RESTRAINING THE ABILITY TO SPEAK TRUTH TO POWER: THE ANACHRONISTIC SEDITION LAWS OF INDIA

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Abstract

The ability of the individual to take offence can in other terms be labeled as tolerance, which represents the ability of not only the society, but also the legal framework to protect dissent in any form. Dissent is essential as societies are usually averse to change and it is by means of dissent that progressive ideas find scope for acceptance against the hegemony of the State. The primordial problem lies in the evolutionary concept of the social and legal contours of the freedom of speech and expression, which has evolved with society but not quite well with legislation. The variance in free speech laws throughout the world is premised on the tolerance that the legislature is willing to impose and the tolerance that society is willing to accept. The emotional violence that is capable of being inflicted through words becomes difficult to translate into an offence, when criticism turns into Sedition, merely upon the established State paradigm of State infallibility being questioned. The manner, in which free speech is sacrificed at the subjective altar of State obedience, can be understood through a legal analysis of the use of Sedition provisions in India. This paper analyses the legal reasoning advanced to determine the contours of freedom of speech and seditious speech, to arrive at the criterion for delineating permissible speech. Firstly, the author analyses the validity of the restrictions that provisions regarding Sedition place on the freedom of speech and its constitutionality juxtaposed to the argumentation of the State about limiting free speech in the exercise of its police powers. Secondly, the author argues for the declaration of unconstitutionality of provisions of Sedition in India, on the basis of violation of fundamental rights and the reasonable restrictions under Article 19(2). The author also suggests the need to abrogate the Sedition provisions in India and the adoption of legal tests to delimit the contours of free speech from State sanctioned speech.

I. INTRODUCTION

The ideological battles that governments seek to engage in are premised on the use of Sedition provisions to create a form of thought control, arising out of the chilling effect on free speech.

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The demarcating line between people's freedom to "*alter, amend or abolish*"[1] their government and its effectuation through force, presents a challenge considering the dilemma of the deterrence on free speech arising out of enforcing provisions of Sedition. The reasoning behind the omission of the word '*sedition*' from the Constitution was the varied interpretation of the term and its ineffectiveness in securing public order, largely at the expense of free speech.[2]The primary objective behind Sedition provisions is to enforce allegiance whilst maintaining a perceived outcome of self-preservation of the State.[3]Section 124A of the Indian Penal Code (**"IPC"),** prohibits any words either spoken or written, or any signs or visible representation that can cause "*hatred or contempt, or excites or attempts to excite disaffection*" towards the government. [4] The interpretation of this provision has been inconsistent, with the courts having oscillated between the test of determining Sedition on the basis of inciting feelings of disaffection[5] on one hand and the requirement of incitement of violence on the other hand.[6]The interpretation of Section124A in pre-independence decisions was soon put to test under the Indian Constitution, whereby the courts adopted an approach whereby Sedition was seen as unconstitutional[7] and antithetical to the existence of a democratic State.[8]However, this development of law, was overturned by the decision of the Supreme Court in *Kedar Nath Singh* v. *State of Bihar*[9] (hereinafter "**Kedarnath Singh**").[10]

In other common law countries[11] such as the United Kingdom, the UK Law Commission has categorically stated that the repeal of the Sedition law should be based on two grounds, firstly the presence of "*more appropriate criminal offences*" to serve the purpose of Sedition law, and secondly that the absence of risk of abuse.[12] In the Indian legal framework, these dual conditions are satisfied adequately to build a case in favour of repealing Section 124A. The IPC, under Chapter

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[1]M.G. Wallace, *Constitutionality of Sedition Laws*, 6 Va. L. Rev. 385 (1920.)
[2]Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955 (hereinafter the Kedarnath Singh case).
[3] P. J. Charles, *Plenary power doctrine and the Constitutionality of ideological exclusions: An historical perspective*, 15 Tex. Rev. L. & Pol. 61,82(2011).
[4]S.124, The Indian Penal Code,1960.
[5]Queen-Empress v. Bal Gangadhar Tilak, (1892) I.L.R. 22 Bom, 135; King Emperor v. Sadashiv Narayan Bhalerao, (1947) LR 74, IA 89.
[6]Niharendu Dutt Majumdar v. The King Emperor, AIR, 1942 FC 22.
[7]SabirRaza v. The State, Cri App No. 1434 of 1955, D/ - 11-2-1958 (All); Ram Nandan v. The State, AIR 1959 All 101.
[8]Tara Singh Gopi Chand v. The State, 1951 CriLJ 449.
[9]Supra 2.
[10]Ibid.
[11] Law Commission of New Zealand, Consultation Draft: *Reforming the Law of Sedition*, available at: http://www.lawcom.govt.nz/sites/default/files/mediaReleaseAttachments/Publication_128_343_SEDITION%20CONSULTATION%20DRAFT.pdf, last seen on 12/5/2017.
[12]72nd United Kingdom Law Commission Working Paper Second Programme Item XVIII, C*odification of the Criminal Law – Treason, Sedition and Allied Offences*,43-47 (1977).

VIII, deals with offences concerning incitement of violence, without substantially hampering free speech, in contrast to the provisions dealing with the offence of Sedition. Moreover, Sedition categorised as an offence against the State.[13] The arduous legal process, which an individual has to go through, merely on being implicated in a case of Sedition, has a prohibitory effect on the exercise of free speech. The Apex Court has also recognised a casual approach among trial courts in handing out convictions under Section 124A.[14] The reading down of Section 124A has also failed to abate the indiscriminate application of Sedition provisions to silence dissent.[15] The Maharashtra Government's circular[16] on the application of provisions of Sedition by the police[17] and cases where listening to the speeches of Jarnail Singh Bhindranwale amounted to Sedition,[18] (though acquitted later on), point to the ambiguity that still exists in this regard. It perpetuates fear in the minds of the people, limiting debate, discussion and deliberation in the marketplace of ideas. The author argues for broadening the fine line that delineates the distinction between free speech and seditious speech, on the basis of the traditional doctrine of '*tendency*' and the stipulation of '*imminent violence*' under the public order requirements of Article 19(2). The arguments of the legal perspective of the State based on interpretation of the term '*public order*' and the reasonable restrictions under Article 19(2) are juxtaposed to the rationale of the Indian courts seeking to render Sedition as unconstitutional through its evolving free speech jurisprudence.

In Part II of this paper the author presents arguments given by the State in favour of Sedition provisions. It mentions that Section 124A of the IPC adheres to the restrictions laid down by the State, as its existence is imperative for the functioning of the State, as the individual freedoms must yield to the community interests. This deduction is in coherence with the reasonable restrictions laid down by Article 19(2).

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[13] J. L.-C. Neo, *Seditious in Singapore! Free speech and the offence of promoting ill-will and hostility between different Racial groups* 2011 Sing. J. Legal Stud. 351 (2011).

[14] Bilal Ahmed Kaloo v. State of Andhra Pradesh, AIR 1997 SC 3483.

[15] *Between two Sets of Guns*, Human Rights Watch, available at http://www.hrw.org/sites/default/files/reports/india0712ForUpload.pdf, last seen on 12/5/2017.

[16] *Government Resolutions*, Government of Maharashtra, available at https://www.maharashtra.gov.in/Site/Upload/Government%20Resolutions/English/201508271250126729.pdf, last seen on 12/5/2017.

[17] *New state circular on sedition shows why law must be repealed*, Amnesty International, available at https://www.amnesty.org.in/show/news/new-state-circular-on-sedition-shows-why-law-must-be-repealed, last seen on 12/5/2017.

[18] Balbir Singh and Anr. v. State of U.P., AIR (2000) SC 464.

The very existence of the State would be in a constant state of jeopardy, if the incitement to violence is not punished under Section 124A. The provision is neither unambiguous nor arbitrary as it clearly demarcates the exercise of the right to freedom of speech and expression through disapprobation of the Government. Moreover, the criterion of abuse of power by an authority cannot render a time-tested provision, although scrutinised by the judiciary on numerous occasions as unconstitutional.

In Part III of the paper the author argues that Section 124A of the IPC arbitrarily places restrictions on the freedom of speech and expression, without due regard to the reasonable restrictions required under Article 19(2). The chilling effect that Sedition has on the exercise of fundamental rights under Article 19(1)(a) defeats the very purpose of the exercise of the freedom of speech and expression. Therefore, Section 124A is to be determined as unconstitutional on the basis of the shifting jurisprudence of the Apex Court from rationale of '*tendency*' to incite public disorder to the Brandenburg test of requiring '*imminent incitement to violence'*.

II. THE STATE'S PERSPECTIVE: ARGUING FOR RETAINING SEDITION LAW

Based on the premise that Section 124A of the IPC[19]is time tested and constitutionally valid, the State has over time advanced a threefold argument to justify retention of Sedition provisions. *First*, it falls within the permissible limits allowed under Article 19(2), based on its existence being imperative for the functioning of the State. *Second,* it is neither unambiguous nor arbitrary. *Third*, mere abuse of power does not render the provision unconstitutional.[20]

2.1. Sedition Law is a permissible restriction upon Article 19(1)(a)

To negate the argument of Sedition provisions being *ultra vires* Article 19(1)(a) of the Constitution, the State can take the recourse under Article 19(2). Where the restrictions are

[19] S. 124, The Indian Penal Code, 1960.
[20]State of Rajasthan v. Union of India, AIR 1978 SC 245, 249.

reasonable and justified on any of the grounds under Article 19(2), freedom of speech and expression cannot be said to have been infringed.

2.1.1. Sedition Law can restrict the freedom of speech and expression on the grounds of 'public order' under Article 19(2)

The State has often relied upon the ground of '*public order*' to justify legislative restrictions on Article 19(1)(a).The Supreme Court has held that the State has a legitimate interest to regulate freedom of speech and expression which is, in the opinion of the State, likely to trigger communal antagonism and hatred, and this follows from the expression *'in the interests of …public order*' under Article 19(2).[21]The liberty granted under Article 19(1)(a) is limited and cannot be used to justify defamatory or libelous speech.[22]In *Babulal Parate* v. *State of Maharashtra*,[23] the Court held that the State is competent to enact legislations to take necessary anticipatory action to maintain public order "*at all times particularly prior to any event".*[24]In *Ramji Lal Modi* v. *State of U.P*,[25] where the validity of Section 295A of the IPC was challenged on the grounds of violating Article 19(1), the Constitutional Bench held:

> "*…certain activities have a tendency to cause public disorder, a law penalising such activities as an offence [should] be held to be a law imposing reasonable restriction in the interests of public order, although in some cases those activities may not actually lead to a breach of public order.*"[26]

Moreover, in *Debi Soren* v. *State of Bihar*,[27] the Court has accorded a broad interpretation to the expression '*in the interest of.…public order".* As Article 19(2) uses the words '*interest of public order*' instead of '*maintenance of public order'*, the ambit of protection includes not only the laws that prohibit direct incitement of disorder but also the tendency to incite disorder.[28] After the *Kedarnath Singh* case,[29] the courts have interpreted Section 124A to be reasonably in compliance

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[21]State of Karnataka v. Praveen Bhai Togadia, AIR 2004 SC 2081.
[22]Dr. D.C. Saxena v. Hon'ble the Chief Justice of India, (1996) 5 SCC 216.
[23]Babulal Parate v. State of Maharashtra and Ors., AIR 1961 SC 884.
[24]Ibid.
[25]Ramji Lal Modi v. State of U.P., AIR 1957 SC 620.
[26]Ibid.
[27]AIR 1954 Pat 254.
[28]Virendra v. State of Punjab, AIR 1957 SC 896; Ramji Lal Modi v. State of U.P., AIR 1957 SC 620.
[29]Supra 2.

with Article 19(2).[30]In *Kameshwar Prasad & Ors.* v. *State of Bihar*,[31] the Court held that police powers of the State in India, in contrast to the American jurisprudence on free speech, allows for the the constitutional validity of laws pertaining to Sedition.[32]

2.1.2. The restriction imposed by Sedition Law is reasonable

The criteria postulated by the Supreme Court to determine reasonableness involves the assessment of factors such as right alleged to have been infringed, the underlying purpose of the restrictions, the extent and urgency of the evil sought to be remedied, the disproportion of the imposition, and the prevailing conditions.[33]The Latin maxim *salus populi est suprema lex* i.e., the safety of the people is the supreme law and *salus reipublicae suprema lex* i.e., safety of the State is the supreme law, coexist[34] and lend credence to the principle that welfare of an individual must yield to that of the community.[35]In the light of the same, the Court has held that Section 124A, 153A and 153B, 295A, 298 and 505(2) of the IPC and the enforcement of these provisions has to be exercised in consonance with the maxim *salus republicae suprema lex*.[36]

The offence of Sedition under Section 124A has been provided under Chapter VI of the IPC which relates to the offences against the State, on the rationale that it prevents the subversion of the Government.[37] In *Kedarnath Singh* case, the Supreme Court applied the reasoning that when the existence of the State is in "*jeopardy*", then the government established by law cannot be allowed to be subverted. In *Dinesh Trivedi* v. *Union of India,*[38]the Court held that if every act of the State is transformed into a public controversy, it would have a chilling effect on the independence of the decision makers of the State. Therefore, this rationale of reasonableness of Section 124A has been established through court decisions[39] and the provision can thereby be

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[30]Arun Jaitley v. State of U.P, App. No. No. 32703, H.C of Allahabad 2015; Pankaj Butaliav. Central Board of Film Certification and Ors, W.P (C) 675, Delhi High Court 2015.
[31]Kameshwar Prasad &Ors. v. State of Bihar,1962 Supp. (3) S.C.R 369.
[32]Ibid, at 378.
[33]Laxmi v. State of U.P., AIR 1981 SC 873; Santosh Singh v. Delhi Administration, AIR 1973 SC 1091.
[34]State of Punjab v. Baldev Singh, (1999) 6 SCC 593,599.
[35] Ibid.
[36]Pravasi Bhalai Sangathan v. Union of India and Ors., AIR 2014 SC 1591.
Balwant Singh v. State of Punjab, AIR 1995 SC 1785; Bilal Ahmed Kaloo v. State of Andhra Pradesh, AIR 1997 SC 3483.
[38]Dinesh Trivedi v. Union of India, (1997) 4 SCC 306.
[39] S. 124A, The Indian Penal Code, 1960.

considered to be in public interest, being meant to prevent incitement to violence against the State.

Furthermore, it can also be argued that the explanations under Section 124A are appended to strike a balance between an individual's fundamental right to speech and expression and the restriction of '*public order*'.[40]Criticism of the government is permitted under the explanation to Section 124A as long as it does not "*incite or attempts to incite hatred, contempt or dissatisfaction*" against the Government or is not made with the intention of creating public disorder.[41] Thus, the restrictions imposed by Section 124A can be considered to fall within the purview of Article 19(2).

2.2. Section 124A is unambiguous and non-arbitrary

It can be argued by the State that Section 124A cannot be termed as ambiguous as several phrases used in the provision have been subject to meaningful interpretations by the Supreme Court.[42]In *A.K. Roy* v. *Union of India*,[43] the Constitutional Bench, whilst dealing with the issue of ambiguity in various sections under the IPC,[44] examined the meaning of terms such as '*bring into hatred or contempt*', '*likely to cause hatred or ill-will*' which are found under Section 124A. It held that these expressions, though difficult to demarcate through definition considering that they can be broadly interpreted, cannot "*elude a just application to practical situations*".[45]Further, Section 124A has been interpreted to clearly demarcate disapprobation from disaffection with the intention to incite violence, thus rendering the provision unambiguous.[46]

2.3. The possibility of abuse of power does not render Section 124A unconstitutional

[40]Supra 2, at 969; Annie Besant v. Advocate General of Madras, AIR 1919 PC 31,37.
[41]Supra 2.
[42]Supra 31; Supra 2.
[43] A. K. Roy v. Union of India and Anr., AIR 1982 SC 710.
[44]Ss. 124A, 153A(1)(b), 153B(1)(c) & 268, The Indian Penal Code, 1960.
[45]Supra 43, at 734.
[46]Supra 2, at 968.

Mere accusation of misuse of the law cannot result in holding the law unconstitutional[47] or violative of Article 14.[48] It cannot solely be a ground for holding a provision procedurally or substantively unreasonable.[49]In *State of Rajasthan* v. *Union of India,* the Court held that "…*merely because power may sometimes be abused, it is no ground for denying the existence of power*".[50] A discriminatory purpose of the law cannot be assumed[51] but what is presumed is that the public official will discharge his duties honestly.[52]It can be argued by the State that if a provision of law is misused and is utilised for the purpose of abuse of the process of law, it is for the legislature to amend, modify or repeal it.[53] In this context, the Supreme Court has further observed that the Court is not empowered to hold a law unconstitutional even on the basis of the law falling into disuse or in light of the changes in the perceptions of society as to its legitimacy.[54]Therefore, validity of the offence of Sedition may be justified despite it being subject to abuse by the administration.

III. REPEALING SEDITION LAW IN INDIA

The arguments advanced by the State however, can be contested in the backdrop of the evolving jurisprudence of the Apex Court on free speech and the limits on the restrictions that the State can impose. Contrary to the argumentation of the State, opponents of Sedition provisions argue that Section 124A violates freedom of speech and expression under Article 19(1)(a) of the Constitution and is not a justified restriction under Article 19(2).

Two conditions must be complied with under Article 19(2)for a restriction to be justified — firstly, it must be reasonable, and secondly, it should be in the interest of public order, security of State, friendly relations with foreign States, decency or morality, in relation to contempt of court,

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[47]Collector of Customs, Madras v. Nathella Samppathu Chetty, AIR 1962 SC 316, 320.
Budhan Choudhry and Ors. v. State of Bihar, AIR 1955 SC 191; D. K. Trivedi and Sons and Ors., v. State of Gujarat, AIR 1986 SC 1323, 1350.

[49] Mafatlal Industries Ltd. and Ors. v. Union of India and Ors., (1997) 5 SCC 536, 540.

[50]State of Rajasthan v. Union of India, AIR 1978 SC 245, 249.

[51]Tarrance v. Florida, 188 U.S. 510, 520 (1901).

[52]Pannalal v. Union of India, AIR 1957 SC 397, 400; Sushil Kumar Sharma v. Union of India and Ors., (2005) 6 SCC 281.

[53] Unique Bottle Tube Industries (P) Ltd. v. U.P. Financial Corporation and Ors., (2003) 2 SCC 455; Padma Sundara Rao and Ors. v. State of Tamil and Ors., (2002) 3 SCC 533.

[54]Suresh Kumar Koushal & Anr v. Naz Foundation &Ors, (2014) 3 SCC 220.

defamation, incitement to an offence and sovereignty and integrity of India.[55]It is argued that Sedition provisions fail to satisfy both these requirements. The mere attempt of exciting disaffection towards the government renders an individual punishable for Sedition, with the mental attitude being presumed to intend the consequences.[56]Thus, instances such as advocating non-compliance with a bad law or even criticising a bad law can come within the ambit of Section 124A, which even after being read down creates a prohibitory environment for reasonable mobilisation against governmental activities.[57]

3.1. Sedition Law Violates Freedom of Speech and Expression under Article 19(1)(A)

3.1.1. The law of Sedition creates a "chilling effect" defeating the exercise of fundamental rights under Article 19(1)(a)

Freedom of speech and expression includes the right to propagate or publish opinion[58] It predicates the freedom of the intellect to entertain *"ideas hateful to the prevailing climate of opinion*"[59] and the freedom to dissent.[60] The wide ancillary powers of detention and investigation in addition to harsh penalties under provisions of Sedition deter the legitimate exercise of the freedom of speech and expression[61]through explicit State deterrence.The chilling effect inhibits the legitimate exercise of fundamental rights. The mere threat of sanction can deter the exercise almost as potently as the actual application of the sanctions.[62] The deterrent effect of the law on the individual leading to inhibition in the exercise of fundamental rights has been upheld as a relevant ground for holding laws *ultra vires* in American jurisprudence.[63]Section 124Ais a non-bailable and cognizable offence with disproportionate punishment, which further renders the freedom of speech and expression infructuous. Sedition provisions are obsolete and non-existent

[55]The Superintendent, Central v. Ram Manohar Lohia, 1960 AIR 633.
[56]S. 124A,The Indian Penal Code, 1960.
[57]Supra 12.
[58]S. Rangarajan v. P. Jagjivanram, 1989 2 SCC 574.
[59] Roth v. United States 354 U.S. 476, 484 (1957).
[60]Abrams v. United States, 1919 250 US 630.
[61]Romesh Thappar v. State, (1950) SCR 594, 603.
[62]Cantwell v. Connecticut (1940) 310 US 296 (311); Gooding v. Wilson, (1972) 405 US 518.
[63]Gooding v. Wilson, (1972) 405 US 518 (521); United States v. Raines, (1960) 361 US 17 (33); Lamont v. Postmaster General, (1965) 381 US 301 (307).

in most common law jurisdictions.[64]An unconstitutional abridgment can be caused not only by prohibition but also by inhibiting the exercise of fundamental rights,[65] which can have a deterrent effect or chilling effect, and should be declared as unconstitutional by the courts.[66]

Ambiguity in the Sedition provisions has given the Government an insidious means of control on an individual's exercise of freedom of speech and expression. The Supreme Court of India has attempted to read the provision down in order to curtail the prevalent mischief within the law. It was ruled that casual raising of slogans, once or twice, by two individuals alone cannot be considered to be an attempt aimed at exciting '*hatred or disaffection*' towards the Government.[67] However, despite the reading down, widespread abuse of the provision still prevails, in turn demonstrating that it is still ambiguous in the light of the evolving constitutional jurisprudence.

The deletion of the word '*sedition*' from the draft of Article 19(2) portrays the intention of the Constituent Assembly,[68] which can be premised as the essential constitutional philosophy of securing political liberty and freedom of speech. During the Constituent Assembly Debates the framers of the Constitution specifically relied on the advocacy of replacement of Government as the only bulwark against democracy and hence the exclusion of Sedition. The Constitution must be interpreted to give effect to the intention of the Constituent Assembly,[69] to "*suppress the mischief and advance the remedy, and suppress subtle inventions and evasions for continuance of the mischief*".[70] The Constitution cannot be construed literally, without having regard to the constitutional scheme.[71] Therefore, the explicit exclusion of references to Sedition under Article 19(2) indicates the intention of the Constituent Assembly and provides strength the legal and philosophical justification of civil disobedience, rendering Sedition provisions an anachronism in modern times.

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[64]L.W. Maher, *The Use and Abuse of Sedition*, 14 Sydney Law Review 287, 312 (1992).
[65] D. D. Basu, *Commentary On The Constitution Of India,* 2417 (8th ed., 2007).
[66]Lamont v. Postmaster General, 1965 381 US 301.
[67]Balwant Singh v. State of Punjab, (1995) 3 SCC 214.
[68]Brij Bhushan and Anr. v. The State of Delhi, 1950 Supp SCR 245.
[69]Lt. Col. Khajoor Singh v. The Union of India &Anr., AIR 1961 SC 532; R. M. D. Chamarbaugwalla v. The Union of India, [1957]1SCR930 .
[70] The Bengal Immunity Company Ltd. v. State of Bihar and Ors., AIR 1955 SC 661.
[71]SapruJayakar Motilal C.R. Das v. Union of India, AIR 1999 Pat 221.

3.1.2. Section 124A is is not in the interest of the 'public order' and is not a reasonable restriction under Article 19(2)

The grounds under Article 19(2) are exhaustive, and must be strictly construed.[72]The term '*public order*' must be demarcated from other grounds under Article 19(2)and read in an exclusive sense to mean public peace, safety and tranquility particularly in the context of national upheavals.[73] These grounds being exhaustive, the Supreme Court in the *Romesh Thapar* v. *State of Madras*[74](hereinafter "**Romesh Thapar**") has specifically laid down that the phrase '*security of State*' refers to those aggravated forms of prejudicial activity which endanger the very existence of the State and does not include ordinary breaches of public peace.[75] The restrictions imposed under Article 19(2) pertain to the interests of public order rather than the interests of the Government. However, the disorder that is sought to be prevented under Section 124A is not a public disorder but in fact a private disorder[76] which pertains to the Government's specific objectives of securing conformity with its policies.

As far as reasonableness of Sedition as a restriction is concerned, the Apex Court has observed that "*fundamental rights cannot be controlled on hypothetical and imaginary considerations and that…..unlessthere is a proximate connection between the instigation and the public order.*" [77] The reasonableness of a restriction has to be judged under Article 19(2) to (6) on the basis of a direct and proximate nexus between securing public order and the restriction imposed by the State.[78] For the determination of reasonableness, the Court has to also take the existing circumstances and the disproportionate imposition of the law into consideration.[79]

Section 124A punishes an individual on the likelihood of creating disaffection and enmity and hence does not bear a proximate nexus with the reasonable restrictions under Article 19(2). Further, it places a clear prohibition on all forms of speech, inclusive of criticism. The '*mere tendency*' which is inferred by the authorities under Section 124A, provides scope for the arbitrary application of the law.

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[72]Sakal Papers Ltd. v. Union of India, AIR 1962 SC 302.
[73]Supra 53.
[74]Supra 59.
[75]Ibid, at paras 4-7.
[76]Ram Nandan v. State, AIR 1959 All 101.
[77]Supra 53, at 635, 641.
[78]Rex v. Basudev, AIR 1950 SC 69.
[79]Harakchand v. Union of India, AIR 1970 SC 1453.

In the *Kedarnath Singh* case, though Section 124A was held to be valid, the judgment states that the freedom of expression can only be curtailed if it results in public disorder.[80]In *Bilal Ahmed Kaloo* v.*State of Andhra Pradesh*[81] the Apex Court observed that a mechanical order convicting a citizen for serious offences such as Sedition must have due regard to the liberty of the citizen. Moreover, the constitutional bench of the Supreme Court in the *Superintendent, Central* v. *Ram Manohar Lohia*[82] held that one cannot argue that instigation by an individual can result in a revolution resulting in serious issues of public order. In the absence of extraordinary circumstances, the exercise of a basic right of speech and expression [83] cannot be made dependent upon the subjective satisfaction of the government.[84]The essence of the offence of Sedition, therefore, consists of the intention with which the language is used and what is rendered punishable by Section 124A of the IPC is the intentional attempt, successful or otherwise. A mere tendency to promote such feelings is not sufficient to justify a conviction.[85]Thus, the tendency to create disaffection rationale advocated by *Kedarnath Singh* case,[86]causes free speech to be confined to suppositions of a probable impact on public order. The Apex Court in the *Rangarajan* v. *Jagjivan Ram* has held that "*Governance is by open discussion of ideas by citizens. Be it wise or unwise, foolish or dangerous statements must be tolerated in a democracy.*"[87] If the limitations are transgressed, the Court cannot save the law on the grounds that the intentions or motives of the legislature were beneficial and that the law would be administered properly.[88]

Another argument against the reasonability of Sedition provisions is that the standard of reasonableness varies from age to age according to the societal interests,[89] as reasonableness changes with time and circumstances.[90]Section 124A, which was framed in the interests of the Government in the colonial era, does not enjoy the protection of the reasonable restrictions under Article19(2).

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[80]Supra 2.
[81]AIR 1997 SC 3843.
[82]Supra 54.
[83]Virendra v. State of Punjab, AIR 1957 SC 896.
[84]Tika Ramji v. State of U.P. 1956 SCR 393.
[85]Satyaranjan Bakshi v. Emperor, AIR 1927 Cal 698.
[86]Supra 2.
[87]Rangarajan v. Jagijivan Ram & others; Union of India & others v. Jagjivan Ram (1990) LRC 424-427.
[88]Kantilal v. Babulal 1968 SCR 735.
[89]Jyoti Pershad v. Union Territory of Delhi, AIR 1961 SC 1062.
[90] Motor General Traders v. State of A.P., AIR 1984 SC 121.

The narrow construction adopted in the *Kedarnath Singh* case, relies on the criterion of '*tendency*' to create public order to justify the compliance with the public order exception under Article 19(2). This is in contrast to the criterion of incitement adopted in *Shreya Singhal* v. *Union of India*[91](hereinafter "**Shreya Singhal**"), which is qualified by term '*imminent*'.[92] Through a decision of the division bench, the *Shreya Singhal* case[93] renders the understanding of the term '*tendency*' in effect ancillary to the requirement of incitement,[94]diverging from the rationale of the *Kedarnath Singh* case which premised the constitutionality of Sedition on the term '*tendency*'.

Moreover, the need for clear and present danger has been replaced by the Brandenburg test as a stringent test of delineating free speech, which requires incitement of imminent lawless action.[95] The courts have resorted to the proximity test to determine the reasonableness of the State action under Article 19(2), requiring incitement of violence[96] or for speech to act as a "*spark in a powder keg*".[97] Therefore, the purpose of the British Government for the enactment of the law,[98] the misuse of the law in the present scenario[99] and the mischief that the law perpetuates, all necessitate holding Section 124A unconstitutional. The Constitutional Court of Uganda in reference to the *Kedarnath Singh* case[100] has also held Sedition to be violative of the freedom of speech and expression.[101]

3.2. The Non-Applicability of The Doctrine of Presumption of Constitutionality to Pre-Constitutional Legislations

[91]Shreya Singhal v. Union of India, (2013) 12 SCC 73.
[92]Ibid.
[93] Ibid.
[94]*The Striking Down of Section 66A: How Indian Free Speech Jurisprudence Found its Soul Again*, Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2015/03/26/the-striking-down-of-section-66a-how-indian-free-speech-jurisprudence-found-its-soul-again/, last seen on 12/5/2017.
[95] Arup Bhuyan v. State of Assam, (2011) 3 SCC 377.
[96]Ibid.
[97] S. Rangarajan v. P. Jagjivan Ram 1989 SCR (2) 204; Whether This Case Involves A ... v. State Of Gujarat, SCR.A/6330/2015, Gujarat High Court, 2015.
[98]Sanskar Marathe v. State of Maharashtra, Cri PIL No. 3 of 2015 (Bom).
[99] P.D.T. Achary, *Render Sedition Unconstitutional*, The Hindu, available at http://www.thehindu.com/opinion/lead/sedition-legislation-meant-to-suppress-the-voice-of-indian-people/article7758013.ece, last seen on 12/5/2017.
[100]Supra 2.
[101]Andrew MujuniMwenda&Anor v. Attorney General, [2010] UGCC 5.

The doctrine of presumption of constitutionality posits that the presumption is always in favour of constitutionality of the provision rather than its invalidation.[102] It is based on the assumed intention of the legislators to not transgress Constitutional boundaries.[103] This intention in case of pre-constitutional amendments or legislations cannot be assumed "*when at the time that the law was passed, there was no such barrier and the limitation was brought in by a Constitution long after the enactment of the law.*"[104] A nine judge bench of the Apex Court has also observed that the doctrine of presumption of constitutionality is not of "infinite application" and does not apply to pre-constitutional legislation.[105] Moreover, the Court held that it has to follow a policy of not enforcing an unnatural and forced meaning on the words, to provide for an interpretation which would render the impugned provisions constitutionally valid.[106] The Court cannot stretch the language of an enactment "*in the interests of any legal or Constitutional theory"*.[107] Further, the courts cannot uphold the validity of any Act restricting a fundamental right on any ground other than those specified in Article 19(2).

Moreover, application of the strict scrutiny test has been advocated. The Apex Court, in *Saurabh Chaudri* v. *Delhi Subordinate Services Selection Board*,[108] has observed that the strict scrutiny test can be applied in a case where life and liberty of the citizen is put into jeopardy by reason of a statute or where a statute or an action is patently unreasonable or arbitrary,[109] or is contrary to the constitutional scheme or where the general presumption as regards the constitutionality of the statute or action cannot be invoked.[110] This test requires the Court to presume that a discriminatory law is invalid, unless the State can prove that the impugned law was enacted for a compelling state interest, with minimal interference with the right in question, in the absence of any alternative, and was proportionate.[111] The Supreme Court, in *Gajanan Vishweshwar Birjur* v. *Union of India*, observed that thought control was alien to the constitutional schemes and values

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[102] Sunil Batra v. Delhi Administration, AIR 1980 SC 1579; New India Sugar Mills v. Commissioner of Sales Tax, AIR 1963 SC 1207; New Delhi Municipal Committee v. State of Punjab, AIR 1997 SC 2847; Govindlalji v. State of Rajasthan (1964) 1 SCR 561; M. Rathinaswami and Ors. v. State of Tamil Nadu and Ors., (2009) 5 SCC 625.

[103] Gulabbhai v. Union of India, AIR 1967 SC 1110; New Delhi Municipal Committee v. State of Punjab, AIR 1997 SC 2847.

[104] New Delhi Municipal Committee v. State of Punjab, AIR 1997 SC 2847.

[105] Ibid, at 2853.

[106] Ibid.

[107] In Re the Central Provinces & Berar Act No.XIV of 1938, (1939) FCR 18 at 37; Diamond Sugar Mills Ltd. v. The State of U.P. [1961] 3 SCR242 ;Gulabbhai v. Union of India, [1967] 1 SCR 602.

[108] Saurabh Chaudri & Ors. v. Union of India &Ors.,(2003) 11 SCC 146; Anuj Garg & Ors v. Hotel Association Of India, (2008) SCC 1.

[109] Mithu v. State of Punjab, (1983) 2 SCC 277.

[110] Subhash Chandra v. Delhi Subordinate Services Selection Board, (2009) 11 SCALE 278.

[111] T. Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement*, 50(2) Journal of Indian Law Institute 177 (2008).

and that suppressing ideas only drove them underground.[112]The Code of Criminal Procedure under Chapter VIII provides for maintaining adequate security and public tranquility.[113] There are numerous provisions under Chapter X of the IPC in order to deal with hate speeches.[114]Moreover, Article 19(3) of the International Covenant on Civil and Political Rights[115] also requires the law enacted to be necessary for the purpose it has been intended, whilst minimally interfering with the freedom of speech.[116] There are many alternatives to Section 124Apresent in the IPC to tackle the menace of hate speeches, whilst ensuring minimal interference with the fundamental right under Article 19(1)(a).Therefore, the presumption of constitutionality should not be applied to Section 124A and it must be construed in accordance with strict principles applied in construing the legal validity under Article 19(2).

3.3. Section 124A is a Vague and Arbitrary Remnant of Colonial Legacy, Unacceptable under the Rule of Law

Section 124A as an offence stifles dissent towards the Government in comparison to other provisions under the IPC. The scope of the provision is defined in wide and ambiguous terms, without clearly stating what constitutes hatred, enmity and disloyalty. The explanation to the provision further perpetuates this by categorically providing that disaffection towards the government includes "*disloyalty and all feelings of enmity*".[117]Disloyalty to the Government differs from disloyalty to the State,[118] whereby in the former, mere criticism can create disaffection. Section 124A, even after having been read down,[119] provides ample scope for unfettered discretion and any form of criticism can amount to disloyalty. Section 124A does not provide any safeguards for truth[120] as provided under Section 499 of the IPC and the explanations do not provide any exception to the application of the provision, but instead add to the scope of discretion of the authorities. In *State of Madhya Pradesh* v. *Baldeo Prasad*[121]where the person sought to be proceeded against must have been a goonda under the relevant legislation, but the

[112]Gajanan Vishweshwar Birjur v. Union of India, (1994) 5 SCC 550.
[113]Ss. 107, 108,109, 110, Code of Criminal Procedure,1973.
[114]Ss.121,186, 188, The Indian Penal Code,1960.
[115]International Covenant on Civil and Political Rights, (16/12/1966), S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.
[116]Kim v. Republic of Korea, No. 574/1994, U.N. Doc. CCPR/C/64/D/574/1994 (1999).
[117]S.124A, The Indian Penal Code,1960.
[118]Supra 2.
[119]Supra 2.
[120] W. Bird, *Press and Speech under Assault, The Early Supreme Court Justices, the Sedition Act of 1798 and the Campaign against Dissent*, OUP 44-49 (2016).
[121]State of Madhya Pradesh and Ors. v. Baldeo Prasad, 1961 AIR 293.

definition of goonda in the Act indicated no tests for deciding which person fell within the definition, the provisions were held to be uncertain and vague. Similarly, in *K. A. Abbas* v. *Union of India,*[122] the Court held that when individuals applying the law are themselves under uncertainty and the law takes away a guaranteed freedom, then the law must be held to offend the Constitution. The reasoning for such invalidity of the law is based on the probability of misuse of the law.[123] Therefore, the ambiguity in the Sedition provisions offends the fundamental principles of the rule of law and legal jurisprudence.[124]

It has also been argued that the terms used in Section 124A are incapable of being judged on objective standards and are susceptible to abuse and hence violative of Articles 14.A law, which authorizes the Executive to select cases for special treatment, without providing a guide or standard for such differentiation, is discriminatory [125] and *ultra vires* the Constitution.[126]In *Himmat Lal* v. *Commissioner of Police*, it was held that "*though a law which is not in itself discriminatory is violative of Article 14 if it makes it possible for the authority, under the guise of powers to discriminate*".[127] Moreover, the vice of conferring unguided discretion on an administrative authority, which offends Article 14, has been held akin to the vice of unreasonableness under Article 19(2).[128] Thus, a provision, which leaves an unbridled power to discriminate to an authority, cannot be characterised as reasonable[129] and is void for denying equal protection.[130] Further, when the statutory provision is in violation of Article 14, the Court cannot uphold its constitutionality by reading the validating requirements, which are lacking, into it.[131]

The Apex Court has also stated that a practical assessment of the operation of the law is necessary in particular circumstances.[132]There are numerous cases reported by Human Rights Watch,[133] which portray the misuse of Sedition provisions by authorities to stifle free speech and manufacture instant patriotism whilst furthering ideological motives. A constitutional provision

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[122]K. A. Abbas v. Union of India & Anr., 1971 AIR 481.
[123]Ibid.
[124]Kartar Singh v. State of Punjab, 1994 SCC (3) 569.
[125]State of Orissa v. Dhirendra, AIR 1961 SC 1715, 1743.
[126]State of Punjab v. Khan Chand, AIR 1974 SC 543, 564.
[127]Himmat Lal K. Shan v. Comm. of Police, AIR 1952 SC 196.
[128]Avinder v. State of Punjab, AIR 1979 SC 321, 350.
[129]Hari Chand Sarda v. Mizo District Council, AIR 1967 SC 829, 850.
[130]Raghubar v. Union of India, AIR 1962 SC 263, 284.
[131]B.B. Rajwanshi v. State of U.P., AIR 1988 SC 1089, 1100.
[132]Re: Special Courts Bill, 1978, (1979) 1 SCC 380.
[133]Supra 15.

must be construed in a wide and liberal manner so that remains it flexible enough to meet the newly emerging problems.[134] Therefore, Section 124A must be held unconstitutional in the light of the various incidents of misuse against the constitutional mandate of Article 19(1)(a).

IV. CONCLUSION

Post analysis of the arguments and counterarguments concerning the validity of the offence of Sedition, it can be categorically stated that the public utility and legal necessity of the offence of Sedition has considerably eroded. Initially the constitutional validity of Sedition provisions was decided was based on a considerable strict interpretation, whilst in the following years the Apex Court has adopted a very liberal approach of effectuating free speech.The analysis of the Supreme Court has also evolved over the years in line with transformative constitutionalism, whereby a textual approach has given way to teleological interpretation.

The politics of fear and exacerbated claims of national security provide the government the ammunition to erode the constituent features of free speech. Moreover, disproportionate number of prosecutions against a particular community through the selective use of the offence can render the entirety of Sedition proceedings counterproductive. In dealing with the separatists the counter narrative should be built by the Government in reasoning with the people rather than resorting to silencing speech by invoking the provisions of Sedition. Silencing speech is only a temporary remedy and moreover exacerbates hatred and disaffection towards the Government. In a scenario where there is a constant abuse of the law to silence dissent the balance of convenience should lie in favour of the rights of the citizenry rather than the State. An individual advocating civil disobedience would satisfy the requirements of Sedition, but mere advocacy, tendency and incitement cannot be termed as the sole grounds for justifying the public order criterion. As it has been contended in the defence of civil disobedience, "*we are disobeying a law with which we agree and we are disobeying it for another reason: to spotlight an injustice*".[135]As Justice Gurtu explained that even law abiding citizens can be "*caught in the mischief of Section 124A of the IPC.*"[136] The vague definition of Sedition under Section 124A, its chilling effect on free speech and the

[134]Francis Coralie Mullin v. Union Territory of Delhi (1981) 1 SCC 608, Para 6 of SCC.
[135]Wasserstrom, *The Obligation to Obey the Law*, 10 U.C.L.A.L.Rev. 780 (1963) cited in *D. D. Smith's Legitimacy of Civil Disobedience as a Legal Concept*, Vol.36 Issue 4.
[136] Ram Nandan v. The State, AIR 1959 All 101.

alternatives available under the IPC justify rendering Sedition a relic of the colonial past meant to be forgotten.

The logic that when the "*law burdens more speech necessary to advance a compelling government interest it is constitutionally overboard*"[137] discerns the necessity to hold such situations in favour of advancing free speech. The debate on free speech has centred around the notion of offending the sensibilities of society and therefore disturbing public order. The Government of India, has also answered in the negative[138] its position on repealing Section 124A, despite forty-seven cases of Sedition having been filed in 2014.[139] This necessitates a judicial review of the provision by a larger bench after the pronouncement of the Apex Court in the *Shreya Singhal* case. An analysis of the reasoning behind the validity of the offence of Sedition reveals that the constitutionality of the provision can be contested, considering the advancement in the Indian jurisprudence on free speech. The counter arguments that the State poses to justify the existence of the offence of Sedition also do not hold ground in light of the recognition of the chilling effect that whittles free speech, a prerequisite for a mature democracy.

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[137] W. Fisher, *Freedom of Expression on the Internet*, Berkman Klein Center for Internet & Society at Harvard University, available athttp://cyber.law.harvard.edu/ilaw/Speech/#readings, last seen on 12/5/2017.

[138] *Rajya Sabha Unstarred Question No.2802*,Ministry of Home Affairs, available at http://mha1.nic.in/par2013/par2015-pdfs/rs-231215/2802.pdf, last seen on 12/5/2017.

[139] *Offences Againt the State*, National Criminal Records Bureau, available at http://ncrb.nic.in/StatPublications/CII/CII2014/chapters/Chapter%2021.pdf, last seen on 12/5/2017.