IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL WRIT JURISDICTION

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

WRIT PETITION (CRIMINAL) NO. _____OF 2021

IN THE MATTER OF:

People's Union for Civil Liberties & Anr. ...PETITIONERS

VERSUS

Union of India ...RESPONDENT

WITH

I.A. NO. _____ OF 2021: APPLICATION SEEKING EXEMPTION FROM FILING DULY AFFIRMED AFFIDAVIT AND VAKALATNAMA

PAPER-BOOK

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MS. APARNA BHAT
ADVOCATE FOR THE PETITIONERS:

SYNOPSIS

In the present Writ Petition filed under Article 32 of the Constitution, Sedition under Section 124A of the Indian Penal Code, 1860 ("IPC") has been challenged. It may be mentioned at the outset that in another Writ Petition (Crl.) No. 106 of 2021, this Hon'ble Court has issued notice and on 12.07.2021 has asked the Attorney General to respond. It is submitted that the Petitioners have dealt comprehensively with the issue of Sedition and have raised several questions some of which are not covered by Writ Petition (Crl.) No. 106 of 2021. The question regarding constitutional validity of sedition being important, it is prayed that this Hon'ble Court may pass necessary orders in the present Petition.

A brief history is necessary to understand how the provision regarding sedition was introduced in India. In India, the law of sedition was introduced in 1870 into the IPC, as derived from the British Sedition Act of 1661, as a colonial tool to criminalise dissent against the British imperialist regime, and in particular to supress the Indian independence struggle. Thus, since its conception, sedition has possessed a distinctly political nature and has been used to stifle political opposition and criticism of the British Monarchy.

The Indian Penal Code, 1860 originally did not include the offence of Sedition. The section corresponding to Section 124A was originally Section 113 of Macaulay's Draft Penal Code of 1837-39, but the said section was omitted from the Indian Penal Code as it was enacted in 1860. The reason for the omission from the Code as enacted is not clear. Section 124A was placed in the Statute books in 1870 when the Legislative Council of the Governor General amended the Indian Penal Code, 1860 by Act XXVII of 1870 and introduced Section 124A, being a revised version of Clause 113 in the draft code. However, in spite of insertion of Section 124A into the Indian Penal Code, 1860, there was no prosecution or trial under the said Section for 21 years i.e., until 1891. The Section was amended by the Indian Penal Code Amendment Act IV of 1898 and also by subsequent amendments in 1937, 1948 and 1950.

The Section, in its original form as well as in its present form, uses vague and overbroad expressions and is in the words of the framers of the Constitution "of doubtful and varying import." The impugned Section is violative of Articles 14, 19(1)(a) and 21 of the Constitution which aspect has been dealt with in detail in the Petition. The terms used are open to different interpretations. As a matter of fact, these broad terms were used purposely by the British regime to incriminate and suppress any kind of dissent. In the pre-independence era, a number of landmark cases on Sedition were decided by the Federal Court as well as the Privy Council. Not surprisingly, these two judicial bodies took diametrically opposite positions on the meaning and scope of Sedition as a penal offence as explained below.

During the freedom struggle, sedition was invoked against many freedom fighters including Mahatma Gandhi and Bal Gangadhar Tilak. In the trial which took place against Bal Gangadhar Tilak, the Court gave a wide meaning to the term disaffection to include a mere lack of affection or feeling that included any kind of hatred, enmity, dislike, hostility, contempt or any other form of ill-will against the Government. During the repressive British rule in India, Tilak was tried 3 times for sedition i.e. in 1897, 1908 and 1916. Mahatma Gandhi was also charged for sedition and while appearing before the court he referred to the nature of Section 124A in the following words:

> *"Section 124A under which I am happily charged is perhaps the prince among the political Sections of the IPC designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by the law.. I have studied some of the cases tried under it; I know that some of the most loved of India's patriots have been convicted under it. I consider it a privilege, therefore, to be charged under that Section… I hold it to be a virtue to be disaffected towards a Government which in its totality has done more harm to India than any previous system…What in law is a deliberate crime appears to me to be the highest duty of a citizen."*
>
> "*My experience of political cases in India leads me to the conclusion that in nine out of every ten, the condemned men were totally innocent. Their crime consisted in the love for their country."*

In the case of *Niharendu Dutt Majumdar v. the King Emperor* AIR 1942 FC 22, the Federal Court interpreted the offence of sedition by holding that "the acts or words complained of must either incite disorder or must be of such nature as to

satisfy a reasonable man that that is their intention or tendency". The said view of the Federal Court was overruled by the Privy Court in *King Emperor v. Sadashiv Narayan Bhalerao* AIR 1947 PC 82 by holding that incitement of feeling of enmity to the government is sufficient to make one guilty of sedition.

The Petitioners have referred to the debates in the Constituent Assembly on sedition as it was initially mentioned in Article 13(1)(a) of the Draft Constitution. Everyone in the Constituent Assembly opposed the inclusion of sedition in the Draft Constitution and wanted that sedition be deleted from Article 13(2). Accordingly, sedition was deleted from Article 13(2) which later became Article 19(2) of the Constitution. The views expressed by some of the members are quoted below:

Shri T. T. Krishnamachari stated that the value of the amendment related to deletion of Sedition was for him, to a very large extent, sentimental:

> *"Sir, in this country we resent even the mention of the word 'Sedition' because all through the long period of our political agitation that word 'Sedition' has been used against our leaders, and in the abhorrence of that word we are not by any means unique… That kind of abhorrence to this word seems to have been more or less universal even from people who did not have to suffer as much from the import and content of that word as we did."*

Shri M. Ananthasayanam Ayyangar stated:

> *"The word 'Sedition' has been removed. 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 altogether."*
>
> [Emphasis supplied]

What Sardar Bhopinder Singh Man said is quite apposite:

> *"I regard freedom of speech and expression as the very life of civil liberty, and I regard it as fundamental. For the public in general, and for the minorities in particular, I attach great importance to association and to free speech. It is through them that we can make our voice felt by the Government, and can stop the injustice that might be done to us. For attaining these rights, the country had to make so many struggles, and after a grim battle succeeded in getting these rights recognised. But now, when the time for their enforcement has come, the Government feels hesitant; what was deemed as undesirable then is now being paraded as desirable. What is being given by one hand is being taken away by the other. Every clause is being hemmed in by so many provisos. To apply the existing law in spite of changed conditions really amounts to trifling with the freedom of speech and expression… To my mind, suppression of lawful and peaceful opposition means heading towards fascism."*
>
> [Emphasis supplied]

Though Sedition was removed from Article 19, it remained in the IPC under Section 124A. In *Romesh Thappar v. State of Madras* AIR 1950 SC 124 and *Brij Bhushan v. State of Delhi* AIR 1950 SC 129 (both judgments given on 16.05.1950), Article 19(1)(a) and (2) were subject matters of discussion. The majority speaking through Patanjali Shastri, J. struck down the impugned provisions by taking a broader view of freedom of speech and expression whereas Fazal Ali, J. in minority took a narrow view. This led to the first amendment in the Constitution in 1951. For convenience, 19(2) before the first amendment and after amendment are presented in a tabular form:

"Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to,	*"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*

libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."	*reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of 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."*

It can be seen from the above that the expression 'reasonable restriction' as well as 'friendly relations with foreign States', 'public order' and 'incitement to an offence' were added after the first amendment. The said amendment was the subject matter of serious discussion in the Parliament. The views expressed by Pandit Jawaharlal Nehru, the then Prime Minister of India, are important.

> *"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 the matter in other ways, in more limited ways, as every other country does but that particular thing, as it is, should have no place…*
>
> *I do not think myself that these changes that we bring about validate the thing to any large extent …. 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..."*
> [Emphasis Supplied]
>
> Parliamentary Debates of India, Vol. XII, Part II

It is clear from the above that Pandit Nehru not only said that restrictions on freedom of speech have to be reasonable but found the law of sedition to be objectionable and obnoxious in free India.

After the first amendment came, this Hon'ble Court gave several important judgments including in the case of *State of Madras v. V.G. Row* AIR 1952 SC 196 explaining the meaning of the term "reasonableness". The judgment in

Superintendent, Central Prison, Fatehgarh v. Dr. Ram Manohar Lohia AIR 1960 SC 633 laid down the meaning of "public order". This was followed by the judgment in *Kedar Nath Singh v. State of Bihar* AIR 1962 SC 955 where validity of Section 124A was discussed. The Constitution Bench judgment delivered by Sinha CJ refers to the history of Sedition in Para 10 onwards. The challenge made to the said provision is considered in several foreign cases (up to Para 20). In Para 21, the judgment in *Romesh Thappar* and *Brij Bhushan* have been considered in detail, in particular, reference has been made to Para 14 of the minority judgment in *Brij Bhushan*. Thereafter, in Para 22 it is observed that the differences in *Romesh Thappar* and *Brij Bhushan* led to the first Constitutional Amendment which was made with retrospective effect. The Para also says (with respect, erroneously) that the amendment indicates that "it accepted the statement of law as contained in the dissenting judgment of Fazal Ali J." As discussed above, the said statement may not be the accurate position. Thereafter, from Para 24, Article 19 has been quoted and discussed. Para 25 is important which is analysed below. At the end, the judgment relies on *R.M.D. Chamarbaugwalla vs. Union of India (supra)* to hold that the interpretation following the Federal Court judgment in *Niharendu Dutt Majumdar v. King-Emperor* would bring Sec.124A within constitutional limits.

That the passage in Para 25 consists of three parts: first part deals with the content of free speech and the extent of criticism which can be made by an individual; the second part discusses the rationale for retaining sedition. It reads as follows –

> *First part:*
>
> *"25. It has not been contended before us that if a speech or a writing excites people to violence or have the tendency to create public disorder, it would not come within the definition of "sedition." What has been contended is that a person who makes a very strong speech or uses very vigorous words in a writing directed to a very strong criticism of measures of Government or acts of public officials, might also come within the ambit of the penal section. But in our opinion, such words written or spoken would be outside the scope of the section. In this connection, it is pertinent to observe that the security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with a 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 qua non of a democratic*

form of Government that our Constitution has established. This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression with which we are concerned in this case. 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.*** *The Court has, therefore, the duty cast upon it of drawing a clear line of demarcation between the ambit of a citizen's fundamental right guaranteed under Article 19(1)(a) of the Constitution and the power of the legislature to impose reasonable restrictions on that guaranteed right in the interest of, inter alia, security of the State and public order.*

Second part:

We have, therefore, to determine how far the Sections 124-A and 505 of the Indian Penal Code could be said to be within the justifiable limits of legislation. If it is held, in consonance with the views expressed by the Federal Court in the case of Niharendu Dutt Majumdar v. King-Emperor that the gist of the offence of ***"sedition" is incitement to violence or the tendency or the intention to create public disorder by words spoken or written, which have the tendency or the effect of bringing the Government established by law into hatred or contempt or creating disaffection in the sense of disloyalty to the State,*** *in other words bringing the law into line with the law of sedition in England, as was the intention of the legislators when they introduced Section 124-A into the Indian Penal Code in 1870 as aforesaid, the law will be within the permissible limits laid down in clause (2) of Article 19 of the Constitution.*

Third Part

> *If on the other hand we give a literal meaning to the words of the section, divorced from all the antecedent background in which the law of sedition has grown, as laid down in the several decisions of the Judicial Committee of the Privy Council, it will be true to say that the section is not only within but also very much beyond the limits laid down in clause (2) aforesaid."*
>
> (Emphasis supplied)

From the above, it comes out that the validity of Sec.124A was sustained on the basis that if the finding given by Federal Court in *Niharendu Dutt AIR 1942 FC 22* is accepted, in other words, bringing the law into line with the law of Sedition in England as was the intention of the legislators when they introduced 124A into the IPC in 1870, sedition will fall within permissible limits under Art.19(2). This is the grave error committed in *Kedar Nath*, namely, that it has followed the judgment of the Federal Court; it has construed the provision in harmony with how the provision is understood in England and what was the intention of legislature when they introduced Sec.124A. In fact, the next Para in the case of *Kedar Nath* admits that if literal meaning to the words of Section 124A are given *de hors* what was said in the Judicial Committee, the Section will be beyond the limits of Art.19(2).

The Petitioners submit that Section 124A IPC was not considered and analyzed by *Kedar Nath* on the following among other grounds:

1. Debates in the Constituent Assembly related to Sedition;
2. Debates in the Parliament when First amendment took place;
3. Development & interpretation of Article 19(1)(a) post the First amendment;
4. Whether there is any relevancy of the provision in the independent India;
5. Whether 124A constitutes a "reasonable" restriction in view of V.G. Row (supra);
6. Whether there is any proximate nexus between 'public order' and the expressions used in the impugned provisions in view of the law laid down in Superintendent, Central Prison (supra);
7. Vagueness and overbreadth of the expressions used in the impugned provision;
8. Vagueness and overbreadth of the expression 'tendency' which was read into 124A provision in *Kedar Nath* to uphold its validity.

The "tendency test" which *Kedar Nath* read into the impugned Section and upon which *Kedar Nath* relied to save Sec.124A from the vice of unconstitutionality is as vague and of varying and doubtful import as the Section itself. In international jurisprudence, the tendency test has been widely

criticised for being vague and over-broad. Several Common Law jurisdictions have now moved away from the tendency test to the "real risk" test which is now preferred in order to protect the right to freedom of speech and expression. The broader test based on "inherent tendency" is considered to inhibit the right to freedom of speech and expression to an unjustifiable degree. The "inherent tendency" test is also criticised for its vagueness and is said to impose liability without the offence being defined in sufficiently precise terms (refer Australian Law Commission's Report at Paras 428, 429 and 431) has criticised the "tendency test" on two grounds (1) Firstly, it is uncertain and does not meet the criteria of the common law doctrine that criminal offences should be clearly and unambiguously defined by the word "provided by law" in Article 19 of the ICCPR. (2) Secondly, the breadth of criterion of liability. The question whether a publication has a "tendency" to prejudice is judged in the abstract. The Recommendations of the Law Commission include replacing the tendency test with the substantial risk test. New South Wales Law Reform Commission Report on Contempt by Publication (Report No 100) has also noted that the tendency test had been widely criticised as being "imprecise and unclear, as well as too broad" (at Para 4.8). In the United States, the tendency test has been completely replaced.

The offence of sedition as contained in Section 124A cannot be sustained in view of the recent interpretation of Article 14, 19 and 21 of the Constitution including the interpretation of Article 19 as laid down in *Superintendent, Central Prison, Fatehgarh v. Dr. Ram Manohar Lohia* AIR 1960 SC 633*; Kameshwar Prasad v. State of Bihar AIR 1962 SC 1166 = (1962) Supp. 3 SCR 369,* reasonableness and proportionality principles laid down in *Shreya Singhal v. Union of India* (2015) 5 SCC 1; the doctrine of manifest arbitrariness in S*hayara Bano v. Union of India (2017) 9 SCC 1* and the concept of reasonableness and disproportionality laid down in *K.S. Puttaswamy v. Union of India (2019) 1 SCC 1*.

Section 124A as it stands today in the IPC reads as follows:

> *"124A. Sedition—Whoever, by words, either spoken or written, or by signs, or by visible representation, or <u>otherwise</u>, brings or attempts to bring into <u>hatred</u> or <u>contempt</u>, or excites or attempts to excite <u>disaffection</u> 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.*

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."

[Emphases supplied]

One important aspect is that when Section 124A was considered in *Kedar Nath*, in CrPC it was treated as non-cognizable offence and an arrest could only be made on warrant issued by Magistrate. For this reason, though Mahatma Gandhi and Bal Gangadhar Tilak were tried and convicted under Section 124A, the police could not arrest them until conviction. But when CrPC was amended in 1973 and the 1898 Code was repealed, the offence of sedition became cognizable. Consequently, the severity of the offence has drastically increased since 1973 leaving police with wide discretionary powers to arrest. The charge under sedition has been widely abused as it is of political nature. The Petitioners have given details of such abuse in the Petition. As per the National Crime Records Bureau, between 2016 and 2019, the number of cases filed under Section 124A increased by 160% while the rate of conviction dropped to 3.3% in 2019 from 33.3% in 2016.

The said provision is liable to be struck down for the following reasons because-

(1) expressions like disloyalty, feelings of enmity, disapprobation, hatred, contempt or disaffection are vague and overbroad and these expressions do not find place in Article 19(2) of the Constitution.
(2) It is no longer permissible to read the said expressions into 'public order' in view of Superintendent Central prison (supra) and Shreya Singhal (supra)
(3) The said expressions do not by themselves constitute an offence.
(4) 124A is anachronistic, has lost all relevance and is not necessary in a free democracy

(5) Its vagueness renders it void as per law settled in Shreya Singhal (supra)
(6) It is manifestly arbitrary, open to misuse & violates Article 14
(7) Results in curtailment of personal liberty of innocent people in violation of Article 21.
(8) It does not meet the test of what constitutes a 'reasonable' restriction as per VG Row (supra)
(9) It is procedurally unreasonable in view of procedural safeguards taken away under the Criminal Procedure Code.
(10) It does not meet the test of proportionality laid down in K.S. Puttaswamy (supra)

If the vague and overbroad expressions in 124A are struck down as unconstitutional, it is not possible to segregate the unconstitutional part from the other provisions and therefore, the entire Section 124A IPC is liable to be struck down as unconstitutional [Shreya Singhal v. Union of India [(2015) 5 SCC 1; State of MP v. Baldev AIR 1961 SC 293; K.A. Abbas v Union of India 1970 2 SCC 780; Harakchand Ratanchand Banthia v. Union of India AIR 1961 SC 293; AK Roy v. Union of India 1982 1 SCC 271 and in Kartar Singh v. State of Punjab 1994 3 SCC 569]. The provisions which might have had some relevance during British times is not relevant today. With the passage of time, India becoming independent and having its own Constitution and being one of the largest democracies in the world, there is no relevance of continuing with the provisions of Sedition. The Petitioners further submit that not only in U.K. from where it originated but in several other countries, sedition has been deleted from the statute book (New Zealand, Ghana, Uganda, Nigeria, Scotland, Ireland, Republic of Korea, Indonesia, Canada, U.S.A. Canada, Australia, Netherlands) and in other countries Sedition has never been taken as part of the statute. Further, in view of the Universal Declaration of Human Rights, ICCPR and several other international instruments, Sedition being against the human rights principles, its continuance is not justified. Therefore, for the above amongst reasons, the present Writ Petition has been filed under Article 32 of the Constitution.

LIST OF DATES AND EVENTS

1661 Sedition is a political crime and as such was unknown to the common law of 15th century England. The doctrine of Sedition developed considerably in the 16th century as a consequence of the threats to the Crown perceived by crown officials and local governors. Sedition laws were thus originally designed to protect

the Crown from any potential uprising. Sedition acquired a precise definition in case law in early 17th century England, leading up to an Act of Parliament, namely, the Sedition Act, 1661 which was described as an “Act for Safety and Preservation of His Majesties Person and Government against Treasonable and Seditious Practices and Attempts.” The Act imposed punishment on anyone who wrote, printed or preached any words against the King.

1837-39 The section corresponding to s. 124A was originally Section 113 of Macaulay's Draft Penal Code of 1837-39.

1860 The Indian Penal Code (IPC) was enacted. The section corresponding to Section 124-A in Macaulay's Draft Penal Code of 1837-39 was omitted from the Indian Penal Code as it was enacted in 1860. The reason for the omission from the Code as enacted is not clear.

1870 S. 124A was placed on the Statute Book in 1870, by Act XXVII of 1870. In India, the law of Sedition was introduced in 1870 into the Indian Penal Code, 1860, as derived from the British Sedition Act of 1661, as a colonial tool to criminalise dissent against the British imperialist regime, and in particular to quell the Indian independence struggle. Thus, since its conception, Sedition has possessed a distinctly political nature and has been used to stifle political opposition and criticism of the government.

(i) In England, this offence was a petty crime punishable with imprisonment up to 2 years, but for subjects in the colonies including India, the punishment was life imprisonment.
(ii) 124A was a non-cognizable offence at this time (until 1973). Hence, though freedom fighters like Gandhiji and Lokmanya Tilak were tried and convicted under 124A, the Police couldn’t arrest them at the outset.
(iii) The section was vague and the terms used were open to different interpretations. In the pre-Independence era, a number of landmark cases on sedition were decided by the Federal Court as well as the Privy Council. These two judicial bodies took diametrically opposite positions on the meaning and scope of sedition as a penal offence.

1892 The first case in India arose under the section, known as the

Bangobasi case, *(Queen-Emprees v. Jogendra Chunder Bose ILR (1892) Cal. 35*). The Court adopted a very wide interpretation of the section.

1898 The second case is the celebrated case of *Queen-Empress v. Balgangadhar Tilak I.L.R. (1898) 22 Bom. 112* which came before the Bombay High Court. It was the first case wherein the law on sedition under Section 124A in the IPC was explained. The Privy Council was of the view that acts like incitement to violence and insurrection are immaterial while deciding the culpability of a person charged with sedition. It took a very broad interpretation of the section.

1898 The section was amended by the Indian Penal Code Amendment Act (IV of 1898). As a result of the amendment, the single explanation to the section was replaced by three separate explanations as they stand now.

1898-1944 The wide interpretation of Section 124A was liberally employed in numerous cases by the colonial government, to suppress any form of political dissent, particularly to quash the rise of Indian Nationalist sentiments. India's most loved patriots including Mahatma Gandhi and Bal Gangadhar Tilak were imprisoned under the law. Lokmanya Tilak was tried on the charge of Sedition three times, that is, in 1897 (as above), then in 1908 and again, in 1916.

13.12.1920 United States repealed the Sedition Act of 1918 which extended the Espionage Act of 1917 to cover speech and the expression of opinion that cast the government or the war effort in a negative light and forbade the use of "disloyal, profane, scurrilous, or abusive language" about the United States government, its flag, or its armed forces or that caused others to view the American government or its institutions with contempt. Those convicted under the act generally received sentences of imprisonment for 5 to 20 years. Under Section 2385 of the US Code, it is unlawful for anyone to knowingly teach/advocate the propriety of overthrowing the government, by force. However, in respect for freedom of speech, this law is rarely

enforced.

1922 Mahatma Gandhi's three articles for “Young India” resulted into his imprisonment under 124A. While appearing in court, Gandhiji stated in his famous speech:

> *“Section 124A under which I am happily charged is perhaps the prince among the political Sections of the IPC designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by the law... I have studied some of the cases tried under it; I know that some of the most loved of India’s patriots have been convicted under it.”*

1942 The Federal Court in *Niharendu Dutt Majumdar Vs. King Emperor (1942) FCR 48*, held that “public disorder or the reasonable anticipation or likelihood of public disorder is the gist of the offence”. These judges were of the view that sedition implies resistance or lawlessness in some form. In all these cases the point that has been emphasized is that if there is no incitement to violence, there is no sedition.

1947 In *King Emperor v. Sadashiv Narayan Bhalerao*, the Privy Council not only reiterated the law on sedition enunciated in the Tilak case, but also held that the Federal Court’s statement of law in the *Niharendu Majumdar case* was wrong. The Privy Council overruled the decision of the Federal Court and held that excitement of feelings of enmity to the government is sufficient to make one guilty under Section 124A of the Code.

1947 India gained independence from the British rule.

1948 The draft Constitution of India was tabled before the Constituent Assembly. Fundamental rights were provided in Chapter III of the draft Constitution and Article 13(1)(a) [one of the predecessors to Article 19(1)(a)] guaranteed all citizens the right to freedom of speech and expression. Article 13(2) [predecessor to Article 19(2)] provided that such freedom of speech and expression would not affect any existing law or prevent the State from making any law

relating *inter alia* to Sedition. The drafting committee had retained the word 'Sedition' in the draft Constitution of 1948. Article 13(1)(a) and 13(2) which contained Sedition as one of the restrictions on free speech and expression. The debates that ensued were extensive and are mentioned in the Petition. The debates show that the Framers of the Constitution were unanimously and vehemently against any such provision being retained in the Constitution to curtail freedom of speech and expression guaranteed by the draft Constitution. One of the framers of the Constitution - Sardar Bhopinder Singh Man is quoted below-

> *"I regard freedom of speech and expression as the very life of civil liberty, and I regard it as fundamental. For the public in general, and for the minorities in particular, I attach great importance to association and to free speech. It is through them that we can make our voice felt by the Government, and can stop the injustice that might be done to us. For attaining these rights, the country had to make so many struggles, and after a grim battle succeeded in getting these rights recognized. But now, when the time for their enforcement has come, the Government feels hesitant; what was deemed as undesirable then is now being paraded as desirable. What is being given by one hand is being taken away by the other. Every clause is being hemmed in by so many provisos. To apply the existing law in spite of changed conditions really amounts to trifling with the freedom of speech and expression… To my mind, suppression of lawful and peaceful opposition means heading towards fascism."*
>
> [Emphasis Supplied]

Sedition was thus deleted from the Constitution with the Constituent Assembly unanimous in their view that the citizens of the country must retain the power to challenge the existing law, namely, Section 124A, which in their view deserved to be tested by the judiciary and declared invalid in order for the citizens to retain their civil liberties guaranteed by the Constitution.

15.08.1950 India adopted its Constitution. 'Sedition' was not included in the final Article 19 (2) of the Constitution. Article 19(2) read thus-

"Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

16.05.1951 Constitution (First Amendment) Act, 1951 was proposed. It included two important changes to Article 19 (2):

- First, it added the word "reasonable" before the word restrictions which made 19 (2) justiciable.
- Second, it included the expressions "friendly relations with foreign States" "public order" and 'incitement to offence" as grounds for legislative restriction on freedom of speech & expression.

The debate which took place in the Parliament vis-à-vis the first Constitution Amendment is very important, particularly the words used by Pt. Jawaharlal Nehru, the then Prime Minister in connection with the impugned section:

- *"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 the matter in other ways, in more limited ways, as every other country does but that particular thing, as it is, should have no place."*

  [Emphasis Supplied]

18.06.1951 The First Constitution Amendment was passed.

1950-62 A spate of litigations followed in the fifties and sixties, and the amendments made to Article 19(2) of the Constitution led to widening the scope of penal legislation, validating them on the

ground of reasonable restrictions.

1973 Code of Criminal Procedure was amended to make the offence of sedition cognizable and non-bailable. By contrast, the offence of sedition was non-cognizable in the U.K. The maximum sentence in the U.K. was 2 years as compared to life imprisonment in India.

1977 In 1977, a Law Commission working paper recommended that the common law offence of sedition in England and Wales (even in the mild form that it existed there) be abolished in the ground that this offence was redundant and that it was not necessary to have any offence of sedition.

1977 Offences classified under Sedition were repealed in Kenya.

10.4.1979 India ratified the UDHR. Article 19 propounds freedom of opinion and expression as a right that admits of no interference.

"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."

10.04.1979 India also ratified the International Covenant on Civil and Political Rights. Article 19 (2) of the ICCPR provides that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Article 19 (3) provides that "*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."*

The General Comment 34 of the United Nations discusses the application of Article 19 (3) of the ICCPR. In Clause 25 the meaning of the term "provided by law" in Article 19 (3) is explained thus-

25. "For the purposes of paragraph 3, a norm, to be

characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution… Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not."

1983 The Nigerian Federal Court of Appeal, declared sedition offences in Nigeria unconstitutional in the case of *Chief Arthur Nwankwo v. The State*.

1988 The Republic of Korea did away with its sedition laws during democratic and legal reforms.

July, 2001 In July 2001, Ghana passed the Criminal Code - Repeal of the Criminal and Seditious Laws (Amendment) Act 2001; thereby repealing criminal libel and sedition from the Ghananian Penal Code. The decision removed a law used to arrest, try and imprison journalists for allegedly defaming members of the government.

2007 Sedition was declared as "unconstitutional" in Indonesia.

01.01.2008 Following a recommendation from the New Zealand Law Commission, the New Zealand government announced on 7 May 2007 that the sedition law would be repealed. Sedition ceased to be a crime following the introduction of The Crimes (Repeal of Seditious Offences) Amendment Bill in 2007, which was enforced w.e.f. 1st January 2008. The Crimes (Repeal of Seditious Offences) Amendment Act 2007 was passed on 24 October 2007, and entered into force on 1 January 2008.

12.01.2010 Sedition was abolished in U.K. with effect from 12th January 2010 through Section 73 of the Coroners and Justice Act 2009 which abolished sedition and seditious libel. Claire Ward, the then Justice Minister, said while abolishing the law:

"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. Freedom of speech is now seen as the touchstone of democracy, and the ability of individuals to criticize the state is crucial to maintaining freedom …

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

25.08.2010 The Uganda Constitutional Court declared null and void the sedition provisions from the Uganda Penal Code because they were in contravention with the enjoyment of the right to freedom of expression. (Facts-Journalist Andrew Mwenda made several comments critical of the President and the government of Uganda on his live radio talk show. The state charged him with the crime of sedition, pursuant to sections 39 and 40 of the Penal Code, because his remarks were made with the intention to bring into hatred and contempt against the President, government, and Constitution.)

28.03.2011 In Scotland, Section 51 of the Criminal Justice and Licensing (Scotland) Act 2010 abolished the common law offence of sedition.

19.09.2011 Australia's sedition laws were amended in Australia on 19 September 2011. The 'sedition' clauses were repealed and replaced with 'urging violence.'

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. The Bill was never passed.

2015 Another Private member Bill titled The Indian Penal Code (Amendment) Bill, 2015103, was introduced in Lok Sabha by Mr. Shashi Tharoor to amend 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.

30.08.2018 Opinion was sought by the Union government from the Law Commission in response to which a "consultation paper" was released by the Law Commission. The 'consultation paper' recommended a "review or even repeal" of the provision because of its unsuitability in a democratic country.

October, 2018 Ireland removed the controversial section of the constitutional clause on freedom of speech which made "blasphemous, seditious or indecent matter" a punishable offence. The change in law came after the people of Ireland voted overwhelmingly in referendum in October 2018 to amend its constitution to remove the clause.

01.07.2019 Only a few months later, contrary to Law Commission's recommendation of review or repeal of the law of sedition, in its official response to a written question in the Rajya Sabha whether the government is mulling doing away with the law of sedition, the Minister of State for Home stated that there was no proposal to repeal Section 124A of the IPC because the "law is necessary."

2021 This nineteenth century sedition law, which was enacted to silence the Indian people by the colonial rulers, has been-

(i) retained in independent India
(ii) made more stringent than during the British regime
(iii) tenaciously retained while the much-milder version of the original English law has been repealed by the United Kingdom
(iv) used and misused more often by free India's governments than the colonial government during the 150 years of its presence in the Penal Code
(v) the misuse is increasing at an alarming rate and is becoming more insidious

Per contra, countries all over the world-

(i) have legislatively repealed the law

(ii) have declared it unconstitutional
(iii) have left it unused (by the executive)
(iv) have not enacted the law in the first place

15.07.2021 Hence this petition.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL WRIT JURISDICTION

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

WRIT PETITION (CIVIL) NO. _____OF 2021

IN THE MATTER OF:

1. **People's Union for Civil -Liberties**

[redacted]

PETITIONER NO. 1

2. **N.D. Pancholi**

[redacted]

PETITIONER NO. 2

VERSUS

1. **Union of India**
Through Secretary,
Ministry of Law and Justice,
4th Floor, A-Wing,
Shashtri Bhawan, New Delhi-110001

RESPONDENT NO. 1

WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA CHALLENGING THE CONSTITUTIONAL VALIDITY OF SECTION 124A OF THE INDIAN PENAL CODE, 1860

TO
THE HON'BLE CHIEF JUSTICE
& THE HON'BLE COMPANION JUDGES
OF THE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE
PETITIONERS ABOVENAMED

MOST RESPECTFULLY SHOWETH:

1. That the Petitioners have filed the present Writ Petition under Article 32 of the Constitution of India, challenging the constitutional validity of Section 124A of the Indian Penal Code, 1860, which criminalizes the offence of "Sedition". The impugned Section forms part of Chapter VI of the Indian Penal Code, 1860 dealing with "Of Offences Against the State".

2. That the impugned Section infringes upon the right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India. The term "Sedition", including its implication in administration during British regime, has lost all its relevance in independent India. Terms like

"disaffection", "disloyalty", "all feelings of enmity" etc. used to define Sedition are vague and, therefore, render the provision void. The impugned provision is hit by the freedom of speech and expression contained in Article 19(1)(a) as none of the terms used in the Section find mention in the reasonable restrictions Clause in Article 19(2). The expressions used in the Section are vague, overbroad and, therefore, amenable to mischief and arbitrary use and cannot be sustained under Article 14. Also the expressions used in Section 124A, being of doubtful and varying import, violate the fundamental right to life and liberty enshrined in Article 21, as they tend to implicate innocent citizens.

3. That the Petitioners have, therefore, filed the present Writ Petition before this Hon'ble Court to declare Section 124A of the Indian Penal Code, 1860 as being unconstitutional and void.

4. That the constitutional validity of Section 124A of the Indian Penal Code, 1860 was upheld by the Constitution Bench of this Hon'ble Court in *Kedar Nath Singh v. State of Bihar AIR 1962 SC 955 = 1962 Supp (2) SCR 769* (hereinafter referred to as "*Kedar Nath*"), which held that while the provisions of the impugned Section impose restrictions on the freedom of speech and expression under Article 19(1)(a), those restrictions are in the interest of public order and within the ambit of permissible restrictions under Article 19(2). However, the judgment clarified that the impugned Section aims at rendering penal only such activities "*as would be*

intended, or *have a tendency*, *to create disorder or disturbance of public peace by resort to violence"*. The Petitioners most respectfully and humbly submit that the judgment passed in *Kedar Nath* requires reconsideration on several grounds stated in this Petition. Further, in view of the development of jurisprudence in the field of civil liberties and expansion of Articles 14, 19 and 21 of the Constitution, Section 124A can no longer be sustained.

5. That the Petitioners have filed the present petition in public interest. The Petitioners have not approached any Tribunal or any other Court at any point of time before or after filing of the present Writ Petition for similar relief. The Petitioners are not involved in any civil, criminal, or revenue litigation, which may have any legal nexus with the issues involved in this Public Interest Litigation. The Petitioners have not approached any authority seeking similar relief as prayed for in the present Petition. That the Petitioner No.1 is an association and is not a registered organization.

FULL NAME OF PETITIONER:	PEOPLE'S UNION FOR CIVIL LIBERTIES, [through Dr. V Suresh (General Secretary)]
COMPLETE POSTAL ADDRESS:	332, Patparganj, Mayur Vihar-I, Delhi 110091
EMAIL ADDRESS:	puclnat@gmail.com
PHONE NUMBER:	011-22750014
PROOF REGARDING Personal Identification:	PAN (AATP7404K)

Occupation:	Social Service, Advocate
Gross taxable Income of PUCL:	2,62,290/-(2019-2020)

6. That Petitioner No. 1 is People's Union for Civil Liberties (PUCL), a civil liberties and human rights body striving to defend civil liberties and human rights of all members of society, formed in 1976 by Sh. Jayaprakash Narayan, Acharya Kriplani, Krishna Kant and others. Justice V.M. Tarkunde, Justice Rajindar Sachar, Rajni Kothari, K.G. Kannabiran and others were associated with PUCL as its President. The Organization has twenty-five state branches across India and has been raising awareness about human rights, civil liberties and also fighting for their protection. PUCL has conducted many fact-finding enquiries and has compiled several reports on human rights violations in India. Among several cases fought by PUCL, few are: Telephone tapping case (1997) 1 SCC 301, Fake police encounter in Manipur (1997) 3 SCC 463; Disclosure of criminal background and assets by candidates, (2003) 9 SCC 490; Challenge to POTA (2004) 9 SCC 980; Encounter killings in Maharashtra, (2014) 10 SCC 635, NOTA (None of the Above) (2013) 10 SCC 1 among others. Petitioner No. 2 is its Vice-President.

BRIEF FACTS OF THE CASE:

7. That the subject-matter of the present Writ Petition, being very important, is required to be dealt with exhaustively. For

convenience the Petition is explained under the following heads:

(i) HISTORY OF SEDITION LAW
(ii) TRIALS UNDER SECTION 124A DURING BRITISH REGIME
(iii) CONSTITUTIONAL DEBATES ON SEDITION
(iv) POST-COLONIAL INTERPRETATION OF SEDITION LAW
(v) CONSTITUTION (FIRST AMENDMENT) ACT 1951
(vi) RELEVANT JUDGMENTS ON ART.19(1)(a) & 19(2): PRE-*KEDAR NATH*
(vii) ANALYSIS OF *KEDAR NATH*: AIR 1962 SC 955 (DECIDED ON 24.01.1962)
(viii) INTERPRETATION AND EXPANSION OF ARTICLE 19(1)(a) & 19(2) POST *KEDAR NATH* UPTO THE PRESENT
(ix) THE IMPUGNED SECTION 124A: WHY IT NO LONGER WORKS
(x) ABUSE OF SEDITION LAW & VIOLATION OF ARTICLES 14,19 AND 21
(xi) REPEAL OF SEDITION LAW BY OTHER COUNTRIES AND REPORT OF THE LAW COMMISSION OF INDIA ON SEDITION
(xii) SECTION 124A VIOLATES INTERNATIONAL OBLIGATIONS ON FREEDOM OF SPEECH AND EXPRESSION

8. HISTORY OF SEDITION LAW

8.1 Sedition is a political crime and as such was unknown to the common law of 15th Century England. The doctrine of Sedition developed considerably in the 16th Century as a consequence of the threats to the Crown perceived by crown officials and local governors. Sedition laws were thus originally designed to protect the Crown from any potential uprising. Sedition acquired a precise definition in case law in early 17th Century England, leading up to an Act of Parliament, namely, the Sedition Act, 1661 which was described as an "Act for Safety and Preservation of His Majesties Person and Government against Treasonable and Seditious Practices and Attempts." The Act imposed punishment on *anyone* who wrote, printed or preached any words against the King.

8.2 Not surprisingly, Sedition found its way into the Criminal law books of all British colonies, with the difference that while in Britain the offence of Sedition was a petty crime, punishable with imprisonment up to a maximum of 2 years; for subjects in the colonies (including India), life imprisonment was prescribed. The harsh punishments were designed to quell any dissent or struggles for independence against the British imperialist regime in the colonies.

8.3 Subsequent developments of England's criminal and constitutional law rendered this offence obsolete culminating in its abolition in 2009. One of the key reasons for England abolishing Sedition was to send out a message to the common law countries that both retain, and use this

law, that Sedition should be done away with. At this juncture, it may be pointed out that the following countries have done away with the law of Sedition:

United Kingdom
Scotland
Ireland
Australia
New Zealand
Korea
Ghana
Uganda
Nigeria
Indonesia

In most of the remaining countries, Sedition either does not exist, such as Netherlands, or has fallen into complete disuse in the context of freedom of speech, such as Canada and United States.

8.4 In India, the law of Sedition was introduced in 1870 into the Indian Penal Code, 1860, as derived from the British Sedition Act of 1661, as a colonial tool to criminalise dissent against the British imperialist regime, and in particular to supress the Indian independence struggle. Thus, since its conception, Sedition has possessed a distinctly political nature and has been used to stifle political opposition and criticism of the government.

8.5 The Indian Penal Code, 1860 originally did not include the offence of Sedition. The section corresponding to Section 124A was originally Section 113 of Macaulay's Draft Penal Code of 1837-39, but the said section was omitted from the

Indian Penal Code as it was enacted in 1860. The reason for the omission from the Code as enacted is not clear. Section 124A was placed in the Statute books in 1870 when the Legislative Council of the Governor General amended the Indian Penal Code, 1860 by Act XXVII of 1870 and introduced Section 124A, being a revised version of Clause 113 in the draft code. However, in spite of insertion of Section 124A into the Indian Penal Code, 1860, there was no prosecution or trial under the said Section for 21 years i.e., until 1891. The original Section 124A added in 1870, read as follows:

> *"Whoever by words either spoken or intended to be read or by signs or by visible representation or otherwise excites or attempts to excite feelings of disaffection to the Government established by law in British India shall be punished with transportation for life or for any term to which fine may be added or with imprisonment for a term which may extend to three years to which fine may be added or with fine.*
> *Explanation—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority against unlawful attempts to subvert or resist that authority is not disaffection. Therefore, the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation is not an offence within this clause."*
> (Emphasis supplied)

(Original Section 124A,1870)

8.6 The Section was amended by the Indian Penal Code Amendment Act IV of 1898 and also by subsequent amendments in 1937, 1948 and 1950. The Section 124A which emerged after these amendments (which is the existing Section 124A) reads as follows:

> *"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, 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.*
>
> *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."* (Emphasis supplied)

8.7 The Section, in its original form as well as in its present form, uses vague and overbroad expressions and is violative of Articles 14, 19(1)(a) and 21 of the Constitution which aspect has been dealt with subsequently. The terms used are open to different interpretations. As a matter of fact, these broad terms were used purposely by the British

regime to incriminate and suppress any kind of dissent. In the pre-independence era, a number of landmark cases on Sedition were decided by the Federal Court as well as the Privy Council. Not surprisingly, these two judicial bodies took diametrically opposite positions on the meaning and scope of Sedition as a penal offence as explained below.

9. TRIALS UNDER SECTION 124A DURING BRITISH REGIME

9.1 Some of the most loved patriots of India including Mahatma Gandhi, Bal Gangadhar Tilak and several of the framers of the Constitution of India were repeatedly convicted by the British under Section 124A. The first prosecution and trial under Section 124A of the Indian Penal Code, 1860, took place in the case of *Queen Empress v. Jogendra Chunder Bose and Others [(1891) ILR 19 Cal 35]*. A broad interpretation was given to the crime of Sedition in this case by holding that the mere utterance of words calculated and intended to excite ill will against the Government and to hold it up to the hatred and contempt of the people was sufficient, even though no disturbance was brought about by the words or feeling of disaffection in fact produced by them.

Queen Empress v. Jogendra Chunder Bose and Others
[(1891) ILR 19 Cal 35]
Queen-Empress vs Jogendra Chunder Bose And Ors. on 25 August, 1891 (indiankanoon.org)

9.2 This broader interpretation of the offence was employed in the trials following this, including the first Sedition trial against Bal Gangadhar Tilak [ILR (1897) 22 Bom 112] in which Justice Strachey gave a wide meaning to the term "disaffection" to include a mere lack of affection or feeling that included any kind of "hatred", "enmity", "dislike", "hostility", "contempt" or "any other form of ill-will against the Government":

> *"The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these Articles, is absolutely immaterial. If the accused intended by the Articles to excite rebellion or disturbance, his act would doubtless fall within Section 124-A, and would probably fall within other Sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the Section."* (Emphasis supplied)

The statement of law by Justice Strachey was the subject matter of a great deal of comments and judicial notice, as observed in *Kedar Nath.* It may be pointed out that the jury by a majority of 6:3 had found Sri Bal Gangadhar Tilak guilty. Sri Tilak approached the Privy Council with a leave to appeal. His application was heard by a full bench. The full bench however refused the application for leave. The case was then taken to Her Majesty in Council by way of an

application for Special Leave to appeal to the Judicial Committee. The argument was that the term "disaffection" meant simply "absence of affection which comprehended every possible form of bad feeling for the government". The Privy Council observed that the case did not deserve further consideration by the Privy Council.

Bal Gangadhar Tilak v. Queen Empress
25 nd. App 1(PC)

9.3 Tilak's trial led to the amendment of the Indian Penal Code in 1898 to reflect Justice Strachey's opinion. The British included the terms "hatred" and "contempt" along with disaffection. Disaffection was stated to include "disloyalty" and "all feelings of enmity." While debating these amendments, the British Parliament took into account the defense's arguments in the Tilak case and the decisions in two subsequent cases to ensure loopholes did not exist in law.

9.4 A wide interpretation of Section 124A was liberally employed in numerous cases by the colonial government, to suppress any form of political dissent, particularly to quash the rise of Indian Nationalist sentiments. During the repressive British rule in India, Tilak was tried on the charge of Sedition on three occasions, that is, in 1897 (supra), then in 1908 and again in 1916.

(Emperor vs Bal Gangadhar Tilak on 22 July, 1908 (indiankanoon.org)
Emperor vs Bal Gangadhar Tilak on 9 November, 1916 (indiankanoon.org)

9.5 It may be stated for the sake of completion that a judgment was given by the full bench of Allahabad High Court in *Queen Empress v Amba Prasad ILR (1898) 20 All 55*. In that case, the court did not examine in detail the implication of the term Sedition and expressed a general agreement with the view of Calcutta and Bombay High Courts (supra). (See Paragraphs 11, 12 and 13 of *Kedar Nath* which referred to the above judgments)

9.6 In 1922, Mahatma Gandhi wrote three Articles for "Young India" which resulted in his trial and imprisonment under Section 124A. A trial ensued which is famously known as the 'Great Trial of 1922'. While appearing in court, Gandhiji referred to Section 124A as follows-

> *"Section 124A under which I am happily charged is perhaps the prince among the political Sections of the IPC designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by the law... I have studied some of the cases tried under it; I know that some of the most loved of India's patriots have been convicted under it. I consider it a privilege, therefore, to be charged under that Section… I hold it to be a virtue to be disaffected towards a Government which in its totality has done more harm to India than any previous system…What in law is a deliberate crime appears to me to be the highest duty of a citizen."*

Significantly, Gandhiji in his statement to the court referred to the political trials that were under way at that time:

> "*My experience of political cases in India leads me to the conclusion that in nine out of every ten, the*

condemned men were totally innocent. Their crime consisted in the love for their country."

Judge Strangman, acknowledged the stature of Gandhi and his commitment to non-violence, but expressed his inability to not hold him guilty of Sedition under the law, and sentenced him to six years' imprisonment.

Statement In The Great Trial Of 1922 - Gandhiji's Famous Speech (gandhiashramsabarmati.org)

The Great Trial of 1922

In 1942, in the matter of *Niharendu Dutt Majumdar v. the King Emperor [AIR 1942 FC 22]*, the Federal Court resorted to a narrow interpretation of the offence by holding that *"The acts or words complained of must either incite disorder or must be such as to satisfy reasonable men that that is their intention or tendency."*

(Emphasis supplied)

Niharendu Dutt Majumdar And Ors. vs Emperor on 10 July, 1939 (indiankanoon.org)

Niharendu Dutt Majumdar v. the King Emperor

AIR (1942) FC 22

9.7 However, this narrower view was again overturned by the Privy Council in England in the case of *King Emperor v. Sadashiv Narayan Bhalerao [AIR 1947 PC 82]*, which reinstated the principle laid down by Justice Strachey in Tilak's first Sedition trial. In this case, the Privy Council not only reiterated the law on Sedition enunciated in

the Tilak case, but also held that the Federal Court's statement of law in the *Niharendu Majumdar case* was wrong. The Privy Council overruled the decision of the Federal Court and held that excitement of feelings of enmity to the government is sufficient to make one guilty under Section 124A of the Code.

King Emperor v. Sadashiv Narayan Bhalerao
AIR 1947 PC 82
King-Emperor vs Sadashiv Narayan Bhalerao on 18 February, 1947 (indiankanoon.org)

10 CONSTITUTIONAL DEBATES ON SEDITION

10.1 India gained independence in 1947. The draft Constitution of India was tabled before the Constituent Assembly in 1948. Fundamental rights were provided in Chapter III of the draft Constitution and Article 13(1)(a) [one of the predecessors to Article 19(1)(a)] guaranteed all citizens the right to freedom of speech and expression. Article 13(2) [predecessor to Article 19 (2)] provided that such freedom of speech and expression would not affect any existing law or prevent the State from making any law relating *inter alia* to Sedition. The drafting committee had retained the word 'Sedition' in the draft Constitution of 1948. Article 13(1)(a) and 13(2) which contained Sedition as one of the restrictions on free speech and expression, were originally framed as under-

"13. (1) Subject to the other provisions of this Article, all citizens shall have the right-
(a) To freedom of speech and expression…"

"13 (2) Nothing in sub-clause (a) of clause (1) of this Article shall affect the operation of any existing law, or prevent the State from making any law, relating to libel, slander, defamation, Sedition or any other matter which offends against decency. or morality or undermines the authority or foundation of the State."

Original draft of Article 13 (1) (a) and 13 (2)

[Emphasis supplied]

10.2 The Constituent Assembly debates that followed revealed that the framers of the Constitution took a vehement objection to the inclusion of Sedition as a restriction on the freedom of speech and expression which was unanimous in nature. It is important, at this juncture to consider what went through the minds of the framers of the Constitution while deleting the word "Sedition" out of the Constitution of India.

10.3 On December 1, 1948, during the Constituent Assembly debates on clause 13, following were the views of Shri Damodar Swarup Seth on Sedition:

> *"Under the Draft Constitution the Law of Sedition, the Official Secrets Act and many other laws of a repressive character will remain intact just as they are. If full civil liberties subject to Police Powers, are to be allowed to the people of this country, all laws of a repressive character including the Law of Sedition will have either to go or to be altered radically and part of the Official Secrets Act will also have to go. I therefore submit that*

this Article should be radically altered and substituted by the addenda I have suggested. I hope, Sir, the House will seriously consider this proposal of mine. If whatever fundamental rights we get from this Draft Constitution are tempered here and there and if full civil liberties are not allowed to the people, then I submit, Sir, that the boon of fundamental rights is still beyond our reach and the making of this Constitution will prove to be of little value to this country."

[Emphasis supplied]

To this Shri K. M. Munshi responded:

"Sir, the importance of this amendment is that it seeks to delete the word 'Sedition' and uses a much better phraseology, viz. "which undermines the security of, or tends to overthrow, the State." The object is to remove the word 'Sedition' which is of doubtful and varying import and to introduce words which are now considered to be the gist of an offence against the State." [Emphasis supplied]

10.4 Pandit Thakur Dass Bhargava stated as under:

"Fortunately, the honourable Member Mr. Munshi has spoken before you about deletion of the word Sedition. If these words 'affect the operation of existing laws' are not removed the effect would be that Sedition would continue to mean what it has been meaning in spite of the contrary ruling of the Privy Council given in 1945. If the present laws are allowed to operate without being controlled or governed by Article 8 the position will be irretrievably intolerable. Thus, my submission is that in regard to freedom of speech and expression if you allow the present law to be continued without testing it in a court of law, a situation would arise which would not be regarded as satisfactory by the citizens of India."

[Emphasis supplied]

10.5 While moving, inter alia, for deletion of entire clause (2) of Article 13 [predecessor of Article 19 (2)] Sardar Hukum Singh stated thus:

> *"…we may take the law of Sedition enacted under 13(2). All that the Supreme Court shall have to adjudicate upon would be whether the law enacted relates to "Sedition" and if it does, the judiciary would be bound to come to a finding that it is valid. It would not be for the Judge to probe into the matter whether the actual provisions are oppressive and unjust. If the restriction is allowed to remain as it is contemplated in13 (2), then the citizens will have no chance of getting any law relating to Sedition declared invalid, howsoever oppressive it might be in restricting and negativing the freedom promised in 13(1)(a). The "court" would be bound to limit its enquiry within this field that the Parliament is permitted under the Constitution to make any laws pertaining to Sedition and so it has done that. The constitution is not infringed anywhere, and rather, the draft is declaring valid in advance any law that might be enacted by the Parliament--only if it related to Sedition."*
>
> [Emphasis supplied]

10.6 The debates which continued on December 2, 1948, revealed that the House had a unanimous view as far as the deletion of Sedition from 13(2) (now 19(2) was concerned). Following were the views of Sardar Bhopinder Singh Man:

> *"I regard freedom of speech and expression as the very life of civil liberty, and I regard it as fundamental. For the public in general, and for the minorities in particular, I attach great importance to association and to free speech. It is through them that we can make our voice felt by the Government, and can stop the injustice*

that might be done to us. For attaining these rights, the country had to make so many struggles, and after a grim battle succeeded in getting these rights recognised. But now, when the time for their enforcement has come, the Government feels hesitant; what was deemed as undesirable then is now being paraded as desirable. What is being given by one hand is being taken away by the other. Every clause is being hemmed in by so many provisos. To apply the existing law in spite of changed conditions really amounts to trifling with the freedom of speech and expression... To my mind, suppression of lawful and peaceful opposition means heading towards fascism.

[Emphasis supplied]

10.7 Seth Govind Das expressing "great pleasure" that an amendment had been moved in regard to deletion of the word "Sedition" from Article 13(2) stated thus:

"I would like to recall to the mind of honourable Members of the first occasion when Section 124 A was included in the Indian Penal Code. I believe they remember that this Section was specially framed for securing the conviction of Lokamanya Bal Gangadhar Tilak. Since then, many of us have been convicted under this Section... It is a matter of pleasure that we will now have freedom of speech and expression under this sub-clause and the word 'Sedition' is also going to disappear."

[Emphasis supplied]

10.8 Shri Rohini Kumar Chaudhari congratulated the House *"for having decided to drop the word "Sedition" from our new Constitution."*

"That unhappy word "Sedition" has been responsible for a lot of misery in this country and had delayed for a

considerable time the achievement of our independence."

10.9 Shri T. T. Krishnamachari stated that the value of the amendment related to deletion of Sedition was for him, to a very large extent, sentimental:

> *"Sir, in this country we resent even the mention of the word 'Sedition' because all through the long period of our political agitation that word 'Sedition' has been used against our leaders, and in the abhorrence of that word we are not by any means unique... That kind of abhorrence to this word seems to have been more or less universal even from people who did not have to suffer as much from the import and content of that word as we did."*

10.10 Shri M. Ananthasayanam Ayyangar finally stated:

> *"The word 'Sedition' has been removed. 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 altogether."*

[Emphasis supplied]

10.11 It was thus that Sedition was deleted from Article 13(2):

> *"(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow the state."*
>
> (Revised Article 13(2))

10.12 Thus, we see that the Framers of the Constitution, having themselves suffered the vagaries of the arbitrary interpretation and misuse of Sedition law under the British regime, were unanimously and vehemently against any such provision being retained in the Constitution to curtail freedom of speech and expression guaranteed by the draft Constitution. In fact, they wanted specifically for the citizens of the country to retain the power to challenge the existing law, namely, Section 124A, which in their view deserved to be tested by the judiciary and declared invalid for the citizens to retain their civil liberties guaranteed by the Constitution.

11 POST COLONIAL INTERPRETATION OF SEDITION LAW

11.1 That Article 13(1) & (2) under the draft Constitution became Article 19(1) & (2) in the Constitution. Original Article 19 read as follows:

"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..."

(2) "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

(Original Article 19 of the Constitution of India)

11.2 The constitutionality of Section 124A of the Indian Penal Code, 1860, was put into doubt on the commencement of the Constitution of India on 26 January 1950, in light of Article 19 (1)(a) [predecessor Article 13(1)(a)] that rendered all laws inconsistent with Article 19(1)(a) void to the extent of such inconsistency. However, Section 124A of the Indian Penal Code, 1860 was not repealed and continued to remain in force.

11.3 Before the first amendment took place in Article 19 of the Constitution, two judgments need reference, namely, *Brij Bhushan v. State of Delhi AIR 1950 SC 129 = (1950) SCR 605* and *Romesh Thappar v. State of Madras AIR 1950 SC 124 = (1950) SCR 594*. Both the judgments were delivered on the same day, that is, on 16th May, 1950.

11.4 In *Brij Bhushan v. State of Delhi (supra)*, constitutionality of Section 7(1)(c) of the East Punjab Public Safety Act, 1949 was challenged. The majority (speaking through Patanjali

Shastri J) followed the reasoning given in *Romesh Thappar* and held that the imposition of pre-censorship of a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Article 19(1)(a). Fazal Ali J. who gave the minority opinion held that it is difficult to hold that public disorder or disturbance of public tranquillity are not matters which undermine the security of the State. Para 14 of the judgment of Fazal Ali J. in *Brij Bhushan (supra)* has been relied upon in *Kedar Nath* in the context of Sedition and therefore, reproduced below:

> *"14. It was argued that "public safety" and "maintenance of public order " are used in the Act disjunctively and they are separated by the word "or" and not 'and", and therefore we cannot rule out the possibility of the Act providing for ordinary as well as serious cases of disturbance of public order and tranquillity. This, as I have already indicated, is a somewhat narrow and technical approach to the question. In construing the Act, we must try to get at its aim and purpose, and before the Act is declared to be invalid, we must see whether it is capable of being so construed as to bear a reasonable meaning consistent with its validity. We therefore cannot ignore the fact that preservation of public safety is the dominant purpose of the Act and that it is a special Act providing for special measures and therefore it should not be confused with an Act which is applicable to ordinary situations and to any and every trivial case of breach of public order. In my opinion, the word "or" is used here not so much to separate two wholly different concepts as to show that they are closely allied concepts and can be used almost interchangeably in the context. I think that "public order" may well be paraphrased in the context as public tranquillity and the words "public*

> *safety" and "public order" may be read as equivalent to "security of the State" and "public tranquillity."*
>
> *Brij Bhushan v. State of Delhi*
>
> *AIR 1950 SC 129*

11.5 In *Romesh Thappar (supra),* Chief Justice Patanjali Shastri, delivered the majority opinion and the dissenting opinion was given by Fazal Ali J. The constitutionality of Section 9(1A) of the Madras Maintenance of Public Order Act, 1949 was challenged which used the term public safety and maintenance of public order. According to the majority, unless a law restricting freedom of speech and expression is directed solely against the undermining of the Security of the State or the overthrow of it, such a law cannot fall within the reservation under clause 2 of Article 19, although the restrictions that it seeks to impose may have been conceived generally in the interest of public order (Para 12). Finally, while striking down the provision, the majority said:

> *"…in other words, clause 2 of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved, an enactment which is capable of being applied to cases where no such danger could arise, cannot be held to be Constitutional and valid to any extent."*

Justice Fazal Ali in his dissenting opinion, observed that for him it was difficult to understand that a document which is calculated to disturb public tranquillity and affect public safety, its entry cannot be prohibited because public

disorder and disturbance of public tranquillity are not matters which undermine security of the state. He relied upon his elaborate reasoning given in *Brij Bhushan*.

It is important to emphasise the following observation of the majority-

> *"Freedom of speech and of the press 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."*

Romesh Thappar v. State of Madras

AIR 1950 SC 124

11.6 In the case of *Tara Singh Gopi Chand v. State AIR 1951 P&H 27,* the Punjab High Court came to the conclusion that Section 124A of the Indian Penal Code, 1860, was a restriction on freedom of speech and expression under Article 19(1)(a) and was not protected under Article 19(2). Hence, Section 124A of the Indian Penal Code, 1860, was rendered void as it contravened the freedom of speech and expression guaranteed under the Constitution of India.

Tara Singh Gopi Chand v. State

[AIR 1951 P&H 27]

12. CONSTITUTION (FIRST AMENDMENT) ACT 1951

12.1 The First amendment in the Constitution took place by virtue of the Constitution of India (First Amendment) Act, 1951 with retrospective effect. In the debates which took place in the Parliament, reference was made to the judgment in *Romesh Thappar* and *Brij Bhushan*. At this juncture itself, the Petitioners wish to state that the observation made in *Kedar Nath* that the statement of law as contained in the dissenting judgment of Fazal Ali J. was accepted (vis-à-vis Para 14 of Fazal Ali J. in *Brij Bhushan*) is not correct as explained hereinbelow. A comparison of the original Article 19(2) and the amended version is given below:

"Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."	*"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 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."*

12.2 Accordingly, the amendment extended the powers of the State to place "reasonable" restrictions on the freedom of speech and expression by way of law in the interests of the

security of the State which is much different from undermining the security of state which has a much higher threshold and further added restrictions on the grounds of security of the State, friendly relations with foreign States, public order and incitement to an offence.

12.3 The opposition leaders were of the opinion that the amendment will dilute the sanctity of freedom of speech and expression which was accepted by the majority judges in *Romesh Thapar* and *Brij Bhushan*. At the same time, they welcomed the addition of the word "reasonable" before the word "restrictions" in the following words:

> *"I think that the introduction of the word "reasonable" before the word "restrictions" in Article 19 (2) introduces a very important change in the original draft. It places in the hands of the judiciary the power to determine whether a restrictive piece of legislation is reasonable or not."*
>
> H.N. Kunzru
>
> *"The addition of the word "reasonable" before "restrictions" in 19 (2) is a very wholesome change. It makes 19 (2) justiciable and I do not wish to minimize the importance of this change in the protection of civil liberty in this country."*
>
> Syama Prasad Mookerjee
>
> [Emphasis supplied]

12.4 The debate which took place in the Parliament vis-à-vis the first Constitutional amendment is very important, particularly the words used by Pt. Jawaharlal Nehru, the then Prime Minister:

> *"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 the matter in other ways, in more limited ways, as every other country does but that particular thing, as it is, should have no place...*
>
> *I do not think myself that these changes that we bring about validate the thing to any large extent .... 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..."* [Emphasis Supplied]
>
> Parliamentary Debates of India, Vol. XII, Part II

12.5 It is clear from the views expressed by Pt. Nehru that he was of the opinion that the restrictions on the freedom of speech have to be reasonable, that the law of Sedition was not only unreasonable but "objectionable" and "obnoxious" and that

in a free India there is no need to have an offence like Sedition. He also expressed the requirement of making changes in Article 19 and, therefore, it is not correct to say (Re: *Kedar Nath*) that the amendment was a complete acceptance of what Justice Fazal Ali in minority said in *Brij Bhushan* and *Romesh Thapar*. Later judgments have approved the view taken by the majority in these judgments.

13. RELEVANT JUDGMENTS ON ART.19(1)(a)&(2): PRE-*KEDAR NATH*

13.1 The Petitioners are endeavouring to discuss the important judgments given post first Constitutional amendment to point out what was the understanding of the Supreme Court on Article 19(1)(a) before *Kedar Nath*.

13.2 The concept of reasonableness which was introduced in Article 19(1)(a) came for discussion in *State of Madras v. V.G. Row AIR 1952 SC 196 = (1952) SCR 597*. The passage quoted below is considered as *locus classicus* and has been followed in most of the judgments of this Hon'ble Court till date:

> *"15. That both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions*

imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

Among others, the said judgment clearly says that the underlying purpose of the restrictions imposed, the prevailing conditions at the time and in that context the extent and urgency of the evil sought to be remedied should enter into the judicial verdict while deciding reasonableness.

13.3 In *State of Bihar v. Shailabala Devi AIR 1952 SC 329 =(1952) SCR 652* in which Mahajan J., speaking for the Constitution Bench, held that the speeches and expression which incite and encourage the commission of violent crimes will come within the ambit of law sanctioned by Article 19(2).

13.4 Subsequently, two High Courts- Punjab and Allahabad declared Section 124A as 'void'. The Allahabad High Court, dealt with the constitutionality of Section 124A of the Indian Penal Code, 1860, in the matter of *Ram Nandan v. State [AIR 1959 All 101]*. The Allahabad High Court held that the restriction imposed on the right to freedom of speech and

expression by Section 124A of the Indian Penal Code, 1860, cannot be said to be in the interests of public order, and accordingly, held Section 124A of the Indian Penal Code, 1860, to be unconstitutional for being in contravention of Article 19(1)(a) of the Constitution of India. The Court held that for the possibility of working of our democratic system, it was essential for criticism of policies and execution of policies and -

> *"if such criticism without having any tendency in it to bring about public disorder, can be caught within the mischief of Section 124-A of the Indian Penal Code, then that Section must be invalidated because it restricts freedom of speech in disregard of whether the interest of public order or the security of the State is involved, and is capable of striking at the very root of the Constitution which is free speech_(subject of limited control under Article 19(2)."*
>
> *Ram Nandan v. State [AIR 1959 All 101]*

13.5 A detailed discussion of the original Article 19(1)(a) and the amended version took place in *The Superintendent, Central Prison, Fatehgarh and Another v. Dr. Ram Manohar Lohia AIR 1960 SC 633 = (1960) 2 SCR 821*. The Constitution Bench speaking through Subba Rao J. referred to the decision in *Romesh Thappar* and *Brij Bhushan* in Para 9 as well as the effect of the First Constitutional Amendment. The finding given in Para 11 is important. The following interpretation given to the activity which would amount to commission of

an offence violating public order is important and reads as follows:

> *"We shall now test the impugned section, having regard to the aforesaid principles. Have the acts prohibited under S.3 any proximate connection with public safety or tranquillity? We have already analysed the provisions of s.3 of the Act. In an attempt to indicate its wide sweep, we pointed out that any instigation by word or visible representation not to pay or defer payment of any exaction or even contractual dues to Government, authority or a land owner is made an offence. Even innocuous speeches are prohibited by threat of punishment. There is no proximate or even foreseeable connection between such instigation and the public order sought to be protected under section. We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite a revolutionary movement destroying public order. We can only say that fundamental rights cannot be controlled on such hypothetical and imaginary considerations. It is said that in a democratic set up there is no scope for agitational approach and that if a law is bad the only course is to get it modified by democratic process and that any instigation to break the law is in itself a disturbance of the public order. If this argument without obvious limitations be accepted, it would destroy the right to freedom of speech which is the very foundation of democratic way of life. Unless there is a proximate connection between the instigation and the public order, the restriction, in our view, is neither reasonable nor is it in the interest of public order. In this view, we must strike down s.3 of the Act as infringing the fundamental right guaranteed under Art. 19(1)(a) of the Constitution."*
>
> (Para 14)

> *"The foregoing discussion yields the following results : (1) "Public order" is synonymous with public safety and tranquillity : it is the absence of disorder involving*

breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State; (2) there must be proximate and reasonable nexus between the speech and the public order; (3) s. 3, as it now stands, does not establish in most of the cases comprehended by it any such nexus; (4) there is a conflict of decision on the on the question of severability in the context of an offending provision the language whereof is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislation; one view is that it cannot be split up if there is possibility of its being applied for purposes not sanctioned by the Constitution and the other view is that such a provision is valid if it is severable in its application to an object which is clearly demarcated from other object or objects falling outside the limits of constitutionally permissible legislation; and (5) and the provisions of the section are so inextricably mixed up that it is not possible to apply the doctrine of severability so as to enable us to affirm the validity of a part of it and reject the rest." (Para 18)

The Superintendent, Central Prison, Fatehgarh v.

Dr. Ram Manohar Lohia AIR 1960 SC 633

13.6 The judgment in *R.M.D. Chamarbaugwalla vs. Union of India AIR 1957 SC 628 = (1957) SCR 930* was referred in the above decision in order to save the provision from the vice of unconstitutionality. The argument was rejected on the ground that constitutional validity of a Section cannot be made to depend upon "uncertain factor" and, therefore, entire Section 3 of the Act was struck down. Para 21 of the said judgment is important because the court did not accept the submission of the Advocate General that the court should express its view that the State could legitimately redraft the provision in

conformity with Article 19(2) of the Constitution. The court observed that it is not general observations.

13.7 That before *Kedarnath* there was an interpretation given to public order in *Lohia's case* (which has been consistently followed) as well as interpretation to the expression 'reasonable' in *V.G. Row.* Both these judgments are not referred to in *Kedarnath*.

14.ANALYSIS OF *KEDAR NATH*: AIR 1962 SC 955 (DECIDED ON 24.01.1962)

14.1 The Constitution Bench judgment delivered by Sinha CJ refers to the history of Sedition in Para 10 onwards. The challenge made to the said provision is considered in several foreign cases (up to Para 20). In Para 21, the judgment in *Romesh Thappar* and *Brij Bhushan* have been considered in detail, in particular, reference has been made to Para 14 of the minority judgment in *Brij Bhushan*. Thereafter, in Para 22 it is observed that the differences in *Romesh Thappar* and *Brij Bhushan* led to the first Constitutional Amendment which was made with retrospective effect. The Para also says (with respect, erroneously) that the amendment indicates that "it accepted the statement of law as contained in the dissenting judgment of Fazal Ali J." As discussed above, the said statement may not be the accurate position. Thereafter, from Para 24, Article 19 has been quoted and discussed. Para 25 is important which is analysed below. At the end, the judgment relies on *R.M.D. Chamarbaugwalla vs. Union of India (supra)* to hold that the interpretation following the

Federal Court judgment in *Niharendu Dutt Majumdar v. King-Emperor* would bring Sec.124A within constitutional limits.

14.2 That the passage in Para 25 consists of three parts: first part deals with the content of free speech and the extent of criticism which can be made by an individual; the second part discusses the rationale for retaining sedition. It reads as follows –

First part:

"25. It has not been contended before us that if a speech or a writing excites people to violence or have the tendency to create public disorder, it would not come within the definition of "sedition." What has been contended is that a person who makes a very strong speech or uses very vigorous words in a writing directed to a very strong criticism of measures of Government or acts of public officials, might also come within the ambit of the penal section. But in our opinion, such words written or spoken would be outside the scope of the section. In this connection, it is pertinent to observe that the security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with a 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 qua non of a democratic form of Government that our Constitution has established. This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression with which we are concerned in this case. 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.*** *The Court has, therefore, the duty cast upon it of drawing a clear line of demarcation between the ambit of a citizen's fundamental right guaranteed under Article 19(1)(a) of the Constitution and the power of the legislature to impose reasonable restrictions on that guaranteed right in the interest of, inter alia, security of the State and public order.*

Second part:

*We have, therefore, to determine how far the Sections 124-A and 505 of the Indian Penal Code could be said to be within the justifiable limits of legislation****. If it is held, in consonance with the views expressed by the Federal Court in the case of Niharendu Dutt Majumdar v. King-Emperor that the gist of the offence of "sedition" is incitement to violence or the tendency or the intention to create public disorder by words spoken or written, which have the tendency or the effect of bringing the Government established by law into hatred or contempt or creating disaffection in the sense of disloyalty to the State, in other words bringing the law into line with the law of sedition in England, as was the intention of the legislators when they introduced Section 124-A into the Indian Penal Code in 1870 as aforesaid, the law will be within the permissible limits laid down in clause (2) of Article 19 of the Constitution.***

Third Part:

If on the other hand we give a literal meaning to the words of the section, divorced from all the antecedent background in which the law of sedition has grown, as laid down in the several

decisions of the Judicial Committee of the Privy Council, it will be true to say that the section is not only within but also very much beyond the limits laid down in clause (2) aforesaid."

(Emphases supplied)

14.3 From the above, it comes out that the validity of Sec.124A was sustained on the basis that if the finding given by Federal Court in *Niharendu Dutt AIR 1942 FC 22* is accepted, in other words, bringing the law into line with the law of Sedition in England as was the intention of the legislators when they introduced 124A into the IPC in 1870, sedition will fall within permissible limits under Art.19(2). This is the grave error committed in *Kedar Nath*, namely, that it has followed the judgment of the Federal Court; it has construed the provision in harmony with how the provision is understood in England and what was the intention of legislature when they introduced Sec.124A. In fact, the next Para (Third part) in the case of *Kedar Nath* admits that if literal meaning to the words of Section 124A are given *de hors* what was said in the Judicial Committee, the Section will be beyond the limits of Art.19(2).

14.4 That the emphasised portions above show the error in construing Sec 124A. The Court adds: *"which have the tendency or the effect of bringing the Government established by law into hatred or contempt or creating disaffection in the sense of disloyalty to the State".* How such interpretation can be accepted under Art. 19(2)?

14.5 That *Kedar Nath* has not analysed the provision of Sedition independently, inter alia, in the light of:

* Debates in the Constituent Assembly related to Sedition;

* Debates in the Parliament when First amendment took place;

* Development & interpretation of Article 19(1)(a) post the First amendment, namely in V.G. Row and Lohia etc.;

*Whether there is any relevancy of the provision in the independent India;

* Testing the provision on the grounds of vagueness and therefore void; being over-broad thus amenable to abuse etc.

* Art 19(2) not containing any such expression and therefore, infringing 19(1)(a).

* Following tendency test.

14.6 That another error committed in *Kedar Nath* in Para 27 is to rely upon the case in *R.M.D. Chamarbaugwalla vs. Union of India AIR 1957 SC 628* and hold that by construing Section 124A in the manner suggested by the Judicial Committee, it will fall within the permissible limits. This finding is also not correct because if we look at the wordings of Section 124A, none of the expressions are referrable to Article 19(2) and in view of several judgments of this court, such a provision would be wholly unsustainable on the tests which have been evolved. It will not be possible to sustain Sec 124A as a whole after striking down the offending portions. It is, therefore, emphatically stated that if

independently examined, Section 124A is liable to be declared unconstitutional and void and its validity cannot be sustained merely on the reasoning given in *Kedar Nath*.

14.7 Lastly, the "tendency test" which *Kedar Nath* read into the impugned Section and upon which *Kedar Nath* relied to save Sec.124A from the vice of unconstitutionality is as vague and of varying and doubtful import as the Section itself. In international jurisprudence, the tendency test has been widely criticised for being vague and over-broad. Several Common Law jurisdictions have now moved away from the tendency test to the "real risk" test which is now preferred in order to protect the right to freedom of speech and expression. The broader test based on "inherent tendency" is considered to inhibit the right to freedom of speech and expression to an unjustifiable degree. The "inherent tendency" test is also criticised for its vagueness and is said to impose liability without the offence being defined in sufficiently precise terms (refer Australian Law Commission's Report at Paras 428, 429 and 431) has criticised the "tendency test" on two grounds (1) Firstly, it is uncertain and does not meet the criteria of the common law doctrine that criminal offences should be clearly and unambiguously defined by the word "provided by law" in Article 19 of the ICCPR. (2) Secondly, the breadth of criterion of liability. The question whether a publication has a "tendency" to prejudice is judged in the abstract. The Recommendations of the Law Commission include replacing the tendency test with the substantial risk test. New South Wales Law Reform Commission Report on Contempt by

Publication (Report No 100) has also noted that the tendency test had been widely criticised as being "imprecise and unclear, as well as too broad" (at Para 4.8). In the United States, the tendency test has been completely replaced; American judgments on this aspect have been dealt with in the subsequent paragraphs.

14.8 Besides the above, if we analyse the provision at present, the development of law as contained in *Shreya Singhal v. Union of India* (2015) 5 SCC 1; the doctrine of manifest arbitrariness in S*hayara Bano v. Union of India (2017) 9 SCC 1* and the concept of reasonableness and disproportionality laid down in *K.S. Puttaswamy v. Union of India (2019) 1 SCC 1*, it cannot be sustained.

15 INTERPRETATION AND EXPANSION OF ARTICLE 19(1)(a) & 19(2) POST *KEDAR NATH* UPTO THE PRESENT

15.1 In *Kameshwar Prasad v. State of Bihar AIR 1962 SC 1166 = (1962) Supp. 3 SCR 369* (Decided on 22.02.1962), this Hon'ble Court held that in order to bring a provision within the exceptions contained under 19(2), it must be established that:

a. The impugned legal provision must have a proximate nexus;
b. The connection should be immediate, real and rational;
c. The impugned legal provision must be clear, unambiguous and not vague;

d. The expression contained in the impugned provision must itself constitute an offence.

15.2 In *Sakal Papers (P) Ltd. and Others v. UOI AIR 1962 SC 305 = (1962) 3 SCR 842* (decided on 25th September 1962), the Constitution Bench referred to the judgments in *Express Newspaper Pvt. Ltd. V. UOI AIR 1958 SC 578 = (1959) SCR 12*, *V.G. Row (supra)* and *Romesh Thappar (supra)*. While referring to *Dwarkadas Shrinivas v. Sholapur Spinning and Weaving & Co. Ltd. & Others AIR 1954 SC 119 = 1954 SCR 674*, it was pointed out that while construing the Constitution, the correct approach should be to enquire as to what in substance is the loss or injury caused to the citizen and not merely the manner and method adopted by the State in placing the restriction. Finally, on the question of freedom of speech and expression under Article 19(1)(a) and reasonable restrictions that can be imposed under Article 19(2), this Court at Para 35 said:

> *"The right to freedom of speech and expression is an individual right guaranteed to every citizen by Article 19(1)(a) of the Constitution. There is nothing in clause (2) of Article 19 which permits the State to abridge this right on the ground of conferring benefits upon the public in general or upon a section of the public. It is not open to the State to curtail, or infringe the freedom of speech of one for promoting the general welfare of a section or a group of people unless its action could be justified under a law competent under clause (2) of Article 19."*
>
> (Emphasis supplied)

15.3 In *Ram Manohar Lohia v State of Bihar AIR 1966 SC 740 = (1966) 1 SCR 709,* the Constitution Bench allowed the

petition filed by Dr. Ram Manohar Lohia directing his release from detention under Rule 13(1)(b) of the Defence of India Rules. Justice Hidayatulla in his elaborate judgment referred to the judgments in *Brij Bhushan* and *Romesh Thapar* as well as in *The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia* and held at Para 52 (AIR citation) as follows:

> *"It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". 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. By using the expression "maintenance of law and order" the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules."*

15.4 Thereafter, Article 19(1)(a) has been the subject matter of discussion in several important cases, namely, *Arun Ghosh v. State of West Bengal (1971) 1 SCC 98; Bennet Coleman v Union of India (1972) SCC 788; Indian Express Newspapers v. Union of India (1985) 1 SCC 641*; *S Rangarajan v. P Jagjivanram (1989) 2 SCC 574; R Rajgopal v State of Tamil Nadu (1994) 6 SCC 632;*

Ministry of I.B. Government of India v. Cricket Association of Bengal (1995) 2 SCC 161; PUCL v Union of India (2003) 4 SCC 399; S Khushboo v. Kanniammal (2010) 5 SCC 600 etc. In these judgments, inter alia, freedom of expression was

widely accepted to be the "cornerstone of democracy". Without freedom of expression, democracy cannot exist.

15.3 In the matter of *S. Rangarajan v. P. Jagjivan Ram (1989) 2 SCC 574*, this Hon'ble Court held:

> *"There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. 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 power keg".*
>
> *53. We end here as we began on this topic. Freedom of expression which is legitimate and constitutionally protected, cannot be held to ransom by an intolerant group of people. The fundamental freedom under Article 19(1)(a) can be reasonably restricted only for the purposes mentioned in Article 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency. Open criticism of government policies and operations is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself."*
>
> *S. Rangarajan v. P. Jagjivan Ram*
>
> *[Emphasis supplied]*
>
> *(1989) 2 SCC 574*

15.4 These judgments have been followed in *Shreya Singhal v. Union of India* (2015) 5 SCC 1. In *Shreya Singhal*, Sec.66-A of the IT Act was struck down. The findings recorded therein are very relevant to the present discussion.

15.5 What comes out from the reading of above judgments is, that there should be proximate and direct connection with the instigation and the public order and that such connection should not be remote, conjectural or far-fetched; the expression 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 "spark in a power keg".

15.6 The subsequent judgments in S*hayara Bano v. Union of India (2017) 9 SCC 1* and *K.S. Puttaswamy v. Union of India*, *(2019) 1 SCC 1* are extremely important to understand the concept of arbitrariness, procedural and substantive due process, reasonableness in construing the fundamental rights and the proportionality principle. The relevant judgments shall be placed before this Hon'ble Court.

15.7 That the above discussion is meant for the purpose of understanding the term reasonableness and public order which were introduced by the first Amendment in the Constitution and which fell for consideration in *Kedar Nath*. The discussion also points out how some of these important principles have been missed in *Kedar Nath* and that in any case, *Kedar Nath* with evolving constitutional principles and morality require reconsideration.

DEVELOPMENT OF THE CONCEPT IN AMERICA

15.8 This Hon'ble Court in *Shreya Singhal* has also referred to and relied upon the 'clear and present danger test' and the 'Brandenburg test' developed by the United States Supreme Court. The Petitioners herein are referring to the judgments commencing from *Schenck V United States* up to Brandenburg and beyond as follows:

15.9 In the United States, the bad tendency test was a test which permitted restriction of freedom of speech by government if it is believed that a form of speech has a sole tendency to incite or cause illegal activity. The principle, formulated in *Patterson v. Colorado*, (1907) was overturned with the "clear and present danger" principle used in the landmark case Schenck v. United States (1919). Justice Holmes in Schenck v. United States 63 L. Ed. 470 enunciated the clear and present danger test as follows:

> *"... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. (At page 473, 474)."*

Schenck v. United States 63 L. Ed. 470

15.10 The test of "clear and present danger" was used by the U.S. Supreme Court in many varying situations. It appeared to have been repeatedly applied, including in Terminiello v. City of Chicago 93 L. Ed. 1131 (1949) at page 1134-1135. It was finally overturned in Brandenburg v. Ohio which replaced the

"clear and present danger test" with the "imminent lawless action" test. According to the court-

> *"The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where (1) such advocacy is directed to inciting or producing imminent lawless action and (2) is likely to incite or produce such action."*
>
> Brandenburg vs Ohio, 395 U.S. 444 (1969)

15.11 The two-step test in *Brandenburg* currently stands as the prevailing standard to determine protectable speech. The 'imminent lawless action' test has three distinct elements, namely intent, imminence and likelihood. In other words, the State cannot restrict and limit the First Amendment protection by forbidding or proscribing advocacy by use of force or law, except when the speaker intends to incite a violation of the law-that is both imminent and likely. The Brandenburg test was reaffirmed in NAACP v. Claiborne Hardware Co., 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) and has been followed consistently by the U.S. Courts in later judgments.

15.12 These decisions were considered in *Arup Bhuyan vs State of Assam, (2011) 3 SCC 377* and then in *Shreya Singhal (2015) 5 SCC 1*. In the latter, Section 66 A of the IT Act was declared unconstitutional as violative of 14 and 19(1)(g) of the Constitution. The following legal principles emerge from the said judgment:

a) Restrictions on freedom of expression must be subjected to intense scrutiny.
b) The State is proscribed from enacting any legislation curtailing the right to expression except in emergency situations that are *immediately* dangerous warranting making an exception to the rule that no law must abridge the freedom of speech.
c) Statutes affecting freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action. In other words, laws cannot forbid or proscribe speech that advocates violence unless there is an actual danger of violence which is both imminent and likely.

16. THE IMPUGNED SECTION 124A: WHY IT NO LONGER WORKS

16.1 That it is important at this juncture to examine the constitutional validity of Section 124A of IPC by applying the following tests to the impugned section:

1. The meaning and intent of the term "Sedition" and whether it has any relevance in the present context? In other words, whether the term Sedition including its implication in administration during British regime, has lost all its relevance in Independent India?

2. Whether terms like 'disaffection' 'disloyalty' 'disapprobation' etc. used to define Sedition are vague and, therefore, make the provision void under Article 14?
3. Whether the use of these terms in Section 124A are hit by the freedom of speech and expression contained in 19(1)(a) as none of these terms find mention in the exceptional areas demarcated in Article 19(2)?
4. Whether it is permissible to read these terms within the expression "public order"?
5. Whether the meaning of the expressions used in Sedition are overbroad and, therefore, amenable to mischief and arbitrary use and whether they can therefore, be sustained under Article 14?
6. Whether the expressions used in Section 124A, being of doubtful and varying import, violate the fundamental right to life and liberty enshrined under Article 21, as it tends to implicate innocent citizens?

16.2 These questions are dealt with below as follows:

16.2.1 <u>"Sedition" has become anachronistic and has lost its relevance in the present times.</u>

In a plethora of judgments, this Hon'ble court has established that a statute which was valid when enacted may, with the passage of time, become arbitrary and unreasonable. *(Motor General Traders v. State of A.P. (1984) 1 SCC 222, Malpe Vishwanath Acharya and Ors. vs. State of Maharashtra and Ors. (1998) 2 SCC page 1 and Satyawati*

Sharma v. Union of India (2008) 5 SCC 284). The term 'Sedition' including its implication in administration during British regime, has lost all its relevance in Independent India. History of Sedition law reveals that it was a political crime originally enacted to prevent political uprisings against the Crown, essentially meant to be a temporary measure to control the colonies. The law has long since served its purpose and thereby, the very foundation of its constitutionality has been destroyed. The Constituent Assembly debates reveal that the framers of the Constitution considered *'Sedition'* to be a law essentially "*repressive*" in character, which had caused and was capable of causing "*a lot of misery*" and thus had no place in independent India. At the time of the First Constitutional amendment, Pt. Nehru called it "obnoxious" and stated that it should be done away with. Most countries around the world have either repealed the law or declared it unconstitutional as it offends the basic principles of democracy and serves no purpose in modern society. In *Joseph Shine vs. Union of India (2019) 3 SCC 39*, Section 497 IPC was struck down in the view of "social progression, perceptual shift, gender equality and gender sensitivity."

> "*What is clear, therefore, is that this archaic law has long outlived its purpose and does not square with today's constitutional morality, in that the very object with 36 which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational. On this basis alone, the law deserves to be struck down, for with the passage of time, Article 14*

> *springs into action and interdicts such law as being manifestly arbitrary. That legislation can be struck down on the ground of manifest arbitrariness is no longer open to any doubt."*

As held in *V.G. Row (supra)*, with the passage of time and drastic change in circumstances, the use of Sedition has become unreasonable.

16.2.2 Terms like 'disaffection' 'disloyalty' 'disapprobation' etc. used to define Sedition are vague and therefore make the provision void.

Section 124A of the Indian Penal Code, 1860, as it stands now, reads as follows:

> *"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, 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.*
>
> *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."
[Emphasis supplied]

According to Collins English dictionary, following are the meanings attributed to the various terms used in the above definition-

Hatred

1. a very strong feeling of dislike for someone or something
2. Synonyms – dislike, animosity, aversion

Contempt

1. the feeling or attitude of one who looks down on somebody or something as being low, mean, or unworthy; scorn
2. the condition of being despised or scorned
3. the punishable act of showing disrespect for the authority or dignity of a court (or legislature), as by disobedience, unruliness, etc.

Disaffection

1. Disaffection is the attitude that people have when they stop supporting something such as an organization or political ideal.
2. Synonyms- alienation, resentment, dis-content, hostility

Disloyalty

1. Someone who is disloyal to their friends, family, or country does not support them or does things that could harm them.
2. Synonyms- treacherous, false, unfaithful, subversive

Feelings

1. A feeling is an emotion, such as anger or happiness.

2. Synonyms- : emotion, sentiment

Enmity

1. A feeling of hostility or ill will, as between enemies;

2. Antagonism

Disapprobation

Moral or social disapproval

In Para 52 of *Shreya Singhal*, Nariman J. states as under:

> *"The U.S. Supreme Court has repeatedly held in a series of judgments that where no reasonable standards are laid down to define guilt in a Section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a Section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable."*

[Emphasis supplied]

The Hon'ble judge in *Shreya Singhal* then systematically goes on to list several enactments which were struck down by the U.S. Supreme Court on the basis of the "void-for-vagueness doctrine" including *Musser v. Utah 92 L. Ed. 562*, where a Utah statute which outlawed conspiracy to commit acts injurious to public morals was struck down, in *Winters v. People of State of New York 1948 92 L. Ed. 840*, a New York Penal Law was struck down. In *Burstyn v. Wilson*, sacrilegious writings and utterances were outlawed and while striking it down, the U.S. Supreme Court stated:

> *"It is not a sufficient answer to say that 'sacrilegious' is definite, because all subjects that in any way might be interpreted as offending the religious beliefs of any one of the 300 sects of the United States are banned in New York. To*

allow such vague, indefinable powers of censorship to be exercised is bound to have stultifying consequences… on the creative process of literature and art--for the films are derived largely from literature. History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men. We not only do not know but cannot know what is condemnable by 'sacrilegious.' And if we cannot tell, how are those to be governed by the statute to tell?" (at page 1121)

[Emphasis supplied]

In Para 57, Nariman J. quotes *Grayned v. City of Rockford 1972: 33 L. Ed. 2d. 222* wherein the law on the subject of vagueness was clearly stated thus:

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms, it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone'... than if the boundaries of the forbidden areas were clearly marked.' (at page 227-228)"

Further:

> *"Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.*
>
> *"When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech. (at page 2317)"*
>
> [Emphases supplied]

Judged by the standards laid down in the aforesaid judgment, it is quite clear that the expressions used in 124A such as "disaffection", "hatred", "contempt", "disloyalty", "feelings of enmity" are completely open ended, vague, are not capable of an objective assessment and have led to and are bound to lead to a great deal of uncertainty. The terms used in the Explanations such as "feelings of enmity" "disloyalty" and "disapprobation" are equally vague and do not provide any objective standard for understanding or determining guilt. This Hon'ble court in *State of MP v. Baldev AIR 1961 SC 293; K.A. Abbas v Union of India 1970 2 SCC 780; Harakchang Ratanchand Banthia v. Union of India AIR 1961 SC 293; AK Roy v. Union of India 1982 1 SCC 271* and in *Kartar Singh v. State of Punjab 1994 3 SCC 569* have discussed the basic principles of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. The expressions used in section 124A being unclear undefined open-ended are violative of the law laid down in the above judgments which are re-iterated and reaffirmed in *Shreya Singhal*. It was further held in *Shreya Singhal* that a penal law is void for

vagueness if it fails to define the criminal offence with sufficient definiteness.

a) Firstly, because ordinary people should be able to understand what conduct is prohibited and what is permitted.
b) And secondly, because those who administer the law must know what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place.

For these reasons, it must be held that expressions which are vague and, therefore, void are used in Section 124A. The entire Section is, therefore, arbitrary and unreasonable making it violative of Article 14 of the Constitution.

16.2.3 <u>The terms in Section 124A are hit by the fundamental right to freedom of speech and expression contained in 19(1)(a) as none of these terms find mention in the exceptional areas demarcated in Article 19 (2).</u>

None of the terms used in Section 124A such as "disaffection" "hatred" or "contempt", nor the term 'Sedition' itself, find any mention in the exceptional areas demarcated in Article 19 (2). They are, therefore, unconstitutional and violative of Article 19(1)(a) of the Constitution *[Sakal Papers v. Union of India AIR 1962 SC 305, Kameshwar Prasad v State of Bihar 1962 Suppl. (3) SCR 396; Shreya Singhal (supra)]*

16.2.4 <u>It is no longer permissible to read these terms used in 124A within the expression "public order."</u>

The expression 'public order' finds mention in item 1 of List II of Schedule VII of the Constitution. General criminal matters are in Concurrent List (List III) item 1. As discussed above that there should be proximate and direct connection with the instigation and the public order and that such connection should not be remote, conjectural or far-fetched; the expression 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 "spark in a power keg".

Thus, the law is now settled that in the context of fundamental rights, the term "public order" must be strictly construed. It cannot be so liberally construed as to bring terms such as 'disaffection' and 'disloyalty' within its purview even while these terms-

a) Have no proximate, nor even foreseeable, nexus with public order sought to be protected under 19(2).
b) Have no immediate, real and rational connection with it.
c) Are unclear, ambiguous and vague.
d) Do not by themselves constitute a criminal offence.

16.2.5 **<u>The terms are Overbroad and amenable to mischief & arbitrary use and cannot therefore, be sustained under Article 14</u>**

Apart from the terms used in 124A as discussed above which are overbroad, the term 'Sedition' (used in the marginal notes of the Section) itself is overbroad. The dictionary meaning of Sedition is as follows:

Black's Law Dictionary (Second Edition) defines 'Sedition' as-

An insurrectionary movement tending towards treason, but wanting an overt act; attempts made by meetings or speeches or by publications, to disturb the tranquillity of the state.

Collins English dictionary defines Sedition as-

1. Sedition is speech, writing, or behaviour intended to encourage people to fight against or oppose the government
2. Synonyms- rabble-rousing, treason, subversion, agitation

As the Constituent Assembly had correctly pointed out, the term Sedition is "*of doubtful and varying import*" and the overbroad expression can even take into account actions which cannot fall within the parameters of an offence. For example, if a person criticises the government and compares it with the other country, it may be termed as being disloyal when such statement and comparison will be in the area of criticism and not an offence. It is because of this over-breadth of the provision that innocent people are being implicated under Sedition. The facts that the provision is overbroad and amendable to different interpretations and arbitrary exercise, it is violative of Article 14 of the Constitution *(vide R. Rajgopal v. State of Tamil Nadu (1994) 6 SCC 632 (Para 19); S. Khushboo v. Kanniammal (2010) 5 SCC 600; Kameshwar Prasad v. State of Bihar AIR 1962 SC 1166 - all these judgments followed in*

Shreya Singhal.) The manner in which Sedition and the expressions used therein are couched, take within its sweep protected speech and speech that is innocent in nature. If used in this manner, it is bound to have a chilling effect on free speech and would therefore, be liable to be struck down on the ground of over-breadth.

16.2.6 <u>The expressions used in Section 124A, being vague, overbroad and of doubtful and varying import, violate the fundamental right to life and liberty enshrined under Article 21</u>

The framers of the Constitution themselves having had their liberty curtailed due to misuse of the section by the British were categorical in their view that the term 'Sedition' was of "doubtful and varying import" and therefore was liable for misuse, "*repressive*" in its character, had caused and was capable of causing "*a lot of misery*" and thus had no place in independent India. At the time of discussion of the First Constitutional Amendment, Sri Jawaharlal Nehru had also commented on the need for sedition to be examined by calling it 'obnoxious' and unnecessary in a free India.

The Victims of arbitrary charges of Sedition wait for years for a judicial determination of a particular act as "seditious" or otherwise, often losing their lives in jail waiting for justice to be done. This results in severe curtailment of liberty and violates the fundamental right to life and liberty of innocent citizens. The process of trial itself is a punishment for free

speech practitioners, even though the ultimate decision may result in acquittal. In the matter of *Shreya Singhal v. Union of India (2015) 5 SCC 1*, this Hon'ble Court held that Section 66-A of the Information Technology Act, 2000 was violative of Article 19(1)(a) and Article 21 of the Constitution of India-

> *"14. A provision of law that forces people to self-censor their views for fear of criminal sanction violates the constitutional guarantee of free speech and as such it is unconstitutional. .... The overhanging threat of criminal prosecution merely for the exercise of civil liberties guaranteed by the Constitution, by virtue of a vague and widely worded law is in violation of Article 21 of the Constitution of India..."*
>
> [Emphasis supplied]

16.2.7 The impugned section is not a 'reasonable' restriction

It is trite law that while examining whether a restriction is reasonable or not, the reasonableness of both substantive and procedural provisions of the law must be considered.

16.7.2.2. Substantive reasonableness

The test of reasonableness of a restriction on a fundamental right was laid down by this Hon'ble Court in the matter of *State of Madras v. V.G. Row (1952) SCR 597*, which provided the factors to be taken into account by courts while determining the reasonableness of restrictions on a fundamental right. The factors are –

a) *the nature of the right alleged to have been infringed,*
b) *the underlying purpose of the restrictions imposed,*
c) *the extent and urgency of the evil sought to be remedied thereby*

d) the disproportion of the imposition

e) the prevailing conditions at the time.

The Petitioners submit that the test of reasonableness was not sufficiently applied while arriving at the judicial verdict in the matter of *Kedar Nath Singh v. State of Bihar (supra)* upholding the constitutionality of Section 124A of the Indian Penal Code, 1860. The factors stated in VG Row (supra) are examined hereinbelow-

i. The *nature of the right alleged to have been infringed* –

The right being infringed is the fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India which is the '*sine qua non* of democracy' as held by this Hon'ble Court in a plethora of judgments including *Kedar Nath*. The right to free speech being a most significant principle of democracy, is required to be safeguarded at all times and any restrictions on this right must be subject to the greatest scrutiny as held by judgments of the Indian and United States Supreme Court. The restrictions hence provided under Article 19(2) of the Constitution of India needs to be tested for their reasonableness. In *Shreya Singhal (2015) 5 SCC 1*, Nariman J. stated as under-

> *"The Preamble of the Constitution of India inter alia speaks of liberty of thought, expression, belief, faith and worship. It also says that India is a sovereign democratic republic. It cannot be over emphasized that when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme."*

[Emphasis supplied]

In Para 12 of the judgment, Nariman J. quotes Justice Brandeis in his famous concurring judgment in *Whitney v. California 1927: 71 L. Ed. 1095* who – while putting freedom of speech on the highest footing- observed that public order cannot be secured through fear of punishment for its infraction and that, in fact, it is hazardous to discourage thought, hope and imagination because fear breeds repression; that repression breeds hate; and hate menaces stable government. In other words, suppressing freedom of speech can cause hazard to public order rather than the other way round:

> *"Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. <u>But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government;</u> that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its*

worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

[Emphasis supplied]

ii. The *underlying purpose of the restrictions imposed* –

The next point of consideration is the underlying purpose of the restriction. The history of the law reveals that the original purpose of the Section was to protect the British colonial power from any expressions of contempt, hatred or discontent and that it was liberally employed to silent political dissent and supress India Nationalist sentiments. Post-independence, however, the underlying purposes of Section 124A, the restriction imposed on Article 19(1)(a) are accepted to be preventing 'public violence' and 'public disorder'. The Supreme Court in *Kedar Nath's case*, reading down the Section, held these to be legitimate purposes, falling within the interests of "security of the State" and of "public order", two of the grounds enumerated under Article 19(2) of the Constitution. What would fall within the interests of "public order" for the purpose of applying the restriction has been examined by this Hon'ble Court in the matter of *Superintendent, Central Prison, Fatehgarh (supra) and Shreya Singhal (supra)*. For the restriction provided under the impugned law to be covered in the interests of "public order" under Article 19(2) of the Constitution of India, such law –

i. must have a proximate or foreseeable nexus with the public order sought to be maintained;

ii. the connection between the Act and the public order sought to be maintained should be intimate, real and rational;

iii. The connection must not be far-fetched, hypothetical or imaginary.

iv. has to be clear and unambiguous, must not suffer from vagueness and overbreadth.

In order to enquire into what the underlying purpose of the restriction is, one must look beyond the wordings of the law, to its actual application in practice. In the matter of *Dwarkadas Shrinivas of Bombay v. Sholapur Spinning & Weaving Co. Ltd. and others AIR 1954 SC 119,* this Hon'ble Court held that while construing the Constitution, the correct approach should be to enquire as to what in substance is the loss or injury caused to the citizen and not merely the manner and method adopted by the State in placing the restriction.

Further-

> *"The right to freedom of speech and expression is an individual right guaranteed to every citizen by Article 19(1)(a) of the Constitution. There is nothing in clause (2) of Article 19 which permits the State to abridge this right on the ground of conferring benefits upon the public in general or upon a section of the public. It is not open to the State to curtail, or infringe the freedom of speech of one for promoting the general welfare of a section or a group of people unless its action could be justified under a law competent under clause (2) of Article 19."*

[Emphasis supplied]

Section 124A of the Indian Penal Code, 1860, fails to satisfy the above requirements, in that the use and application of Section 124A of the Indian Penal Code, 1860, has seldom any connection with maintenance of public order, let alone a proximate or intimate one. The wordings of Section 124A of the Indian Penal Code, 1860, are so liberal and broad-scoped that any and all criticism of the government is covered under its ambit. The underlying purpose of the impugned law has historically been political and not legal, in as much as it has operated and continues to operate as a tool to crush any form of dissent.

iii. *The extent and urgency of the evil sought to be remedied thereby*

The Petitioners have given a historical background as to how Sedition was brought as an offence. The purpose was to suppress the dissent and protest by the British colonies. It was for this purpose that 'Sedition' was added in the IPC. The evil namely disloyalty, disaffection etc. as conceived by the Britishers was sought to be remedied through addition of Sedition as an offence. That evil does not exist now. In relation to the freedom of Speech and Expression it cannot be said that either in oral discussion or in writing people should adhere to loyalty and affection while criticising the State. Even *Kedar Nath* accepts that criticism is part of democracy and is covered by Article 19 (1) (a) of the Constitution. It is quite different that an Act is complained of creating public disorder. That aspect has been discussed in detail earlier. In any case, enough

provisions in the Indian Penal Code exist and Sedition is not required for the reasons discussed in this Writ Petition.

iv. *The disproportion of the imposition* –

That one of the facets of the principle of proportionality and legitimacy as recognized in *K.S. Puttaswamy and Anr. v. Union of India and Ors. (2017) 10 SCC 1* is that the proposed action must be necessary in a democratic society for a legitimate aim, there should be a need for such interference and that procedural guarantees exist against abuse of such interference. When we look at Section 124A, as already discussed above, there is no need to have such a criminal provision besides the same being in violation of Article 14, 19 and 21 of the Constitution. Sedition has no place in independent India and in a democracy which is governed by the rule of law and the Constitution. This finds support from the views expressed in the Constituent Assembly debates. There appears to be no legitimate aim to retain Sedition as its abuse is not only resulting in offending fundamental rights of the people but in generating public disorder as mentioned in *Whitney v. California 1927: 71 L. Ed. 1095.*

The doctrine of proportionality has been extensively examined by the 9-judge bench of this Hon'ble Court in the matter of *K.S. Puttaswamy and Anr. v. Union of India and Ors. (2017) 10 SCC 1* which deals with the constitutional right to privacy. Insofar as restriction of Article 19(1) is concerned, the judgment stipulates the requirement that '*there must not only be a law but such law must be tailored to achieve the purposes indicated*

in the corresponding clause'. In the course of their separate opinions, Learned Justices held that an invasion of life and personal liberty must meet the threefold requirement of (i) legality, which postulates the existence of law (ii) need, defined in terms of the legitimate State aim and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them. In his concurring judgment, Justice Sanjay Kishan Kaul, provided the test for proportionality as far as the right to privacy is concerned as under –

> *"Test: Principle of proportionality and legitimacy*
>
> *638. The concerns expressed on behalf of the petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:*
>
> *i. The action must be sanctioned by law;*
> *ii. The proposed action must be necessary in a democratic society for a legitimate aim;*
> *iii. The extent of such interference must be proportionate to the need for such interference;*
> *iv. There must be procedural guarantees against abuse of such interference."*

v. *The prevailing conditions at the time –*

Prevailing conditions have changed drastically since British colonial times. The law was brought in order to supress dissent against the imperial regime. The debates in the Constituent Assembly and Parliament which took place in 1948 and 1951 respectively reveal the unanimous view of the framers of the Constitution and political leaders that Sedition had no place in

a free India. Yet the law continued and since then, it has served as a tool for reprisals and vindictive action against human rights defenders, journalists, right to information activists, protestors and other voices of dissent. Social media posts on platforms such as Facebook, Twitter have invited action under Sedition law. This is elaborated in subsequent paragraphs.

16.2.7.1 **Procedural reasonableness-**

There are two ways in which Section 124A lacks the necessary procedural safeguards-

At the time of *Kedar Nath*, Section 124A was governed by Criminal Procedure Code, 1898 in terms of the procedural aspects. It was treated as a non-cognizable offence and an arrest could only be made on a warrant issued by Magistrate. Hence, though freedom fighters like Gandhiji and Lokmanya Tilak were tried and convicted under Sec.124A, the Police couldn't arrest them until conviction. Under the Code of Criminal Procedure, 1898 which was introduced by the British following the Indian Penal Code, 1860, Section 124A i.e. the offence of Sedition was always classified as a non-cognizable offence, under Schedule 2 to the antiquated 1898 Code.

1	2	3	4	5	6	7	8
Section of Ranbir Penal Code	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compound-able or not	Punishment under the Ranbir Penal Code	By what Court triable

124-A.	Sedition	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable	Imprisonment for life and fine, or imprisonment of either description for 3 years and fine, or fine.	*[Court of Session, Chief Judicial Magistrate or another Judicial Magistrate of the 1st class specially empowered

Under the 1898 Code, a non-cognizable is defined under Section 4(1)(j) as –

> "(*j) "Non-cognizable offence", "Non-cognizable case"— "Non-cognizable offence" means an offence for, and "non-cognizable case" means a case in which, a police officer may not arrest without warrant ;"*

Under Section 155 of the 1898 Code, the procedure for information in non-cognizable cases was provided. This Section contemplated that in a non-cognizable case, the police would record the information in its book and refer the case to the Magistrate who alone has the power to try or commit the case for trial. The police did not have the power to investigate into non-cognizable offences without the order of the Magistrate or to arrest any person without warrant.

> *"155. Information in non-cognizable cases.—(1) When information is given to an officer-in-charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and refer the informat to the Magistrate*

1[having power to try such case or commit the same for trial.].

(2) Investigation into non-cognizable cases.—No police officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer-in-charge of a police station may exercise in a cognizable case."

This position held true when the Constitution Bench of this Hon'ble Court considered the constitutionality of Sedition law in the matter of *Kedar Nath Singh v. State of Bihar (supra)*. Accordingly, in 1962, the offence of Sedition under Section 124A of the Indian Penal Code, 1860 was a non-cognizable offence and this Hon'ble Court was examining a less severe and better protected version of the offence. At the relevant time, the impugned provision being a non-cognizable offence, a case filed under it was required to be examined by the Magistrate before trying the case, committing the same for trial or issuing warrant of arrest. Hence, this layer of checks and balances was present. It is only pursuant thereto, in 1973 that the offence of Sedition was made cognizable, with the coming into effect of the Code of Criminal Procedure, 1973 and the repeal of the 1898

Code. Under Schedule 1 of the Code of Criminal Procedure, 1973, the offence of Sedition is classified as follows –

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or Non-bailable	By what Court triable
1	2	3	4	5	6
124A	Sedition	Imprisonment for life and fine, or imprisonment for 3 years and fine, or fine.	Cognizable	Non-bailable	Court of Session.

Hence, Section 124A of the Indian Penal Code, 1960 was made a cognizable offence only in the year 1973 and consequently, the severity of the offence has been drastically increased since 1973. The Constitution Bench of this Hon'ble Court in the matter of *Kedar Nath Singh v. State of Bihar (supra)* did not have the occasion to deal with this aspect of the law as it stands today. Due to the prevailing condition of the offence being cognizable, the police is left with wide discretionary powers proving to be a fertile ground for abuse, especially in the case of Sedition law owing to its political nature. There is no check on its misuse and misapplication of Sedition law at the stage of registration of the offence by the police authorities, investigation and arrest. In practice the read-down interpretation of the offence in the matter of *Kedar Nath Singh v. State of Bihar (supra)* is not followed by the police authorities, as can also be seen from the line of judgments passed by the courts. Especially since Sedition law is mostly used against journalists, students, civilian protestors, dissenters and activists, the absence of protections to safeguard from

misuse of the provision far outweighs any possibility of fair, reasonable and just use of the provision.

16 ABUSE OF SEDITION LAW & VIOLATION OF ARTICLES 14 AND 21

17.1 Pursuant to the judgment passed by this Hon'ble Court in the matter of *Kedar Nath Singh v. State of Bihar (supra),* several cases of overreach and wrongful prosecution on account of abuse, misuse and misapplication by police authorities of Section 124A of the Indian Penal Code, 1860, have taken place. The courts have time and again reiterated the interpretation given by this Hon'ble Court in the *Kedar Nath Singh* judgment to address misapplication and free wrongfully incarcerated prisoners. In 2016, in the matter of *Common Cause and Anr. v. Union of India (2016) 15 SCC 269,* this Hon'ble Court passed direction that while dealing with offences under Section 124A of the Indian Penal Code, 1860, the authorities shall be guided by the principles laid down in the said matter of *Kedar Nath Singh* by the Constitution Bench of this Hon'ble Court.

17.2 However, the overbroad, subjective, ambiguous and vague terminology used in Section 124A of the Indian Penal Code, 1860, causes two problems as stated in *Shreya Singhal-*

a) Firstly, ordinary people are not able to understand what conduct is prohibited and what is permitted.

b) Secondly, those who administer the law are not clear what offence has been committed resulting in arbitrary and discriminatory enforcement of the law.

The vagueness of the provision has provided sanction to abuse of Sedition law by the authorities which is amplified by procedural delays which severely curtail the right to life and liberty of those suffering from wrongful incarcerations.

17.3 In 1995, in the matter of *Balwant Singh v. State of Punjab (1995) 3 SCC 214*, this Hon'ble Court set aside the Sedition conviction for sloganeers who shouted the slogans "Khalistan Zindabad", "Raj Karega Khalsa" etc. shortly after the assassination of Indira Gandhi, on the grounds that the slogans raised did not lead to any disturbance and holding that casual raising of slogans cannot be said to be aimed at exciting or attempting to excite hatred or disaffection towards the government. This Hon'ble Court also opined in the facts and circumstances of the case and cautioned the police authorities against such action. It was held at Para 12 as follows:

> *"12.....The police authorities exhibited lack of maturity and more of sensitivity in arresting the appellants for raising the slogans – which arrest – and not the casual raising of one or two slogans – could have created a law and order situation, keeping in view the tense situation prevailing on the date of the assassination of Smt. Indira Gandhi. In situations like that, over-sensitiveness*

sometimes is counterproductive and can result in inviting trouble. Raising of some lonesome slogans a couple of times by two individuals, without anything more, did not constitute any threat to the 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."

17.4 However, due to the inherent ambiguousness present in the provision for the offence of Sedition under Section 124A of the Indian Penal Code, 1860, which leaves it open for the police authorities to interpret legitimate criticism of the government, holding of dissenting views or issuing a call for advocacy and democratic protest as Sedition, Section 124A of the Indian Penal Code, 1860, has been used to take away the right to freedom of speech and expression of citizens, both as a matter of practice and by creating an atmosphere of fear where independent, free-thinking voices cannot possibly flourish.

17.5 In 2012, residents of an entire village in Kudankulam, Tamil Nadu, had Sedition cases slapped against them for resisting a nuclear power project. In 2014, *adivasis* of Jharkhand, who were resisting displacement, were slapped with Sedition charges.

17.6 In 2012, a political cartoonist and social activist, Aseem Trivedi was arrested on the basis of registration of a FIR alleging inter alia the commission of offence under Section

124A of the Indian Penal Code, 1860. It was alleged that cartoons mocking the Parliament and the corruption in the administrative machinery were uploaded by him on his Facebook page and website "India Against Corruption". It was alleged that the cartoons not only defamed the Parliament, the Constitution of India and the Ashok Emblem but also tried to spread hatred and disrespect against the Government and published the said cartoons on 'India Against Corruption" website, which not only amounts to insult under the National Emblems Act but also amounts to serious act of Sedition. While dealing with a Public Interest Litigation filed in respect of this case in the matter of *Sanskar Marathe v. State of Maharashtra and Ors. [2015 Cri LJ 3561]*, the Bombay High Court held that the offence of Sedition was not made out and provided for issuance of guidelines with a view to reinforce the implementation of the standards laid down in the matter of *Kedar Nath Singh v. State of Bihar (supra)*.

17.7 In the matter of *Arun Jaitley v. State of U.P. [(2016) 92 ACC 352]*, the Allahabad High Court was confronting a case filed against ex-Minister Arun Jaitley for an Article titled "NJAC Judgment – An Alternative View" written by him and posted on his Facebook Page. Holding that none of the ingredients essential for invoking the offence of Sedition was found in the case, the Allahabad High Court concluded that the Magistrate had committed a manifest illegality by forming an opinion that offence under the provision stood committed.

17.8 The frequency of use of Sedition law by the authorities has increased in the recent years. In a news Article titled "*Arrests under Sedition charges rise but conviction falls to 3%*" the Economic Times reported that in terms of the National Crime Records Bureau (NCRB) data, between 2016 and 2019, the number of cases filed under Section 124-A of the Indian Penal Code increased by 160% while the rate of conviction dropped to 3.3% in 2019 from 33.3% in 2016. A study conducted by Article 14 reveals the rise in Sedition cases in recent times. The study reveals that there has been a 28% increase in Sedition cases filed each year between 2014 and 2020, much of which were filed during the protest movements against CAA-NPR-NRC and the rape of a Dalit woman in Hathras, Uttar Pradesh. Some of the more recent cases where the offence of Sedition has been applied for expressing critical views, advocacy, reporting, social media posts etc. are listed below:

i. In October 2019, an FIR charging Sedition was lodged on the order of the subordinate court against 49 celebrities in India, including writers and social workers of immense repute such as Mani Ratnam, Shyam Benegal, Ramchandra Guha etc, for writing to the Prime Minister against the frequent mob-lynching incidents throughout the nation.

ii. FIR was lodged under Sedition against a former JNU student in January 2020 for delivering an allegedly seditious speech at the Shaheen Bagh Protest in Delhi

and he was arrested. Following this in connection with an unconnected event at the Queer Aazadi March in Mumbai in February 2020, an FIR was filed against a transgender activist and 50 others for raising a slogan in support of the JNU student at the event.

iii. In Karnataka, Fareeda Begum, a 50-year-old teacher, and Nazbunnisa, a 36-year-old parent, were arrested over a children's school play depicting the fear gripping the country's minority due to the contentious Citizenship Amendment Act (CAA). Human Rights Watch published an Article titled *"India: Arrests of Activists Politically Motivated - Sedition, Counterterrorism Laws Used to Silence Dissent"* which reported that the children, as young as 6 to 7 years, were questioned, harassed and intimidated by the police for hours for several days, merely for participating in a play that talked about the ill-effects of NRC, and allegedly criticized the Prime Minister.

iv. FIR was lodged against journalist Siddique Kappan for offences under Unlawful Activities Prevention Act (UAPA) and Sedition, after he was arrested in October 2020 while *en route* to Hathras, Uttar Pradesh to report on a crime (Hathras rape case) in the discharge of his duty as a journalist in October 2020. He has been under detention since. The chargesheet was filed on April 2, 2021.

v. FIRs were lodged in Uttar Pradesh, Madhya Pradesh and Delhi against Member of Parliament Shashi Tharoor, journalists Rajdeep Sardesai, Vinod K Jose

(Caravan), Zafar Agha, the Group Editor-in-Chief of National Herald, Ananth Nath, the Editor of Caravan, Paresh Nath and Mrinal Pande under the offence of Sedition and other Sections of the Indian Penal Code, for tweeting and spreading fake news pertaining to the death of a farmer during a tractor rally on 26th January 2021 as part of the farmers agitations.

vi. In February 2021, pursuant to a FIR under Sedition and other offences filed against environmentalists in what is now popularly known as the "toolkit conspiracy case", 22-year old climate change activist was arrested and released on bail by a district court in Delhi. The case was filed against the activists on the charge of creating a protest toolkit backing the farmers agitation with the aim of allegedly tarnishing the image of India, with the backing of pro-Khalistani elements.

vii. In May 2021, an FIR under Section 124A of the Indian Penal Code was lodged against news channels TV 5 and ABN Andhrajyoti by the Andhra Pradesh Police, for airing "offending speeches" made by YSR Congress lawmaker, Kanumuri Raghu Rama Krishna Raju. In a separate FIR registered by the police, Raju was also arrested by the Andhra Pradesh police.

viii. BBC News published an Article entitled *'Farmer protests: India's Sedition law used to muffle dissent'* on the use of Sedition law to curb dissent against new laws regulating farming.

ix. In a news Article dated May 16, 2021 titled "Posting posters is not a mutiny" the Economic Times reported

that 21 FIRs had been filed and 17 persons arrested for posting posters criticizing the Government of India's vaccine policy. Several of these persons were poor people, painters and auto-rickshaw wallas.

17.9 As far as the contemporary arrests are concerned, it is clear that Section 124A is repeatedly being used to silence or discipline citizens of the country who express their thoughts in news, Articles, cartoons, speeches or peaceful protests which are critical of the government or Ministers or politicians in power for things such as liking or sharing a social media post, drawing a cartoon or staging a school play etc.; these include-

- public spirited social workers, human rights activists
- writers of repute, famous cartoonists,
- news agencies, media reporters and journalists
- academicians, professors and teachers
- students including pregnant women.
- political and opposition leaders
- farmers, painters, auto-rikshaw drivers
- civil protesters and ordinary citizens

This has resulted in a chilling effect and atmosphere of fear, discouraging citizens from voicing their opinions and expressing differing / critical views.

17.10 In March 2021 a report titled "Freedom in the World 2021 - Democracy under Siege" was published by a United States Organization Freedom House which evaluates the state of

freedom in the world. Based on evaluation of 195 countries and 15 territories during calendar year 2020, the Report stated that India had been downgraded from a free country to "partly free" inter alia due to repeated *"crackdown on expressions of dissent by the media, academics, civil society groups, and protesters".*

18 Consequently, as show above, even inclusion of the read-down interpretation of the impugned Sedition law as a restriction on the freedom of speech and expression, proves to be unreasonable and disproportionate. The Petitioners submit that the Sedition law provided under Section 124A of the Indian Penal Code, 1860, hence, suffers from vagueness and is unreasonable and would hence continue result in arbitrary application and potential misapplication / abuse of the law. It is hence manifestly arbitrary and violative of the Article 14 of the Constitution of India and the long time-gaps till judicial determination takes place result in curtailment of liberty of innocent citizens violating their fundamental right to life and liberty under Article 21.

18. REPEAL OF SEDITION LAW BY OTHER COUNTRIES AND REPORT OF THE LAW COMMISSION OF INDIA ON SEDITION

It is not surprising that international trends are against retention of the Sedition law and for free speech.

18.1 <u>United Kingdom-</u>

A similar provision to Indian law existed in the commonwealth laws of England. However, in England, this offence was a petty crime punishable with imprisonment up to 2 years, but for subjects in the colonies including India, the punishment was life imprisonment. In England, the law was non-cognizable. To their credit, the British colonial government made Sedition a non-cognizable offence in colonial India, as it was in England. This position changed in 1973 when the new Code of Criminal Procedure, 1973 made Sedition a cognizable and non-bailable offence.

Not only was the provision in England milder, it was rarely used. Prosecutions for Sedition were scarce in the United Kingdom since 1832. The last prosecution for Sedition was in 1972, when three people were charged with seditious conspiracy and uttering seditious words for attempting to recruit people to travel to Northern Ireland to fight in support of Republicans. In 1977, a Law Commission working paper recommended that the common law offence of Sedition in England and Wales be abolished saying that this offence was redundant and that it was not necessary to have any offence of Sedition. The United Kingdom, from where the law can be traced in India, abolished the offence of Sedition, by way of Section 73 of the Coroners and Justice Act 2009. While abolishing Sedition law, the then Parliamentary Under-Secretary of State at the Ministry of Justice of the United Kingdom was quoted saying:

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

Parliamentary Under-Secretary of State
Ministry of Justice, United Kingdom
[Emphasis Supplied]

18.2 Noting concerns over the potential abuse of Sedition law to curb legitimate expression and recommending the need to study revision of Section 124A of the Indian Penal Code, 1860, the Law Commission of India in its Consultation Paper on "Sedition" dated 30th August 2018 has inter alia raised the following question –

"1. 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?"

Consultation Paper on "Sedition"

18.3 The Law Commission report also goes on to examine the use of Sedition law by other big nations such as United States, noting that the restrictions on expression are subject to intense scrutiny. The Law Commission report also records that pursuant to the recommendation of the Australian Law Reform Commission, the term Sedition has been removed and replaced with reference to 'urging violence offences' by way of the National Security Legislation Amendment Act, 2010.

18.4 Several Countries have done away with Sedition law, either from its books or by holding it unconstitutional, while many others are in the process of repealing the law and have already stopped or restricted its use in practice. The global trend is in favour of repeal of Sedition law.

- Countries such as New Zealand and Ghana have already passed legislation repealing Sedition in the years 2007 and 2001 respectively.
- Sedition was repealed in Uganda in the year 2010 following a judgment passed by the Ugandan Constitutional Court declaring the offence of Sedition unconstitutional. In this case, Journalist Andrew Mwenda made several comments critical of the President and the government of Uganda on his live radio talk show. The state charged him with the crime of Sedition, pursuant to Sections 39 and 40 of the

Penal Code, alleging that his remarks were made with the intention to bring into hatred and contempt against the President, government, and Constitution. The Constitutional Court declared null and void the Sedition provisions from the Penal Code because they were in contravention with the enjoyment of the right to freedom of expression.

- Similarly, in the case of Chief Arthur Nwankwo v. The State Sedition was declared unconstitutional in 1983 in Kenya by the High Court of Nigeria.
- In Scotland, Section 51 of the Criminal Justice and Licensing (Scotland) Act 2010 abolished the common law offences of Sedition with effect from 28 March 2011.
- In Ireland, a controversial Section of the constitutional clause on freedom of speech made "blasphemous, seditious or indecent matter" a punishable offence. The change in law came after the people of Ireland voted overwhelmingly in referendum in October 2018 to amend the Irish constitution to remove the following clause: "blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law".
- The Republic of Korea did away with its Sedition laws during democratic and legal reforms in the year 1988.
- In 2007, Indonesia declared Sedition as "unconstitutional", saying it has been derived from its colonial Dutch masters.
- The Law Commission of Canada has recommended repeal of Sedition law.
- In the United States of America, The Sedition Act of 1918 which extended the Espionage Act of 1917 to cover speech and the expression of opinion that cast the

government or the war effort in a negative light and forbade the use of "disloyal, profane, scurrilous, or abusive language" about the United States government, its flag, or its armed forces or that caused others to view the American government or its institutions with contempt, was repealed on December 13, 1920. Under Section 2385 of the US Code, it is unlawful for anyone to knowingly teach/advocate the propriety of overthrowing the government, by force. However, in respect for freedom of speech, this law is rarely enforced.

- In New York Times v. Sullivan, 376 U.S. 254, 273-76 (1964), 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'. In Brandenburg v. Ohio, 395 U.S. 444 (1969) 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. Pursuant to Brandenburg case, restrictions on expression are subject to intense scrutiny.
- Canadian citizens enjoy liberal freedom as the laws to restrict freedom of speech are rarely enforced. There has been no Sedition brought to light after the 20th century.
- In Australia, the word “Sedition” was removed from the laws since it was seen as archaic and replaced with the offence of “urging violence”.

- Freedom of expression in the Netherlands is protected by Article 7 of the Dutch Constitution and Article 10 of the European Convention on Human Rights (ECHR). The scope of protection generally covers every type of expression from any individual, group, or type of media, notwithstanding its content, with the exception of expressions that negate the fundamental values of the ECHR or hate speech. Relevant limitations on freedom of expression in the Dutch Criminal Code do not include Sedition.

18.5 By contrast, countries that tenaciously hold on to Sedition law and often misuse it to punish political dissent include Pakistan, Saudi Arabia, Malaysia, Iran, Uzbekistan, Sudan, Senegal, Turkey and India. In India, in 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 several laws dealing with internal and external threats to destabilize the nation. Thus, to check the misuse of the Section and to promote the freedom of speech and expression, the Section should be omitted. In 2015, another Private member Bill titled The Indian Penal Code (Amendment) Bill, 2015103, was introduced in Lok Sabha by Mr. Shashi Tharoor to amend 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.

18.6 Neither Bill was ever passed.

19 SECTION 124A VIOLATES INTERNATIONAL OBLIGATIONS ON FREEDOM OF SPEECH AND EXPRESSION

19.1 The Universal Declaration of Human Rights, 1948 (UDHR), the drafting and adoption of which took place almost alongside the Constitution of India, recognises freedom of speech as the highest aspiration of the people in its Preamble. Article 19 of the UDHR states –

> "*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."*

19.2 Pursuant to the judgment in the matter of *Kedar Nath Singh v. State of Bihar (supra)*, in 1966, the General Assembly of the United Nations adopted and opened for signature, ratification and accession, the International Covenant on Civil and Political Rights (ICCPR), based on the recognition of the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil and political rights, as well as economic, social and cultural rights, in accordance with the UDHR. The ICCPR was ratified by India on 10th April 1979. Article 19 of the ICCPR provides that –

"Article 19
1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."
3. 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 (ordre public), or of public health or morals."

19.3 India is a party to the Universal Declaration of Human Rights and has ratified the ICCPR, and is hence, bound by the international standards. The Human Rights Committee of the United Nations releases General Comments, which serve to clarify substantive issues regarding States' duties in the implementation of the ICCPR. The General Comment 34 of the United Nations discusses the application of Article 19 (3) of the ICCPR. In Clause 25 the meaning of the term "provided by law" in Article 19 (3) is explained thus-

25. "For the purposes of paragraph 3, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution… Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not."

Clause 25
General Comment 34
[Emphasis Supplied]

Clause 35 explains the restrictions on freedom of expression-

"34. Restrictions must not be overbroad. The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law". The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain."

Clause 35
General Comment 34
[Emphasis Supplied]

19.4 Thus, it is clear that the impugned provision of the Indian Penal Code, 1860, is ambiguous, not narrowly drawn, and suffers from overbreadth and vagueness and is disproportionate, thus violates Article 19 (3) "prescribed by law" of the ICCPR Article 19. The Australian Law Reform

Commission Report published by the Commonwealth of Australia in 1987 [Annexure ____] has stated as under:

> *"The common law doctrine that criminal offences should be clearly and unambiguously defined finds expression in the phrase "provided by law" in Article 19 of the ICCPR, describing permissible restrictions on freedom of expression."*
>
> Australian Law Commission Report 1987
>
> [Emphasis Supplied]

19.5 Further, Johannesburg principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, 1996 provides for the General Principles on Freedom of Opinion, Expression and Information under Principle 1.

> *"(a) Everyone has the right to hold opinions without interference.*
> *(b) Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.*
> *(c) The exercise of the rights provided for in paragraph (b) may be subject to restrictions on specific grounds, as established in international law, including for the protection of national security.*
> *(d) No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government."*

19.6 Accordingly, for the purpose of justifying a restriction on the freedom of speech and expression it mandates that the restriction must be (i) prescribed by law; (ii) for the protection of a legitimate national security interest and (iii) necessary in a democratic society. Under Principle 1.1, 1.2 and 1.3 of the document, the above requirements are elaborated as under –

> "*Principle 1.1: Prescribed by Law*
> *(a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.*
> *(b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.*
> *Principle 1.2: Protection of a Legitimate National Security Interest*
> *Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.*
> *Principle 1.3: Necessary in a Democratic Society*
> *To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:*
> *(a) the expression or information at issue poses a serious threat to a legitimate national security interest;*
> *(b) the restriction imposed is the least restrictive means possible for protecting that interest; and*
> *(c) the restriction is compatible with democratic principles."*

Under Principle 2 of the document, what constitutes a legitimate national security interest is provided.

> *"Principle 2: Legitimate National Security Interest*

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest."

19.7 Further, the impugned provision violates the requirements provided under the Johannesburg principles, in as much as Sedition is neither necessary for democracy nor serves to protect legitimate national security interest.

19.8 In the Twentieth Anniversary Joint Declaration : Challenges to Freedom of Expression in the Next Decade adopted on 10th July 2019, the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information set out the key challenges to freedom of speech and expression in the next decade. First and foremost it provided for the creation of an environment that enables the

exercise of freedom of speech and expression, holding that the protection and promotion of freedom of expression, especially but not only in the digital environment, requires protection and appropriate legal rules and regulatory systems. Point (1) (b) of the document requires States to *"Ensure protection of freedom of expression as a matter of domestic legal, regulatory and policy frameworks in accordance with international standards, including by limiting criminal law restrictions on free speech so as not to deter public debate about matters of public interest."*

19.9 Acknowledging the spate of Sedition cases against journalists and activists in India, the United Nations High Commissioner for Human Rights in her statement dated 26th February 2021 delivered at the recently held 46th session of the Human Rights Council, stated that *"Charges of Sedition against journalists and activists for reporting or commenting on the protests, and attempts to curb freedom of expression on social media, are disturbing departures from essential human rights principles."*

19.10 An opinion was sought by the Union government from the Law Commission, a "consultation paper" was released by the Law Commission which recommended a "review or even repeal" of the provision because of its unsuitability in a democratic country. However, only a few months later, contrary to Law Commission's recommendation, in its official response to a written question in the Rajya Sabha whether the government is mulling doing away with the law of Sedition, the

Minister of State for Home stated that there was no proposal to repeal Section 124A of the IPC because the "law is necessary."

19.11 The Petitioners humbly submit that an archaic provision such as Section 124A of the Indian Penal Code, 1860, cannot be allowed to continue in a free country and democratic republic in the grounds stated in the petition. The impugned law violates the right to freedom of speech and expression of citizens, suffers from procedural and substantive unreasonableness, is void-for-vagueness, manifestly arbitrary as well as disproportionate results in a chilling effect on free speech, misuse and curtailment of life and liberty of ordinary citizens, violating Article 19 (1) (a), Article 14 and 21 of the Constitution of India. It is hence, required to be struck down on the following grounds, amongst others:

GROUNDS

A. Because Section 124A of the Indian Penal Code, 1860 is admittedly violative of Section 19(1)(a) of the Constitution of India and infringes upon the legitimate right of citizens to freedom of speech and expression, which is fundamental requirement of a functioning democracy, and is not protected from unconstitutionality by Section 19(2) of the Constitution of India providing reasonable restrictions to the right to freedom of speech and expression.

B. Because the word "Sedition" was removed from the draft Constitution during the Constituent Assembly debates

due to serious objection on the inclusion of Sedition as a restriction to the freedom of speech and expression. It was stated to be a provision of doubtful and varying import and therefore, subject to widespread misuse having caused a lot of misery and having lost all relevance in an Independent India, and hence the constitutionality of Section 124A of the Indian Penal Code, 1860, was put to doubt on the commencement of the Constitution and the coming into force of Article 19, without any exception for Sedition.

C. Because Section 124A of the Indian Penal Code, 1860, falls foul of the exceptions provided under Article 19(2) to freedom of speech and expression under Article 19(1)(a).

D. BECAUSE the Constitution First Amendment had deliberately added the word "reasonable" before restrictions in 19 (2) in order to make Article 19 (1) (a) just and not subject to arbitrary inclusions. The impugned provision does not meet various test of reasonability laid down in *VG Row (supra*) because of the drastic changes in the prevailing conditions, loss of original purpose of British imperialist regime and expansion of the fundamental right by this court in various judgments. (See also: *Anuradha Bhasin v. Union of India 2020(3) SCC 637)*

E. BECAUSE in the matter of *The Superintendent, Central Prison, Fatehgarh and Another v. Dr. Ram Manohar Lohia*

AIR 1960 SC 633 = (1960) 2 SCR 821. The Constitution Bench speaking through Subba Rao J. referred to the decision in *Romesh Thappar* and *Brij Bhushan* in Para 9 as well as the effect of the First Constitutional Amendment. The finding given in Para 11 is important. The following interpretation given to the activity which would amount to commission of an offence violating public order is important and reads as follows:

> *"We shall now test the impugned section, having regard to the aforesaid principles. Have the acts prohibited under S.3 any proximate connection with public safety or tranquillity? We have already analysed the provisions of s.3 of the Act. In an attempt to indicate its wide sweep, we pointed out that any instigation by word or visible representation not to pay or defer payment of any exaction or even contractual dues to Government, authority or a land owner is made an offence. Even innocuous speeches are prohibited by threat of punishment. There is no proximate or even foreseeable connection between such instigation and the public order sought to be protected under section. We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite a revolutionary movement destroying public order. We can only say that fundamental rights cannot be controlled on such hypothetical and imaginary considerations. It is said that in a democratic set up there is no scope for agitational approach and that if a law is bad the only course is to get it modified by democratic process and that any instigation to break the law is in itself a disturbance of the public order. If this argument without obvious limitations be accepted, it would destroy the right to freedom of speech which is the very foundation of democratic way of life. Unless there is a proximate connection between the instigation and the public order, the restriction, in our view, is neither reasonable nor is it in the interest of public*

order. In this view, we must strike down s.3 of the Act as infringing the fundamental right guaranteed under Art. 19(1)(a) of the Constitution."

(Para 14)

"The foregoing discussion yields the following results : (1) "Public order" is synonymous with public safety and tranquillity : it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State; (2) there must be proximate and reasonable nexus between the speech and the public order; (3) s. 3, as it now stands, does not establish in most of the cases comprehended by it any such nexus; (4) there is a conflict of decision on the on the question of severability in the context of an offending provision the language whereof is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislation; one view is that it cannot be split up if there is possibility of its being applied for purposes not sanctioned by the Constitution and the other view is that such a provision is valid if it is severable in its application to an object which is clearly demarcated from other object or objects falling outside the limits of constitutionally permissible legislation; and (5) and the provisions of the section are so inextricably mixed up that it is not possible to apply the doctrine of severability so as to enable us to affirm the validity of a part of it and reject the rest." (Para 18)

In *Kameshwar Prasad v. State of Bihar AIR 1962 SC 1166 = (1962) Supp. 3 SCR 369* (Decided on 22.02.1962), this Hon'ble Court held that in order to bring a provision within the exceptions contained under 19(2), it must be established that:

e. The impugned legal provision must have a proximate nexus

f. The connection should be immediate, real and rational

g. The impugned legal provision must be clear, unambiguous and not vague

h. The expression contained in the impugned provision must itself constitute an offence.

Further in S. Rangarajan v. P. Jagjivan Ram (1989) 2 SCC 574, this Hon'ble Court held:

> *"There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. 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 power keg".*

F. Because in *Kedar Nath Singh v. State of Bihar* AIR 1962 SC 955 where validity of Section 124A was discussed, the Constitution Bench (speaking through Sinha CJ) refers to the history of Sedition in Para 10 onwards. The challenge made to the said provision is considered in several foreign cases (up to Para 20). In Para 21, the judgment in *Romesh Thappar* and *Brij Bhushan* have been considered in detail, in particular, reference has been made to Para 14 of the minority judgment in *Brij Bhushan*. Thereafter, in Para 22 it

is observed that the differences in *Romesh Thappar* and *Brij Bhushan* led to the first Constitutional Amendment which was made with retrospective effect. The Para also says (with respect, erroneously) that the amendment indicates that "it accepted the statement of law as contained in the dissenting judgment of Fazal Ali J." As discussed above, the said statement may not be the accurate position. Thereafter, from Para 24, Article 19 has been quoted and discussed. Para 25 is important which is analysed below. At the end, the judgment relies on *R.M.D. Chamarbaugwalla vs. Union of India (supra)* to hold that the interpretation following the Federal Court judgment in *Niharendu Dutt Majumdar v. King-Emperor* would bring Sec.124A within constitutional limits.

The passage in Para 25 consists of three parts: first part deals with the content of free speech and the extent of criticism which can be made by an individual; the second part discusses the rationale for retaining sedition. It reads as follows –

> *First part:*
>
> *"25. It has not been contended before us that if a speech or a writing excites people to violence or have the tendency to create public disorder, it would not come within the definition of "sedition." What has been contended is that a person who makes a very strong speech or uses very vigorous words in a writing directed to a very strong criticism of measures of Government or acts of public officials, might also come within the ambit of the penal section. But in our opinion, such words written or spoken would be outside the scope of the section. In this connection, it is pertinent to*

observe that the security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with a 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 qua non of a democratic form of Government that our Constitution has established. This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression with which we are concerned in this case. 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.*** *The Court has, therefore, the duty cast upon it of drawing a clear line of demarcation between the ambit of a citizen's fundamental right guaranteed under Article 19(1)(a) of the Constitution and the power of the legislature to impose reasonable restrictions on that guaranteed right in the interest of, inter alia, security of the State and public order.*

Second part:

We have, therefore, to determine how far the Sections 124-A and 505 of the Indian Penal Code could be said to be within the justifiable limits of legislation. If it is held, in consonance with the views expressed by the Federal Court in the case of Niharendu Dutt Majumdar v. King-Emperor that the gist of the offence of ***"sedition" is incitement to violence or the tendency or the intention to create public disorder by words spoken or written, which have the tendency or the effect of bringing the Government established by law into hatred or contempt or***

> ***creating disaffection in the sense of disloyalty to the State,*** *in other words bringing the law into line with the law of sedition in England, as was the intention of the legislators when they introduced Section 124-A into the Indian Penal Code in 1870 as aforesaid, the law will be within the permissible limits laid down in clause (2) of Article 19 of the Constitution.*
>
> *Third Part*
>
> *If on the other hand we give a literal meaning to the words of the section, divorced from all the antecedent background in which the law of sedition has grown, as laid down in the several decisions of the Judicial Committee of the Privy Council, it will be true to say that the section is not only within but also very much beyond the limits laid down in clause (2) aforesaid."*
>
> (Emphasis supplied)

From the above, it comes out that the validity of Sec.124A was sustained on the basis that if the finding given by Federal Court in *Niharendu Dutt AIR 1942 FC 22* is accepted, in other words, bringing the law into line with the law of Sedition in England as was the intention of the legislators when they introduced 124A into the IPC in 1870, sedition will fall within permissible limits under Art.19(2). This is the grave error committed in *Kedar Nath*, namely, that it has followed the judgment of the Federal Court; it has construed the provision in harmony with how the provision is understood in England and what was the intention of legislature when they introduced Sec.124A. In fact, the next Para in the case of *Kedar Nath* admits that if literal meaning to the words of Section 124A are given *de hors* what was said in the Judicial Committee, the Section will be beyond the limits of Art.19(2).

The Petitioners submit that Section 124A IPC was not considered and analyzed by *Kedar Nath* on the following among other grounds:

9. Debates in the Constituent Assembly related to Sedition;
10. Debates in the Parliament when First amendment took place;
11. Development & interpretation of Article 19(1)(a) post the First amendment;
12. Whether there is any relevancy of the provision in the independent India;
13. Whether 124A constitutes a "reasonable" restriction in view of V.G. Row (supra);
14. Whether there is any proximate nexus between 'public order' and the expressions used in the impugned provisions in view of the law laid down in Superintendent, Central Prison (supra);
15. Vagueness and overbreadth of the expressions used in the impugned provision;

G. Because the right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India is the *'sine qua non of democracy'* as held by this Hon'ble Court. It is hence required to be safeguarded at all times and any restrictions are subject to great scrutiny. Without the protection of the right to freedom of speech and expression, democracy cannot function. Discussion, debate and advocacy are all part of the freedom of speech and expression. There is a difference between advocacy and incitement to violence and it is only in the case of the latter

that Article 19(2) of the Constitution of India may apply. However, Section 124A of the Indian Penal Code, 1860, has been used to stifle legitimate dissent and curb critical expression, thereby infringing upon the right to freedom of speech and expression.

H. BECAUSE after *Kedar Nath*, Article 19(1)(a) has been expanded and given a very wide meaning in several important cases. In *Sakal Papers (P) Ltd. and Others v. UOI AIR 1962 SC 305 = (1962) 3 SCR 842* (decided on 25th September 1962), the Constitution Bench referred to the judgments in *Express Newspaper Pvt. Ltd. V. UOI AIR 1958 SC 578 = (1959) SCR 12*, *V.G. Row (supra)* and *Romesh Thappar (supra)*. While referring to *Dwarkadas Shrinivas v. Sholapur Spinning and Weaving & Co. Ltd. & Others AIR 1954 SC 119 = 1954 SCR 674*, it was pointed out that while construing the Constitution, the correct approach should be to enquire as to what in substance is the loss or injury caused to the citizen and not merely the manner and method adopted by the State in placing the restriction.

I. BECAUSE subsequently, Article 19 (1) (a) was further interpreted and expanded in many decisions namely, *Ram Manohar Lohia v State of Bihar AIR 1966 SC 740 = (1966) 1 SCR 709, Arun Ghosh v. State of West Bengal (1971) 1 SCC 98; Bennet Coleman v Union of India (1972) SCC 788; Indian Express Newspapers v. Union of India (1985) 1 SCC 641*; *S Rangarajan v. P Jagjivanram (1989) 2 SCC 574; R Rajgopal v State of Tamil Nadu (1994) 6 SCC 632; Ministry of I.B. Government of India v. Cricket Association of Bengal (1995) 2*

SCC 161; PUCL v Union of India (2003) 4 SCC 399; S Khushboo v. Kanniammal (2010) 5 SCC 600 and etc. In these judgments, inter alia, freedom of expression was widely accepted to be the "cornerstone of democracy". Without freedom of expression democracy cannot exist. Recently in Shreya Singhal (supra), S*hayara Bano v. Union of India (2017) 9 SCC 1* and *K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1* explain the concept of arbitrariness, procedural and substantive due process, reasonableness in construing the fundamental rights and the proportionality principle. Section 124A does not meet the tests laid down in these judgments.

J. BECAUSE the tendency test which was read into *Kedar Nath* in order to uphold its validity has been widely criticised internationally including by the Australian and New South Wales Law Commissions as vague and overbroad on the ground that a criminal provision must be extremely precise so that it can be easily understood by the public as well as the authorities. Most Commonwealth countries have replaced the tendency test by more definitive tests. In the United States landmark judgment in Brandenburg (supra) is the prevailing standard to determine protectable speech which replaced the 'tendency' test with the 'imminent lawless action' test has three distinct elements, namely intent, imminence and likelihood. In other words, the State cannot restrict and limit the First Amendment protection by forbidding or proscribing advocacy by use of force or law, except when the speaker intends to incite a violation of the

law-that is both imminent and likely. The Brandenburg test was reaffirmed in NAACP v. Claiborne Hardware Co., 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) and has been followed consistently by the U.S. Courts in later judgments.

K. BECAUSE from reading of the above decisions the following conclusions emerge:

d) Restrictions on freedom of expression must be subjected to intense scrutiny.

e) The State is proscribed from enacting any legislation curtailing the right to expression except in emergency situations that are immediately dangerous warranting making an exception to the rule that no law must abridge the freedom of speech.

f) Statutes affecting freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action. In other words, laws cannot forbid or proscribe speech that advocates violence unless there is an actual danger of violence which is both imminent and likely.

L. One important aspect is that when Section 124A was considered in *Kedar Nath*, in CrPC it was treated as non-cognizable offence and an arrest could only be made on warrant issued by Magistrate. For this reason, though Mahatma Gandhi and Bal Gangadhar Tilak were tried and convicted under Section 124A, the police could not arrest them until conviction. But when CrPC was amended in 1973 and the 1898 Code was repealed, the offence of sedition became cognizable. Consequently, the severity of the offence

has drastically increased since 1973 leaving police with wide discretionary powers to arrest. The charge under sedition has been widely abused as it is of political nature. The Petitioners have given details of such abuse in the Petition. As per the National Crime Records Bureau, between 2016 and 2019, the number of cases filed under Section 124A increased by 160% while the rate of conviction dropped to 3.3% in 2019 from 33.3% in 2016.

M. BECAUSE Section 124A has become anachronistic. This Hon'ble court has established that a statute which was valid when enacted may, with the passage of time, become arbitrary and unreasonable. *(Motor General Traders v. State of A.P. (1984) 1 SCC 222, Malpe Vishwanath Acharya and Ors. vs. State of Maharashtra and Ors. (1998) 2 SCC page 1 and Satyawati Sharma v. Union of India (2008) 5 SCC 284)*. The term 'Sedition' including its implication in administration during British regime, has lost all its relevance in Independent India. History of Sedition law reveals that it was a political crime originally enacted to prevent political uprisings against the Crown, essentially meant to be a temporary measure to control the colonies. The law has long since served its purpose and thereby, the very foundation of its constitutionality has been destroyed. The Constituent Assembly debates reveal that the framers of the Constitution considered *'Sedition'* to be a law essentially "*repressive*" in character, which had caused and was capable of causing "*a lot of misery*" and thus had no place in independent India. At the time of the First Constitutional

amendment, Pt. Nehru called it "obnoxious" and stated that it should be done away with. Most countries around the world have either repealed the law or declared it unconstitutional as it offends the basic principles of democracy and serves no purpose in modern society. In *Joseph Shine vs. Union of India (2019) 3 SCC 39*, Section 497 IPC was struck down in the view of "social progression, perceptual shift, gender equality and gender sensitivity."

> "*What is clear, therefore, is that this archaic law has long outlived its purpose and does not square with today's constitutional morality, in that the very object with 36 which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational. On this basis alone, the law deserves to be struck down, for with the passage of time, Article 14 springs into action and interdicts such law as being manifestly arbitrary. That legislation can be struck down on the ground of manifest arbitrariness is no longer open to any doubt.*"

N. Because the words *'excites or attempts to excite disaffection'* are subjective and left to interpretation by the authorities, leaving it open for them to include legitimate expression by citizens in its ambit. While explanation (1) to Section 124A of the Indian Penal Code, 1860, provides that "disaffection" will include disloyalty and all feelings of enmity, but what constitutes this feeling of disloyalty or enmity is nowhere specified. No guiding standards have been provided on how

to interpret these broad terminologies, resulting in potential abuse of the provision.

O. BECAUSE judged by the standards laid down in the judgments of this court, it is quite clear that the expressions used in 124A such as “disaffection”, “hatred”, “contempt”, “disloyalty”, “feelings of enmity” are completely open ended, vague, are not capable of an objective assessment and have led to and are bound to lead to a great deal of uncertainty. The terms used in the Explanations such as "feelings of enmity" “disloyalty” and “disapprobation” are equally vague and do not provide any objective standard for understanding or determining guilt. This Hon’ble court in *State of MP v. Baldev AIR 1961 SC 293; K.A. Abbas v Union of India 1970 2 SCC 780; Harakchang Ratanchand Banthia v. Union of India AIR 1961 SC 293; AK Roy v. Union of India 1982 1 SCC 271* and in *Kartar Singh v. State of Punjab 1994 3 SCC 569* have discussed the basic principles of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. The expressions used in section 124A being unclear undefined open-ended are violative of the law laid down in the above judgments which are re-iterated and reaffirmed in *Shreya Singhal*. It was further held in *Shreya Singhal* that a penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness.

a) Firstly, because ordinary people should be able to understand what conduct is prohibited and what is permitted.

b) And secondly, because those who administer the law must know what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place.

In Para 52 of *Shreya Singhal*, Nariman J. states as under:

> *"The U.S. Supreme Court has repeatedly held in a series of judgments that where no reasonable standards are laid down to define guilt in a Section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a Section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable."*

For these reasons, it must be held that expressions which are vague and, therefore, void are used in Section 124A. The entire Section is, therefore, arbitrary and unreasonable making it violative of Article 14 of the Constitution.

P. Because the restriction provided by way of Section 124A of the Indian Penal Code, 1860, suffers from vagueness and overbreadth and is open to interpretation in as much as what constitutes the "intention" and "tendency" to create disorder or disturbance of law and order or incitement to violence penalised under Section 124A of the Indian Penal Code, 1860, on the reading down of the provision in the matter of ***Kedar Nath Singh v. State of Bihar (supra)***, has

been left to interpretation and wide exercise of discretion, and is hence capable of abuse and misapplication by the authorities. No guiding standards have been provided so as to assist the interpretation of the words "intention" and "tendency" in order to narrow its application to the intended crime. Instead, the words, whose meanings are subjective, are thereby allowed to be widely and arbitrarily applied.

Q. BECAUSE none of the terms used in Section 124A such as "disaffection" "hatred" or "contempt", nor the term 'Sedition' itself, find any mention in the exceptional areas demarcated in Article 19 (2). They are, therefore, unconstitutional and violative of Article 19(1)(a) of the Constitution *[Sakal Papers v. Union of India AIR 1962 SC 305, Kameshwar Prasad v State of Bihar 1962 Suppl. (3) SCR 396; Shreya Singhal (supra)]*

R. BECAUSE as the Constituent Assembly had correctly pointed out, the term Sedition is "*of doubtful and varying import"* and the overbroad expression can even take into account actions which cannot fall within the parameters of an offence. For example, if a person criticises the government and compares it with the other country, it may be termed as being disloyal when such statement and comparison will be in the area of criticism and not an offence. It is because of this over-breadth of the provision that innocent people are being implicated under Sedition. The facts that the provision is overbroad and amendable to

different interpretations and arbitrary exercise, it is violative of Article 14 of the Constitution *(vide R. Rajgopal v. State of Tamil Nadu (1994) 6 SCC 632 (Para 19); S. Khushboo v. Kanniammal (2010) 5 SCC 600; Kameshwar Prasad v. State of Bihar AIR 1962 SC 1166 - all these judgments followed in Shreya Singhal.)* The manner in which Sedition and the expressions used therein are couched, take within its sweep protected speech and speech that is innocent in nature. If used in this manner, it is bound to have a chilling effect on free speech and would therefore be liable to be struck down on the ground of over-breadth.

S. BECAUSE victims of arbitrary charges of Sedition wait for years for a judicial determination of a particular act as "seditious" or otherwise, often losing their lives in jail waiting for justice to be done. This results in severe curtailment of liberty and violates the fundamental right to life and liberty of innocent citizens. The process of trial itself is a punishment for free speech practitioners, even though the ultimate decision may result in acquittal. In the matter of *Shreya Singhal v. Union of India (2015) 5 SCC 1*, this Hon'ble Court held that Section 66-A of the Information Technology Act, 2000 was violative of Article 19(1)(a) and Article 21 of the Constitution of India-

> *"14. A provision of law that forces people to self-censor their views for fear of criminal sanction violates the constitutional guarantee of free speech and as such it is unconstitutional. <u>.... The overhanging threat of criminal prosecution merely for the exercise of civil liberties guaranteed by the Constitution, by virtue of a vague</u>*

and widely worded law is in violation of Article 21 of the Constitution of India..."

T. Because the restriction under the offence of Sedition under Section 124A of the Indian Penal Code, 1860, is not clear and unambiguous and hence in practical application, has seldom any connection with maintenance of public order, let alone a proximate or intimate one. The nexus, even if any, between the impugned provision and the public order sought to be maintained, is so remote and far-fetched that it does not serve the interests it espouses and instead only serves as an embargo to legitimate expression by citizens.

U. Because the trend of cases in which Section 124A of the Indian Penal Code,60, has been applied is indicative of the gross abuse and misapplication of the provision by the authorities, in order to curb legitimate expression by citizens. The overbroad, subjective, ambiguous and vague terminology used in Section 124A of the Indian Penal Code, 1860, has provided sanction to abuse of Sedition law by the authorities. This abuse is amplified by the procedural delays, low conviction rates, media trial that often accompanies such cases and wrongful incarcerations. Accordingly, both substantive and procedural aspects of the provision are problematic and susceptible to abuse. The process of trial itself is a punishment for free speech practitioners, even though the ultimate decision may result in acquittal. The accusation of Sedition i.e. "deshdroh" automatically brings with it the tag of "anti-national", which is a part of the public narrative created in recent years to

silence any legitimate criticism of the government and its policies. Hence, all the factors play to the disadvantage of a person accused of Sedition, even as the ingredients of the offence itself are ambiguous and subjective.

V. Because the frequent abuse of Section 124A of the Indian Penal Code, 1860, has resulted in a chilling effect and atmosphere of fear in which freedom of speech an expression of citizens is gravely impaired and which is unhealthy for a democracy that posits itself on respect for individual freedoms.

W. Because the underlying purpose of Sedition law in India has been political and not legal, in as much as it operates as a tool to silence and penalise voices of dissent.

X. Because Section 124A of the Indian Penal Code, 1860, suffers from vagueness and is unreasonable and would hence result in arbitrary application and potential misapplication / abuse of the law. It is hence manifestly arbitrary and violative of the Article 14 of the Constitution of India.

Y. BECAUSE this archaic law enacted to silence Indian people by the colonial rulers has long outlived its purpose and does not square with today's constitutional morality and has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly obsolete. Instead of doing away with it, it has been retained by independent India, made even more stringent and misused more than the British ever did, whereas the much-milder version of the law has long since been repealed in the United Kingdom. In view of the law laid down in a spate of

judgments by this Hon'ble court to the effect that a legislation can be struck down on the ground of manifest arbitrariness, on this basis alone, the law deserves to be struck down.

Z. Because the judgment in the matter of *Kedar Nath Singh v. State of Bihar (supra)* is erroneous on the aforesaid grounds and in any event, fails to pass the test of constitutionality today, i.e. almost 60 years later, and Section 124A of the Indian Penal Code, 1860, is unconstitutional, violative of Article 14, 19(1)(a) of the Constitution of India and is liable to be struck off.

AA. Because Section 124A of the Indian Penal Code, 1860, and its application in India, violates India's commitments under the ICCPR and is also violative of the UDHR, that provide for the right to freedom of speech and expression, to which India is a party.

BB. Because Section 124A of the Indian Penal Code, 1860, has lost its significance in light of the progress made by India as a democracy and developments of the international law, which necessitate the removal of archaic provisions such as Sedition law used by rulers to curb dissent.

CC. Because United Kingdom, the place from where the Sedition law originated in India, which fact had bearing while determining the constitutionality of Sedition law in the matter of *Kedar Nath Singh v. State of Bihar (supra)*, has repealed the Sedition law in 2009.

DD. Because democracies across the world have rejected and repealed the law of Sedition as being archaic and alien to a democratic society, and India being the largest

democracy has still retained and increased the application of the law of Sedition. Countries all over the world-

(v) have legislatively repealed the law, or

(vi) have declared it unconstitutional, or

(vii) have left it unused (by the executive), or

(viii) have not enacted the law in the first place

EE. Because instead of protecting the interests of the nation, Section 124A of the Indian Penal Code, 1860, has become a tool to harass vocal and critical citizens and to face them with reprisals for opposing and criticising government policies and action.

FF. Because in the truest sense, Section 124A of the Indian Penal Code, 1860, has not proved to be a tool to prevent public disorder or stop violence but has instead been used against the active citizenry which plays an important role in a democracy.

20 The Petitioners have not filed any other Petition before this Hon'ble Court or any other Court seeking same reliefs.

21 The Petitioners crave leave of this Hon'ble Court to add, alter or amend any of the above grounds and to file additional affidavits at a later stage if so advised.

PRAYER

The Petitioners, therefore, pray that in the facts and circumstances of the present case, this Hon'ble Court may be pleased to issue a writ of mandamus/certiorari or a writ or direction of like nature:

a. To issue appropriate writ, order or direction in the nature of mandamus for a declaration that Section 124A of the Indian Penal Code 1860 is unconstitutional and void;
b. For such further and other orders as this Hon'ble Court may deem fit in the interest of justice and circumstances of the present case.

AND FOR THIS KINDNESS THE PETITIONERS AS IN DUTY BOUND SHALL EVER PRAY

[redacted]

MS. APARNA BHAT
ADVOCATE FOR THE PETITIONER

[redacted]

Drawn On :15.07.2021
Filed On : 15.07.2021