionary powers are given to the authorities to make such assessments, this is all too likely to lead to misuse, further contributing to a chilling effect that already exists, as India's citizens increasingly start to censor themselves.

The establishment of a regulatory authority thus will likely substantially undermine the empowering effect that the Internet has had for ordinary people, and in particular for the boost it has given to their abilities to express themselves on a wide range of issues that concern them. While this includes speech that is at times of a questionable nature, it also lead to a great number of benefits, including forcing greater transparency and accountability on a wide range of power centres in our country, be they political or commercial. If these buds of active citizenship that so many Indians have embraced enthusiastically are to flower, freedom of expression should be protected and promoted by all means possible, rather than curtailed.

This is in addition to the fact that, as experiences in a wide range of countries have shown, filtering the Internet or creating a blacklist of undesirable sites to be made inaccessible are by no means effective measures. While generally merely driving the consumption of the material that was sought to be banned underground, rather than stopping it, such measures tend to cause content that would be wholly legitimate to be blocked as well. This can be both as a consequence of human mistakes (as humans not trained for this task interpret definitions overly broad, as we have seen repeatedly in the context of the implementation of section 66A) or of technical limitations (as filter systems based on key words will filter out *all* content containing those key words, without considering at their intent or context)[10].

[10] See for example James, V. (2013). Attempts to filter the Internet in other countries show the difficulties for David Cameron's plans. *The Independent*, 24 July 2013, http://www.independent.co.uk/life-style/gadgets-and-tech/attempts-to-filter-the-internet-in-other-countries-show-the-difficulties-for-david-camerons-plans-8729820.html. Last accessed on 29 July 2013. Also: Google and Facebook blocked by Danish child porn filter on March 1 2012. *IT Politisk Forening.* http://www.itpol.dk/notater/google-and-facebook-blocked-by-danish-child-porn-filter Last accessed on 30 July 2013.

This is not to say, of course, that action should not be taken against speech that clearly violates the law. However, several mechanisms to do so are already in place – and this in addition to the legal right every Indian has to approach the Courts.

For example, section 69A of the IT Act makes it possible for the Central Government to block content "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". Importantly, the Rules that were issued under the section explicitly allow for a speed procedure to put into place such blocks in case of emergency.

At the same time, the Intermediary Guidelines Rules, issued in 2011 under section 79 of the IT Act, make it possible for any Indian to send a take-down request to an intermediary for content that they believe violates the Rules.

Like section 66A, the Intermediary Guidelines Rules unfortunately suffer from important procedural and substantive shortcomings that have been argued to have a chilling effect on freedom of speech and expression, and strong protections of freedom of expression on the Internet in India would require these Rules, too, therefore to be revised extensively. For example, one aspect of the Intermediary Guidelines Rules that has come in for heavy criticism is that the Rules have effectively privatised censorship by relying on the intermediaries to make the assessment as to whether or not content is unlawful, rather than requiring the judiciary or an independent body to do so. We have repeatedly pointed to the dangers of doing so in this submission.

However, the principle that intermediaries should take down *unlawful* content stands by and large undisputed in the country. **Rather than establishing a regulatory authority, a review of the Intermediary Guidelines Rules can thus be used as an opportunity to devise a mechanism that protects free speech while also effectively dealing with illegal content on the Internet in India as required.** Such a mechanism would need to include at the very minimum judicial intervention or review at some point in the process if content is to be removed, as well as a recognition of the author's right to be informed and right to object/appeal.

In addition to such a review, there is however one more area where far greater energy could be focused: that of non-legal measures to fight objectionable speech online. Where objectionable content on the Internet is discussed, the tendency in India has been to overwhelmingly to look at censorship and arrests as ways to fight such speech. Yet especially in a country with the diversity of India - where what might be offensive to one community might be common sense to another – such an approach alone is clearly never going to fully resolve the problem of objectionable speech. As there is a considerable gap between speech that is socially unacceptable and that which is legally unacceptable, the singular focus on the law will inevitably leave many types of speech uncontested. But perhaps more importantly, as it fosters a culture of intolerance, such a purely legal approach might also have severe negative repercussions for the social fabric in the long-term.

What we need, therefore, is a far more extensive toolbox, containing positive measures as well that are geared towards nurturing public discussion and a culture of tolerance, and, ultimately, changing social behaviour on the Internet.

Such a toolbox should contain, among other things, both **education for school children and public awareness campaigns** about the ways in which Indians' fundamental rights and concomitant obligations translate to the Internet; about the damage hate speech and other forms of objectionable speech do to the social fabric of the country; and about the ethical actions all of us can take when we observe abuse and other forms of objectionable content.

It should also involve the **active use of counter-speech and social dialogue**, including through the public denouncement of instances of hate speech by public officials. It deserves consideration, for example, whether, when people from the North East started to flea Bangalore in mid-August 2012 following the spread of rumours that they would be attacked as a fall-out from violence that had occured in Assam, a public announcement of the then Prime Minister on national television that the government would not allow this to happen would not have been more effective than the blocking of Internet content at the time when the number of people fleeing had already substantially come down. The explicit rejection of acts of abuse and other objectionable speech by community leaders and other influential figures can go a long way in stemming the flow and impact of such content indeed.

All these measures would provide considerable fill-up to the wide range of non-legal strategies that Internet users in India are already developing to fight objectionable content

online. For example, In "'Don't Let it Stand!' An Exploratory Study of Women and Online Abuse in India", conducted in 2012-2013 by the Internet Democracy Project[11], women users of social media highlighted support from their online community, not the law, as one of the most critical factors to ensure their fight against online abuse was successful. Where they were alone and isolated, it was difficult for them to respond. Where others in their circle supported them actively, the likelihood that they were able to deal with an abuser effectively immediately increased many-fold. Non-legal initiatives by the government, the media, schools, not-for-profit organisations, religious and caste associations and a slew of other groups could thus do much to further empower users to deploy such strategies to fight abuse and hate speech.

What all these non-legal measures to address objectionable content online have in common[12], is that they rely on freedom of speech and expression, rather than on restrictions on this right, to combat objectionable content. Indeed, as we have pointed out also at the beginning of our submission, it is important to remember that overall, freedom of expression facilitates the exercise of other human rights. Fighting against hate speech, or for equality, and strengthening freedom of expression are, thus, not simply compatible with each other. Instead, they exist in an affirming, mutually reinforcing relationship as they make complementary yet essential contributions to the securing and safeguarding of human dignity.

Currently, unfortunately, initiatives that recognise this interplay are sorely lacking in India. Rather than towards establishing a social media regulator, it is towards initiatives such as these that a great part of our energies should urgently be devoted.

[11] Kovacs, Anja, Richa Kaul Padte, and Shobha SV (2013). "'Don't Let it Stand!' An Exploratory Study of Women and Online Abuse in India". New Delhi, Internet Democracy Project, April 2013.

[12] For more examples of non-legal initiatives that a range of actors can take, see Kovacs (2012).