Abstract

The Constitution of India provides the right to freedom, given in articles 19, 20, 21 and 22, with the view of guaranteeing individual rights. The rights to freedom in Article 19(1)(a) expressly guarantee the freedom of speech and expression. The framers of India did not provide absolute right of speech and therefore restricted this freedom with certain reasonable restrictions in article itself. One such restriction is in the interest of sovereignty and integrity of India. The violation of this condition directly invokes the charge of sedition as defined in section 124A of the Indian penal code. The paper analyses the conflict between these two provisions of the constitution and Indian penal code.

I. INTRODUCTION

Freedom of speech is one of the cornerstones of liberal government. The question of how much criticism a government can tolerate is indicative of the self-confidence of a democracy. On that count, India presents a mixed picture where, on the one hand, we regularly see the use of sedition laws to curtail political criticism even as we find legal precedents that provide a wide ambit to political expression. At the heart of the debate on subversive speech is the question of how the law imagines the relationship between speech and action. In thinking of the scope of free speech in relation to public order in Art. 19(2) and sedition in Sec. 124A of the IPC, a key question has been how courts conceptualize the relation between speech and effect. Is someone who advocates the use of violence to overthrow the government entitled to protection under Art. 19(1)(a)? Does a harsh criticism of the government amount to an act that undermines the security of the state or a disruption of public order? In India Article 19 in its broad implication suggests that everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions
without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. In *Romesh Thapar v. State of Madras*\(^1\), it has been observed by Patanjali Shastri, that Freedom of speech and expression lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible.

1.1 Restrictions

As stated earlier the freedom of article 19 is not absolute and it is subjected to reasonable restrictions under Clause (2) of Article 19 of the Indian constitution. This clause enables the legislature to impose certain restrictions on free speech under following heads:

- security of the State,
- friendly relations with foreign States,
- public order,
- decency and morality,
- contempt of court,
- defamation,
- incitement to an offence, and
- Sovereignty and integrity of India.

Reasonable restrictions on these grounds can be imposed only by a duly enacted law and not by executive action. These can be imposed either in the interest of the security of the State\(^2\) or *Friendly relations with foreign States*\(^3\) or *Public order*\(^4\). The expression 'public order' connotes the sense of public peace, safety and tranquility. In *Kishori Mohan v. State of West Bengal*\(^5\), the Supreme Court explained the differences between three concepts: law and order, public order, security of State. Anything that disturbs public peace or public tranquillity disturbs public order. But mere criticism of the government does not necessarily disturb public order. A law punishing the utterances deliberately tending to hurt the religious feelings of any class has been held to be valid as it is a reasonable restriction aimed to maintaining the public order. It is also necessary that there must be a reasonable nexus between the restriction imposed and the achievement of public order.

**Decency and morality:**

The word 'obscenity' is identical with the word 'indecency' of the Indian Constitution. In an English case of *R. v. Hicklin*\(^6\) the test was laid down according to which it is seen 'whether the tendency of the matter charged as obscene tend to deprave and corrupt the minds which are open to such immoral influences'. This test was upheld by the Supreme Court in *Ranjit 1 AIR 1950 SC 124*

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1. AIR 1950 SC 124
2. All the utterances intended to endanger the security of the State by crimes of violence intended to overthrow the government, waging of war and rebellion against the government, external aggression or war, etc., may be restrained in the interest of the security of the State. It does not refer to the ordinary breaches of public order which do not involve any danger to the State.
3. This ground was added by the Constitution (First Amendment) Act of 1951. The State can impose reasonable restrictions on the freedom of speech and expression, if it tends to jeopardise the friendly relations of India with other State.
4. This ground was added by the Constitution (First Amendment) Act, 1951 in order to meet the situation arising from the Supreme Court's decision in Romesh Thapar, s case (AIR 1950 SC 124).
5. AIR 1972SC 1749
6. (1868)
D. Udeshi v State of Maharashtra \(^7\). In this case the Court upheld the conviction of a book seller who was prosecuted under Section 292, I.P.C., for selling and keeping the book *Lady Chatterley's Lover*. The standard of morality varies from time to time and from place to place. The next is *Contempt of court\(^8\)* whereby the constitutional right to freedom of speech would not allow a person to contempt the courts. The clause (2) of Article 19 prevents any person from making any statement that injures the reputation of another. With the same view, defamation has been criminalised in India by inserting it into Section 499 of the I.P.C. *Incitement to an offense* ground was also added by the Constitution (First Amendment) Act, 1951. The Constitution also prohibits a person from making any statement that incites people to commit offence. *Sovereignty and integrity of India* ground was also added subsequently by the Constitution (Sixteenth Amendment) Act, 1963. This is aimed to prohibit anyone from making the statements that challenge the integrity and sovereignty of India. In relation to the above restriction the offender is directly charged with the offence of sedition as defined in section 124 as of the Indian penal code.

### 1.2 Sedition

According to the English Law, sedition embraces all the practices whether by word or writing which are calculated to disturb the tranquility of the State and lead an ignorant person to subvert the Government.\(^9\) Section 124A of the Indian Penal Code defines the offence of sedition as follows: “Sedition. 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”. But Explanation 3 says "Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section".

### II. THE HISTORY OF LEGISLATION

Sedition laws are found in the following laws in India: the Indian Penal Code, 1860 (Section 124 (A)); the Code of Criminal Procedure, 1973 (Section 95); the Seditious Meetings Act, 1911; and the Unlawful Activities (Prevention) Act (Section 2 (o) (iii)). Common to these laws is the idea of ‘disaffection’ that we have inherited from the British. ‘Disaffection’ has been defined as a feeling that can exist only between ‘the ruler’ and ‘the ruled’. The ruler must be accepted as a ruler. Disaffection is the opposite of that feeling, and manifests a lack of, or repudiation of acceptance of a particular government as ruler. The draft Constitution included ‘sedition’ and the term ‘public order’ as grounds on which laws limiting the fundamental right to speech (Article 13) could be framed. However, the final draft of the Constitution eliminated sedition from the list of exceptions to the freedom of speech.

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\(^7\) AIR 1965 SC 881

\(^8\) The expression Contempt of Court has been defined Section 2 of the Contempt of Courts Act, 1971. The term contempt of court refers to civil contempt or criminal contempt under the Act of Defamation

\(^9\) R. v. Salliven, (1868) 11 Cox Cases 5
speech and expression (Article 19 (2)). This amendment was the result of the initiative taken by K M Munshi who proposed these changes in the debates in the constitutional Assembly. The law of sedition was introduced by Sec. 124A of the IPC in 1870 as a draconian measure to counter anti-colonial sentiments, and most major leaders of the independence movement – including Gandhi and Tilak – were tried under this provision. Gandhi ji described Sec.124A as the ‘prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen’. When the constituent assembly deliberated on the scope and extent of restrictions that could be placed on free speech, the prominent exclusion from what eventually became Article 19(2) was the word sedition. In the original draft that was up for discussion, the word sedition had been included as one of the grounds for restriction on speech. A view of the constituent assembly during one of its debates. The question of sedition was debated in the constituent assembly on December 1-2, 1948 and October 16-17, 1949. Of interest is Seth Govind Das’s speech on December 2, 1948, and Somnath Lahiri ‘s speech in CAD III:2, 385-6 and Damodar Swarup’s speech on December 1, 1948. A number of the constituent assembly members took objection to this and reminded the assembly that Indians had suffered greatly through the misuse of sedition laws. T. T. Krishnamachari argued that the word sedition was anathema to Indians given their experience of it and he suggested that the only instance where it was valid was when the entire state itself is sought to be overthrown or undermined by force or otherwise, leading to public disorder.

III. SEDITION AND JUDICIAL INTERPRETATION

The first major case after the first amendment in 1951 is Ram Ji Lal Modi Vs State Of UP10. This was not a sedition case but it was the first one to examine the scope of the words ‘in the interest of’ and ‘public disorder’ in Art. 19(2). The question in this case was whether Sec. 295A of the IPC was protected by Art. 19(2). The petitioner argued that 295A sought to punish any speech which insulted a religion or the religious beliefs of a community but not all insults necessarily lead to public disorder and since the provision covers speech that does not create public disorder, it should be held to be unconstitutional. The Supreme Court disagreed with this interpretation and held that the phrase “in the interests of” has a much wider connotation than “for maintenance of” public order. Thus if certain activities have a tendency to cause public disorder, then a law penalising such activities as an offence cannot but be held to be a law imposing reasonable restriction “in the interests of public order” even if those activities may not actually lead to a breach of public order. The court also held that 295A does not penalise every act of insult, it penalises only those acts of insults which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of a class. The court introduced two tests – “aggravated form”, which defines the criteria for what counts as an insult, and the “calculated tendency” of the insult to disrupt the public order. This is a confusing standard for while interpreting the words “in the interest of”, the court comes close to the bad tendency test with no requirement of any actual proximity between speech and consequence, at the same time it qualifies the bad tendency test with

10 AIR 1957 SC 620
“calculated tendency”. The next major case to deal with these issues was Suptd Central Prison Vs Ram Manohar Lohia in 1960\textsuperscript{11}. The court discussed the idea of public order and observed that under Art. 19(2), the wide concept of “public order” is split up under different heads (security of the state, friendly relations with foreign states, public order, decency or morality etc) and they argued that while all the grounds mentioned can be brought under the general head “public order” in its most comprehensive sense, it was important that “public order” be demarcated from the others. In their understanding, “public order” was synonymous with public peace, safety and tranquillity. In their discussion of Ramji Lal Modi, the court says the distinction between ‘in the interest of’ and ‘for the maintenance of’ does not ignore the necessity for an intimate connection between the law and the public order sought to be maintained by the law. They added that after the word reasonable had been added to 19(2) it was imperative that restrictions have a reasonable relation to the object which the legislation seeks to achieve and must not go in excess of that object. The restriction made “in the interests of public order” must have a reasonable relation to the object to be achieved, i.e., the public order. If the restriction has no proximate relationship to the achievement of public order, it fails the reasonableness test. They approvingly cited the Federal Court, Rex Vs Basudeva\textsuperscript{12} (which established the proximity test where a restriction has to have a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with public order. Lohia therefore introduces a double test – ‘proximity and proportionality’, which is described as the consequences of “introducing an ‘inbuilt autonomy-respecting limitation’ by which the chain of causation (and, by extension, responsibility) between speech and public order disruption is broken when the actions of autonomous, rational individuals intervene”. However, the defining moment came in 1962 when in the landmark In Kedar Nath v. State of Bihar\textsuperscript{13} in which the Supreme Court upheld the constitutionality of Section 124 A, at the same time circumscribing its meaning. In its decision, the Supreme Court distinguished clearly between disloyalty to the government and commenting upon the measures of the government without inciting public disorder by acts of violence. The court upheld the constitutionality of the sedition law, whilst also curtailing its meaning and limiting its application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence. The judges observed that if the sedition law were to be given a wider interpretation, it would not survive the test of constitutionality.. The Court in Kedar Nath, after examining the conflict in standards in the colonial decisions (between “bad feelings” and ‘bad tendency”) observed that since sedition was not included in Art. 19(2) it implied that a more liberal understanding was needed in the context of a democracy. They made a distinction between a strong criticism of the government from those words which excite with the inclination to cause public disorder and violence. They also distinguished between “the government established by law” and “persons for the time being engaged in carrying on the administration”. The court then held

\textsuperscript{11} 1960 SCR (2)821
\textsuperscript{12} AIR 1949 ALL 513
\textsuperscript{13} AIR 1962 SC 955
that “strong words used to express disapprobation of the measures of government with a
view to their improvement or alteration by lawful means would not come within the section.
Similarly, comments, however strongly worded, expressing disapprobation of actions of the
government, without exciting those feelings, which generate the inclination to cause public
disorder by acts of violence, would not be penal”. They argued that what is forbidden are
“words, written or spoken, etc. which have the pernicious tendency or intention of creating
public disorder or disturbance of law and order”. So if Ramji Lal Modi introduced the idea
of “calculated tendency”, in Kedarnath we have the phrase “pernicious tendency”. Does this
effectively bring us back to the bad tendency test? It appears that part of the confusion in
Kedarnath emerges from the eagerness of the court to save Sec. 124A from being
invalidated and towards such end acknowledge that if seditious were interpreted to mean
disaffection in the sense of creating bad feelings alone, it would be invalid on the basis of
exceeding Art. 19(2). It is only by drawing a nexus between speech and consequence in a
manner consistent with Art. 19(2) that the provision is saved. While Kedar Nath cites Ramji
Lal Modi, it completely ignored Ram Manohar Lohia which had reinterpreted Ramji Lal
Modi to develop a strict test of proximity.

One of the most significant tests that have emerged after Lohia and Kedarnath is the
analogy of ‘spark in a powder keg’ in Rangrajan case.\textsuperscript{14} In this case the court observed that
Freedom of expression is the rule and it is generally taken for granted. Everyone has a
fundamental right to form his own opinion on any issue of general concern. He can form
and inform by any legitimate means. Democracy is Government by the people via open
discussion. The democratic form of government itself demands its citizens an active and
intelligent participation is a basic features and a rational process of democracy which
distinguishes it from all other forms of govt. Public discussion on issues relating to
administration had positive value. The court explicitly hold that while there has to be a
balance between free speech and restrictions for special interest, the two cannot be balanced
as though they were of equal weight. One can infer that the courts are making it clear that
exceptions have to be construed precisely as deviations from the norm that free speech
should prevail except in exceptional circumstances. The court observed that our
commitment of freedom of expression demands that it cannot be suppressed unless the
situations created by allowing the freedom are pressing and the community interest is
endangered. 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. The court lays down in no uncertain terms the standard that has to be met
in alleging a relation between speech and effect. The analogy of a spark in a powder keg
brings in a temporal dimension of immediacy where the speech should be immediately
dangerous to public interest. In other words, it must have the force of a elocutionary speech
act in which there is no temporal disjuncture between word and effect. A cumulative reading

\textsuperscript{14} S. Rangarajan vs. P. Jagjivan Ram 1989 SCC (2) 574
of the cases on public order and sedition suggest that as far as subversive speech targeted at the state is concerned, one can infer that even if there is no absolute consistency on the doctrinal tests, there is a consistency in the outer frame, namely that democracy demands the satisfaction of high standards of speech and effect if speech is to be curtailed. Therefore, advocating revolution, or advocating even violent overthrow of the state, does not amount to sedition, unless there is incitement to violence, and more importantly, the incitement is to ‘imminent’ violence. Thus, in Balwant Singh v State Of Punjab the Supreme Court overturned the convictions for ‘sedition’, (124A, IPC) and ‘promoting enmity between different groups on grounds of religion, race etc.’, (153A, IPC), and acquitted persons who had shouted – “Khalistan zindabad, Raj Karega Khalsa,” and, “Hinduan Nun Punjab Chon Kadh Ke Chhadange, Hun Mauka Aya Hai Raj Kayam Karan Da”, late evening on October 31, 1984, i.e. a few hours after Indira Gandhi’s assassination – outside a cinema in a market frequented by Hindus and Sikhs in Chandigarh. And finally the Supreme Court in Arup Bhuyan v State Of Assam has incorporated the Brandenburg standards into Indian law. After citing the Brandenburg test, they explicitly state the following: “We respectfully agree with the above decisions, and are of the opinion that they apply to India too, as our fundamental rights are similar to the Bill of Rights in the U.S. Constitution”. In Nazir Khan v. State of Delhi, the Supreme Court explained meaning and content of sedition. Sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval. 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 tranquility of the state, and lead ignorant persons to endeavour to subvert the Government and laws of the country. The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of the sedition is to incite the people to insurrection and rebellion. The court further observed: "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. The decisive ingredient for establishing the offence of sedition under S. 124-A IPC is the doing of certain acts which would bring to the Government established by law in India hatred or contempt etc. Raising of some slogans only a couple of times by the two lonesome appellants, which neither evoked any response nor any reaction from anyone in the public cannot attract the provisions of S. 124-A. Some more overt act was required to bring home charge of the sedition.
From these judicial observations it is abundantly clear that freedom of speech and expression within the Indian legal tradition includes within its ambit any form of criticism, dissent and protest. It cannot be held hostage to narrow ideas of what constitutes “anti-national” speech and the courts usually step in not merely to defend free speech but also pass strictures on those who abuse the legal process to create a chilling effect on constitutional rights.

IV. RECENT CONTROVERSY OVER FREEDOM OF SPEECH AND SEDITION

The issue of conflict between freedom of speech and sedition has sparked the controversy regarding sedition laws and freedom of speech again. Both the Union Home Minister Rajnath Singh as well as the then Human Resources Minister Smriti Irani has opined that any insult to India will not be tolerated. The incident is also supporting the alleged suicide of Dalit scholar Rohith Vemula after he was suspended from his hostel for activities that the Union minister Bandaru Dattatreya considered “anti-national”. Vemula committed suicide soon after and Dattatreya is now accused of abetting his suicide.

V. CONCLUSION

Today, the law of Sedition in India has assumed controversial importance largely on account of change in the body politic and also because of the constitutional provision of freedom of speech guaranteed as a fundamental right. The media attention and public debate around India’s sedition laws have renewed interest in the manner in which these laws have been used to curb free speech in the country. As we know that going against any form of nationalism is a big deal and, just like religion, is a matter of public morality. As a matter of justified and logical law a liberal state should not be in the habit of outlawing speech just because people’s feelings are hurt. In this context India’s sedition law is fairly liberal as it has given that only speech that directly incites violence against the government is liable to be prosecuted as seditious. But keeping in mind the present scenario it is rather obvious that there is still a need to rethink over this issue and to resolve this conflict in the best interest of citizens as well as the nation. It is clear that freedom of speech and expression within the Indian legal tradition includes within its ambit any form of criticism, dissent and protest. It cannot be held hostage to narrow ideas of what constitutes “anti-national” speech. The major reson of the conflict arises because of the meaning and scope of S. 124-A of IPC and the guarantee of freedom of speech in the Constitution of India and above all the power of the courts under the Constitution to act as the guarantors and protectors of liberties. If we refer to the limits set out by Art. 19(2) as permissible legislative abridgement of the right of free speech and expression, and S. 124-A of the Indian Penal Code the following broad conclusions can be drawn:

20 where the Delhi Police arrested the President of the Jawaharlal Nehru University Students Union for allegedly anti-national speech,

21 www.hindustantimes.com/india

22 Clause (1) of Art. 19 secures "freedom of speech and expression" and clause (2) contains a limitation on the right of freedom of speech guaranteed by clause (1)
Section 124-A IPC is ultra vires the Constitution inasmuch as it infringes the fundamental right of freedom of speech in Art. 19(1) (a) and is not saved by the expression "in the interest of public order".

Section 124-A is not void because the expression "in the interest of public order" has a wider connotation and should not be confined to only one aspect of public order viz. It has a much wider content, and embraces such action as undermines the authority of Government by bringing it into hatred or contempt or by creating disaffection towards it.

Section 124-A IPC is partly void and partly valid. In the sense that S. 124-A seeks to impose restrictions on exciting mere disaffection or attempting to cause disaffection is ultra vires, but the restriction imposed on the right of free-speech which makes it punishable to excite hatred or contempt towards the Government established by law in India, is covered by clause (2) of Art.19 of the Constitution of India and can be held intra vires by the court.

VI. REFERENCES

TO CITE THIS PAPER