



SEDITION, MISUSE & CONSTITUTIONALITY: VOICE OF DEMOCRAT OR FOUNDATION OF REPUBLIC?

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Abstract

The law of Sedition (section 124A of Indian Penal Code) has always been in news because of its invocation in various cases. The law, which is said to be a symbol of colonial oppression, and is termed as inconsistent with the fundamental rights by various commentators. But conversely, it has been upheld by the Apex court of our country. So this paper aims to analyse whether sedition law, which is still a part of Indian penal system, per se leads to unconstitutional restriction of fundamental right to free speech or is it the misuse of the law by various political and governmental authorities which leads to unreasonable restriction of speech. In pursuance of this, landmark cases in this field were deconstructed to have the reality check of constitutionality and analysis of recent cases, where this section was invoked, has been done to gauge the way in which the section is being used currently. It was found that interpretation of section by the courts in landmark cases had already narrowed the usage to such an extent where it has become very rare for the authorities to invoke it legitimately. From the analysis of recent cases, it is found that it is the unfettered use, or more appropriately misuse, of sedition law which is responsible for unreasonable restriction of legitimate speech. These findings have important implication as it goes

against well-established narrative that sedition law should be scrapped for being misused by authorities.

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Introduction

First and foremost thing which a society has to fight against is a crime. And for its prevention, there are laws which work as an instrument of social control.¹ But then the question arises what is a crime? According to Russel, crime is creation of criminal policy adopted one to time by the that section of the society which is powerful.² So out of plethora of laws which are made by the lawmakers, for whatever reasons and not just the aforementioned one, law of sedition can also be stated as a penal provision which is used as a tool of subjugation of subjects, as was the case in India where this law was introduced by Britshers in late nineteenth century. The researcher will later on endeavour to prove the point as to how this law is subduing in nature, but for the sake of argument, we will assume it so. So, an apparent question would be that whether in a democratic setting, where government, in essence, is made by the will of the people, can such laws exist in the first place?

This question would be answered step by step in various chapters of this research paper. For this one needs to know in what context this law was made and in what context this law is read by jurist in India. And then researcher would analyse what is happening with the existence of sedition and why its usage is in

¹ Justice K.T. Thomas, *Ratanlal and Dhirajlal* (Lexis Nexis, New Delhi, 34th edn./2010)

² JW Cecil Turner (ed.), *Russel on crime* p.18. (Stevens and Sons, London, 12th edn./1964)



question and then it would be deliberated as to whether right measure would be to scrap the law, or to bring some changes in it, or something else.

Interpretation and its Constitutionality

When the section was drafted by Macaulay in 1837-39, the word of importance was exiting disaffection, which was later on interpreted in different ways by various cases. Most of the pre-constitutional cases involved an interpretation which was very narrow in nature. It was after the enactment of the constitution that this law was challenged before the court of law, different interpretations were deduced and then came the first constitutional amendment act. This brought about new words being added to Article 19 of the constitution, especially 'in the interest of public order'. How the interpretation of courts changed afterwards has been discussed in the later chapters.

Cases-

The present interpretation of seditious is of what was given in the case of *Kedar Nath Singh v. State of Bihar*³ which states that acts having the objective to stir up the government established by law and which incite disorder or tendency or likelihood of public disorder are only seditious in nature. Thus, it provides for an element of actus reus to be necessarily present to make an act seditious in nature. Thus, only a criticism of a government is not going to invoke charges under this section.

The same proposition was reiterated in the case of *Bilal Ahmed Kaloo v. State of Andhra Pradesh*.⁴ In this case, a Kashmiri youth was acquitted of a charge of sedition, which was put on him for the possession of lethal weapons and was alleged of incitement Muslim youths for liberating Kashmir from India. The court here held that there was nothing which the appellant did against the government established by law which can also incite violence for the uprooting the same.

Also, in the case of *Nazir Khan & Ors. v. State of Delhi*⁵ is a recent case where the definition of sedition clause was given an elaborate explanation. So, it is pertinent to note that it is the interpretation of Kedarnath which is still in use and has been upheld repeatedly or we can say it is the only one definition which has clearly passed the litmus test of constitutionality of such archaic and draconian law.⁶ But one more thing which all these cases, i.e., the cases which have upheld the constitutionality of this section, has emphasised on is the government established by law. On a nuanced reading of Kedarnath judgement, we would see how it states that it is the visible import of the state, and thus extending the power of states to impose reasonable restriction over the right to free speech of its people.

A citizen has the right to free speech and is protected against any unreasonable and unconstitutional bar until and unless it does not invade the rights of society in to-to.⁷ This

³ AIR 1962 SC 955

⁴ AIR 1997 SC 3438

⁵ AIR 2003 SC 4427

⁶ Nivedita Saksena & Siddhartha Srivastava, "An Analysis of the Modern Offence of Sedition" 7 NUJS L Rev 121 (2014).

⁷ S.P. Sen Gupta, *Sarkar and Justice Khastgir on Indian Penal Code, 1860* (Dwivedi Law House, Allahabad, 2015)



can be ascertained from the explanation 2 and 3 of the said provision. Also, this interpretation is also very certain which should be the very prerogative of the courts to interpret in this way because this offence is against the state and convicting someone under this provision would educe higher standard of proof. Legitimate speech and expression of thoughts must be protected from the unwarranted powers of the state.⁸ Because it is this unwarranted and unquestionable power of the government which has the tendency to curb any dissenting voice. There has always been a potential of misuse of sedition law, as it takes with itself the parochial view of nationalism and jingoism aimed at any 'alleged' attempt to rebel against the state.⁹

So, the question arises, whether the main essence of democracy, i.e., freedom of speech should be subject to reasonable restriction, or more appropriately, the restrictions which in the current state is in blatant misuse (*which will be dealt in the next section of this paper*) against the security of the state. What if the state in itself is totalitarian and dictatorial? If so, then who will safeguard individuals when they will raise their voices? This dilemma is long drawn where an upright and definite answer is still an illusion.

Comparative Analysis-

Also, one fact which needs to be known is that England, the country which introduced offence of sedition, has, almost ten years back, parted with such draconian law citing that it did not want to be an example of using such laws. Scotland also did away with the

same in 2010. In the United states, the law of sedition says that there has to be anything which raises the presumption of overthrowal of state. Also, the American Supreme Court has said that active participation is an essential ingredient of making someone liable of seditious libel. In 2007, Indonesia declared sedition as "unconstitutional", saying it had been derived from its colonial Dutch masters.

But for the time being, what our focus is on the very existence of this law in a democratic setup where there exist responsibilities of state and citizen toward each other, and how this law is to be dealt in the present environment.¹⁰ So there looms a question of how to balance individuals' rights between the most rudimental element of democracy and section 124-A. This question gets its importance from the fact that this section hits at the very root of any democratic setup and any such section also lowers down the authoritarian say, even though normatively. But then a sub-issue arises about the extent to which they want freedom. Do they want a state of laissez-faire? These questions are of also utmost importance.

Sedition and Recent Developments

Types of Cases seen today-

In recent times we have seen manifolds of instances where charges of sedition were slapped on people or institutions which are prima facie not aimed toward the objective which the provision inculcates. Various writers have segregated the cases, generally the recent ones, into three categories, i.e., 'clear acquittal cases', 'grey area cases' and

⁸ Meera Mathew, "Expression, Advocacy and Incitement" Working Paper submitted to the Law Commission of India (2017)

⁹ A P Shah, "Free Speech, Nationalism and Sedition" 52 EPW 16 (2017)

¹⁰ Coroners and Justice Act, 2009



‘convictions.’¹¹ In such cases, as the name suggests, convictions are one where alleged people are convicted of the offence. Clear acquittal cases are one which clearly did not satisfy the requirements of the offence. Grey area cases are those which have a kind of ambiguity with respect to the fact that it involves people with the allegation of chanting anti-national slurs or saying things which may incite people against the very foundation of governmental authorities.¹² Now seeing the trend, it is imperative that we are seeing a lot of grey area and clear acquittal cases. The case of *Dr. Vinayak Binayak Sen v. State of Chhattisgarh*¹³, *JNU case*¹⁴, *V.A. Pugalenti v. State*¹⁵, *Cartoonist Aseem Trivedi case*.¹⁶ *Arundhati Roy case*, etc. all are recent cases where the prosecution doesn’t seem to make any case out of the complaints and all of these are, in one way or the other, are politically motivated, where the stake of some or the other, involved in politics, is there.¹⁷ But there’s a need to understand the root of this problem, i.e., why people are being charged under this draconian and stringent laws. One of the main reasons is the imposed jingoism by the ruling class where this law has become a convenient mechanism to stifle any voice which they think would go against their interests.¹⁸

In the case of *Balwant Singh v. State of Punjab*¹⁹, the court clearly explained what cannot be held as a seditious offence. This case included chanting of slogans in a casual

public. Similarly, it was said in the case of *Javed Habib v. State of Delhi*²⁰ that, ‘criticism of the government is the hallmark of democracy’. There are many cases which define what is not to be construed as an offence under the definition 124-A. So, there is no dearth of examples for the public authorities to get an idea of meaningful application of this section. Then what possibility remains is that of unawareness about the rightful application of this section or there is a deliberate attempt of the authorities to charge people with such offences. To prove this further, the researcher would look into some of the recent case laws permeating in the domain of individuals’ fundamental rights.

Misuse of Authorities-

The first, the foremost and the inevitable – *JNU case*. This case is famous in the sense that it was used as a tool of propaganda for stakeholders across the sides. But one point which is quite clear is that even if individuals chant strong criticism of the government or they voice anti-national slogans, hateful expressions, or contempt of national symbols, still it won’t attract charges of the said provisions because of the fact that it is not inciting violence.²¹ Delhi High Court rejected the dismissed the earlier petition on the grounds of arbitrariness and violation of principles of natural justice. It is very well evident that after the *Balwant Singh case*²² there is a need for clear and immediate incitement of violence. Celebrating countries defeat in cricket matches can’t be described

¹¹ *Id.* at 6

¹² *Ibid.*

¹³ 2011 (266) ELT 193 (Chhattisgarh)

¹⁴ *Kanhaiya Kumar v. State (NCT of Delhi)*, (2016) 227 DLT 612.

¹⁵ CrI. O.P. No. 21463 of 2017

¹⁶ *Sanskar Marathe v. State of Maharashtra & Anr.*, 2015 Cri LJ 3561

¹⁷ Nalin Mehta, “Redefining “Azadi” in India: the prose of anti-sedition” 7(3) SAHC 322–325 (2016).

¹⁸ *Id.* at 1

¹⁹ AIR 1995 SC 1785

²⁰ (2007) 96 DRJ 693

²¹ *Id.* at 9

²² *Id.* at 26



as seditious²³, an inverse we frequently see, for e.g. in Madhya Pradesh and Kashmir two years back, when celebrating India's defeat in champions trophy indicted few people of charges of sedition.

In *Binayak Sen case*²⁴ it can be clearly seen how the judgement was politically motivated or was delivered with nationalistic fervour as the orders passed in that case show there was no cognizance of some relevant documents from the defence side, and there was galore of presupposition with regard to the fact that connection with Naxalites and Maoists was considered to be against anti-nationalistic.²⁵ Even eminent jurist and lawyer such as Ram Jethmalani has said that no case under the said provision can be made out.²⁶

The most recent in this line is the charging of people under the said clause for the proposed *Citizenship Amendment Bill*²⁷. The biggest name in this is of Assamese scholar Hiren Gohain, a Sahitya Awardee, for inciting people against the said legislation and describing it as a tool of persecution against a certain section of the society. It is a heavy-handed response to stringent political criticism. Here the law is used in its much narrow sense, where there is neither any incitement to violence nor any sloganeering against the state.²⁸

The case of *Aseem Trivedi*²⁹ also holds a lot of value as it reiterates what does not constitute sedition. In this case, where

national emblems and constitution was allegedly disrespected, court gave a clear difference between strong criticism and disloyalty. This case also held that commenting on government policies and agencies, which in way incite violence would not come under the purview of sedition. But still, due to police and political negligence, he had to face acute pain of going through the process of judicial scrutiny of such severe law.

The list does not stop here. *Arundhati Roy* and *S.A.D. Geelani* for advocating for a plebiscite in Kashmir, *Uday Kumar*, a Kudunkulam activist raising his voice against the building of nuclear reactors in the vicinity of residential and agricultural lands, *Divya Spandana*, a Congress chief communicator for calling prime minister 'chor'(thief), Kamal Shukla, a Bastar based journalist for sharing cartoon which made derogatory references to the judiciary and the government, Akhil Gogoi, farmers' right leader, allegedly instigated people to take up arms against the government, and... This list is innumerable.

According to the National Crime Records Bureau, there were a total of 112 cases of sedition across the country, out of which only eighteen completed the trials and out of that, only two were convicted.³⁰ Take the case of Assam, where from 2016, the total no. of

²³ Karan Thapar, "It's not sedition" *The Hindu*, June 17, 2017.

²⁴ *Id. at 20*

²⁵ Sudha Bharadwaj, Kavita Srivastava, Iina Sen, "Critiquing The Binayak Sen Judgement" *Outlook* Dec. 28 2010

²⁶ Ram Jethmalani, "No sedition case against doctor Binayak Sen" *Bar, Bench & Litigation*, (December 2010)

²⁷ Citizenship (Amendment) Bill, 2016

²⁸ "Sedition, once more" *The Hindu* (15 January 2019)

²⁹ *Id. at 23*

³⁰ National Crime Records Bureau, 'Crime in India report' 2016



sedition cases filed are more than 245!³¹ Except few cases of terrorism, most of the sedition charges are politically motivated. They are slapped against ones who are protesting or dissenting against the government and even the police knows what will be the outcome of putting people behind the bars for such charges.³² Therefore it can very well be inferred that this law has gone misuse from all the places where the power to use it is present. And this prohibition of people from exercising their rights will possess grave danger to democracy.

Escalating Cases and Fate of Clause

Senior advocate Sanjay Hegde said that the primary reason for the towering high acquittal rates and abysmally low conviction rate for sedition cases is that the law is misapplied.³³ The question over the existence of clause of sedition is not new. During Constituent Assembly Debates, many leaders stood in front of the continuance of this law vehemently. Shri M. Ananthasayanam Ayyangar, Shri K M Munshi, etc. are some names which said that anarchy would follow if such a law is given in hands of the government.³⁴ Various authors have given their perspective as to what should be the correct step ahead with regard to this draconian law.

In his book of *Republic of Rhetoric*, Abhinav Chandrachud covers a wide range of issues

relating the political dissent and how that is curbed by the unrestricted power invested in the government of the time. But one of the main issues which his book has covered is the misuse of sedition for pity political gain by various governments.³⁵ Another book in line Anushka Singh's *Sedition in Liberal Democracies*. She talks about how this law is used as an effective mechanism for silencing dissent and criticism. She also talks about the quantum of punishment which this law takes with itself, the political nature of law, etc. From these set of books, what the writer is trying to make a point is that sedition in itself, even if it passes the test of constitutionality, could not pass the test of its rightful and appropriate use. It is a sword by which government cuts the dissenting voices of the criticizers and that's the reason why it should be scrapped.³⁶

In one of his articles, T.S.R. Subramanian, former cabinet secretary, says that the law of sedition is extremely nuanced, and needs to be applied with caution.³⁷ In a way, he was with the continuance of the law even in the time of its misuse. In another article, Soli J Sorabjee, Former Attorney General of India, has in clear and vehement term stated that its misuse should not be the grounds for its

³¹ Written reply in the Assam assembly by parliamentary affairs minister Chandra Mohan Patowary

³² The Wire Staff, "Sedition Charges: Despite Few Convictions, Police Register More Cases" *The Wire* (18 January 2019)

³³ Abhishek Dey, "Sedition in India" *The Wire* (December 2017)

³⁴ Constituent Assembly of India, 1st-2nd December 1948; Constituent Assembly Debates Official Report,

Vol.VII, Reprinted by Lok Sabha Secretariat, New Delhi, Sixth Reprint 2014

³⁵ Abhinav Chandrachud, "*Republic of Rhetoric: Free Speech and the Constitution of India*" (Penguin House 2016)

³⁶ Anushka Singh, "*Sedition in Liberal Democracies*" OUP (2018)

³⁷ T.S.R. Subramanian, "Should the sedition law be scrapped?" *The Hindu* (June 2017)



deletion.³⁸ He stresses on the constitutionality of the offence and what should be done to curb the misuse of this very law.

In the year 2011, a private member Bill titled the Indian Penal Code (Amendment) Bill, was introduced in the Rajya Sabha by Mr D. Raja and in 2015, a Bill titled The Indian Penal Code (Amendment) Bill was introduced by Mr Shashi Tharoor.³⁹ Both of these bills tried to revive the discussion on the interpretation of the very definition of the term sedition.

The researcher, from all these aforementioned examples, wants to show how diverse are the views with regard to the continuance of the sedition as a part of our penal legislation. But one thing is very clear, that there is no clear theory we can adopt with regard to those laws where the right of the individuals is to be balanced with the right of the sovereign to curb the former right. And here we are dealing with that right of individual which is sacrosanct to the very essence of democracy.

In *Shreya Singhal v. Union of India*, court said that ‘the liberty of speech and expression “is a cardinal value and of paramount importance.”’⁴⁰ The Universal Declaration of Human Rights, 1948, in its Preamble and Article 19 declared freedom of speech as a basic fundamental right.⁴¹ John Stuart Mill also argued that a society can only be sustain

if free flow of ideas and expression is permitted there.

So, the question becomes more intriguing, as any unreasonable and inappropriate restriction to the right of free speech and expression will destroy the whole idea of any democratic setup, as this is the very core value of any republic. In this condition, the existence of sedition law becomes more vulnerable, as it has been a handy tool for those in power to suppress the lifeline of democracy, where this law has been used to declare nationals and anti-nationals, where this law leads to more dictatorial approach towards its people.⁴²

But then it is important to go back into history and the constitutionality debate of this law. When the country got independence from clutches of the tyrannical rule of Britishers, the government did not part ways with such draconian law, although there was some dissent with respect to this in the constituent assembly. Then the courts had to consider the same question. Now here the courts applied the doctrine of constitutionality of law. It means that if an interpretation of the section is constructed in a way which would make section a constitutional one from being ultra vires, then the former interpretation is bound to apply.⁴³ In 1959, after plethora of cases sending out an uncertainty with respect to the constitutionality of the law, the case of *Ram Nandan v. State*⁴⁴ held this law has become void with the advent of constitution of India,

³⁸ Soli J Sorabjee, “Sedition law should stay, but its interpretation must be specific and not wide-ranging as in British era” *Times of India* (February 19, 2016)

³⁹ The Indian Penal Code (Amendment) Bill, 2015

⁴⁰ AIR 2015 SC 1523

⁴¹ Also Article 19 of International Covenant on Civil and Political Rights, 1966 (ICCPR); Article 9 of African Charter on Human and Peoples’ Rights, 1981;

Article 10 of European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; Article 13 of American Convention on Human Rights, 1969

⁴² Ashwani Kumar, “Protecting the dissenters” *The Hindu* (September 2018)

⁴³ The Indian Penal Code 1860

⁴⁴ AIR 1959 All 101



as it was against article 19(1). Then Kedarnath judgment came which also invoked the doctrine of constitutionality and thus narrowed the scope of this particular law. This case kept this law on a different pedestal, saying: ‘Government established by law is a visible representation of the state and the very existence of state will be in jeopardy if the Government established by law is subverted. Hence, the continued existence of the Government established by law is an essential condition of the stability of the State.’⁴⁵

But it was the same case, which upheld its constitutionality, also curtailed its scope in its application.⁴⁶ Also looking at other narrative we find that there is a fallacy in their argument. They denounce this law on the basis of its misuse, which in a way concedes the fact that there exist instances where use may be warranted.⁴⁷ It is also well settled that while drafting a particular interpretation, courts need to look at the context, purpose and history of the legislation too.

So the moot question which still remains is ‘whether the law of sedition, notwithstanding the question of constitutionality, can have a place in a democracy like ours, where individual rights are cherished and freedom of dissent has been the tool from which this nation has taken birth from the hands of colonial powers, especially in a scenario where the use of law is itself in question, or more appropriately, has become an instrument of those in power to suppress the voices which are antithetical to the voice of power. In an environment where there is

catena of narratives with opinions for, against and for a change in the section, with no dearth of nationalistic fervour of government attached to it on one hand and peoples fundamental right on the other side, the question of its existence has seen dialogues, debates, discussions, demonstrations, disruptions but no development as to its answer.

Conclusion

There has been galore of cases decided on the question of interpretation and applicability of sedition and these have made clear the scope and very limitations of the clause. According to the construction given by *Kedarnath* judgment, the section strikes a correct balance between the individual’s right to freedom of speech and expression and state’s right to maintain public order and secure its existence. But when it comes to the authorities, who are entrusted with the duty of applying and enforcing this very section according to the limitations laid down and contours drawn by plethora of cases, the misuse and mismanagement are evident on the face. What this research paper has strived for is to examine the validity of section in the wake of its ostensible misuse.

While examining the validity of argument of deletion of sedition law, and after reading the context, i.e., history, objective of law, intention of law, what role does the law play for today’s regime, horizon of the clause, the researcher has reached on to the conclusion that mere misuse of law cannot be a ground for any law deletion, especially when there is, even though narrow, scope of use of law.

⁴⁵ *Kedar Nath Singh v. State of Bihar*, AIR 1962 SC 955

⁴⁶ Atul Dev, “A History of the Infamous Section 124A” *The Caravan* (25 February 2016)

⁴⁷ Meenakshi Lekhi, ‘Should the sedition law be scrapped?’ (June 2017) *The Hindu*



What should be focussed on is to how the authorities are going to implement and enforce these laws, as the reasons for the incorrect use of law are very far-fetched. Reasons are such as unawareness about the correct usage, political motivations, nationalistic fervours, personal gains, etc, are not easy to eliminate and will need an approach targeting the very root of these problems from the scratch. Needless to say, that the state must allow a culture where diversity of opinions, spectrums of views can find their way to flow freely, but one must make a distinction between the free flow of ideas and absolute flow of ideas. Absolute flow can even make the state pay a price for it. So, as the law is construed in a very narrow sense it does not restrain any rights of the people. It is only devoid of utmost caution while exercising it. If misuse stops, then, fortunately, we may preserve the idea of the free society.

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