‘SAVING’ THE HOUSE TO ROAST THE PIG: NORMATIVE ANALYSIS OF SECTION 66A IT ACT, 2000

- Medha Rao*

ABSTRACT

At the very heart of right to freedom of speech and expression lies the right to dissent. However, even the strongest advocates of the freedom of speech state that this right is not absolute. It takes sound legal framework to strike a balance between the right of the speaker, the audience and the bystander. The author through the current advocacy begins by tracing the history behind the freedom of speech and expression jurisprudence in India along with the reasons for the passing of the Information Technology Act, 2000. This paper analyses the scope of Section 66A, Information Technology Act keeping in mind primarily the statement of object and reason, the scope of the other offences in the Act and the original Section. In the course of discussing the factors to be considered while drafting the Section, the paper explores the limitations set by the Constitution of India, the internet as a distinct medium, cybercrimes, need to compound penalties and lastly the threshold for provisions of Section 66A to apply. This paper is an attempt to balance the right to freedom of speech of the speaker and the rights of the bystander or audience by redrafting the contested Section 66A in the hope of ‘saving’ the house of rights.

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* Student, Indian Law Society, Pune.

1. INTRODUCTION

Dissent is not easily cabined; it resides in many quarters and goes by many names. It manifests its opposition to orthodoxy in religious realms, political circles, economic arenas, and other social and cultural contexts.[1] Jurisprudence has defined freedom of speech by the scope of its protection, when in fact freedom of speech and expression simply means the freedom for the thought we hate,[2] or in other words the freedom to dissent.

Free speech forms the very basis of a successful democratic society.[3] In the absence of an adequate legal framework protecting the same, people of the State have to resort to revolutions to keep their voices of dissent from being suppressed. In 2011, the world witnessed dissents culminate into one such revolution now referred to as Arab spring. Come 2015 however, the only offspring of this revolution that has been able to establish political stability and democracy is Tunisia. So what sets Tunisia apart from its counterparts of the Arab spring? Tunisia was the only State to take the first step towards establishing a democracy by adopting a *sound progressive Constitution*. In contrast, Egypt has not been able to protect freedom of speech and bring about political stability due to the absence of rule of law.[4] Therefore a sound Constitutional framework is indispensable for the protection of freedom of speech and expression.

Innovations in technology have facilitated increased possibilities for communication and freedom of expression, enabling anonymity, rapid information sharing, and cross-cultural dialogues.[5] The Internet has become a vital communication medium which individuals can use to exercise their right to freedom of expression, or the right to seek, receive

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[1] Collins & Skover, *On Dissent Its Meaning in America*, 81(Edition, Year).
[2] United States v. Schwimmer, 279 U.S 644 (1929, Supreme Court of the United States).
[3] Union of India v. Motion Picture Association, AIR 1999 SC 2334.
[4] *See* Report on freedom in the world, *Discarding democracy: Return to the iron fist*, 2015.
[5] *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,* General Assembly, Sess.23, U.N Document A/HRC/23/40, 4, (17/04/2013) (available at).

and impart information and ideas of all kinds, regardless of frontiers, as guaranteed under article 19 of both; the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[6] It has become a forum where people gather and interact both socially and commercially and it also presents ample space as well as information for an opportunist to prey upon the unsophisticated, the uninformed or the naive.[7] Any ignorance of the State with respect to this situation shall result in chaos akin to the situation present in Egypt. Therefore, States have to establish rule of law through a sound legislative framework governing the internet so as to protect the rights of its people.

At the heart of making any policy limiting the right to free speech is the art of balancing rights of the three primary participants of free speech- the speaker, the audience and the bystander.[8] The internet adds to the dilemma of States as they now have to ensure adequate protection to the speaker's right to freedom of speech on the internet as well as resort to surveillance or intervention limiting the same so as to protect the other rights of the audience or third party. Moreover, given the intimate relationship between the right to freedom of speech and means of expression, any excessive limitation of the right to internet shall inevitably lead to limitation of a person's right to freedom of speech.[9] Therefore, in other words, States must ensure that in the process of trying to restrict the freedom of speech, their policies do not "burn the house to roast the pig."

This paper is an attempt to strike such a balance. The first part explains the history behind the drafting of Article 19(1) and 19(2) of the Constitution of India, 1950 as well as explores the objective and reasoning as stated in Information Technology

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[6] *Report by the Secretary General on the promotion and protection of the right to freedom of opinion and expression*, General Assembly, Sess.66, U.N Document A/66/290, 5 (10/08/2011) (available at).

[7] Decker Charlotte, *Cyber Crime 2.0: An argument to update the United States Criminal Code to reflect the changing nature of crime*, 81, S.Cal. L. Rev.959, 961.

[8] Eric Barnedt, *Freedom of Speech*, 23 (2nd ed., 2008).

[9] Molly Land, *Toward an International law of the Internet,* 54 Harvard International Law Journal 393, 395.

Act, 2000 so as to understand the background to Section 66Aof the Information Technology Act. The second part deals with the scope of the section, factors that should have been considered in the drafting of the section and lays down the legislation as it should have been drafted.

2. PART I

2.1 The 'Reasonably Restricted' Freedom of Speech and Expression

The Constitution of India, 1950 is first and foremost a social document as most of its provisions aim to foster a social revolution.[10] The drafting of the Constitution was vested in the hands of the Constituent Assembly.[11] The Committee on fundamental rights which was to assist the Constituent Assembly in the drafting of the fundamental rights presented reports containing positive and negative rights from various foreign Constitutions. The Assembly in its discussions concluded that rights cannot be of an absolute nature.[12] From the jurisprudence they had read, the then member of the Committee N.G. Ayyangar informed the Sub-Committee that there were two alternatives to choose from.[13] The first being that the provisions with respect to the rights could be drafted in a general manner as is seen in the Constitution of the United States of America and leave the expansion or limitation to be decided by the Courts or the second being that they could limit the rights by introducing provisos in the Constitution based on the judicial decisions of the American Courts. The Sub-Committee chose the second alternative in drafting the 'right to freedom' and introduced the same subject to the proviso of public order and morality.[14] However, this was never implemented in the Constitution. Consequently this gave rise to

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[10] Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, 50. (ed. Year)
[11] Indian Independence Act, 1947.
[12] Granville Austin, *The Indian Constitution*, 68. (ed. Year)
[13] *Law Ministry Archives,* File. CA/43/Com/47, 5 March 1947.
[14] *Prasad papers,* File I-F/47.

Article 19(1) (a) of the Constitution which guaranteed the fundamental right to freedom of speech and expression.

In 1951, Jawaharlal Nehru introduced the first amendment to the Constitution,[15] the main object of which was to impose reasonable restrictions for the 'general good of the public'. As a result, Article 19(2) was inserted which made the right to freedom of speech and expression subject to reasonable restrictions imposed in the interest of security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of Court, defamation or incitement of an offence.[16] An additional proviso 'the sovereignty and integrity of India' was introduced by the sixteenth amendment.[17] The legislature cannot restrict the right to freedom of speech beyond the purview of Article 19(2) of the Constitution of India.[18] Therefore the rights represent the claim of the individuals, the limitations protect the individuals and the limitations are not to destroy the balance which Article 19 was designed to give.[19]

2.2 Information and Technology Act, 2000

In August 1995, Videsh Sanchar Nigam Limited (VSNL) was the first company to introduce internet in India. With the change in economic policy, by the year 2000 about 0.53%[20] of India's population used the internet. That percentage has increased to 12.58% in 2012[21] and in the year 2014 India had 259.59 million internet users.[22] By 2020, Mckinsey & Company in its report estimates that there will be 500 million users in India.[23]

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[15] The Constitution (First Amendment) Act, 1951.
[16] S.3 (a) for clause (2), ibid (with retrospective effect).
[17] S. 2(a), The Constitution (Sixteenth Amendment) Act, 1963 (w.e.f 5-10-1963).
[18] Durga Das Basu, *Constitution of India*, 2122 (8th ed., 2007).
[19] H.M Seervai, *Constitutional Law of India-Vol I*, 703 (4th ed., 2005).
[20] Report on the percentage of individual users of the internet, ITU, 2014.
[21] *Ibid.*
[22] The Indian Telecom Regulatory performance Indicators, TRAI,(30 /07/2014),available at http://www.trai.gov.in/WriteReadData/PIRReport/Documents/Indicator%20Reports%20-%20Mar -14.pdf. (last seen)
[23] Mckisney & Company, Online and Upcoming: the internet's impact on India, 15,(Dec. 2012), available at

Recognising the commercial and legal implications an internet boom in India could have in the future and in light of the resolution passed by the United Nations General Assembly establishing the model law on electronic commerce,[24] the Indian Parliament enacted the Information Technology Act, 2000 (hereinafter referred to as the IT Act) whose primary object as reflected in the preamble[25] is to provide legal recognition for transactions carried out by means of electronic commerce which involves the use of alternatives to paper based methods of communication and storage of information and also facilitates the filing of electronic documents with Government agencies. Therefore, the main object of the original legislation was to legalise writing and signature so as to facilitate electronic commerce and governance.[26] The amendment to the Act in 2008[27] recognised the rapid increase in the misuse of the internet and recognised among other things the need to prevent the transit of offensive messages through communication services. It was this amendment that inserted Section 66A of the IT Act.

Section 66A of the IT act deals with sending of offensive messages for commercial services etc. and states *"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 makes by making use of such computer resource or a communication device,

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file:///C:/Users/Hp/Downloads/Online_and_Upcoming_The_internets_impact_on_India.pdf. (last seen)

[24] U.N General Assembly, *Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law*,Res 51/162,Sess. 51, U.N Document Res/51/162,(30/01/1997).

[25] Preamble, IT Act, 2000.

[26] *Ibid*, statement of object and reasons.

[27] *Ibid.*

(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."

This Section was recently adjudged void by the Supreme Court in the case of Shreya Singhal v. Union of India[28] on several grounds. The Section as it should have been drafted shall be discussed in detail in Part II.

3. PART II

3.1 General scope of section 66a

There are three factors which must be taken into consideration in order to determine the scope of the crimes that Section 66A IT Act aims to prevent:-

(1) The statement of object and reasons to identify the purpose behind the amendment

(2) The scope of other Sections in the Chapter[29] to identify the crime by a process of elimination

(3) The original Section 66A.

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[28] Shreya Singhal v. Union of India, Writ Petition (Criminal) no. 167 of 2012, (Supreme Court, 24/03/2015).

[29] Supra 25, Chapter XI.

The statement of objects and reasons referred to in the Act is merely an attempt to explain the reasons which induced the mover of the bill to introduce the same in the House as well as what objects he sought to achieve.[30] However, the statement of objects and reason can be referred to ascertain the circumstances which led to the legislation in order to understand what mischief the legislation aimed to rectify.[31] Hence, pursuant to the statement of objects and reasons accompanying the Amendment Act of 2009 and applying the same, the following should be noted while defining the scope of Section 66A:-

> (a) The section must be defined to prevent computer based cybercrime in the context of the *widest possible use of information technology worldwide*[32]
>
> (b) It must consider *new crimes* like the publishing of explicit sexual materials, video voyeurism, breach of confidentiality and leakage of data by intermediary, e-commerce frauds like phishing, identity theft and offensive messages through communication services[33]
>
> (c) It must provide for *penal provisions*[34]
>
> (d) It must also take into account that the act is to introduce suitable amendments to *the Indian Penal Code, Indian Evidence Act and the Code of Criminal Procedure*[35]

All offences are mentioned in Chapter XI of the IT Act. Section 66A therefore in general cannot aim to:-

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[30] Kafaltiya A.B, *Interpretation of Statutes*, 178 (2008).
[31] S.C. Prashar, Income Tax Officer, Market Ward, Bombay and Anr. v. Vasantsen Dwarkadas and Ors. AIR 1963 SC 1356.
[32] Para 1, Statement of objects and reasons, IT (Amendment) Act 10 of 2009.
[33] *Ibid*, Para 2.
[34] *Ibid*.
[35] *Ibid*.

(a) Prevent the tampering of computer documents[36]

(b) Punish a person who fraudulently and dishonestly commits an act which leads to the damage of a computer, computer system, etc. as stated under Section 43 of the Act[37]

(c) Punish a person for dishonestly receiving a stolen computer resource or communication device[38]

(d) Punish a person for identity theft[39]

(e) Punish a person who by means of any communication device or computer resource cheats another by impersonation[40]

(f) Punish a person for violation of another's privacy[41]

(g) Punish a person for cyber terrorism[42]

(h) Punish a person for publishing or transmitting obscene material in the electronic form[43]

(I) punish a person for publishing or transferring sexually explicit material[44]

(j) Punish a person for publishing or transmitting sexually explicit material of a child[45]

It may be inferred from the original section that section 66A of the IT Act aims to prevent the communication of offensive messages through the use of electronic messaging. Moreover,

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[36] Supra 25, S. 65.
[37] *Ibid,* S. 66.
[38] *Ibid*, S. 66-B.
[39] *Ibid*, S. 66-C.
[40] *Ibid*, S. 66-D.
[41] *Ibid*, S. 66-E.
[42] *Ibid*, S. 66-F.
[43] *Ibid,* S. 67.
[44] *Ibid*, S. 67-A.
[45] *Ibid*, S. 67-B.

except for section 66E which includes the term 'transmit' as has been defined to include visual texts and sections 67, 67A and 67B wherein 'transmit' has not been defined, there exists no such section which deals with the transmission of electronic message.

Therefore, section 66A *should* cover cybercrimes in the form of spamming, cyber stalking etc. and should also include within its ambit transmission of messages which incite or cause the commission of an offence covered by the other sections in the Act. Moreover, section 66A while specifying the crimes it aims to prevent, shall not restrict its scope to technology currently known but also to technology which is foreseeable in the future.

3.2 Factors to be considered while drafting legislation

3.2.1 Limitations under Article 19(2), Constitution of India

Section 66A can only criminalize and restrict freedom of speech for acts which fall within the purview of Article 19(2) of the Constitution of India.[46] All such restrictions must be reasonable[47] and it must not be applied arbitrarily or beyond what is required in the interests of the public.[48] There should be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object sought to be achieved.[49] Section 66A cannot be vague, as a law affecting a fundamental right shall be held bad for sheer vagueness.[50] Considering freedom of speech also includes the right to acquire and disseminate information,[51] the section while limiting the freedom to transmit messages cannot include within its ambit speech which would ideally be protected. Otherwise there shall be a 'chilling effect'[52] on free speech. Hence, the section must make a clear distinction between people who are merely advocating their opinion through the sharing of

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[46] M.P Jain, *The Constitution Of India*, 1072 (6th ed. 2012).
[47] State of Madras v. V.G Row, AIR 1952 SC 196.
[48] M.R.F Ltd. v. Inspector Kerala Govt., AIR 1999 SC 188.
[49] Papnasam Labour Union v. Madhura Coats Ltd., AIR 1995 SC 2200.
[50] K.A Abbas v. Union of India, AIR 1973 SC 123.
[51] PUCL v. Union of India, (2003) 4 SCC 399.
[52] R.Rajagopal v. State of T.N, (1994) 6 SCC 632**);** S. Khushboo v. Kanniammal, (2010) 5 SCC 600.

information as compared to people who are misusing the right to message so as to incite others into committing acts which fall within the restrictions imposed by the Constitution.

3.2.2 Internet as a medium

The internet is an international network of interconnected computers and is a unique and wholly new medium of worldwide communication.[53] It differs from traditional mass media in two very important aspects - the first being that it is neither unidirectional nor asymmetrical like broadcasting and second aspect being that it makes the costs of copying or dissemination extremely low due to the absence of intermediaries who are prevalent in traditional media.[54] It is these characteristics of the internet which make it extremely easy for perpetrators of crime to disseminate wrong information or send offensive messages or spam as compared to their ability to do the same in traditional media.

It is essential to take into consideration the nature of the medium while making laws. This was reflected in the decision of the Supreme Court in K.A Abbas v. Union of India[55] wherein it upheld censoring of films under Article 19(1) (a) on the grounds that the same must be treated differently from other forms of art and expression as a motion picture is able to stir up emotions more deeply than any other product of art.[56] Since the ability of causing damage is extremely great through the internet, the legislation must provide for penalties at a threshold higher than that provided for other media.

3.2.3 Cyber crimes

The IT Act does not define 'cybercrime'. However the act defines computer, computer network, computer resource and computer system. Every criminal conduct involving a computer has two victims - a computer or a person. Where section 66A is concerned, a computer/network/system can be made a victim

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[53] Reno v. ACLU, 521 U.S. 844(1997, Supreme Court of United States).
[54] (Name of the author(s)), *How Rights Change: Freedom of Speech in the Digital Era*, 26 Sydney Law. Review. 5 2004, 6-7.
[55] *Supra* note 50.
[56] *Supra* note 46, at 1101.

of spamming. Spam means to crash a program by over sending a fixed size buffer with excessively large input data.[57] This is usually done through unsolicited emails containing advertising from credit card companies, dating card services etc. In a study by an agency, a random sample of 1000 unsolicited emails taken from a pool of 11 million spam pieces contained 20% spam involving business opportunities, 18% spam from dating services and 17% from credit card services, mortgage etc.[58] Since all other forms of damage to computer/network/system is included in section 43 of the Act, section 66A should take primarily into consideration spamming. With respect to persons as victims of transmission of messages, examples shall include corporate smearing, cyber stalking, cyber bullying etc. The wide ambit of its effect resulted in the vague provisions of the original Section 66A when ideally it should have equated the offences with those under Sections 499, 503 etc. under the IPC.

3.2.4 Reason for compounded penal provisions

Section 66A should penalise in addition to the provisions under IPC so as to act as deterrence. An additional fine or imprisonment should be attached due to the lasting effect the crime has on society and difficulty faced in keeping track of such an offence. To substantiate the former, an example may be given of Equity Funding Corporation, United States. The Company was an insurance company and the directors as well as other senior staff were engaging in embezzlement. To hide the amount taken, the staff would sell Life Insurance policies to people online. The auditors accepted computer printouts as definitive evidence of the policies. By the time the crime was discovered, 64000 of the 97000 who had been issued policies had with them false policies.[59] The extent of the damage that can be caused due to the nature of the internet itself is the reason behind compounded offences.

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[57] Devashish Baruka & Ajit Joy, Computer Crimes in *Legal Dimensions of Cyber Space*, 258. (edition, year)

[58] Ibid at 259.

[59] A.R.D Norman, *Computer Security*, 119 (London, 1983).

3.2.5 Threshold for Section 66A to apply

There are three approaches that the legislature can adopt to make a law with respect to speech that could steer away an audience from committing a crime - first, it could focus only on punishing the audience for the crimes committed; second, either through the threat of punishment or outright muzzling it may decide to prevent the speaker from uttering the words which will stir up the illegality and the last approach would be to negotiate a balance between the two.[60] The first is most conducive to free speech while the second completely bans it. The first approach is best reflected in the Indian Penal Code wherein the law punishes the audience the moment they commit the crime and the original section 66A is a perfect example of the second approach as it was an attempt to completely gag the speaker.

The section should have ideally been defined along the lines of the third approach. This approach poses several problems. The primary problem is the difficulty of language interpretation and the use of vague or unclear language. It may be open to multiple meanings and interpretations. There are phrases which are used colloquially and do not have serious ramifications. So how does the Government or the Judiciary decide what speech constitutes 'threat'?

The US Supreme Court has established the Brandenburg test[61] which lays out that Constitutional guarantees of free speech do not permit the State to forbid or proscribe advocacy of the use of force or law violations except where such advocacy is *directed* to *inciting* and producing *imminent lawless action* and is *likely to incite or produce such action*. The term "directed to inciting" implies an element of intent/ Mens Rea to incite an act. The problem with the original Section 66A especially sub-clause (a) and (c) was that the crimes in the Indian Penal Code that it aimed to prevent did not have the element of Mens Rea as a prerequisite. For example - the cartoonist Aseem Trivedi was arrested under Section 66A and on several grounds under

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[60] Larry Alexander, *Reddish on freedom of speech,* 107 Northwestern University Law Review 593 at 595.

[61] Brandenburg **v.** Ohio, 395 U.S. 444,447 (1969, Supreme Court of the United States).

the IPC including Section 124-A (sedition) for publishing a cartoon. It is pertinent to note that section 124-A has no element of Mens Rea as a prerequisite. This also reflects the shortcomings of the Indian Penal Code. The code which is as old as 1860 only takes into account actual physical action or speech wherein it is easier to judge the effect it may have on the audience as compared to the social media. There are certain terms which have been incorporated in the IPC into different sections to denote 'intention' like voluntarily, intentionally, knowingly etc.[62] These terms should be included in the drafting of Section 66A and are defined in the code. '*Likely*' was defined from the perspective of a reasonable man. Under Indian law, the term 'reasonable man' is a part of common law under negligence. Therefore if the situation is such that a reasonable prudent man under the circumstances has reason to believe[63] that the message is likely to incite or produce the commission of a crime, the transmission of the message will amount to commission of an offence under Section 66A.

3.3 Legislation

66-A Punishment for misuse of electronic mail or message services-

Any person who voluntarily sends message/messages by means of a computer resource or any other communication device-

(1) having reason to believe that the message shall directly incite or is likely to incite the commission of an offence under the Act or the Indian Penal Code; or

(2) having reason to believe that the messages he intends to send or has been sending is of a data size or will result in a data size that is likely to cause inconvenience in the access and use of a computer network; or

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[62] K.D Gaur, *The Indian Penal Code*, 81(4th ed., 2008).
[63] S. 26, The Indian Penal Code, 1860.

(3) having knowledge that the message/messages is part of a criminal conspiracy or other conspiracy to overthrow the State; or

(4) intending to cause criminal intimidation or public mischief; or

(5) having knowledge that the message/messages is false with the intention of causing harm, or knowing or having reason to believe that such message will harm the reputation of another person;

Shall be punishable with a term which may extend to at the most 2 years and a fine up to rupees one lakh.

Explanation 1- "Message" refers to electronic message or electronic mail 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.

Provided that with respect to clause 2 the term 'message' shall also include unsolicited electronic mail or electronic messages from commercial services.

Explanation 2- "Likely to incite" means that a reasonable prudent man under the circumstances has reason to believe that the message is likely to incite the commission of a crime.

Explanation 3- The terms "reason to believe", "voluntarily", "criminal intimidation", "public mischief", "criminal conspiracy" and "conspiracy to overthrow the States" have the same meanings as the corresponding relevant sections in the Indian Penal Code.