THE HINDU CENTRE
for
Politics and Public Policy

Dissent & Democracy: Why the Sentinel Should Strike Down IPC Sec. 124A

EKLAVYA VASUDEV

Activists at a silent protest against the arrest of environmental activist Disha Ravi in Hyderabad on February 20, 2021. The 22-year-old Indian climate activist who was arrested for sedition charges for her alleged role in the creation of an online document was later freed on bail. The bail order said dissent, including disapprobation, "are recognised legitimate tools to infuse objectivity in state policies". Quoting the following couplet from the Rig Veda 'Let Noble thoughts come to me from all directions', the Court said: "An aware and assertive citizenry, in contradistinction with an indifferent or docile citizenry, is indisputably a sign of a healthy and vibrant democracy." File photo: AP / Mahesh Kumar A.

Sedition laws sit at the crossroads of politics and society, and law and justice. The political nature of this "offence against the state" tests the limits of free speech a citizen can rightfully enjoy. India's polity has changed since 1870, when Sedition was added as an offence under Section 124A of the Indian Penal Code (IPC) to govern restive subjects of the British Crown. This stifling legislation, conceived as a colonial tool to incarcerate freedom fighters, continues to be quickly invoked by free India's elected rulers against dissenting citizens, deeply damaging the country's democratic fabric.

This law which chips away at the essence of republican democracy – the right to dissent – has a chequered journey in independent India starting from 1950, when courts upheld free speech. However, the First Amendment to the Constitution put a damper on such liberal judicial interventions. Since then, although judgments urged governments to exercise restraint, the latter chose to unreservedly invoke Sec. 124A to quell dissenters—including protest movements and individuals—expressing views that run afoul of ruling establishments. On May 11, 2022, the Supreme Court accepted the Union Government's plea that it would re-examine Sec. 124A, but suspended pending criminal trials and court proceedings, and said that it "hopes and expects" Union and State governments to refrain from using this legal provision while it is under reconsideration.

In this essay, ***Eklavya Vasudev, a Lawyer and Doctoral candidate in Law at the Friedrich-Alexander-Universität Erlangen-Nuremberg, Germany****, argues the case for a well-reasoned judgment by the Supreme Court striking down Sec. 124A of the IPC in its entirety by asserting its role as the sentinel of the Constitution. Doing so, he points out, will forestall any moves by governments to abuse the law in some form or the other, be consistent with positions taken by previous Supreme Court judgments and give life to the vision of the founders of the Constitution who unanimously voted against using "sedition" to restrict free speech. On the other hand, leaving Sec. 124A as it is, narrowing its scope, or letting the government replace it with either an updated or a different legislation, will mean a judicial nod for the "sedition juggernaut to roll on in one form or the other to thwart dissent in a secular and democratic republic".*

Sedition has become one of those contentious laws that is hotly debated every few years in India for the manner in which it has been misused by elected governments. In the latest instance, as many as nine writ petitions, including by the Editors Guild of India, have questioned the constitutional validity of Section 124A of the Indian Penal Code (IPC). The Government of India, till recently maintained that Sec. 124A was "settled law" and need not be reviewed, or if so, should be done before a larger Bench. However, on May 11, 2022, when the matter came before a three-member Supreme Court Bench headed by the Chief Justice, it suddenly changed tact and said that it would "re-examine" the law. Accepting this position, the Supreme Court directed the Union and State governments to desist from using the law while it is under re-examination.

Related Article and Resources

Article:

The Law of Sedition and India: An Evolutionary Overview, Saptarshi Bhattacharya, August 5, 2022.

Resources:

1. **The Sedition Law in India - Select Resources**.

2. **Resources on Sedition from The Hindu Centre for Politics and Public Policy**.

The essence of the position of those in favour of retaining this 152-year-old legislation is that free speech has its limits, necessitating regulation in situations that may incite public disorder. Liberals, on the other hand, argue that the law is a colonial remnant, out of sync with modern democracies, has been used by successive governments to curb dissent, and has a chilling effect on freedom of speech.

What is striking, however, is that this sedition law has continued to be in use despite sharply opposing views held by the higher judiciary on the very constitutionality of the law. This is evidenced by the contrary judicial even before India's independence. Moreover, after the First Amendment in 1951, the overall standard for when free speech can be restricted was made narrower by the Supreme Court. In more recent times, the Supreme Court has hinted towards the law's possible unconstitutionality but has not issued an authoritative and reasoned judgment on it.

This essay argues that it is crucial for India's democracy that the Supreme Court takes charge of the matter and strikes down the law. Three compelling reasons bolster this position. First, it is the Court's role as the final interpreter of the Constitution to invalidate laws that go *against itsethos*. [Emphases in this essay are by the author]. Second, the manner in which the law has been used over the years clearly points out that successive governments violate the guidelines issued by the Supreme Court and continue to prosecute dissenters under this law. Third, attempts at regulating the effects of the law have not resulted in harmonious interpretation. Therefore, by not settling the matter, the Court, in effect, sanctions the status quo to continue. In the absence of a clear judgment striking down the law, the sedition juggernaut will roll on

It is crucial for India's democracy that the Supreme Court takes charge of the matter and strikes down Sec. 124A.

in one form or the other and continue to be abused by elected governments to thwart dissent in a secular and democratic republic.

Legal and Constitutional issues

Sec. 124A [1] of the IPC [2] defines sedition as:

> **"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 shall be punished with imprisonment for life, to which fine may be added…"**

Further, the Section has three explanations that elaborate on the meaning. The first explanation states that "disaffection" includes disloyalty and feelings of enmity. The word *includes* implies that the grounds specified are not exhaustive. The second and third explanations, in effect, say that comments expressing disapprobation of government measures and actions would not be an offence if the means used are lawful. However, they must not attempt to excite contempt *or disaffection* towards the government. This definition of the law suffers from some grave legal and constitutional issues that are evidenced in both the phrasing and the inconsonant interpretations of the law.

What is 'Government established by law'

A point that must be made at the outset is that the law uses the words "Government established by law" to trigger the offence of sedition. Different political parties in power tend to interpret this phrase to mean that there must be no incitement of hatred and disaffection towards their respective governments. However, it is important to distinguish between "Government established by law" and "a" government. The former means a system of government established by the Constitution. It does not mean the government in power at a particular point of time. In other words, it does not mean an individual or collective reference to persons who are in charge of running the government. This distinction was made even in 1942, during the Crown rule, by the Chief Justice of the Federal Court Maurice Gwyer, who observed in *Niharendu Dutt Majumdar v. The King Emperor* that:

> **"This [sedition] is not made an offence in order to minister to the wounded vanity of Governments, but because where Government and the law cease to be obeyed because no respect is felt any longer for them, only anarchy can follow."**[3]

This distinction was also made eloquently clear in free India as early as 1958 by Justice Desai in *Ram Nandan v. State*[4], where the Allahabad High Court observed that an individual is transitory and that

> **"exciting a feeling of hatred, contempt, or disaffection towards a person holding the office of the President or a Governor or a Minister is, therefore, not exciting such a feeling towards the Government and is not punishable under Section 124A".**

Thus, one criticism against this sedition law and its application is that governments conflate the idea of a system of government with that of individuals in power at a given time. This criticism is crucial as the very idea of this sedition law is to protect the constitutional system implemented by the state.

The *Ram Nandan* judgment also spells out what can and cannot be considered as a threat to "the security of the State" by making a distinction between the constitutionality or otherwise of the act or speech that may result in "public disorder". Pointing out that "the security of the state cannot be threatened by anything done in exercise of the powers conferred by the Constitution", it made clear that "what is meant by 'internal disturbance' is a rebellion or insurrection and not an ordinary breach of the public peace".

It was not the intention of the authors of free India's Constitution to grant immunity to individuals holding power.

Clearly, it was not the intention of the authors of free India's Constitution to grant immunity to individuals holding power. If the intent was to provide mechanisms to avoid criticism and scrutiny by individual citizens, it would lead to a constitutional absurdity. This is because the Constitution itself provides for a change in the individuals who govern the nation through democratic elections. If the intention would have been to protect individuals from criticism, then the Constitution would have granted a perpetual rule to individuals comprising the government!

Vagueness

The multiple and often incongruent interpretations that can be applied to "Government established by law" extends to "disaffection" as well. The second charge against the law of sedition is that it is based on criteria that are unclear. Given that the offence is predicated on disaffection, it is unclear how that word must be interpreted as descriptions of such emotions are by nature obtuse. In a

constitutional democracy, every citizen must have the right to fully understand their legal rights and limitations in simple, clear terms, and the statutes that prescribe arrest and curtailment of liberty must describe which conduct is punishable. [5] Thus, because the law is vague, it provides the space for misuse and arbitrary application by prosecuting authorities. This vagueness leads to the further danger of the wanton abuse of the law through the level of discretion and the unexplained proportion of punishment prescribed under Sec. 124A.

Disproportionate and discretionary

The punishment prescribed under Sec. 124A could be life imprisonment, to which fine may be added, or imprisonment which may extend to three years along with fine. Most other criminal statutes have a narrower margin of discretion for courts. The related arguments against the sedition law are that even minor breaches may be punished with long imprisonment and that there are no clear criteria to distinguish it from more serious infractions which, again, makes it prone to arbitrary application. Criminal laws need to have more clear criteria for sentencing and must be proportionate to the offence committed. [6] This proportionality becomes all the more crucial when there is a suppression of a fundamental right involved. As the right to freedom of speech is a fundamental and constitutional doctrine, any "reasonable restriction" on it should be proportional to the harm it is seeking to curb.

Violates freedom of speech

The idea that there needs to be affection at all times to the state goes against democratic liberties. Citizens should be free to express their discontent with government policies and action in India's constitutional scheme where free speech is a fundamental right under Article 19. The most telling comment on 124A was made by Mahatma Gandhi who, when charged with sedition in 1922, observed that the sedition law was the "prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen". [7] He further stated that "what in law is a deliberate crime…appears to me the highest duty of the citizen". [8] Thus, in his opinion, not only did the sedition law curtail liberty but it also violated the consequent duty of citizens to uphold the truth and speak critically of the government when need be.

In addition to the curb on free speech, the law does not indicate whether speech becomes seditious only if it triggers or can trigger public disorder. Unlike most other criminal laws, the sedition law also does not specify *mens rea* (criminal intent). It is generally a settled principle that for an act to be punishable in criminal law, it must be committed with criminal intent or knowledge that it would

result in a certain outcome. In Sec. 124A, though, anything which could be construed as a disapprobation of the government can be punished, making the law, again, prone to arbitrary misuse. To understand these legal issues in more specificity, it would be useful to trace the legal challenges to the sedition law over the years.

Legal challenges over the years

Sedition was made punishable under the IPC at a time when Indians were subjects of the British Crown. Thus, leading up to the time of India's independence, there had already been several prosecutions under it, most notably that of Bal Gangadhar Tilak and Mahatma Gandhi. The most famous trial under sedition was of Tilak in the case titled *Queen Empress v. Bal Gangadhar Tilak* [9] in which Justice Arthur Strachey defined 'disaffection' in the offence as "the absence of affection." This interpretation did not sit well with several leaders, including Mahatma Gandhi, who, when charged with Sedition in 1922, stated that affection could not be forced by law. And, if one had a lack of affection for a system or person, they should be free to express their disaffection as long as it did not incite or promote violence. [10]Critics of the law also put forward the argument that the fact that India had its own government now, was in itself a reason to not retain a law on sedition. This argument was made forcefully by K.M. Munshi, who stated [11] in the Constituent Assembly that:

> **"Now that we have a democratic Government a line must be drawn between criticism of Government which should be welcome and incitement which would undermine the security or order on which civilized life is based, or which is calculated to overthrow the State. Therefore, the word 'sedition' has been omitted. As a matter of fact, the essence of democracy is criticism of Government."**

Nevertheless, sedition was retained in the IPC despite the criticism. The controversies surrounding the suppression of free speech and forced affection, however, ensured that it was not included in the new Constitution. [12]

Two significant cases on sedition in independent India point to the liberal judicial interpretations favouring free speech. One was *Romesh Thappar v. State* [13] in which a leftist journal, *Cross Roads,* published by Romesh Thapar was challenged owing to the fact that Madras had banned the Communist Party, and as part of that policy banned the journal from circulation. The Supreme Court declared the policy unconstitutional and Thapar won that challenge. [14,15] Another involved the Government's "attempts at pre-censoring" *The Organiser,* published by the Rashtriya Swayamsevak Sangh (RSS), in *Brij Bhushan v. Delhi* [16]*,* which met the same fate as *Thapar.* After these decisions, both

dated May 26, 1950, Vallabhbhai Patel, the then Union Home Minister, wrote to Prime Minister Jawaharlal Nehru in July 1950, stating that the *Cross Roads* and *Organiser* rulings had knocked the bottom out of "most of our penal laws for the control and regulation of the Press." As these two judgments had prevented government measures to curtail free speech, Patel wrote to Nehru: "My own feeling is that very soon we shall have to sit down and consider constitutional amendments." [17]

Later in November of 1950, *Tara Singh Gopi Chand v. State* [18] was decided by the Punjab and Haryana High Court which struck down Sec. 124A and held that:

> **"India is now a sovereign democratic State. Governments may go and be caused to go without the foundations of the State being impaired. 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…The unsuccessful attempt to excite bad feelings is an offence within the ambit of Section 124A. In some instances, at least the unsuccessful attempt will not undermine or tend to overthrow the State. It is enough if one instance appears of the possible application of the section to curtailment of the freedom of speech and expression in a manner not permitted by the constitution. The section then must be held to have become void."**

Meanwhile, in response to Patel's letter, Nehru had constituted a Cabinet Committee to amend Art. 19 [19]. The Statement of Objects and Reasons on May 10, 1951, by Nehru makes it evident that the amendment was a result of the liberal interpretation of Art. 19 by the judiciary:

> **"During the last fifteen months of the working of the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements specially in regard to the chapter on fundamental rights. The citizen's right to freedom of speech and expression guaranteed by article 19(1)(a) has been held by some courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence."** [20]

The Constitution (First Amendment) Act, 1951, which was passed on June 18, 1951, added "reasonable restrictions" to the freedom of speech in Art. 19. More specifically sub-section 2 of Art. 19 now contained the expressions " *friendly relations with foreign states*" [21] and " *public order*" [22] as grounds for reasonable restrictions on free speech. Given that these exceptions could authorise laws supressing dissent, Nehru had to clarify to the Parliament that the amendment was *not validating* offences like sedition. [23]

His address to the Parliament in 1951 stated that:

> **"Take again Section 124A of the Indian Penal Code. 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 variety of ways and apart from the logic of the situation, our urges are against it. I do not think myself that these changes that we bring about validate the thing to any large extent. I do not think so, because the whole thing has to be interpreted by a court of law in the fuller context, not only of this thing but other things as well. Suppose you pass an amendment of the Constitution to a particular article, surely that particular article does not put an end to the rest of the Constitution, the spirit, the languages, the objective and the rest. It only clarifies an issue in regard to that particular article."** [24]

Judicial differences on the constitutionality of Sec. 124A

Nevertheless, despite the amendment to Art. 19, the Allahabad High Court held in 1958, in the case of *Ram Nandan v. State of UP* [25], that the restrictions imposed under Sec. 124A were excessive and curtailed free speech which was contrary to the interests of the public. More importantly, it went on to declare 124A as unconstitutional by ruling that the provisions of Sec. 124A, IPC were void with the enforcement of the Constitution. [26]

However, the judicial nod for free speech *even after* the restrictions introduced by the First Amendment ran into rough weather in 1962, when a five-judge Constitution bench of the Supreme Court held in *Kedar Nath v. State of Bihar* [27] that Sec. 124A had passed constitutional scrutiny. The Court noted that although there were contrary opinions of previous benches on the matter,

> **"every State, *whatever its form of Government*, has to be armed with the power to punish those who by their conduct, jeopardies the safety and stability of the State, or disseminate such feelings of disloyalty as have the tendency to lead to the disruption of the State or to public disorder".**

At the same time, the Court realised the potential for abuse of the law and tried to limit it by issuing guidelines for when speech critical of the government would qualify as sedition. Importantly, the

Court clarified that not all *disaffection* or *contempt* or *hatred* would qualify for the offence to be complete. In addition, there must be incitement or likelihood of inciting "public disorder". [28]

Is *Kedar Nath* "good law"?

The importance of *Kedar Nath* in the current context is that this was the case on which the Solicitor General (SG) based his arguments. He argued that Sec. 124A, as it stands, continued to be good law [29]. This was because the case squarely decided the constitutionality of the sedition law and the guidelines issued in the case brought it in conformity with Articles 14 (right to equality), 19 (freedom of speech), and 21 (right to life) of the Constitution. Further, the reasoning of the judgment has continued to be reaffirmed by courts, including in the recent case of *Vinod Dua v. Union of India* [30]. The SG further argued that in a Common Law system like India, the law declared by the Supreme Court is law of the land under Art. 141 of the Constitution and that precedents are binding for future courts.

However, the SG admits that if there is a constitutional question that is unresolved, or needs a re-look, because it is so patently unconstitutional – which, he argues, was not in this case – then only a larger constitutional bench should re-evaluate the challenged law. Therefore, as *Kedar Nath* was decided by a five-judge constitution bench, the present petition must be referred to a seven-judge bench if the present three-judge bench feels so inclined to do.

Coming back to *Kedar Nath* being "good law", it must be argued that such is not the case. The sedition law continues to be abused and misused six decades after *Kedar Nath*. Although the SG rightly argues that misuse of a law cannot be a reason to challenge its constitutionality, it must be stressed that the misuse in the case of sedition stems both from the uncertain wording of the statute itself *and* the unclear guidelines in *Kedar Nath*. The guidelines did not actually add clarity to the *applicability* of the sedition law. In fact, as A.G. Noorani argued [31], *Kedar Nath* was a judgment relying on old British law (cited and relied on in the judgment) and was contrary to the decision in *Romesh Thapar*. Citing a classic work titled *Freedom of Speech* by Eric Barendt, Professor of Media Law at University of London, Noorani emphasised that Common Law crime in England was obscure and unclear. The British definition of sedition reflected an outdated view of the relationship between the state and society. The doctrine which formed the basis of the law of sedition, that of divine kings who had to be forcefully respected, was clearly not applicable in a democratic society where governments are responsible to the people. [32]

The misuse stems both from the uncertain wording of the statute and the unclear guidelines in Kedar Nath.

Kedar Nath's rationale, which aimed to balance the state's right to protect itself against disloyalty with the rights of citizens to air their views, has not realised its value precisely because it reasoned that the law could be applicable when there was likelihood of "public disorder", a term as vague and laden with the same legal issues as the words "disaffection" and "government established by law". This discord between *Kedar Nath*'s rationale and the actual implementation on the ground can be seen from how the law has played out over the decades that followed the judgment.

Sec. 124A despite *Kedar Nath's* restraining arm

Successive governments have continued to use Sec. 124A even after *Kedar Nath* to book dissidents in violation of the judgment's guidelines. This abuse of the law is because the police invoke only the words mentioned in the statute without taking into cognisance the court's guidelines.

An analysis by *Article 14,* which has established a sedition database, shows that 10,938 individuals were accused of sedition since 2010 [33]. This trend was rightly defined as "frightening" by Justice Madan Lokur, who states that not only dissent but disagreement is now being criminalised. [34]

In the last couple of years, given the visible increase in sedition cases, judges have intermittently expressed ire at the misuse of Sec. 124A. [35] For instance, last year, when there were protests against the Union government's new agriculture laws, a climate activist, Disha Ravi, was booked for sedition for sharing a toolkit to help farmers navigate the government's new laws. The judge who granted her bail, relying on *Kedar Nath,* reiterated the point that there must be *actual incitement* of violence for the section to be attracted. [36] Later, Justice D.Y. Chandrachud of the Supreme Court stopped the Andhra Pradesh Government from using the sedition law against news channels observing that "not everything could be seditious". [37] Again in 2021, the Chief Justice of India, N.V. Ramana, observed that "if the police want to fix somebody, they can invoke Sec. 124A" and that *"everybody is a little scared when this section is invoked*." [38]

It was against this backdrop that the Supreme Court, on May 11, 2022, in *S.G. Vombatkere v. Union of India* and other related writ petitions, including one by the Editors Guild, effectively put Sec 124A on hold. [39] A three-judge Constitution bench led by CJI Ramana, in an interim order, held that "All pending trials, appeals and proceedings with respect to the charge framed under Section 124A of the IPC be kept in abeyance". [40] The Court, which accepted the Government's sudden change in position that it would "reconsider the law", however, said that it "*hopes and expects*" the Union and State

governments to refrain from taking coercive measures under Sec. 124A while the issue is under reconsideration.

The court also went on to say that it was trying to do a balancing act between "*security interests and integrity of the state on one hand, and the civil liberties of citizens on the other*". [41] And, herein lies the problem. The result of not handing down a final judgment creates continuity of the *status quo*.

The costs of judicial uncertainties

a) Court's role in the constitutional scheme

Respectfully, it must be said that the pre-eminent role of the Supreme Court is to act as the arbiter of the Constitution. As the Court has itself stated on many occasions, the judiciary acts and operates as the *sentinel on the qui vive*[42,43]. The Court has also unequivocally stated that no organ of the state has unfettered powers. The Constitution has devised a structure of power relations with checks and balances and it is the Court's duty to uphold and enforce constitutional limitations. [44]

Critics have argued that of late the Court has minimised its interference against excesses of the executive. [45] Perhaps this is due to the fact that it is trying to curtail its usually activist character. However, when it comes to violations of Fundamental Rights like free speech, the Court must be decisive. Its intent is already evident from the nudges and censures it has made in the recent past regarding the issue.

Thus, a well-reasoned judgment striking down the sedition law is what is needed. If the Court waits for the legislature to reconsider the issue, then there is the danger of the law being brought back in another form. That the other solution – asking governments to exercise restraint and apply the principles set out in judgments – has not worked is evident. The sheer diversity of matters in which the law has been invoked to incarcerate dissidents in recent times, despite the *Kedar Nath* guidelines and important subsequent judgments like *Balwant Singh v. State of Punjab* [46] where the Court held that the *real intent* of a speech should be taken into account before assessing it to be seditious, stand as testimonies to such flagrant violations.

b) How prosecution under Sec. 124A has played out

A recent analysis by *TheIndian Express,* which documented 14 important sedition cases in the past year, showed that governments across India — ruled both by the BJP and the Indian National Congress —

have invoked sedition to cover a wide range of alleged offences. [47] Details of some of these cases bear this out. For instance, in Uttar Pradesh, Dr. Neeraj Chaudhary was booked by Bijnor Police for shouting "Pakistan zindabad" slogans. In Chhattisgarh, a case was filed against the former IG of Raipur because material was found in his diaries which had "inflammatory pieces of writing" against the government. In Assam, a journalist, Anirban Roy Choudhury, was booked in December 2021, for an editorial published on the arrest of a politician. In Gujarat, an advocate, Suhil Mor, was arrested for circulating an objectionable statement about Chhatrapati Shivaji in a housing society WhatsApp group. In Haryana, a Khap leader, Sunil Gulia, was arrested in January 2021, for uploading a video on social media vowing to attack the government with a canon. The analysis documents similar action taken in other States as well. [48]

In effect, what these several instances demonstrate is that despite the Supreme Court having issued guidelines for the application of sedition from as early as the 1960s and the repeated nudges and remarks over the decades, governments across India continue to invoke sedition even for flimsy remarks. Other examples include "celebrating Pakistan's victory" [49] against India in a cricket match, and the odd case of an entire village being charged with Sedition in Tamil Nadu for the Kudankulam protests. [50] Although the case against the Kudankulam protesters was withdrawn, it is indicative of the manner in which the law can be invoked. Given these trigger-happy reactions by governments, the Court has to step up to its constitutional obligations and protect the freedom of speech guaranteed to every Indian citizen under Art. 19. It cannot continue the previous strategy of nudging as it has clearly not worked.

c) Uncertainty in the application of the law

Another reason that calls for a clear striking down of the Sec. 124A is the inability of *Kedar Nath* to ensure that governments interpret the guidelines in a uniform manner. This inherent lack of uniformity in the application of the law is a cause for the continued filing of cases under this section. The case for striking down the Section is further sharpened as the judiciary's recent nudging the government to do away with the law has not had the desired effect. Even the government's position to reconsider the law, as per a news report, is admittedly because "the directions came from the Prime Minister", which resulted in the "departure from the government's stand of refusing to entertain any opinion against the sedition law" [51]. That said, the same news report also quoted the Union Law Minister, Kiren Rijiju, as follows: "The government will *reconsider and change the provisions as per the need of the present time*" – a clear pronouncement that it was not in favour of doing away with the law [52]. With regard to the Prime Ministerial "directions", it must be stressed that a consideration of a law's

constitutionality cannot and should not depend on individual directions from transitory governments of the day or individuals. It is, in fact, the Court's duty to address a constitutional infirmity and give it the stamp of institutional authority. Doing so will insulate it from directives from individuals, howsoever well-intentioned the latter may be, and enshrine the rule of law.

Meanwhile, the Court, in other cases, has itself made the test under Art. 19(2)—for when speech can be curtailed lawfully—stricter. As Gautam Bhatia notes, the Court has defined a steadily required link between speech and resultant disorder to be proximate. [53] This is also consistent with reasoning in a similar scenario by the U.S. Supreme Court mentioned by the Law Commission of India in its Consultation Paper on Sedition. [54] In *Schenck v. United States* [55]while judging the validity of the Sedition Act 1918 enacted by the U.S. Congress, the Supreme Court of the United States held that:

> **"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."**

In India, this was held in the case of *Superintendent v. Ram Manohar Lohia*[56]. In *S. Rangarajan v. P. Jagjivan Ram*[57], the Court said that the link was to be like a "spark in a powder keg" and in *Arup Bhuyan v. State of Assam*[58] increased the standard to incitement of immediate violence. This was reiterated in *Shreya Singhal v. Union of India*. [59] Bhatia notes that since the incitement of violence standard is the current legal test, no interpretation of Sec. 124A can be made that "can square the words of the section with the legal test".

This leads one back to the need that the court makes the law clear in this regard, and if it has to be consistent with its own precedent in other cases it must strike down Sec. 124A. Allowing the government to reconsider the law will not solve that problem.

Conclusion

The fact of the matter is this: India has evolved from being a British colony to a country which the world applauds for democratic values. But while India has evolved, some archaic laws, in this case sedition, have not. Laws are enacted to regulate social conduct but it is also social realities that dictate which laws are enacted.

India's sedition law was enacted when the reality, both of India and the world, was different. Colonial rule was okay. Most polities were not democracies. The League of Nations, that later became the United Nations, had not come together. Genocides were still not a crime against humanity. Although the present reality still has a myriad of problems, freedom of speech and expression is the foundation of the free world and is *binding*in India's constitutional scheme. Restrictions on this freedom based on a colonial law which inherently aims to suppress dissent cannot and should not continue. And, given the law's chequered history in India's case, the judiciary must put an end to it once and for all.

Ironically, although jurisprudence from the U.K. and the U.S. is continued to be selectively relied on by the Indian lawyers and the judiciary, these have been disregarded in the case of the sedition law. While the U.S., for instance, in the First Amendment to its constitution, *prevented* its government from making laws abridging the freedom of speech, India's first constitutional amendment *added* restrictions on free speech. Furthermore, the British government which had first enacted the sedition law in India itself abolished sedition in the U.K. in 2009, finding it to be 'unnecessary' and having a 'chilling effect' on free speech. [60]

Britain abolished sedition in 2009, as it was 'unnecessary' and had a 'chilling effect' on free speech.

Other laws that fetter free speech

A number of other laws put similar fetters on free speech in India and these include Sections 153A of the IPC (promoting enmity between different groups on ground of religion, race, place of birth, etc.), 153B (imputations, assertions prejudicial to national integration), 505 (statements conducive to public mischief) and 505(2) (statements creating or promoting enmity, hatred or ill-will between classes). Add to this Sec. 13 (1) of the Unlawful Activities (Prevention) Act, 1967 (UAPA) which states that "Whoever: (a) takes part in or commits, or (b) advocates, abets, advises or incites the commission of, any unlawful activity...." shall be punishable with imprisonment for a term which may extend to seven years. The definition of "Unlawful activity" under Sec. 2(1)(o)(iii) of the UAPA is very similar to the definition of sedition contained in Sec. 124A IPC.

Now, if the government *revisits* or *revises* the sedition law, not only does it continue in some form but it will also continue to provide credence to all of these related provisions. On the other hand, if the Supreme Court *strike it down*, the constitutionality of the related sections would also become suspect.

Even if the Union government decides to do away with Sec. 124A IPC, the result is different from the Court striking it down. This is because the Union government can continue to apply similar laws

which *only it* can apply, given the constitutional scheme, for the other sections. Removing it will only oust the jurisdiction of local and State governments.

The requirement for judicial assertiveness in this case is bolstered by the need to prevent the use of stifling laws from becoming a monopoly of a government at the centre. The most important reason, however, remains that it is the Court's duty to resolve constitutional infirmities. If laws that go against the constitution's mandate are allowed to continue for decades and centuries, the damage to both India's polity and the state is incalculable. The Supreme Court, as the sentinel of the Constitution, should prevent that.

*[**Eklavya Vasudev** is a lawyer and co-founder of Neev Foundation for legal aid, a public charitable trust that aims to promote access to justice. He has previously worked at Lawyers Collective, been a judicial law clerk at the Delhi High Court and a Junior Counsel at the Chambers of Senior Advocate Gopal Subramaniam. He also worked at the O'Neill Institute for Global Health Law in Washington DC and the Indian Institute for Human Settlements in Bangalore. He has a master's in Law from Georgetown University, USA and is currently a Konrad Adenauer Stiftung doctoral scholar at the Friedrich-Alexander-Universität Erlangen-Nürnberg where he is researching on Comparative Constitutional Law approaches to Climate Litigation. He can be reached at eklavyavasudev@gmail.com. The views expressed here are personal.]*

References:

[*All URLs are last accessed on July 21, 2022*]

1. 124A. 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, [102] [***] the Government established by law in [103] [India], [***] shall be punished with [104] [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. Explanation 1. —The expression "disaffection" includes disloyalty and all feelings of enmity. Explanation 2. —Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section. Explanation 3. —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.

2. The Indian Penal Code, Arrangement of Sections, 1860 Act No. 45 of 1860 [October 6, 1860]. [https://legislative.gov.in/sites/default/files/A1860-45.pdf].

3. **Federal Court Reports. 1942**. *Niharendu Dutt Majumdar v The King Emperor*, Mar - Apr, pp. 38-53. [https://tinyurl.com/2v2f3ywu].

4. 1959 CriLJ 1.

5. **Ahmad, N. M and Sharma, A. 2022.***Blasphemy & Sedition Laws: Why these are affecting the actualisation of free speech*, Mojo Story, June 15. [https://mojostory.com/pov/blasphemy-law/]. last accessed on June 17, 2022.

6. **Malimath J, V. S. 2003**. *Committee on Reforms of Criminal Justice System*, Volume I.

7. **Alam, M. 2019**. Book Review: Chronicling the Mis (Use) of Sedition Law in India, *The Wire*, September 1. [https://thewire.in/law/book-review-chronicling-the-misuse-of-sedition-law-in-india]. last accessed on July 6, 2022.

8. **Masoodi, A. 2019**. *Republic of dissent: Gandhi's sedition trial*, Live Mint, January 25. [https://www.livemint.com/politics/news/republic-of-dissent-gandhi-s-sedition-trial-1548352744498.html]. last accessed on July 6, 2022.

9. (1897) I.L.R. 22 Bom. 112, 151.

10. **Omer, R. 2020**. India's sedition law is just another colonial hangover and has no place in a democracy, Dawn, February 4. [https://scroll.in/article/952017/indias-sedition-law-is-just-another-colonial-hangover-and-has-no-place-in-a-democracy]. last accessed on June 17, 2022.

11. **Chibber, M. 2019**. How our Constitution makers debated & rejected the draconian sedition law, *The Print*, January 26. [https://theprint.in/opinion/how-our-constitution-makers-debated-rejected-the-draconian-sedition-law/183548/]. last accessed on June 17, 2022.

12. **Ibid**.

13. 1950 AIR 124.

14. **Daniyal, S. 2015**. *Why Nehru and Sardar Patel curbed freedom of expression in India*, Scroll, January 13. [https://scroll.in/article/700020/why-nehru-and-sardar-patel-curbed-freedom-of-expression-in-india]. last accessed on July 6, 2022.

15. Supra at n. 13.

16. 1950 SCR 605.

17. **Chandrachud, A. 2016**. Of curbs to free speech, *The Hindu,* July 27. [https://www.thehindu.com/opinion/op-ed/Of-curbs-to-free-speech/article14509786.ece]. last accessed on July 24, 2022.

18. 1951 CriLJ 449.

19. Article 19. Protection of certain rights regarding freedom of speech etc.

(1) All citizens shall have the right

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) omitted

(g) to practise any profession, or to carry on any occupation, trade or business

(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause.

(4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause.

(5) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

20. Ministry of Law and Justice (1951), The Constitution (First Amendment) Act, 1951, Statement of Objects and Reasons (May 10), and Act (June 18). Government of India. [https://legislative.gov.in/constitution-first-amendment-act-1951].

21. The inclusion of this clause is to be seen against the backdrop of differences between Jawaharlal Nehru and Syama Prasad Mookherjee, the founder of the Bharatiya Jan Sangh, the predecessor party of the ruling Bharatiya Janata Party (BJP), on India's approach to Pakistan and the latter's public speeches. (Note 17 Supra).

22. **Kashyap, S. C. 2018**. Citizens and the Constitution (Third Edition), Publications Division, Government of India. p.133. "This ground was added by the 1951 Amendment to overcome the situation arising out of the Supreme Court judgment in the Romesh Thapar's case."

23. **Narrain, S. 2011**. 'Disaffection' and the Law: The Chilling Effect of Sedition Laws in India, *Economic and Political Weekly*, Vol. 46(8), pp. 33–37.

24. **Kashyap, S. C. 1998**. 100 Best Parliamentary Speeches 1947-1997, Harper Collins Publishes, India, p.241.

25. 1959 CriLJ 1.

26. Supra at n. 23.

27. 1962 AIR 955.

28. **Vishwanath, A. 2022**. Explained: What is the sedition law, and why Supreme Court's fresh directive is important, *The Indian Express*, May 12. [https://indianexpress.com/article/explained/sedition-law-explained-origin-history-legal-challenge-supreme-court-7911041/]. last accessed on June 17, 2022.

29. Written Submissions by the Solicitor General in *Vombatkare V Union of India.* Supreme Court Observer. [https://www.scobserver.in/wp-content/uploads/2021/07/v5-Final-Reference-Sedition-Submissions-SGI-TRM.pdf].

30. 2021 SCC Online SC 414.

31. **Noorani, A. G. 2020**. The plague of sedition, *Frontline*, March 13. [https://frontline.thehindu.com/the-nation/the-plague-of-sedition/article30913046.ece]. last accessed on July 6, 2022.

32. Supra at n. 30.

33. **Purohit, K. 2021**. *Our New Database Reveals Rise in Sedition Cases in the Modi Era*, Article 14, February 2. [https://www.article-14.com/post/our-new-database-reveals-rise-in-sedition-cases-in-the-modi-era]. last accessed on July 7, 2022.

34. **Ibid**.

35. **Vasudev, E. 2022**. Costs, Konrad Adenauer Stiftung, May 10. [https://www.kas.de/en/web/indien/single-title/-/content/sedition-in-india-origins-challenges-and-reputational-costs]. last accessed on June 17, 2022.

36. **BBC. 2021**. *Disha Ravi: India activist, 22, granted bail by court*, February 23. [https://www.bbc.com/news/world-asia-india-56164865]. last accessed on June 17, 2022.

37. **Anand, U. 2021**. It's time we define what is and is not sedition: SC, *Hindustan Times*, June 01. [https://www.hindustantimes.com/india-news/its-time-we-define-what-is-and-is-not-sedition-sc-101622486269556.html]. last accessed on June 17, 2022.

38. ***The Indian Express*. 2021**. Why Section 124A. July 17. [https://indianexpress.com/article/opinion/editorials/section-124a-supreme-court-sedition-chief-justice-n-v-ramana-7408463/]. last accessed on June 17, 2022.

39. **Parthasarthy, S. 2022**. In abeyance of Section 124A, a provisional relief, *The Hindu*, May 16. [https://www.thehindu.com/opinion/lead/in-abeyance-of-section-124a-a-provisional-relief/article65417140.ece]. last accessed on June 17, 2022.

40. **Rajagopal, K. 2022**. Supreme Court puts colonial sedition law on hold, *The Hindu*, May 11. [https://www.thehindu.com/news/national/sc-asks-centre-states-to-not-file-fresh-firs-in-sedition-cases/article65403622.ece]. last accessed on June 17, 2022.

41. WP (C) 682/2021.

42. French phrase for watchful guardian.

43. V.G. Row's case AIR 1952 SC 196.

44. **Pai, V. S. 2022**. *The Constitution and the Court- Sentinel on the Qui Vive*, CMR Journal for Contemporary Legal Affairs, February 18.

45. **PTI. 2022**. Supreme Court's record of 'judicial evasion' most disheartening: CPI(M), *Deccan Herald*, April 28. [https://www.deccanherald.com/national/supreme-courts-record-of-judicial-evasion-most-disheartening-cpim-1104768.html]. last accessed on June 17, 2022.

46. 1995 (1) SCR 411.

47. ***The Indian Express.*** **2022**. Social media posts to texts, why all parties love the sedition law, May 11. [https://indianexpress.com/article/india/social-media-posts-to-texts-why-all-parties-love-the-sedition-law-7904949/]. last accessed on June 17, 2022.

48. **Ibid**.

49. **Sharma, S. and Bukhari, F. 2021**. Indian State threatens sedition charges for celebrations against celebrations of Pakistan cricket win, *Reuters,* October 28. [https://www.reuters.com/world/india/indian-state-threatens-sedition-charges-celebrations-pakistan-cricket-win-2021-10-28/].

50. **Ghosh, S. 2016**. Were 7000 people really charged with sedition in Kudankulam?, Newslaundry, March 14. [https://www.newslaundry.com/2016/03/14/were-7000-people-really-charged-with-sedition-in-kudankulam]. last accessed on July 18, 2022.

51. **Financial Express. 2022**. Directions to re-examine sedition law came from PM Modi: Law Minister Kiren Rijiju, May 10. [https://www.financialexpress.com/india-news/directions-to-re-examine-sedition-law-came-from-pm-modi-law-minister-kiren-rijiju/2518801/]. last accessed on July 18, 2022.

52. Supra at n. 43.

53. **Bhatia, G. 2022**. The Upcoming Sedition Case before the Supreme Court: Key Issues, Indian Constitutional Law and Philosophy Blog, May 2. [https://indconlawphil.wordpress.com/2022/05/02/the-upcoming-sedition-case-before-the-supreme-court-key-issues/]. last accessed on June 17, 2022.

54. **Law Commission of India. 2018**. Consultation Paper on Sedition, Government of India, August 30. [https://lawcommissionofindia.nic.in/reports/CP-on-Sedition.pdf]. last accessed on July 6, 2022.

55. 249 US 47 (1919).

56. 1960 AIR 633.

57. 1989 SCC (2) 574.

58. (2011) 3 SCC 377.

59. AIR 2015 SC 1523.

60. ***The Times of India*. 2022**. UK killed sedition law for its chilling effect on free speech, May 12. [https://timesofindia.indiatimes.com/world/uk/uk-killed-sedition-law-for-its-chilling-effect-on-free-speech/articleshow/91505310.cms] last accessed on July 18, 2022.