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LAW COMMISSION OF INDIA

Consultation Paper on

“SEDITION”

30 August 2018

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Sedition**

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Preface

The Law Commission of India was asked to consider section 124A of the Indian Penal Code, 1860 which deals with sedition. Accordingly, a study was undertaken to examine the various pros and cons of the provision. The subject was discussed by the Commission on several occasions. In its meeting held on 5 July 2018 and it was that for making the final recommendations, more discussions need to take place. Hence, it has been decided to put up a Consultation Paper in public domain, for wider discussions. This Consultation Paper contains the various aspects of the sedition law as it existed in the pre-independence era, in the international jurisdiction and the present scenario, in the country. The Commission solicits the valuable suggestions from the cross section of the society.

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1 BACKGROUND

1.1 Free speech is one of the most significant principles of democracy. The purpose of this freedom is to allow an individual to attain self-fulfilment, assist in discovery of truth, strengthen the capacity of a person to take decisions and facilitate a balance between stability and social change.¹ The freedom of speech and expression is the first and foremost human right, the first condition of liberty, mother of all liberties, as it makes the life meaningful. This freedom is termed as an essence of free society. The Universal Declaration of Human Rights, 1948, in its Preamble and Article 19 declared freedom of speech as a basic fundamental right.²

1.2 The freedom of speech often poses difficult questions, like the extent to which State can regulate individual conduct.³ Since, individual's autonomy is the foundation of this freedom; any restriction on it is subject to great scrutiny. However, reasonable restrictions can always be imposed on this right in order to ensure its responsible exercise and to ensure that it is equally available to all citizens. According to Article 19(3) of the International Covenant on Civil and Political Rights 1966 (ICCPR), this freedom may be subjected to restrictions, provided they are prescribed by law and are necessary for 'respecting the rights or reputation of others' or for the protection of national security, public order, public health or morals.⁴

1.3 Article 19(1)(a) of the Constitution of India guarantees freedom of speech and expression to all citizens. However, this freedom is subjected to certain restrictions namely, 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.

1.4 The offence of sedition is provided under section 124A of the Indian Penal Code, 1860 (hereinafter IPC). The relevance of this section in an independent and

¹ Stephen Schmidt, Mack C. Shelly *et. al*, *American Government and Politics Today* 11 (Cengage Learning, USA, 2014).

² See also Article 19 of International Covenant on Civil and Political Rights, 1966 (ICCPR); Article 9 of African Charter on Human and Peoples' Rights, 1981; Article 10 of European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; Article 13 of American Convention on Human Rights, 1969.

³ S. Sivakumar, *Press Law and Journalists* 18-20 (Universal Law Publishing Co. Lexis Nexis, Gurgaon, 2015).

⁴ Article 19 of the International Covenant of Civil and Political Rights 99 U.N.T.S. 171 (1966) reads as:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- b) For the protection of national security or of public order (order public), or of public health or morals.

democratic nation is the subject of continuous debate. Those opposing it see this provision as a relic of colonial legacy and thereby unsuited in a democracy. There is an apprehension that this provision might be misused by the government to suppress dissent. During a Conference on Freedom of Speech and Expression on 5-6 November 2016, organised by the Law Commission in association with the Commonwealth Legal Education Association and Lloyd Law College, Greater Noida, Justice A P Shah and Dr. Subramaniam Swamy suggested that even without section 124A IPC, there are sufficient constitutional and statutory safeguards. On the other hand, it is also argued that amidst growing concerns of national security, this section provides a reasonable restriction on utterances that are inimical to the security and integrity of the nation.

1.5 According to the National Crime Records Bureau 35 cases of sedition (all over India) were reported in 2016.⁵ The courts have stressed on the importance of contextualising the restrictions while ascertaining the permissibility of expression. Balancing freedom of expression with collective national interest is one of the key ingredients of this law. Though it is argued that this law is a colonial vestige, the Indian courts have upheld its constitutionality.

2 PREVIOUS REPORTS OF THE COMMISSION

2.1 The issue of revisiting ‘sedition’ has been taken up by the Law Commission previously as well. The Commission, in its 39th Report (1968) titled “**The Punishment of Imprisonment for Life under the Indian Penal Code**” recommended that there are certain extremely anomalous situations where certain offences have been made punishable with severe punishment and it was suggested that “*offences like sedition should be punishable either with imprisonment for life or with rigorous or simple imprisonment which may extend to three years, but not more.*”

2.2 Further, in its 42nd Report (1971) titled “Indian Penal Code”, the Commission made three crucial suggestions to be incorporated in section 124A, IPC. They were:

- Incorporation of *mens rea* in the section,
- The scope of the section be widened, incorporating Constitution of India, Legislatures and the administration of justice (Judiciary), along with the executive Government, against whom disaffection would not be tolerated, and,
- bridging the ‘odd’ gap between ‘imprisonment for life’ and ‘imprisonment which may extend to three years’, or fine, by fixing the maximum punishment for sedition at ‘seven years rigorous imprisonment and fine’.

⁵ Crime in India - Statistics, National Crime Records Bureau, Ministry of Home Affairs (2016).

However, the Government did not accept the revision proposed by the Commission.

2.3 The 43rd Report of the Law Commission on “Offences Against the National Security”, (1971), also dealt with the ‘sedition’ as part of the National Security Bill, 1971. Section 39 of this Bill dealt with ‘sedition’, which was merely a reiteration of the revised section proposed by the 42nd Report (1971).

2.4 The 267th Report of the Commission on “Hate Speech”,(2017), distinguished between ‘sedition’ and ‘hate speech’, providing that the offence of hate speech affects the State indirectly by disturbing public tranquillity, while the sedition is directly an offence against the State. The Report adds, that to qualify as sedition, the impugned expression must threaten the sovereignty and integrity of India and the security of the State.

2.5 Further, it is required to be noted that we have certain sets of established tests for understanding what speech amounts to sedition and what would be merely an expression of dissatisfaction or disaffection which may even be productive criticism or a necessary indication of problems in the state and society. Laws governing both hate speech and sedition must preserve the right to ‘offend’.

3 SEDITION LAWS IN INTERNATIONAL JURISDICTION

A. United Kingdom

3.1 The offence of sedition can be traced to the Statute of Westminster 1275 when the King was considered the holder of Divine right.⁶ In order to prove the commission of sedition, not only the truth of the speech but also intention was considered. The offence of sedition was initially created to prevent speeches ‘inimical to a necessary respect to government’.⁷ The *De Libellis Famosis*,⁸ case was one of the earliest cases wherein ‘seditious libel, whether ‘true or false was made punishable’. This case firmly established seditious libel in United Kingdom.⁹ The rationale of this judgment was that a true criticism of government has a greater capacity to vilify the respect commanded by the government and cause disorder, and therefore needs a higher degree of prohibition.

3.2 Sedition was defined by Fitzgerald J. in *R. v. Sullivan*,¹⁰ as:

⁶ See English PEN, *A Briefing on the Abolition of Seditious Libel and Criminal Libel* (2009).

⁷ William T. Mayton, “Seditious Libel and the Lost Guarantee of a Freedom of Speech” 84 *Colum. L. Rev.* 91 (1984).

⁸ 77 Eng. Rep. 250 (K.B. 1606).

⁹ *Supra* note 7.

¹⁰ *R v. Sullivan* (1868) 11 Cox C.C. 44 at p. 45 cited in United Kingdom Law Commission, “Codification of the Criminal Law: Treason, Sedition and Allied Offences”, Working Paper no. 72, available at : <http://www.lawcom.gov.uk/wp-content/uploads/2016/08/No.072-Codification-of-the-Criminal-Law-Treason-Sedition-and-Allied-Offences.pdf> (last visited on Jan. 5, 2017) at 4.

Sedition in itself is a comprehensive term and it embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the Empire. The objects of sedition generally are to induce discontent and insurrection and to stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion.

3.3 The United Kingdom Law Commission while examining the need of law on seditious libel in modern democracy,¹¹ in 1977 referred to the judgment of the Supreme Court of Canada in *R. v. Boucher*,¹² wherein it was opined that only those act that incited violence and caused public order or disturbance with intention of disturbing constitutional authority could be considered seditious.¹³ The Commission in its working paper remarked:

Apart from the consideration that there is likely to be a sufficient range of other offences covering conduct amounting to sedition, we think that it is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is 'political'. Our provisional view, therefore, is that there is no need for an offence of sedition in the criminal code.

3.4 This marked the beginning of the movement to abolish seditious libel in United Kingdom. With the enactment of the Human Rights Act, 1998, the existence of seditious libel, started being considered in contravention to the tenets of the Act and the European Convention on Human Rights¹⁴. The global trend has largely been against sedition and in favour of free speech. While abolishing sedition as an offence in 2009, the then Parliamentary Under-Secretary of State at the Ministry of Justice of the United Kingdom reasoned that:

Sedition and seditious and defamatory libel are arcane offences – from a bygone era when freedom of expression wasn't seen as the right it is today... The existence of these obsolete offences in this country had been used by other countries as justification for the retention of similar laws which have been actively used to suppress political dissent and restrict press freedom... Abolishing these

¹¹ Working Paper No. 72, *supra* note 11.

¹² [1951] 2 D.L.R.369.

¹³ Working Paper No. 72, *supra* note 11.

¹⁴ European Convention on Human Rights, 1950, 213 UNTS 221.

offences will allow the UK to take a lead in challenging similar laws in other countries, where they are used to suppress free speech.¹⁵

3.5 Finally, the seditious libel was deleted by section 73 of the Coroners and Justice Act, 2009.¹⁶ One of the reasons given for abolishing seditious libel was:

Having an unnecessary and overbroad common law offence of sedition, when the same matters are dealt with under other legislation, is not only confusing and unnecessary, it may have a chilling effect on freedom of speech and sends the wrong signal to other countries which maintain and actually use sedition offences as a means of limiting political debate.¹⁷

B. United States

3.6 The United States Constitution proscribes the State from enacting any legislation curtailing the first amendment – right to expression. There has been a debate among the jurists whether first amendment guarantee was aimed at eliminating seditious libel.¹⁸ It is argued by many that this doctrine ‘lends a juristic mask to political repression’.¹⁹ Despite the conflicting views and the attempts by courts to narrow the scope of sedition, it survives as an offence in the United States, though it is very narrowly construed and can even be said to have fallen in disuse.²⁰

¹⁵ “Criminal libel and Sedition Offences Abolished”, *Press Gazette* (Jan. 13, 2010).

¹⁶ Section 73: Abolition of common law libel offences etc

The following offences under the common law of England and Wales and the common law of Northern Ireland are abolished—

(a) the offences of sedition and seditious libel;

(b) the offence of defamatory libel;

(c) the offence of obscene libel.

¹⁷ Liberty’s Report Stage Briefing and Amendments on the Coroners and Justice Bill in the House of Commons (March 2009) available at: <https://www.liberty-human-rights.org.uk/sites/default/files/liberty-s-coroners-and-justice-report-briefing-excluding-secret-inquests-.pdf> (last visited on Jan. 5, 2017).

¹⁸ *Supra* note 8

¹⁹ Judith S. Koffler and Bennett L. Gershman, “New Seditious Libel” 69 *Cornell L. Rev.* 816 (1984).

²⁰ Centre for the Study of Social Exclusion and Inclusive Policy, National Law School of India University, Bangalore and Alternative Law Forum, Bangalore, *Sedition Laws and Death of Free Speech in India*, available at: https://www.nls.ac.in/resources/csseip/Files/SeditionLaws_cover_Final.pdf (last visited on Jan. 5, 2017).

3.7 It was argued by many that the first amendment aimed at abolishing seditious libel.²¹ However, this view has been opposed on grounds that the first amendment does not protect speech of all kind; therefore, suggesting that law on sedition was abolished by it would amount to interpreting history through one's own civic sensibilities.²²

3.8 Sedition was made a punishable offence in the United States through the Sedition Act of 1798.²³ This Act was repealed in 1820. In 1918, Sedition Act was again enacted by the U.S. Congress to protect American interests in the First World War.²⁴ In *Schenck v. United States*,²⁵ the court while adjudging the validity of Sedition Act 1918, laid down the "clear and present danger" test for restricting freedom of expression.

Words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment may become subject to prohibition when of such a nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent.

3.9 The Supreme Court in *Abrams v. United States*,²⁶ held that distribution of circulars appealing for strike in factories to stop manufacturing of machineries to be used to crush Russian revolutionaries could not be protected under the First Amendment. Justice Holmes' dissenting opinion, however championed the wide ambit of free speech liberty in United States. He remarked:

It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.

3.10 Sedition was also brought as an offence under Alien Registration Act 1940 (also known as Smith Act) which penalised advocacy of violent overthrow of the government. The constitutional validity of this Act was challenged in *Dennis v.*

²¹ *Supra* note 8 at 4-8.

²² L. Levy, "Legacy of Suppression" 10 (1960) in Mayton, *supra* note 8 at 6-8.

²³ Section 2 of the Sedition Act, 1798 defines sedition as : To write, print, utter or publish, or cause it to be done, or assist in it, any false, scandalous, and malicious writing against the government of the United States, or either House of Congress, or the President, with intent to defame, or bring either into contempt or disrepute, or to excite against either the hatred of the people of the United States, or to stir up sedition, or to excite unlawful combinations against the government, or to resist it, or to aid or encourage hostile designs of foreign nations.

²⁴ This Act was a set of amendments to enlarge Espionage Act, 1917.

²⁵ 249 U.S. 47 (1919).

²⁶ 250 U.S. 616 (1919).

United States.²⁷ Applying the “clear and present danger” test, the court upheld the conviction on the grounds that:

...the words [of the act] cannot mean that, before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt.

3.11 The restriction on free speech has, however, been narrowly construed in subsequent cases. In *Yates v. United States*,²⁸ the Supreme Court distinguished advocacy to ‘overthrow as an abstract doctrine from an advocacy to action’.²⁹ It was reasoned that the Smith Act did not penalise advocacy of abstract overthrow of the government and the *Dennis* (supra) did not in any way blur this distinction. It was held that the difference between these two forms of advocacy is that ‘those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something’.

3.12 In *New York Times v. Sullivan*,³⁰ the Supreme Court remarked that speech must be allowed a breathing space in a democracy and government must not be allowed to suppress what it thinks is ‘unwise, false or malicious’.

3.13 In *Brandenburg v. Ohio*,³¹ the Supreme Court categorically held that ‘freedoms of speech and press do not permit a State to forbid 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’.

²⁷ 341 U.S. 494 (1951).

²⁸ 354 U.S. 298 (1957)

²⁹ *Ibid.*

³⁰ 376 U.S. 254, 273-76 (1964).

³¹ 395 U.S. 444 (1969).

This decision overruled the Supreme Court decision in *Whitney v. California*,³² wherein the court had held that ‘to knowingly be or become a member of or assist in organising an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes involves such danger to the public peace and the security of the State, that these acts should be penalised in the exercise of its police power.’ Legislations penalising such acts were not considered an arbitrary and unreasonable exercise of State power.

3.14 Pursuant to *Brandenburg case (supra)*, restrictions on expression are subject to intense scrutiny. Thus, criticism or advocacy must lead to incitement of immediate lawless action in order to qualify for reasonable restriction of first amendment.

3.15 The U.S. Constitution though forbids apparent restrictions on speech, there are various doctrines that are practised to avert hate speech. The doctrines such as-“reasonable listeners test”, “present danger test”, “fighting words” are just examples. The chilling effect concept had been recognised most frequently and articulated most clearly in decisions chiefly concerned with the procedural aspects of free speech adjudication.

C. Australia

3.16 The first comprehensive legislation that contained sedition offence was the Crime Act 1920. The provisions on sedition in this Act were broader than the common law definition as subjective intention and incitement to violence or public disturbance were not the sine qua non for conviction under these provisions. The Hope Commission constituted in 1984 recommended that the Australian definition of sedition should be aligned with the Commonwealth definition.³³ Subsequently, the sedition provisions were again reviewed by the Gibbs Committee in 1991. It was suggested that while the offence of sedition should be retained, convictions should be limited to acts that incited violence for the purpose of disturbing or overthrowing constitutional authority. In 2005 amendments were made in Schedule 7 of the Anti-Terrorism Act (No 2) 2005, including the sedition as an offence and defences in sections 80.2 and 80.3 of the Criminal Code Act 1995. The Australian Law Reform Commission (hereinafter ALRC) reviewed whether the use of the term sedition was appropriate to define the offences mentioned under the 2005 amendment. After a detailed study the ALRC Report suggested that:³⁴

³² 274 U.S. 357 (1927).

³³ Royal Commission on Australia’s Security and Intelligence Agencies, *Report on the Australian Security Intelligence Organization* (1985) cited in Australian Law Reform Commission, “Report on Fighting Words: A Review of Sedition Laws in India” (July 2006).

³⁴ “Report on Fighting Words” *supra* note 34.

The Australian Government should remove the term ‘sedition’ from federal criminal law. To this end, the headings of Part 5.1 and Division 80 of the Criminal Code (Cth) should be changed to ‘Treason and urging political or inter-group force or violence’, and the heading of s 80.2 should be changed to ‘Urging political or inter-group force or violence’.

3.17 The Recommendation of the ALRC was implemented in the National Security Legislation Amendment Act 2010 wherein the term sedition was removed and replaced with references to ‘urging violence offences’.

4 SEDITION LAWS IN INDIA: PRE-CONSTITUTION ERA

A. History of Sedition law in India.

4.1 Macaulay’s Draft Penal Code 1837 consisted of section 113 that corresponded to section 124A IPC. The punishment proposed was life imprisonment. Sir John Romilly, Chairman of Second Pre-Independence Law Commission commented upon the quantum of the punishment proposed for sedition, on the ground that in England the maximum punishment had been three years and he suggested that in India it should not be more than five years.³⁵ However, this section was not included in the IPC when it was enacted in 1860. This was surprising for many. Mr. James Stephens when asked about this omission referred to the letter written by Sir Barnes Peacock to Mr. Maine, where he had remarked that:

“I have looked into my notes and I think the omission of a section in lieu of section 113 of the original Penal Code must have been through mistake [...] I feel however that it was an oversight on the part of the committee not to substitute for section 113”.³⁶

4.2 Mr. James Stephen thereafter set out to rectify this omission. Consequently, sedition was included as an offence under section 124A IPC through special Act XVII of 1870.³⁷ This section was in line with the Treason Felony Act 1848³⁸ that penalised seditious expressions.³⁹ One of the reasons cited by Mr. Stephen for

³⁵ Dr. Hari Singh Gour, *Penal Law of India*, vol. 2, 11th edn., Law Publishers (India) Pvt. Ltd., Allahabad, 2011, p. 1232

³⁶ Quoted in Arvind Ganachari, *Nationalism and Social Reform in a Colonial Situation* (Kalpaz, 2005).

³⁷ Ganachari in his book opines that this section was included in the penal code to counter the Wahabi activities.

³⁸ Available at: <http://www.legislation.gov.uk/ukpga/Vict/11-12/12/section/3> (last Visited on Jan. 21, 2016).

³⁹ Section 3 of the Act stipulated that :

introducing this section was that in the absence of such provision, this offence would be penalised under the more severe common law of England.⁴⁰ Therefore, the adoption of this section was projected as an obvious choice for protecting freedom of expression from the stricter common law. According to Mr. Stephen, the adopted clause was ‘much more compressed, much more distinctly expressed, and freed from great amount of obscurity and vagueness with which the law of England was hampered’.⁴¹ The intent of the section was to punish an act of exciting feelings of disaffection towards the government, but this disaffection was to be distinguished from disapprobation. Thus, people were free to voice their feelings against the government as long as they projected a will to obey its lawful authority.⁴²

4.3 Section 124A IPC was amended in 1898 by the Indian Penal Code (Amendment) Act 1898 (Act V of 1898) providing for punishment of transportation for life or any shorter term. While the former section defined sedition as exciting or attempting to excite feelings of disaffection to the Government established by law, the amended section also made bringing or attempting to bring in hatred or contempt towards the Government established by law, punishable.⁴³ The provision was amended by Act No.26 of 1955, substituting the punishment as ‘imprisonment for life and/or with fine or imprisonment for 3 years and / or with fine.

4.4 The West Minister Parliament enacted the Prevention of Seditious Meetings Act, 1907, in order to prevent public meetings, likely to lead the offence of sedition or to cause disturbance as in many parts of India, meetings were held against the British rule, with the main objective of overthrowing the Government.

4.5 The Prevention of Seditious Meetings Act, 1911, repealed the Act 1907. Section 5 thereof enabled the statutory authorities to prohibit a public meeting in case such meeting was likely to provoke sedition or disaffection or to cause

“If any person whatsoever shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our Most Gracious Lady the Queen, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of her Majesty’s dominions and countries, or to levy war against her Majesty, within any part of the United Kingdom, in order by force or constraint to compel her to change her measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other of her Majesty’s dominions or countries under the obeisance of her Majesty, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted thereof shall be liable to be transported beyond the seas for the term of his or her natural life.”³⁹

⁴⁰ *Queen Emperor v. Jogendur Chandra Bose* (1892) 19 ILR Cal 35.

⁴¹ Available at: <http://archive.org/stream/onlawofsedition00dono#page/2/mode/2up> (last visited on Jan.2, 2017).

⁴² For detailed discussion see W.R. Donogh, *A Treatise on the Law of Sedition and Cognate Offences in British India* (Thacker, Spink and Co., Calcutta, 1911).

⁴³ See K.I. Vibhute, *P.S.A. Pillai’s Criminal Law* 335 (Lexis Nexis Butterworths, Nagpur, 2012).

disturbance of public tranquillity. Violation of the provisions of the Act was made punishable with imprisonment for a term, which could extend to six months or fine or both. The said Act 1911 stood repealed *vide* Repealing and Amending (Second) Act (Act No. IV of 2018).

B. Pre-Constitution Rulings

4.6 Section 124A IPC was extensively used to curb political dissent in India. *Jogendra Chandra Bose*,⁴⁴ was charged with sedition for criticising the Age of Consent Bill and the negative economic impact of British colonialism. While directing the jury on the case, the Court distinguished sedition as was understood under the Law of England at that time, from section 124A IPC. It was observed that the offence stipulated under section 124A IPC was milder, as in England any overt act in consequence of a seditious feeling was penalised, however in India only those acts that were done with an ‘intention to resist by force or an attempt to excite resistance by force’ fell under this section.

4.7 It was opined that section 124A IPC penalised disaffection and not disapprobation. Disaffection was defined as a feeling contrary to affection; like dislike or hatred and disapprobation as merely disapproval. The following interpretation was ascribed to the term disaffection under section 124A IPC:

If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them.

No verdict was announced as the jury did not reach a unanimous decision. Later the case was withdrawn after Bose had tendered apology.⁴⁵

4.8 In *Queen Empress v. Bal Gangadhar Tilak*,⁴⁶ the defendant was accused of sedition for publishing an article in *newspaper- Kesari* invoking the example of the Maratha warrior Shivaji to incite overthrow of British rule. In this case Justice Strachey placed relevant material before the jury for interpreting ‘disaffection’ by saying:

⁴⁴ *Supra* note 41.

⁴⁵ *Supra* note 41.

⁴⁶ ILR (1898) 22 Bom 112.

It means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. 'Disloyalty' is perhaps the best general term, comprehending every possible form of bad feeling to the Government. That is what the law means by the disaffection which a man must not excite or attempt to excite: he must not make or try to make others feel enmity of any kind towards the Government. the amount or intensity of the disaffection is absolutely immaterial, if a man excites or attempts to excite feelings of disaffection, great or small, he is guilty under the section. In the next place it is absolutely immaterial whether any feelings of disaffection have been excited or not by the publication in question.the section places absolutely on the same footing the successful exciting of feelings of disaffection and the unsuccessful attempt to excite them.....

4.9 The interpretation that, only acts that suggested rebellion or forced resistance to the Government should be given to this section was expressly rejected by the court.⁴⁷ This judgment influenced the 1989 amendment to section 124A IPC wherein the explanation defined disaffection to include disloyalty and feelings of enmity.⁴⁸

4.10 Two important decisions pursuant to *Tilak* judgement were, *Queen Empress v. Ramchandra Narayan*,⁴⁹ and *Queen Empress v. Amba Prasad*.⁵⁰ In *Ramchandra Narayan* (supra), attempt to excite feelings of disaffection to the Government was defined as, 'equivalent to an attempt to produce hatred towards the Government as established by law, to excite political discontent, and alienate the people from their allegiance'.⁵¹ However, it was clarified that every act of disapprobation of Government did not amount to disaffection under section 124A IPC, provided the person accused under this section is loyal at heart and is 'ready to obey and support Government'.⁵²

4.11 A similar interpretation was given to disapprobation in *Amba Prasad* (supra), who was booked under section 124A IPC, for publishing an article in a newspaper called *Jami-ul-ulam*. The court after analysing the meaning of disaffection held that any disapprobation will only be protected as free speech if it did not lead to disloyalty or subverting the lawful authority of the State. The court remarked that:

⁴⁷ *Supra* note 43.

⁴⁸ *Supra* note 21.

⁴⁹ ILR (1898) 22 Bom 152.

⁵⁰ ILR (1897) 20 All 55.

⁵¹ *ibid.*

⁵² *Supra* note 51.

... the disapprobation must be 'compatible' with a disposition to render obedience to the lawful authority of the Government and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority.

4.12 Following the literal interpretation under section 124A IPC, the court categorically held that it is not necessary that an actual rebellion or mutiny or forcible resistance to the Government or any sort of actual disturbance was caused by the act in question.⁵³ Stressing on this point, the Court remarked that:

(Sedition) makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action, such as rebellion or forcible resistance, the test of guilt.⁵⁴

4.13 These cases brought to light the ambiguity being created by the explanation in interpreting the term disaffection. In order to remove any further misconception in interpreting section 124A, the legislature introduced Explanation III to the section, which excluded 'comments expressing disapprobation' of the action of the Government, but do not intend to lead to an offence under the section. The main intention behind adding another explanation was to make the law more precise. The Select Committee, while considering the law of sedition, explained this addition in the following words:

We have added a further explanation to clause 124A. The second explanation was intended to protect fair and honest criticism which had for its object the alteration of the policy pursued by the Government in any particular case. Some people were apprehensive that the express declaration of this principle might be held impliedly to negative the right of people to criticise Government action when that criticism could not lead to a reversal of such action; for instance criticism on past expenditure, or criticism on an appointment which the critic may think objectionable. I think this apprehension was quite unfounded, but in order to allay it we have introduced the third explanation.⁵⁵

4.14 The discussions of the Select Committee indicate that the British Government was not keen on granting freedom of expression to India to the extent enjoyed in England. The British found it difficult to limit the scope of

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Supra* note 43 at 65.

sedition to direct incitement to violence or to commit rebellion in view of the fact that the landscape was under foreign rule and inhabited by many races, with diverse customs and conflicting creeds⁵⁶.

4.15 While the British Government was justifying enlarging the ambit of laws on sedition, the court in *Kamal Krishna Sircar v. Emperor*,⁵⁷ refused to term a speech that condemned Government legislation declaring Communist party of India and various trade unions and labour organisations illegal, seditious. It was opined by the court that imputing seditious intent to such kind of speech would completely suppress freedom of speech and expression in India.

To suggest some other form of government is not necessarily to bring the present Government into hatred or contempt... That does not mean that one may not make speeches of this kind. I do not like quite a lot of things the people do constantly from day to day. That is no reason for suggesting that those people are guilty of sedition or of attempting to bring the Government into hatred or contempt.

4.16 The case reflects the tendency of the then Government to use sedition to suppress any kind of criticism. Recognising this aspect of section 124 A IPC, in *Niharendu Dutt Majumdar v. the King Emperor*⁵⁸ the court digressed from the literal interpretation given to section in 124A IPC in *Bal Gangadhar Tilak* (supra). The court held that the offence of sedition was linked to disruption of public order and prevention of anarchy and until and unless the speech leads to public disorder or a reasonable anticipation or likelihood of it, it cannot be termed seditious.⁵⁹ Thus, the crux of the defence argument in *Bal Gangadhar Tilak* (supra) was affirmed. The appellant was consequently acquitted by the Federal Court opining that all unpleasant words cannot be regarded 'actionable'.

4.17 Later on, this definition was overruled in the case of *King-Emperor v. Sadasiv Narayan Bhalerao*.⁶⁰ The reading of 'public order' in section 124 A IPC in *Niharendu* (supra), was not accepted and the literal interpretation in *Bal Gangadhar Tilak* (supra), and later in *Ramchandra Narayan* (supra), and *Amba Prasad* (supra), was upheld.

C. Constituent Assembly Debates

4.18 From the Constituent Assembly Debates it is understood that there had been serious opposition for inclusion of sedition as a restriction on freedom of

⁵⁶ *Supra* note 43 at 66.

⁵⁷ AIR 1935 Cal 636.

⁵⁸ AIR 1942 FC 22.

⁵⁹ *Ibid.*

⁶⁰ AIR 1947 PC 84.

speech and expression under the then Article 13 of the draft Indian Constitution. Such a provision was termed as a shadow of colonial times that should not see light of the day in free India. The Constituent Assembly was unanimous in having the word 'sedition' deleted from Article 13 of the draft Constitution. During the discussions Shri M. Ananthasayanam Ayyangar said:

If we find that the government for the time being has a knack of entrenching itself, however bad its administration might be **it must be the fundamental right of every citizen in the country to overthrow that government without violence**, by persuading the people, by exposing its faults in the administration, its method of working and so on. The word 'sedition' has become obnoxious in the previous regime. We had therefore approved of the amendment that the word 'sedition' ought to be removed, **except in cases where the entire state itself is sought to be overthrown or undermined by force or otherwise, leading to public disorder; but any attack on the government itself ought not to be made an offence under the law.** We have gained that freedom and we have ensured that no government could possibly entrench itself, unless the speeches lead to an overthrow of the State altogether⁶¹ (Emphasis added).

4.19 Shri K M Munshi⁶², while speaking on his motion to delete the word 'sedition' from Article 13, quoted the following words of the then Chief Justice of India, in *Niharendu Dutt Majumdar v. King*⁶³ wherein a distinction between "what 'sedition' meant when the Indian Penal Code was enacted and 'Sedition' as understood in 1942.":

This (sedition) is not made an offence in order to minister to the wounded vanity of Governments but because where Government and the law ceases to be obeyed because no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency.

4.20 As a result of the vehement opposition in the Constituent Assembly, the word 'sedition' does not find a place in our Constitution.

⁶¹ Constituent Assembly of India, 2nd December 1948; Constituent Assembly Debates Official Report, Vol.VII, Reprinted by Lok Sabha Secretariat, New Delhi, Sixth Reprint 2014.

⁶² Constituent Assembly of India discussions held on 1st December 1948, *Ibid.*

⁶³ *Supra* note 59

4.21 Presently, section 124 A IPC defines sedition as an act that brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India by words, either spoken or written, or by signs, or by visible representation, or otherwise.

5 POST CONSTITUTIONAL DEVELOPMENTS

5.1 Sedition was not acceptable to the framers of the Constitution as a restriction on the freedom of speech and expression, but it remained as it is in the penal statute post-independence. After independence, section 124A IPC came up for consideration for the first time in the case of *Romesh Thapar v. State of Madras*⁶⁴. The Supreme Court declared that unless the freedom of speech and expression threaten the ‘security of or tend to overthrow the State’, any law imposing restriction upon the same would not fall within the purview of Article 19(2) of the Constitution.

5.2 The Punjab High Court in *Tara Singh Gopi Chand v. The State*,⁶⁵ declared section 124A IPC unconstitutional as it contravenes the right of freedom of speech and expression guaranteed under Article 19(1) (a) of the Constitution observing that “*a law of sedition thought necessary during a period of foreign rule has become inappropriate by the very nature of the change which has come about*”.

5.3 By the first Constitutional Amendment two additional restrictions – namely, ‘friendly relations with foreign State’ and ‘public order’ were added to Article 19(2), for the reason that the court in *Romesh Thapar* (supra), had held that freedom of speech and expression could be restricted on the grounds of threat to national security and for ‘serious aggravated forms of public disorder that endanger national security’ and not ‘relatively minor breaches of peace of a purely local significance’.

5.4 In the case of *Ram Nandan v. State of Uttar Pradesh*⁶⁶ the Court quoted Pt. Jawaharlal Nehru, who while introducing the first Constitution of India (Amendment) Bill 1951, referred to sedition and stated:

Now so far as I am concerned that particular Section is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in any body of laws that we might pass. The sooner we get rid of it the better. We might deal with that matter in other ways, in more limited ways, as every other country does but that particular thing, as it is, should have no place, because all of us have had enough experience of it in a

⁶⁴ AIR 1950 SC 124.

⁶⁵ AIR 1951 Punj. 27.

⁶⁶ AIR 1959 All 101

variety of ways and apart from the logic of the situation, our urges are against it.

5.5 This amendment echoed the logic in dissenting opinion of Justice Saiyid Fazl Ali, in *Brij Bhusan v. State of Delhi*⁶⁷. In his opinion, serious and grave instances of public disorder and disturbance of public tranquillity might affect the security of public and State. The reason the term 'sedition' was absent from Article 19(2) was because the framers of the Constitution had included terms with wider connotation which includes the activity of sedition along with other activities 'which are detrimental to the security of the State as sedition'.

5.6 The constitutional validity of section 124A IPC came to be challenged in the case of *Kedar Nath Singh v. State of Bihar*⁶⁸. The Constitution Bench upheld the validity of section 124A and kept it at a different pedestal. The Court drew a line between the terms, 'the Government established by law' and 'the persons for the time being engaged in carrying on the administration' observing:

'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, the continued existence of the Government established by law is an essential condition of the stability of the State. That is why 'sedition', as the offence in Section 124-A has been characterised, comes, under Chapter VI relating to offences against the State. Hence any acts within the meaning of Section 124-A which have the effect of subverting the Government by bringing that Government into contempt or hatred, or creating disaffection against it, 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.

5.7 At the same time, the Court struck a balance between the right to free speech and expression and the power of the legislature to restrict such right observing thus:

...the security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with view to punishing offences against the State, is undertaken. Such a legislation has, on the one hand, fully to protect and guarantee the freedom of speech and expression, which is the *sine quo non* of a democratic form of Government that

⁶⁷ AIR 1950 SC 129

⁶⁸ AIR 1962 SC 955.

our Constitution has established. ... But the freedom has to be guarded against becoming a licence for vilification and condemnation of the Government established by law, **in words, which incite violence or have the tendency to create public disorder.** A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, **so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder.** (emphasis added)

5.8 After the pronouncement in the case of *Kedar Nath* (Supra) by the Supreme Court, public disorder has been considered to be a necessary ingredient of section 124A IPC by the courts. In *Bilal Ahmed Kaloo v. State of Andhra Pradesh*⁶⁹, the court quashed the charges under the said section, as it was not established before the court that the appellant had done anything, which would threaten the existence of the Government, established by law or might cause public disorder. In *Nazir Khan & Ors. v. State of Delhi*,⁷⁰ the court reiterated this principle by stating:

Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitutions of the realm, and generally all endeavours to promote public disorder.

5.9 A prayer was made in the case of *Common Cause & Anr. v. UOI*⁷¹, to issue directions for review of pending cases of sedition in various courts, where a superior police officer may certify that the 'seditious act' either led to the incitement of violence or had the tendency or the intention to create public disorder. The court granted the prayer and directed the authorities that while dealing with section 124A IPC, they are to be guided by the principles laid down in *Kedar Nath Singh* (supra).

5.10 The Supreme Court, in the case of *Raghubir Singh v. State of Bihar*⁷², held that in order to constitute an offence of conspiracy and sedition, it not necessary that the accused himself should author the seditious material or should have actually attempted hatred, contempt or disaffection. Similar was the view taken in

⁶⁹ AIR 1997 SC 3438

⁷⁰ AIR 2003 SC 4427.

⁷¹ (2016) 15 SCC 269

⁷² AIR 1987 SC 149

the case of *Dr. Vinayak Binayak Sen v. State of Chhattisgarh*,⁷³ where the Chhattisgarh High Court held that, to hold a person guilty of sedition, it is not necessary that the person himself be an author of seditious material, under this section, even circulation of such material can be penalised.

5.11 In the case of *Kanhaiya Kumar v. State (NCT of Delhi)*,⁷⁴ the petitioner, charged under section 124A IPC approached Delhi High Court for grant of bail. Deciding upon the issue, the Court observed that while exercising the right to freedom of speech and expression under Article 19(1)(a) of the Constitution, one has to remember that Part-IV Article 51A of the Constitution provides Fundamental Duties of every citizen, which form the other side of the same coin.

5.12 In *V.A. Pugalenthil v. State*,⁷⁵ the case of the prosecution was that the petitioner along with others, distributed pamphlets containing seditious and defamatory statements. The Madras High Court held that calling out public to demonstrate and agitate against the Central and State Governments on the issue of NEET Examination would *prima facie* constitute the offences of sedition and defamation. At the same time, the Court cautioned the government not to take action against any peaceful protest or criticism or dissent observing that every citizen of the country had a fundamental right to register her/his protest peacefully and to demonstrate, not causing a situation resulting in violence to paralyse the law and order situation.

5.13 The aforesaid judicial pronouncements have been discussed to get an idea as to what amounts to seditious acts. In the light thereof, it could be stated that unless the words used or the actions in question do not threaten the security of the State or of the public; lead to any sort of public disorder which is grave in nature, the act would not fall within the ambit of section 124-A of IPC.

6 FREEDOM OF SPEECH AND SEDITION

6.1 Giving voice to the importance of the freedom of speech, John Stuart Mill advocated for the free flow of the ideas and expressions in a society. He argued that for the stability of a society one must not suppress the voice of the citizens, how so ever contrary it might be. To reach a point of conclusion and that too a right conclusion, in certain cases, open public discussions and debates are inevitable. According to Mill, this could be achieved through the right to freedom of speech. The right not only makes it possible to highlight the popular opinion of a society but also provides a platform to the suppressed and unheard people who

⁷³ 2011 (266) ELT 193 (Chhattisgarh).

⁷⁴ (2016) 227 DLT 612.

⁷⁵ Crl. O.P. No. 21463 of 2017, decided on 9/11/2017

wish to voice against any celebrated culture. Mill further points out that a good government is the one where the ‘intelligence of the people’ is promoted.

6.2 The Apex Court of India, while crystallising the relationship between a democratic society and freedom of speech *In Re Harijai Singh*⁷⁶ opined that

In a democratic set-up, there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the State. It is their right to be kept informed about current political, social, economic and cultural life as well as the burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way in which they are being managed, tackled and administered by the Government and its functionaries. To achieve this objective the people need a clear and truthful account of events, so that they may form their own opinion and offer their own comments and viewpoints on such matters and issues and select their further course of action.

6.3 Democracy is not another name of majoritarianism, on the contrary it is a system to include every voice, where thought of every person is counted, irrespective of the number of the people backing that idea. In a democracy, it is natural that there will be different and conflicting interpretation of a given account of an event. Not only viewpoints which constitute the majority are to be considered, but at the same time, dissenting and critical opinions should also be acknowledged. Free speech is protected because it is necessary to achieve some greater, often ultimate, social good. In the unforgettable words of Charles Bradlaugh:

“Better a thousand fold abuse of free speech than denial of free speech. The abuse dies in a day but the denial slays the life of the people and entombs the hopes of the race.”⁷⁷

6.4 In the case of *S. Khusboo v. Kanniamal & Anr.*⁷⁸, observing that the morality and criminality do not co-exist, the Supreme Court opined that free flow of the ideas in a society makes its citizen well informed, which in turn results into the good governance. For the same, it is necessary that people be not in a constant fear to face the dire consequences for voicing out their ideas, not consisting with the current celebrated opinion. In the case of *Tata Press Ltd. v. Mahanagar*

⁷⁶ AIR 1997 SC 73

⁷⁷ Jewish Supremacism, Freedom of Speech and My Book Jewish Supremacism , available at <http://davidduke.com/freedom-of-speech/>

⁷⁸ AIR 2010 SC 3196

*Telephone Nigam Ltd. & Ors.*⁷⁹, emphasising the importance of the freedom of speech the Supreme Court observed:

Freedom of speech goes to the heart of the natural right of an organised freedom-loving society to 'impart and acquire information about that common interest'.

6.5 In the case of *Shreya Singhal v. Union of India*⁸⁰, section 66A of the Information and Technology Act, 2000, was declared unconstitutional on the ground that it was in direct conflict with the fundamental right of freedom of speech and expression. The Supreme Court held that under the Constitutional scheme, for the democracy to thrive, the liberty of speech and expression "is a cardinal value and of paramount importance"⁸¹.

6.6 The freedom of speech does not only help in the balance and stability of a democratic society, but also gives a sense of self-attainment⁸². In the case of *Indian Express Newspaper (Bombay)(P) Ltd. v. Union of India*⁸³, following four important purposes of the free speech and expression were set out:

- (i) it helps an individual to attain self-fulfilment,
- (ii) it assists in the discovery of truth,
- (iii) it strengthens the capacity of an individual in participating in decision-making, and
- (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

6.7 Having discussed the importance of free speech and expression, one cannot deny the fact that the right to free speech and expression in isolation is not enough. It has to be understood that to speak or to express a thought it is necessary to be aware of all the aspects and fundamentals of the issue in discussion. One cannot be supposed to form his/her opinion without having the true account of an event and debates about the matter in question. Here comes another aspect of the free speech and that is the right to listen, followed by the free flow of the information available.

6.8 It was observed by Alexander Meiklejohn that freedom of speech makes a democracy vibrant. The focus of Meiklejohn was not free speech, but rather he was an advocate of 'right to hear'. He argued that to let people self-govern it is very important for them to make an informed and well-researched decision and

⁷⁹ AIR 1995 SC 2438, see also *LIC of India v. Prof. Manubhai D. Shah & Cinemart Foundation*, AIR 1993 SC 171

⁸⁰ AIR 2015 SC 1523

⁸¹ Id. Para 8

⁸² *Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, AIR 1995 SC 1236

⁸³ AIR 1986 SC 515

that is only possible when they will be able to hear every voice raised in the society⁸⁴. In the case of *S. P Gupta v. Union of India*⁸⁵, the Supreme Court held that the right to know is inherent in the right to freedom of speech and expression under Article 19(1) (a)⁸⁶.

6.9 In the case of *Union of India & Ors. v. The Motion Picture Association & Ors, etc. etc.*⁸⁷, the Supreme Court observed:

...free speech is the foundation of a democratic society. A free exchange of ideas, dissemination of information without restraints, dissemination of knowledge, airing of differing view points, debating and forming one shown views and expressing them, are the basic indicia of a free society.

6.10 The Bombay High Court in the case of *Kamal R. Khan v. State of Maharashtra*⁸⁸, while dealing with the validity of the ban imposed by the State on the release of a motion picture, pronounced that blocking ‘the free flow of information, ideas and knowledge’ renders a society ‘inhibited’ and ‘repressed’.

6.11 The Supreme Court in the case of *Cellular Operators Association of India & Ors. v. Telecom Regulatory Authority of India & Ors.*⁸⁹, held that right to information rests upon the right to know, which ultimately was an inseparable part of the freedom of speech guaranteed under Article 19(1)(a).

6.12 The other important aspect to be kept in mind is reasonable restriction on the speech and expression which enables the State to impose certain restrictions on the right to free speech. The restrictions are tried to be justified on the ground of ‘harm’. For example, Mill explains ‘harm principle’, stating that until and unless a speech does not result into some sort of harm, the same cannot be suppressed. However, the yardstick on which this harm is to be measured has to be high. The harm is to be of such a potentiality that it threatens the very existence of the society; it disturbs the public order and results into the chaos in the society. Justice Holmes, in *Gompers v. Buck’s Stove & Range Co.*⁹⁰ opined:

In the name of freedom of speech and expression, the protection is not extended to the ones who utter words that may have all the effect of force.

⁸⁴ A. Meiklejohn, Free Speech and its relation to Self- Government, Washington: London, 1948, cited in Anushka Sharm, Sediton in Liberal Democracies, Oxford, 2018

⁸⁵ AIR 1982 SC 149

⁸⁶ See also PUCL v, Union of India, AIR 2003 SC 2363

⁸⁷ AIR 1999 SC 2334

⁸⁸ 2009(4) BomCR 496

⁸⁹ AIR 2016 SC 2336

⁹⁰ 221 U.S 418(1911)

6.13 The Supreme Court has been consistently pronouncing in various judgments that the right to free speech and expression is not absolute in nature. It is subjected to the reasonable restrictions as enshrined in Article 19(2) and other laws, such as section 124A of IPC. In the case of *A.K. Gopalan v. State of Madras*⁹¹, the Supreme Court observed:

“man, as a rational being, desires to do many things, but in civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals... Liberty has, therefore to be limited in order to be effectively possessed.”

6.14 A similar view was taken by the United States Supreme Court in the case of *Snyder v. Phelps*⁹² wherein Mr. John G. Robert, Chief Justice said:

“speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and ... inflict great pain. Hence, it is to be delivered rightfully.”

6.15 Thus, whenever there is a need to interfere with the most important natural rights of the human beings, the Courts have laid down certain rules as touchstones. In the case of *S. Rangarajan v. P. Jagjivan Ram*⁹³ it was held that unless there is danger to the society and public order, the right to freedom of speech and expression cannot be restricted. The Court further held:

The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg".

6.16 Similarly in the case of *Ramesh v. Union of India*⁹⁴ the Court again cautioned that while determining the impact of the words uttered, the standard of a ‘reasonable, strong minded, firm and courageous men’ is to be applied; and not of a ‘weak and vacillating mind’.

6.17 In the case of *Shreya Singhal* (supra) the Court observed:

There are three concepts which are fundamental in understanding the reach of this [freedom of speech and

⁹¹ AIR 1950 SC 27

⁹² 562 U.S. 443 (2011)

⁹³ (1989) 2 SCC 574; see also *The Superintendent, central prison, Fatehgarh v. Dr. Ram Manohar Lohia*, AIR 1960 SC 633

⁹⁴ AIR 1988 SC 775

expression] most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1) (a). **It is only when such discussion or advocacy reaches the level of incitement** that Article 19(2) kicks in. **It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty & integrity of India, the security of the State, friendly relations with foreign States, etc.** (emphasis added)

6.18 In a number of cases, scepticism has been expressed about the potential misuse of the sedition law. Justice A P Shah, in one of his articles⁹⁵, warns about the very basis for the logic of a sedition law. He compares the idea of sedition to a parochial view of nationalism which often endangers the diversity of opinions rather than protect against rebellion.

6.19 In the case of *Ramesh Yashwant Prabhoo v. Prabhakar Kashinath Kunte & Ors.*⁹⁶, the use of religion in electoral campaigns was challenged under section 123 of the Representation of the People Act, 1951. It was contended that repeated use of open threats to India's constitutional commitment to secularism could be construed as 'disloyalty' and the threat of public nuisance this would generate was also palpable. However, the Court did not accept it and held that the candidate expressed at best a 'hope' for creation of a monolithic *rashtra* than, in fact, acting on elimination of minorities and thus threatening to eliminate other religions. Significantly, Section 123 of the Act, 1951 covers use of such speech in campaigns and therefore there is no question of invoking the provisions of 124A IPC. Thus, expression of a particular image of the country does not alone amount to a threat to the security of the nation.

A. Expression not amounting to sedition

6.20 The court has been categorical in expressing that every criticism does not amount to sedition and the real intent of the speech must be considered before imputing seditious intent to an act. In the case of *Balwant Singh v. State of Punjab*,⁹⁷ the Court refused to penalise casual raising of slogans few times against the State by two persons (*Khalistan Zindabad, Raj Karega Khalsa, and Hinduan Nun Punjab Chon Kadh Ke Chhadange, Hun Mauka Aya Hai Raj Kayam Karan Da*). It was reasoned that raising of some lonesome slogans, a couple of times by two individuals, without anything more, did not constitute any threat to the

⁹⁵ A P Shah, Free Speech, Nationalism and Sedition, Economic & Political Weekly, Vol. 52, Issue No. 16, 22 Apr, 2017

⁹⁶ AIR 1996 SC 1113

⁹⁷ AIR 1995 SC 1785.

Government of India as by law established nor could the same give rise to feelings of enmity or hatred among different communities or religious or other groups.

6.21 Similarly, in *Javed Habib v. State of Delhi*,⁹⁸ it was held:

Holding an opinion against the Prime Minister or his actions or criticism of the actions of government or drawing inference from the speeches and actions of the leader of the government that the leader was against a particular community and was in league with certain other political leaders, cannot be considered as sedition under Section 124A of the IPC. The criticism of the government is the hallmark of democracy. As a matter of fact the essence of democracy is criticism of the Government. The democratic system which necessarily involves an advocacy of the replacement of one government by another, gives the right to the people to criticize the government. In our country, the parties are more known by the leaders. Some of the political parties in fact are like personal political groups of the leader. In such parties leader is an embodiment of the party and the party is known by the leader alone. Thus, any criticism of the party is bound to be the criticism of the leader of the party.

6.22 The need to look into the context of the speech was reiterated in the case of *Pankaj Butalia v. Central Board of Film Certification & Ors.*⁹⁹, the Delhi High Court held that while judging sedition, intention is extremely important. An offence under section 124A IPC has to be ascertained by judging the act 'holistically and fairly without giving undue weight to isolated passages'.¹⁰⁰

6.23 In the case of *Sanskar Marathe v. State of Maharashtra & Anr.*,¹⁰¹ a cartoonist Aseem Trivedi was booked under section 124A IPC for defaming the Parliament, the Constitution of India and the National Emblem and attempting to spread hatred and disrespect against the Government through his cartoons. The court distinguished between strong criticism and disloyalty observing:

... disloyalty to Government established by law is not the same thing as commenting in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the condition of the people or to secure the

⁹⁸ (2007) 96 DRJ 693.

⁹⁹ (2015) 221 DLT 29.

¹⁰⁰ *Ibid.*

¹⁰¹ 2015 Cri LJ 3561.

cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement to public disorder or the use of violence.

6.24 In the case of *Arun Jaitley v. State of U.P.*,¹⁰² the Allahabad High Court held that a critique of a judgment of the Supreme Court on National Judicial Appointment Commission does not amount to sedition. It was merely a fair criticism. While interpreting section 124A, IPC the court observed:

Hence any acts within the meaning of s. 124A which have the effect of subverting the Government by bringing that Government into contempt or hatred, or creating disaffection against it, 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.

6.25 Thus, expression of strong condemnation towards the State or State institutions can never amount to sedition for the simple reason that no institution or symbol alone embodies the whole country in entirety. In many cases the critique over a failed law expressed through for instance, the burning of Constitution, or expression of disappointment with members of Parliament through a visually disparaging cartoon or an image of Parliament cannot amount to sedition because often the protests may be routed in an idea of India which has been frustrated by its elected representatives, or a law that has demeaned or disappointed citizens of India.

B. Private Member's Bill Suggesting Amendment

6.26 In the year 2011, a private member Bill titled the Indian Penal Code (Amendment) Bill, was introduced in the Rajya Sabha by Mr. D. Raja. The Bill proposed that section 124A IPC should be omitted. It was reasoned that the British Government used this law to oppress the view, speech and criticism against the British rule. But the law is still being used in independent India, despite having specialised laws to deal with the internal and external threats to destabilise the nation. Thus, to check the misuse of the section and to promote the freedom of speech and expression, the section should be omitted.

6.27 Another Private member Bill titled The Indian Penal Code (Amendment) Bill, 2015¹⁰³, was introduced in Lok Sabha by Mr. Shashi Tharoor to amend

¹⁰² 2016 (1) ADJ 76.

¹⁰³The Indian Penal Code (Amendment) Bill, 2015, *available at*: <http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/2535LS.pdf> (last visited on Jan 20, 2017).

section 124A IPC. The Bill suggested that only those actions/words that directly result in the use of violence or incitement to violence should be termed seditious. This proposed amendment revived the debate on interpretation of sedition. The courts through various judgments have settled that the language of this section does not imply that only words, either spoken or written, or signs, or visible representation that are likely to incite violence should be considered seditious.

7 SEDITION VIS-À-VIS OTHER STATUTES

7.1 Potentiality and impact of expression has always been looked into by the court to determine the permissibility of its restriction.¹⁰⁴ In order to qualify as sedition, the act must be intentional and must cause hatred.¹⁰⁵ Disturbance of public order has been recognised as an important ingredient of sedition in India¹⁰⁶. The term ‘public order’ has been defined and distinguished from ‘law and order’ and ‘security of State’ in *Ram Manohar Lohiya v. State of Bihar*.¹⁰⁷ The Court observed the difference between the three of them is that of degree.

One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State.

7.2 It has been suggested that sedition is many a times used to stem any sort of political dissent in the country, and also any alternate political philosophy which goes against the ruling party’s mindset.¹⁰⁸

7.3 Since sedition is an offence against the State, higher standards of proof must be applied to convict a person for this offence. This is necessary to protect fair and reasonable criticisms and dissenting opinions from unwarranted State suppression. Legitimate speech must be protected and care must be taken that the grounds of limitation are reasonable and just.¹⁰⁹ Section 124A IPC must be read in consonance with Article 19(2) of the Constitution and the reasonableness of the restriction must be carefully scrutinised on the basis of facts and circumstances of the case. On the other hand, there have also been instances where people have been charged with sedition for making statements that in no manner undermine the security of the nation.

¹⁰⁴ See S. Sivakumar, “Freedom of Press vis-a-vis Working of the Constitution” 2 *Journal of Indian Legal Thought* 163-64 (2004).

¹⁰⁵ B.S. Chauhan, “Freedom of Speech and Expression” 3 *Lexigentia* 4 (2016).

¹⁰⁶ *Kedarnath v. State of Bihar*, AIR 1962 SC 955

¹⁰⁷ AIR 1966 SC 740.

¹⁰⁸ *Supra* note 21.

¹⁰⁹ Meera Mathew, “Expression, Advocacy and Incitement” Working Paper submitted to the Law Commission of India (2017).

7.4 Indian Penal Code, 1860, within its ambit covers a wide range of actions threatening the peace of the society. For instance, Chapter VI includes the offences against the State, inter alia, waging or attempting to wage war (section 121), collecting arms, etc. with intention of waging war against India (section 122), concealing with intent designed to wage war (section 123), covering a wide range of malicious intentions against the State. Chapter VII covers provisions relating to abetting mutiny (section 131 and 132). Further, Chapter VIII, titled ‘*of offences against the public tranquillity*’ covers actions which, if allowed, would disturb the peace of the society. Section 141 defines the unlawful assembly and section 143 provides for the punishment for the same; section 153A prohibits the actions ‘promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and acts prejudicial to maintenance of harmony’; so on and so forth. These provisions take care of any activity which might be indulged into for the purpose of waging war against India or causing disruption of public order.

7.5 The Unlawful Activities Prevention Act, 1967, was enacted in view of various resolutions passed by the Security Council of the United Nations to prevent terrorist activities and to freeze the assets and other economic resources belonging to terrorists. The object as explained in the Statement of Objects and Reasons had been to enable the State authorities to deal with “activities directed against the integrity and sovereignty of India”. The Act also deals with the demands/ assertions of “cession of a part of territory of India from the Union” [section 2 (i)].

7.6 The Act 1967 was amended in 2004¹¹⁰, by which certain provisions of Preventions of Terrorism Act, 2002 (POTA) were incorporated therein. In 2008 the Act 1967 was further amended¹¹¹ whereby provisions of POTA, and Terrorist and Disruptive Activities Act, 1987 (TADA), regarding maximum period in police custody, detention without a chargesheet and restrictions on bail were added. The Act 1967 was also amended in 2012¹¹², removing the vagueness in the definition of ‘terrorist act’ to include offences which may threaten the economic security of the nation.

7.7 In the case of *N.R. Narayana Murthy v. Kannada Rakshana Vakeelara*¹¹³, the Karnataka High Court observed:

According to Article 51A(a), it shall be the duty of every citizen of India to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem. National Flag, National Anthem and the Constitution of India are the symbols of sovereignty and the integrity of the Nation. Public acts of insults to these symbols must be prevented. The Prevention of Insults to National Honour Act, 1971 was enacted and brought on the Statute book. Section 2 of the National

¹¹⁰ The Unlawful Activities (Prevention) Act, 2004 (29 of 2004) (w.e.f.21.09.2004)

¹¹¹ The Unlawful Activities (Prevention) Act, 2008 (35 of 2008) (w.e.f.31.12.2008)

¹¹² The Unlawful Activities (Prevention) Act, 2012 (3 of 2013) (w.e.f.01.02.2013)

¹¹³ AIR 2007 Kant 174

Honour Act deals with insult to Indian National Flag and Constitution of India. Section 3 of the National Honour Act says that whoever intentionally prevents the singing of the Indian National Anthem or causes disturbance to any assembly engaged in such singing shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both". Section 3A prescribes enhanced penalty on second and subsequent convictions under Sections 2 and 3 of the National Honour Act.

7.8 The Supreme Court of India has reiterated the need to contextualise the form of expression before restricting it.¹¹⁴ Similar acts can affect public order in different manner in different context. Stressing on the importance of context, the apex Court in the case of *Arun Ghosh v. State of West Bengal*,¹¹⁵ held that before limiting any speech the following question must be asked:

Does [the speech] lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affects merely an individual leaving the tranquillity of the society undisturbed?

7.9 Constitutional and statutory provisions confer various privileges and immunities on the legislatures and their members¹¹⁶. Articles 129 and 215 give powers to the Supreme Court and High Courts to punish for the contempt of court¹¹⁷. The Contempt of Courts Act, 1971, provides the procedure to deal with the issue. Section 2 of the Prevention of Insults to National Honour Act, 1971, makes an insult to the National flag and the Constitution in the manner set out therein, a punishable offence.

7.10 The Criminal Law Amendment Act, of 1961 was enacted with the purpose of curbing activities that are “likely to jeopardise the security of the country and its frontiers point”¹¹⁸. Section 2 of the Act, deals with cases where someone questions the territorial integrity or frontiers of India, which is likely to prejudice the safety and security of the country, and provides for punishment up to three years. It is notable that under section 3(1), the Central Government may by notification declare ‘any area adjoining the frontiers of India’, as a notified area. In which case, no person shall enter the notified area, without the permission of the designated magistrate notified under section 3(3). The Act empowers under section 3(4) the police officer, not below the rank of sub-inspector of police, to search any person entering or attempting to enter or being in or leaving a notified area. Further section 4 (1), empowers the State Government that if it is of the

¹¹⁴ See *Bobby Art International v. Om Pal Singh Hoon*, AIR 1996 SC 1846.

¹¹⁵ AIR 1970 SC 1228.

¹¹⁶ See also the opinion of Supreme Court in Special reference No. 1 of 1964 AIR 1965 SC 745.

¹¹⁷ See Review of the Contempt of Courts Act, 1971 (Limited to Section 2 of the Act), (2018)

¹¹⁸ Statement of Objects and the reasons, the Criminal Law Amendment Act, 1961.

opinion that any newspaper or book contains material which is in contravention of sections 2 and 3(2) of the Act, it may, by notification and reasons recorded, order the forfeiture of the same. The Act of 1961 was amended in 1990 by Act of 1990 and made publication Map of India by any person which is not in conformity with the map published by the Survey of India, a punishable offence.

7.11 Therefore, before branding any act as seditious, the gravity of the action must be diligently looked into. If the act does not fall within the ambit of sedition, rather attracts the provisions of some other law, such act may be booked under the same.

8 THE WAY FORWARD

8.1 In a democracy, singing from the same songbook is not a benchmark of patriotism. People should be at liberty to show their affection towards their country in their own way. For doing the same, one might indulge in constructive criticism or debates, pointing out the loopholes in the policy of the Government. Expressions used in such thoughts might be harsh and unpleasant to some, but that does not render the actions to be branded seditious. Section 124A should be invoked only in cases where the intention behind any act is to disrupt public order or to overthrow the Government with violence and illegal means.

8.2 Every irresponsible exercise of right to free speech and expression cannot be termed seditious. For merely expressing a thought that is not in consonance with the policy of the Government of the day, a person should not be charged under the section. Expression of frustration over the state of affairs, for instance, calling India 'no country for women', or a country that is 'racist' for its obsession with skin colour as a marker of beauty are critiques that do not 'threaten' the idea of a nation. Berating the country or a particular aspect of it, cannot and should not be treated as sedition. If the country is not open to positive criticism, there lies little difference between the pre- and post-independence eras. Right to criticise one's own history and the right to 'offend' are rights protected under free speech.

8.3 While it is essential to protect national integrity, it should not be misused as a tool to curb free speech. Dissent and criticism are essential ingredients of a robust public debate on policy issues as part of vibrant democracy. Therefore, every restriction on free speech and expression must be carefully scrutinised to avoid unwarranted restrictions.

8.4 In order to study revision of section 124A further, the following issues would require consideration:

- (i) The United Kingdom abolished sedition laws ten years back citing that the country did not want to be quoted as an example of using such draconian laws. Given the fact that the section itself was introduced by the British to use as a tool to oppress the Indians, how far it is justified to retain s.124A in IPC?

- (ii) Should sedition be not redefined in a country like India – the largest democracy of the world, considering that right to free speech and expression is an essential ingredient of democracy ensured as a Fundamental Right by our Constitution?
- (iii) Will it be worthwhile to think of an option of renaming the section with a suitable substitute for the term ‘sedition’ and prescribe punishment accordingly?
- (iv) What is the extent to which the citizens of our country may enjoy the ‘right to offend’?
- (v) At what point the ‘right to offend’ would qualify as hate speech?
- (vi) How to strike a balance between s.124A and right to freedom of speech and expression?
- (vii) In view of the fact that there are several statutes which take care of various acts which were earlier considered seditious, how far would keeping section 124A in the IPC, serve any purpose?
- (viii) Given the fact that all the existing statutes cover the various offences against the individual and / or the offences against the society, will reducing the rigour of s.124A or repealing it be detrimental or beneficial, to the nation?
- (ix) In a country, where contempt of Court invites penal action, should contempt against the Government established by law not invite punishment?
- (x) What could be the possible safeguards to ensure that s.124A is not misused?

8.5 The Commission hopes a healthy debate will take place among the legal luminaries, lawmakers, Government and non-Government agencies, academia, students and above all, the general public, on the above issues, so that a public friendly amendment could be brought about.
