**Right to freedom of expression: the grey area**

The freedom of expression, universally acknowledged as both a fundamental and foundational human right, is not only the cornerstone of democracy, but indispensable to a thriving civil society. Indeed, the freedom of expression is considered the “foundational human right of the greatest importance.”

The right to freedom of expression is protected by a multitude of regional and international treaties, charters, and frameworks. According to Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR), a formally binding legal treaty ratified by 165 nations that echoes in key respects the Universal Declaration of Human Rights (UDHR):

*Everyone shall have the right to freedom of expression; this right shall include 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 choice.*

Despite being a cornerstone of modern civil society, the freedom of expression is still subject to restrictions, as a result of which we enter into the ‘grey area’ of its enforcement and exercise. The two major reasons for which this right can be restricted are:

1. For respect of the rights or reputation of others;
2. For the protection of national security or of public order or of public health or morals[[1]](#footnote-1).

The first of these essentially comprises hate or libelous speech, whereas the second is concerned with sedition. The focus of our body today is the latter of these two restrictions.

**Section 124-A**

Section 124-A of the Indian Penal Code (IPC)**,**as it stands today, reads:

*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 attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*

*Explanation 3 – Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section[[2]](#footnote-2).*

(Note: Interestingly, the word “Sedition” does not occur in Section 124-A of the Indian Penal Code or in the Defense of India Rule. It is only found as a marginal note to Section 124-A, and is not an operative part of the section but merely provides the name by which the crime defined in the section will be known[[3]](#footnote-3).)

**Section 124-A: Pre-independence**

This law was introduced in India in 1870 in response to increasing Wahabi activities between 1863 and 1870., This law was amended in 1898 and, according to Arvind Ganachari the framework of this section was imported from various sources- the Treason Felony Act (operating in Britain), the Common law of seditious libel, and English law relating to seditious words.

Between 1870 and 1898, the British sought to suppress criticism through two legislations” the Dramatic Performances Act, 1876 that introduced pre-censorship of theatre, and the Vernacular Press Act of 1878 meant to control publishers and printers of the native press by introducing a system of security.

The section corresponding to s. 124A was originally s. 113 of Macaulay’s Draft Penal Code of 1837-39, but the section was omitted from the Indian Penal Code as it was enacted in 1860. This was a peculiar decision, given the circumstances of the First War of Indian Independence in 1857.

**Tilak case:**

A number of cases resulted from the enforcement of this law. The most famous of these cases was the trial of Bal Gangadhar Tilak  for sedition, widely followed across the subcontinent, and by his admirers across the world. The fundamental moral question that Tilak raised was whether his trials constituted sedition of the people against the British Indian government (Rajdroha) or of the Government against the Indian people (Deshdroha).

Tilak’s first trial began in 1897. The government claimed that some of the speeches that referred to Shivaji killing Afzal Khan, had instigated the murder the much reviled Plague Commissioner Rand and another British officer Lieutenant Ayherst. The two officers were killed as they were returning from the reception and dinner at Government House, Pune, after celebrating the Diamond Jubilee of Queen Victoria’s rule.

Tilak was convicted of the charge of sedition, but released in 1898 after the intervention of internationally known figures like Max Weber on the condition that he would do nothing by act, speech, or writing to excite disaffection towards the government[[4]](#footnote-4). The Anglo-Indian Press (which at that time included the Times of India and the Bombay Gazette) egged the government on to initiate proceedings against Tilak.

Once charges were framed against Tilak, the British government transferred and promoted Justice James Strachey, who was known for his anti-native bias. Strachey, the youngest person on the Bench, was asked to preside over this important case. Living up to his reputation, Strachey rejected the defense’s argument that the articles describing the suffering of people were consistent with loyalty.

He went further and expanded the scope of the definition of this law, laying down the foundation for the manner in which sedition laws is understood even today. He held that the term ‘feelings of disaffection’ meant ‘hatred’, ‘enmity’, ‘dislike’, ‘hostility’, ‘contempt’ and every form of ill will to the government. He equated disaffection to disloyalty, and held that the ‘explanation’ that followed the main section which made allowance for acts of disapprobation, would not apply to “any writing which consists not merely of comments upon government measures, but of attacks upon the government itself, its existence, it’s essential characteristics, its motives, or its feelings towards people”. The native press condemned this judgement as ‘the Stachey Law’.

**Gandhi case:**

The most famous sedition trial after Tilak’s was the trial of Mohandas Gandhi in 1922. Gandhi was charged, along with Shankerlal Banker, the proprietor of Young India, for three articles published in the magazine.

The trial, which was attended by the most prominent political figures of that time, was followed closely by the entire nation. The trial was presided over by Judge Strangman.  Gandhi explained to the judge why from being a staunch royalist, he had become an uncompromising disaffectionist and non-cooperator, and why it was his moral duty to disobey the law. Gandhi famously denounced the law against sedition in the court: “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[[5]](#footnote-5).”

**Section 124a: Post-independence**

The issue of sedition was anxiously discussed during constituent assembly debates. On 29 April 1947, when laying out the Rights of Freedom, Vallabhbhai Patel—who went on to become the home minister of India—made an exception for “seditious, obscene, blasphemous, slanderous, libellous or defamatory” language. The Communist Party of India leader, Somnath Lahiri opposed the use of the word seditious. “As far as I know, even in England, a speech, however seditious it may be, is never considered a crime unless an overt act is done,” Lahiri said. The members continued debating, coming back to the question of sedition intermittently. Finally, an amendment was moved to drop the word and not allow it to infringe upon the freedom of speech and expression. On 2 December 1948, senior Congress leader, Seth Govind Das spoke jubilantly in the house:

*The restriction imposed later on in respect of the extent of this right, contains the word ‘sedition.’ An amendment has been moved here in regard to that. It is a matter of great pleasure that it seeks the deletion of the word ‘sedition.’ 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. In this connection many things that happened to me come to my mind… I mean to say that there must be many Members of this House who must have been sentenced under this article to undergo long periods of imprisonment. 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.*

The word did indeed disappear from the constitution when it was adopted on 26 November 1949, but section 124A stayed in the Indian Penal Code. Then, in 1950, two Supreme Court judgements led the government to introduce the much-maligned first amendment. The first case involved objectionable material in *Organiser*, a magazine run by the Rashtriya Swayamsevak Sangh; the second was against a magazine called *Cross Roads*, for criticising the government. In both the cases, the Supreme Court sided with the government. It asked the editor of *Organiser*to clear provocative content with a regulating authority, and banned *Cross Roads*.

**Kedarnath vs the state of Bihar:**

In post-independence India, however, the judgement with the most impact came in January 1962. In the case of Kedarnath versus the State of Bihar, the constitutional bench of the Supreme Court defined the scope of sedition for the first time and this definition has been taken as precedent for all matters pertaining to Section 124A since.

Kedarnath Singh was convicted by the high court for his speech that lampooned the Crime Investigation Department and the Congress party. “To-day the dogs of CID are loitering around Barauni. Many official dogs are sitting even in this meeting. The people of India drove out the Britishers from this country and elected these Congress goondas to the *gaddi*.” He accused the Congress of corruption, black-marketing and tyranny and talked about a revolution that would overthrow capitalists, zamindars and Congress leaders. The constitutional bench upheld the punishment given to Kedarnath by the high court but at the same time limited the section’s scope. Towards the end, the judgement states that the section penalises words that reveal an intent or tendency to disturb law and order or that seem to incite violence. And then, it draws a line: “It has been contended 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.”[[6]](#footnote-6)

**Present day scenario**

We can see that sedition has been a contentious issue in the Indian subcontinent since the enactment of laws concerning it. Today, the debate is arranged more or less along the lines of a fight between the Left and the Right. The former argues that the law on sedition is being used to stem any sort of political dissent in the country, and also any alternate political philosophy which goes against the ruling party’s mindset. The latter counters that the law is necessary to contain anti-national elements who threaten the security and integrity of the nation. This debate has been at the forefront of the media cycle lately as a result of recent events at Jawaharlal Nehru University that most of you will be very familiar with.

1. Right to Freedom of expression: http://www.icnl.org/research/trends/trends6-1.pdf [↑](#footnote-ref-1)
2. Sedition law: https://indiankanoon.org/doc/1641007/ [↑](#footnote-ref-2)
3. Peculiarity of 124-A: http://www.rmlnlu.ac.in/webj/sedition.pdf [↑](#footnote-ref-3)
4. Tilak case: A. G. Noorani, *Indian Political Trials: 1775-1947*, New Delhi: OUP, 2009 [↑](#footnote-ref-4)
5. History of sedition law: https://kafila.org/2010/12/06/we-are-all-seditious-now-but-when-did-this-start/ [↑](#footnote-ref-5)
6. Kedarnath case: http://www.caravanmagazine.in/vantage/section-124a-sedition-jnu-protests [↑](#footnote-ref-6)