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Sedition: Crucifixion of Free Speech and Expression?

Section 124A, under which I am happily charged is perhaps the prince among the political sections of the IPC designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by the law.

– Mahatma Gandhi²

When Rabindranath Tagore wrote *Where the Mind is without Fear*, he envisaged a nation that would celebrate the freedom for which he eventually gave up his Knighthood. He prayed for a country which would someday awaken to what he called a “heaven of freedom”. Decades forward, and every 15th of August, every 26th of January is spent in attention to a national anthem written by the same man but the “heaven of freedom” still sleeps soundly among the dust-laden pages of Tagore’s poetry.

As India marches proudly to the beat of a presumably sustainable democracy, it recognizes freedom as a fundamental right guaranteed by its constitution. In extension, the freedom of speech and expression being an indivisible aspect of liberty as a whole, is enshrined in the constitution under article 19(1)(a). The constitution, however, also obliges certain restrictions on this right, under article 19(2). These restrictions are in the interests of “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.”³

It is these very restrictions that make up the dramatic balance between justice and liberty, use and misuse, individual and state. And it is these restrictions that must be viewed in the context of democracy – their unjust use prevented in a nation founded on the presumption that every citizen has certain undeniable and inalienable rights that cannot be taken away under any unreasonable circumstances.

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Section 124A of the Indian Penal Code

The right to freedom of speech and expression is an implicit part of any democratic nation; to curb this right is to curb free will and liberty of thought. If one cannot voice his or her opinion freely then it invalidates the point of having an opinion. In the past, the successive governments have often been alleged to have used certain laws as their weapon of choice to suppress this very free speech that forms the basic foundation of a democracy. One such law is the sedition law, which in our legal system, is embodied under section 124A of the Indian Penal Code (IPC). It states that:

Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the government established by law in India shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.⁴

The ambit of this section (law) provides wide ranging powers to the government to prevent the use of free speech, however, the explanation to this section also includes several exceptions. Cases which do not incite feelings of enmity against the government or which are mere lawful criticisms of the policies of the government are not to be included within the scope of this section.

To understand the rationale behind the implementation of this law, it is vital to understand the history and the framework of the law.

Tracing the History of the Law

It was in 1870 that the British government enacted section 124A into the primary penal legislation. In retrospective analysis, it is understood to have been so enacted to stifle anti-colonial voices of the time (pre- Independence). As a precedent, therefore, this section was used against various nationalist leaders, most notably against Bal Gangadhar Tilak and Mahatma Gandhi.

The structure of this section was formed by including points collected from various sources such as the *Treason Felony Act*, as it was operating in Britain at that time, the common law of seditious libel and the English law relating to seditious words. The common law of seditious libel dealt with both actions and words that were aimed towards citizens and the government, as well as between communities of persons.⁵ Even in contemporary times this law has been applied for reasons which in many ways are similar to those of the colonial rulers.

In *Tilak's trial*, it was alleged that he was guilty of sedition as the newspaper, *Kesari* had published certain seditious articles: one titled "The country's Misfortune" which referred to the unjustifiable murder of two innocent European women at Muzzafferpore.⁶ Tilak had condemned the outrage and had stated that the means do not justify the ends they seek to achieve. The prosecution also used four other articles

which were not the subject matter of the charges, but were displayed for the purpose of establishing the intention of the accused. It was shown that he had even given a call for Swarajya.⁷ The court interpreted 124A as exciting ‘feelings of disaffection’ towards the government, it covered within its structure feelings such as enmity, hostility, any and all forms of ill-bearings against the government.

It was in *Queen Empress v. Amba Prasad* that the court laid down the relation between ‘disaffection’ and ‘disapprobation’.⁸ It was held that even in cases of ‘disapprobation’ of the policies and decisions of the government, if the intention of the accused was to excite feelings of disaffection towards the government, the same could be construed as a seditious act.⁹ This decision expanded the scope of the meaning of ‘disaffection’ as it would now include aversion towards the government.¹⁰

In the aftermath of the non-cooperation movement of 1921, in March 1922, Mahatma Gandhi was also tried for sedition with respect to two articles which he had written in *Young India*. Gandhiji being a proud, self-proclaimed ‘disaffectionist’ and non-cooperator, pleaded guilty to the charges (his acceptance of the purported crime was more an act of rebellion to prove his point for independence rather than an acceptance of the sedition law) against him and was sentenced to six years of simple imprisonment. In fact, the judge in his final remarks classed Gandhi with Tilak, stating, “If the course of events in India should make it possible for the Government to reduce the period and release you, nobody would be better pleased than I.”¹¹

The discussion of Section 124A in the pre-independence context cannot be complete without giving consideration to the opinions of the Federal Court (highest court in India at the time) in conflict with those of the Privy Council (highest court of appeal for commonwealth countries at the time). The definition of sedition was a bone of contention even in colonial India. In defining sedition in the Niharendu Dutt Majumdar case,¹² the Federal Court held that words, however strong they might be, did not make a speech or any document seditious. They should in addition have the power to incite disorder among the masses or must have the intention to do the same. Conversely, the Privy Council, in the Sadashiv case overruled this decision and reiterated the view articulated in Tilak’s trial.¹³ It stated that the incitement to violence was not a necessary ingredient of sedition.

What the Framers had to Say

The concern of having Sedition as a restriction on the freedom of speech was not lost in the constitutional assembly debates. With a recent history of our prominent freedom fighters (virtually our heroes of independence) being charged and imprisoned under this law, the drafters of the constitution were cautious of the implications of the inclusion of sedition in the constitution and with just reason. After all, this basic right of a person to free speech was one of the main ingredients that got us our freedom from oppressive foreign rule.

Initially the draft constitution did include ‘sedition’ as a foundation on which laws could be founded upon for limiting the fundamental right to speech (restriction on

freedom of speech). In the final draft, however, Sedition was eliminated from the exceptions under article 19(2). This was largely due to the initiative of eminent lawyer and freedom fighter, K.M. Munshi.¹⁴ While sedition was removed from the constitution it was retained by the IPC, making way for one very crucial but troublesome question in this day and age: whether the IPC lords over the constitution or does the constitution do so over the IPC?

The Opinion of the Courts

The afore-mentioned question has been attempted by a number of courts of the country – the scope of sedition in independent India, assessed and reassessed over time. In many ways, this can primarily be attributed to the patent incongruity of the right to freedom of speech with Section 124A of the Indian penal code.

In *Ram Nandan v. State of U.P.*,¹⁵ the High Court held section 124A to be ultra-vires as it imposed restrictions on the liberty of speech and expression which was contrary to the interest of the general public. Similarly, in *Tara Singh Gopi Chand v. State of Punjab*,¹⁶ section 124A was held to be unconstitutional for being against the ideals of a democratic nation. The right to freedom of speech and expression guaranteed under Article 19(1) (a) was therefore, protected and celebrated.

It was in *Romesh Thappar v. Madras* that the court analysed the legislative intent behind the deletion of the word sedition from the draft Article 13(2) which was the article intended for restrictions on freedom of speech and expression.¹⁷ It was held that criticism of the government and incitement of bad feelings toward it, was not to be regarded as sedition unless it could possibly overthrow the state.

Subsequently, presumably to prevent this judicial to and fro pendulum of the basis of the law, the 1st constitutional amendment was made. The government decided to amend the constitution by inserting the words “public order” and “relations with friendly states” into Article 19(2) along with the addition of the word “reasonable” before “restrictions”. The addition of the word reasonable was to prevent misuse by any or all of the future governments for their own nefarious purposes.. However, the insertion of the other “restrictions”, especially “public order” unfortunately provided the government with a wide variety of powers to curtail the liberty of speech and expression. It is for this reason that the amendment of the article 19(2) is often seen as a legalization and constitutional validation of the law of sedition.

In *Ram Manohar v. the State of Bihar*, a distinction was made between “public order” and “security of the state”.¹⁸ Thus, in yet another twist of words, when a restriction on speech and expression is to be justified on the grounds of security of state, it would have to be subjected to superior standards than that applied in case of public order.

A discussion on the numerous judicial pronouncements on the offence of sedition would be criminally incomplete without deliberation upon the case of *Kedarnath Das v. State of Bihar*.¹⁹ This landmark judgment has become the ruling precedent on Sedition and remains the basic, undisputed interpretation of Section 124A that is followed even

today. In this case, the Supreme Court upheld the constitutionality of Section 124A of the IPC as against Article 19 of the Constitution, with the necessary caveat that there should be acts involving the intention or a tendency to create disorder, or disturbance of law and order, or incitement to violence. Therefore, a mere incitement to cause disaffection would not be seditious if unaccompanied by the incitement to violence against the Government. Such intention or tendency to create disturbance would also have to be directed towards the “Government established by law” and not “Persons for the time being engaged in carrying on the administration”. The above would then, according to the Court fall under the purview of Art 19(2) of the Constitution and thereby reasonably restrict the fundamental freedoms guaranteed under Art 19(1), making Section 124A constitutionally valid. The Court stated that:

The government established by law is the visible symbol of the state. The very existence of the state will be in jeopardy if the government established by law is subverted. Hence any act within the meaning of section 124A which have the effect of subverting the government would be within the penal statute because the feeling of disloyalty to the government established by law or enmity to it imports the idea of tendency to public disorder by the use of actual violence or incitement to violence.

In other words, simplifying the whole understanding of the law, strong criticism of any of the policies of the government cannot and would not be considered to have penal consequences; but disloyalty to the government would be punished. Therefore, a speech suggesting that a government established by law, was dishonest and unlawful and so steps should be taken to abolish it through force or the threat of force, comes within the purview of section 124A.

While some would say that the practical limitations in implementing the *Kedarnath* ratio has in fact led to the numerous cases of Sedition in the twenty-first century, it is the principle laid down by the Apex Court in this decision that has been the bedrock for setting the tone (judicially, at least) against all apparent misuse, intentional or otherwise, of law to stifle the voice of the country.

Scope of Sedition: Recent Decisions

With the *Kedarnath* rationale locked safely in place, let us fast forward to the advent of the twenty-first century. India seems to have woken up to a generation that expects the highest of freedoms from its Constitution. It refuses to be shackled by draconian measures masked as reasonable restrictions; it refuses to be stifled by the misuse of an archaic law. The India of the twenty-first century is young, fearless and is willing to rise against anything that makes the foul mistake of dictating the terms of a democracy they are so familiar with. The law of any land must be a reflection of the society in which it exists. This highlights one of the most pertinent questions of the present context – how is Section 124A, being an admittedly colonial import, perceived today?

The law of sedition, in recent times, has been the subject of major criticism. Despite the principles laid down in *Kedarnath*, which has been accepted as the primary test for determining the commission of the offences of Sedition – the newspapers of the country are riddled daily with the news of Section 124A having been slapped on some new “offender”.²⁰ Of course, the Courts in appreciation of the same cases have gone on to acquit most of the afore-mentioned offenders. This, however, does nothing to redeem all that is lost in the numerous Court visits, legal fees borne by the alleged offender, police detention suffered by them, the trauma and the unimaginable mental burden on them for having allegedly committed the single gravest offence of waging war against the State.

Binayak Sen v. State of Chhattisgarh:²¹ In one of the most infamous cases of Sedition in the recent past, the Chhattisgarh High Court created history for many wrong reasons. Convicting the accused for the offence of Sedition, the High Court passed a judgment for which it has drawn a lot of flak. The accused that was in possession of and had ordered the distribution of certain letters containing information regarding police atrocities and Naxal literature was convicted of Sedition keeping in view the widespread naxalite violence against the State. Blatantly disregarding the afore-mentioned principle of direct “incitement to violence” established in *Kedarnath*, the High Court refused to allow an objective application of the frequently misused provision of law connecting the accused with the Naxals and their offences. In an interesting turn of events, however, the Supreme Court on appeal²² granted Dr. Sen bail²³ and commenting on the merits of the case highlighted the importance of protecting the fundamental freedom of speech and expression while also appreciating the underlying principle of “Guilt by Association”.²⁴

Gurjatinder Pal Singh v. State of Punjab:²⁵ In this case, the accused gave a “Pro-Khalistan” speech at a religious ceremony and commented on the Constitution, which was followed by sword-raising and unpleasant slogans. Adopting and upholding the precedent set by the Supreme Court in *Balwant Singh v. State of Punjab*,²⁶ which had similar facts and circumstances, the Chandigarh High Court held that the casual raising of slogans cannot be held seditious as it did not point to a direct incitement of violence or public disorder. The accused was therefore, acquitted of charges u/s 124A.

P.J. Manuel v. State of Kerala:²⁷ Decided by the Kerala High Court, this case involved a poster that exhorted people to boycott the Legislative Assembly elections of “masters who have become swollen exploiting the people”. This poster and its circulation brought for the accused charges u/s 124A, observing that even Section 124A must be read with the intent and spirit of the Constitution and not the Colonizers of a bygone era. It further appreciated the essential ingredient of “incitement to violence”, the true meaning of “disaffection against the government” in modern times and acquitted the accused. Interestingly, however, the Court also applied Section 196 of the CrPc,²⁸ according to which a Court can only take cognizance of a complaint involving an offence against the State if such complaint has been expressly authorized by the Government.

Sanskar Marathe v. State of Maharashtra:²⁹ A similar view as the aforementioned case was taken here by the Bombay High Court, acquitting the accused – cartoonist, Aseem Trivedi of charges u/s 124A. Further, the court also came out with a series of guidelines to be followed by the Maharashtra Police before booking someone for the offence of Sedition. Based on these guidelines, the Maharashtra government came out with a circular laying down grounds for invocation of section 124A, which it was then forced to withdraw following a case in the High Court questioning its constitutionality.³⁰

One would assume, that with developing times and the plethora of legal precedents, clearly setting out the boundaries of the law of sedition in India, the reckless invocation of Section 124A against unsuspecting individuals would reduce. This, however, has not proved to be the case – and the recent past has been flooded if not completely shrouded by many of the strangest instances of alleged “sedition”; some worthy of a mention in this article being: In March, 2014, around 67 Kashmiri students from Swami Vivekanand Subharti University in Meerut were charged u/s 124A for merely cheering for Pakistan in the Asia Cup match against India. The charges were later dropped when the Police came under major criticism for their actions and major political parties got involved.³¹ Another familiar and laughably ironic incident that hit headlines was when reputed, Bollywood actor and filmmaker, Aamir Khan was charged with sedition for his comments on “intolerance” in the Country.³² The most recent example of what can only be termed as a misuse of legislation is the January 2016 incident of a Kerala man being charged with sedition over a derogatory Facebook post on Lt. Col. E K Niranjana, who died in the terror attack at the Pathankot Air Force base.³³ All the afore-mentioned incidents lack the basic ingredients of Sedition made out by the Courts of India, as discussed above. At best, what these incidents seem to have in common is expression – made within the apparently secure confines of a fundamental freedom.

Visualizing the Way Forward

Once a law fails to resonate with the context with which it is surrounded and for which it was formulated in the first place, it not only becomes irrelevant but also stagnant. It has often been suggested that the Sedition law is not only outdated but also something that should be repealed³⁴ – its retention making liberty a matter of judicial interpretation. This is the era of globalization and increasing interdependence between nations with the State embroiled in multilateral agreements; this is the era of fast paced, million-dollar developmental projects involving huge MNCs taking over indigenous lands;³⁵ this is the era of global interconnectedness, of images and words and opinions celebrated daily in an online world. In such an era, Section 124A could potentially imprison every passionate outburst against State action, every tribal protesting against the takeover of their lands, every “derogatory” post on social media. Examples of these are abundant in countries across the world, becoming the primary reason for repeal/ replacement/ amendment of this offence in these countries. In this murky world map of overlapping ideals and trends, where does one plot the Indian experience?

Viewed in this context, it becomes pertinent to review Section 124A in its entirety. Its letter and application must be amended to suit the new generation it governs and the current times and especially to ensure that social justice does not become a distant dream. A deliberation to that end is attempted here.

Catalytic of the *Aseem Trivedi* case, where the Bombay High Court slashed aside the charges of sedition as invoked by the Police against the cartoonist, it also came up with a series of guidelines to be followed by the state police before invoking Section 124A against anyone. These guidelines have narrowed the scope for misuse of Section 124A by the police, if not entirely eliminated it. It is suggested that the same guidelines be viewed in a broader, national context along with a few amendments in order to be the much desired change in the Indian socio-legal spectrum, especially with respect to the sedition law.

Guidelines: (i) *The words, signs or representations must bring the Government (Central or State) into hatred or contempt or must cause or attempt to cause disaffection, enmity or disloyalty to the Government and the words/ signs/ representation must also be an incitement to violence or must be intended or tend to create public disorder or a reasonable apprehension of public disorder.*

In extension of the opinion that the guideline wisely makes “incitement to violence” or “intention to incite violence” or “tendency to create public disorder” or “reasonable apprehension of public disorder” an essential ingredient of the offence, it is also observed that “tendency to create a reasonable apprehension of public disorder” leaves significant room for consequent misuse. What would constitute such a “reasonable apprehension of public disorder” and who would decide it? Today, every law student is familiar to the term “reasonable apprehension” as being anything that appeals to the primary rationality of an ordinary, prudent human being. It is undisputed, therefore, that it is this understanding of the phrase that would rule most judgments on sedition. The more pressing question is: would this definition and its scope with regard to the sedition law differ from case to case? And if it did, where would the line be drawn separating free speech and expression from seditious expression?

Guidelines and Circulars Delimiting “Reasonable Apprehension of Public Disorder”: It is suggested that the scope of “reasonable apprehension of public disorder” be further reduced to limit it to situations that do in fact threaten the peaceful social fabric of a nation, a state or a town as per an ordinary, prudent man. It is further suggested that police be specifically instructed by guidelines and circulars in tandem with this particular judgment, to invoke 124A when such reasonable apprehension of public disorder is in line with factors such as: (a) the social context of the time, (b) the seditious act charged with, (c) the person who is so charged, etc. For example, In the case of the 67 Kashmiri students, the invocation of 124A was completely unnecessary as per the aforementioned ingredients and there was no “reasonable apprehension of public disorder” let alone “incitement to violence or intention to incite violence”.

Supervisory Amendments: It is also suggested that for further supervision in cases of alleged Sedition, the investigation/arrest of the accused u/s 124A, should be confirmed by a gazetted or senior officer of the State or district³⁶ before such arrest is made to avoid other repercussions of an allegedly false charge, in addition to the powers and duties of the police as u/s 156 & 157 of the CrPC.³⁷

Classification of the Offence under IPC: Currently, the IPC classifies Section 124A as a cognizable, non-bailable offence.³⁸ This necessarily means that the accused in a case of Sedition does not have the right to be bailed. It is suggested cases of *sedition libel* and cases pertaining to *sedition speech/expression* be made bailable.³⁹ This would serve as a check against unnecessary harassment of persons wrongfully charged with 124A, while also ensuring a fair trial of those rightfully charged.

It must also be remembered that almost anything that the State may want to prosecute u/s 124A would be potentially punishable under the myriad of the other sections of the IPC and other legislations, if in fact such an allegedly offensive act has criminal tendencies. Sedition is a terribly grave offence and its use, therefore, has to be restricted to only those acts that expressly meet the requirements u/s 124A, in practice.

(ii) Words, signs or representations against politicians or public servants by themselves do not fall in this category unless the words/signs/representations show them as representative of the Government.

Another considerably problematic aspect of the guideline is the question that, when does it necessitate words/signs and representations showing politicians or public servants as “representative of the government” to be termed as seditious. Despite the apparent goodwill promised by this qualification, there could arise quite a few problems in its practical application. What exactly would be something showing politicians or public servants as “representative of the government”? Qualifying this definition could also tilt it in the undesired direction of restricting free speech and expression. It is perhaps a problem similar in nature to that which is encountered in the practical application of the Kedarnath judgment – a difference between “government established by law” and “persons for the moment engaged in administration” which makes it difficult to obtain in practice.

It is thus suggested that this be deliberated so as to lay down what exactly would or would not be considered as “representative of the government” and make it have enough transparency and clarity in the verbal jargon to uphold the spirit of Article 19 and the primary reason behind the amendments.

(iii) A legal opinion in writing which gives reasons addressing the aforesaid must be obtained from Law Officer of the District followed within two weeks by a legal opinion in writing from Public Prosecutor of the State.

A novel guideline, this is suggested to be a necessity in all charges of sedition throughout the states of the Country. Such legal opinion by the Law officer of the district should also be obtained within 24 hours of arrest of the accused, followed by a

legal opinion from the Public Prosecutor within 7 days. This would ensure that all the afore-mentioned lacunae are addressed in an objective legal fashion and thus also ensure that the person being charged with the extreme crime of Sedition not be unfairly charged.

Conclusion

“The Constitutional guarantees of free speech and free press do not permit a State to forbid or prescribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”.⁴⁰ In the realms of Martin Luther King and Mahatma Gandhi, the echoes of the importance of free speech and expression can never be forgotten. It is often said that Martin Luther King was sent to jail by the world’s oldest democracy,⁴¹ and Binayak Sen by the world’s largest.⁴² A simple Google search on “Sedition” would permit the understanding that most of the democracies in the world have removed it from their statute books.⁴³ The reason being – that it is an outdated law, more a law of colonial times to oppress rather than deal justice, which suddenly seems to reveal its ugly head in the present generation which is rather unforgiving of anything that curtails its fundamental freedoms.

For far too long the laws of this land have been used as means of attacking the fundamental principles of democracy. It is to be remembered that this is not a judgment call on whether or not section 124A should be repealed. Rather, it is a call on whether 124A should remain as it is or whether the liberty of free speech and thought should be further subjected to the fancies of a whimsical government that seldom tolerates any dissent towards its many policy decisions.

The day isn’t far when simple essays written by aspiring lawyers which are critical of the government could be considered seditious. In ardent hopes that such a day never comes, and in celebration of liberty in all its forms and manifestations: “If there is anything that cannot bear free thought, let it crack” said Wendell Phillips.⁴⁴

Notes

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