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# Curbing Free Speech by Iron Fist Ruling: Need for Reform

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## ABSTRACT

*Freedom of Speech and Expression is an essential freedom that must be conferred to the citizens of all democracies of the world where people are the supreme authority. It is a means to participate in a democracy where people can express their views with full liberty. This freedom of speech and expression is enshrined in the Constitution of India as a basic right with certain reasonable restrictions upon absolute exercise of this right. In the recent years, it has been observed that problems arise as to the enforcement of the Fundamental Rights in India due to the conflicts taking place between these rights and few pre-constitutional laws still in existence. State limits the citizens of the country to voice their opinions in the guise of public order and peace of the country. The highlight of the article is the question whether such restrictions are reasonable enough to be included in our constitution or is there a need to reform the existing laws. A critical analysis of criminal laws such as Sedition and imposing urgent orders under Section 144 of the Code of Criminal Procedure helps to substantiate the arbitrary use of powers given to the State. Through this article, by proposing certain recommendations, there is an effort to answer pertinent questions and scrutinize the ambit of restrictions under Article 19 in the light of other statutes.*

**Keywords:** *Freedom of speech and expression; law reforms; public order; reasonableness; sedition*

## I. INTRODUCTION

The Preamble to the Constitution of India aims to secure to all its citizens “*Liberty of thought, expression, belief, faith and worship*”.<sup>2</sup> It is through this objective of ‘liberty’ that the fundamental right to freedom guaranteed to every citizen of the country under Article 19 of our Constitution emanates its authority. During the Constitutional Assembly debates, there was a strong belief to protect freedoms including free speech in the Constitution, but there was a significant division regarding grounds to restrict these freedoms, which are now a part

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<sup>2</sup> Indian Const. Preamble

of the reasonable restrictions under the Constitution.

It must be recognized that free political discussions are indispensable for proper working of a democratic government. *Freedom of speech and expression*<sup>3</sup> is guaranteed under the Constitution, and *right to assemble peacefully without arms*<sup>4</sup> is also considered to be an extension of free speech and expression. The Constitution of India under Article 19 itself has prescribed certain 'reasonable' limits on these freedoms. Few colonial laws (as discussed here), which hold no significance today, continue to pose a threat to the fundamental rights of the citizens showing the hidden intent of the government to curb any dissent against it.

Sedition in India is a *cognizable, non-compoundable*, and a *non-bailable* offence provided under *Section 124A of the Indian Penal Code* (hereinafter "IPC") as an "Offence against the State". It is a stringent law where punishment ranges from a fine to three years or life imprisonment.<sup>5</sup> The ambit of the section is wide enough to cover not only hatred, contempt, or disaffection towards government, but even their attempts; not only words but even signs and visible representations.<sup>6</sup> An attempt has been made to protect the right of speech by excluding fair criticisms by way of explanations 2 and 3 attached to the provision.

*Section 144 of the Code of Criminal Procedure Code, 1973* (hereinafter "S.144 Cr.P.C.") gives power to the executive for *maintaining public order and tranquility* by issuing certain orders in urgent cases of 'nuisance' or '*apprehended danger*'. Invoking this provision requires sufficient grounds of "*immediate prevention or speedy remedy*"<sup>7</sup> and a written order by the executive<sup>8</sup>. Although through various judicial interpretations, it has been held that before invoking such a provision, the urgency of the situation should be established.

The objective of this research is to analyze the recent incidents of arbitrary use of S.124A IPC and S.144 CrPC, by the Government to curb the citizens' right to speech and peaceful assemblies and to suggest a law reform under these provisions in light of reasonable restrictions on free speech and assembly.

### **(A) Review of Existing Literature**

The various judgments of the Supreme Court and High Courts form the dominant part of literature review of this research. **Kaur**<sup>9</sup> has studied in detail the rulings on sedition, right

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<sup>3</sup> Indian Const. art. 19(1)(a)

<sup>4</sup> Indian Const. art. 19(1)(b)

<sup>5</sup> Indian Penal Code Section 124A

<sup>6</sup> *Id.*

<sup>7</sup> Code of Criminal Procedure Section 144(1)

<sup>8</sup> *Id.*

<sup>9</sup> Prenavpreet Kaur, *Sedition under Section 124-A of the Indian Penal Code: An Analysis* (2019)

from pre-constitutional era to the landmark judgment on the constitutionality of the law, and some recent decisions of twenty-first century. Whereas, **Yadav**<sup>10</sup> has given an in-depth analysis of the *Ramlila Maidan case* clearing the stance of S.144 CrPC in light of fundamental rights, discussing its constitutionality.

These studies show inclination of courts to protect the fundamental rights by balancing of interests, also giving guidelines to avoid misuse of powers. Here the works of **Kelso**<sup>11</sup> and **Riordan**<sup>12</sup> needs mention where the doctrine of free speech and reasonableness balancing test has been examined.

Dealing with the *evolution of sedition*, **Saxena & Srivastava**<sup>13</sup> in has argued that sedition laws were enacted during the colonial era by the despotic rulers against *Wahabi movements*. This is comparable to the notable work of **Donogh**<sup>14</sup> where the history of law of sedition in British India is discussed. Such circumstances do not exist in the current state of democracy post-independence, so the position of sedition should change in the present day in India.

**Dholakia**<sup>15</sup> has addressed law of sedition in light of the First Amendment to the Constitution of India, providing reasonable restrictions of *public order* to the freedom of speech and expression. However, **Saxena and Shrivastava** believe that there are *other laws to govern the issues of public order* and tranquility, and sedition laws should be kept out of it.

**Sorial**<sup>16</sup> in her book, analyzing the *current legislative framework*, has defined sedition as hate speech against the state in reference to the words, “contempt” and “disaffection against the state”, used in the section. Whereas, **Donogh** believes that the study of sedition being complex, requires its interpretation beyond the wordings of the section and obtained through the application of the law to the existing cases. On the other hand, **Mishra**<sup>17</sup> has taken a very novel observation that under the freedoms to speech guaranteed as a fundamental right, right to offend should also be inclusive, giving examples like Gandhiji’s satyagraha, to explain how revolutionary ideology is always offensive.

The view taken that the offence of sedition go beyond the wordings of the provision is acceptable but including right to offend under free speech seems to be too contradictory to be

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<sup>10</sup> Kanchan Yadav, *Right to Sleep as a Fundamental Right: An Analysis vis-à-vis the Ramlila Maidan Case* (2020)

<sup>11</sup> R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny* (2016)

<sup>12</sup> Patrick Riordan SJ, *Freedom of Expression, No Matter What?* (2016)

<sup>13</sup> Nivedita Saxena & Siddhartha Srivastava, *An Analysis of the Modern Offence of Sedition* (2014)

<sup>14</sup> Walter Russell Donogh, *A Treatise on the Law of Sedition and Cognate Offences in British India* (1911)

<sup>15</sup> Prof. H.C. Dholakia, *Right to freedom of Speech and Expression in India*

<sup>16</sup> Sarah Sorial, *Sedition and the Advocacy of Violence: Free Speech and Counter-Terrorism* (2012)

<sup>17</sup> Anand Mishra, *Freedom to Express Includes Free Speech with Freedom to Offend* (2011)

allowed in a democracy. The stand of allowing dissenting opinions as a part of freedom of speech is taken into consideration.

**Saxena & Srivastava** in their paper make an argument in favour of *repealing the law of sedition* in India to avoid the law being invoked as a means to curb voices against the Government. Whereas, **Kumar & Guha**<sup>18</sup> argue that S.124A needs to be reformed to prevent government's whimsical restrictions on free speech.

There have been various newspaper articles and reports on the abuse of power of S.144 CrPC by government in the current times, which contains opinions of Courts and eminent lawyers to curtail the use of this discretion. Despite the various guidelines of judiciary, a huge gap is observed between these verdicts and the actual enforcement and the applicability of such guiding principles by those in power. The recent incidents are evaluated to reveal existence of such gaps in the study.

### **(B) Research Methodology**

The whole research is based on a *Doctrinal type of Research*. The data in this research is collected from legislations, textbooks, articles, journals, and websites. An analytical, descriptive and a qualitative research method is adopted. It is a research wherein the legal provisions and the judicial pronouncements on the topic of research are critically examined. A historical analysis dealing with the evolution of the laws is also done. The research also includes a comparative analysis, whereby the laws of other democratic countries are compared with that of the Indian laws. The recent case studies of the misuse of powers are also scrutinized to come to a conclusion.

## **II. DISCUSSIONS AND RESULTS**

By the first amendment to the Constitution, ground of "*public order*" was added under Article 19(2), widening the scope of restrictions on free speech and expression, and the word "*reasonable*" was added to define the restriction imposed on such freedoms.<sup>19</sup> No single formula is laid down to ascertain the question of reasonableness. Courts determine reasonableness of the restrictions imposed.<sup>20</sup> This is done by checking the *nature of right infringed*, *purpose* for imposing restriction, *urgency of the evil* sought to be curbed and *balancing* the proportion of imposition with these objectives.<sup>21</sup> There has to be a direct and

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<sup>18</sup> Ytharth Kumar & Sreyoshi Guha, *Sedition: Crucifixion of Free Speech and Expression* (2017)

<sup>19</sup> Constitution (First Amendment) Act 1951

<sup>20</sup> Chintaman Rao v. State of M.P., AIR 1951 SC 118; Harakchand v. Union of India, AIR 1970 SC 1453

<sup>21</sup> State of Madras v. V. G. Row, AIR 1952 SC 196

real effect of the legislation on the Fundamental Right.<sup>22</sup>

A study of evolution of the laws of sedition in India, shows that it was added as an offence into the Indian Penal Code when there was unrest and revolt against British rule. The trials of *Jogendra Chandra Bose*<sup>23</sup>, *Bal Gangadhar Tilak*<sup>24</sup>, or *Mahatma Gandhi*<sup>25</sup> clears that this law was used as a weapon by British Government to terrorize Indians and suppress voices raised against them.<sup>26</sup> Sedition today is categorized as an offence against the state, and rights of people are restricted on the grounds of “*security of the nation*” and “*public order*”. The former expression was explained to be related to violence.<sup>27</sup> While the latter expression is synonymous to public peace, safety and tranquility.<sup>28</sup> ‘Intention’ and ‘incitement to violence’ are held by courts to be essential ingredients of Section 124A IPC, while upholding constitutionality of the provision.<sup>29</sup>

The laws of sedition have been abolished in countries like England<sup>30</sup> and New Zealand<sup>31</sup> but the irony is that it still holds good in the countries like India having a colonial history. Few other countries like USA and Canada have also recognized the peril of this law and have thus stopped filing cases of sedition since many years.

Orders under S.144 CrPC are used by the Government to restrict the rights of people based on the grounds of disturbing the “*public order*”. The courts have emphasized on cautious use of this power only in urgency situations, and held it is subject to judicial review.<sup>32</sup> Test of ‘*imminent danger*’ has been laid down by the court stating requirement of a real threat and not imaginary.<sup>33</sup>

Despite no violence or urgency, recent instances show arbitrary use of such laws under the garb of reasonable restrictions, thus raising questions whether restriction of ‘public order’ is itself a menace to fundamental rights.

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<sup>22</sup> Express Newspapers v. Union of India, AIR 1958 SC 578.

<sup>23</sup> Queen Empress v. Jogendra Chandra Bose, ILR XIX Cal. 35 (1892)

<sup>24</sup> Queen Empress v. Bal Gangadhar Tilak, (1898) 22 ILR Bom 528

<sup>25</sup> Mahatma Gandhi, *Statement of the Great Trial of 1922*; Available at: <http://pdcrodas.webs.ull.es/anglo/GandhiStatementInTheGreatTrialOf1922.pdf>; Accessed on 23.11.2020

<sup>26</sup> *Id.* At 12

<sup>27</sup> State of Bihar v. Shaila Bala, AIR 1952 SC 329

<sup>28</sup> Superintendent Central Prison, Fatehgarh v. Ram Manohar Lohia, AIR 1960 SC 633

<sup>29</sup> KedarNath Singh v. State of Bihar, AIR 1962 SC 955

<sup>30</sup> Coroners and Justice Act of 2007 abolished Sedition in England

<sup>31</sup> Crimes (Repeal of Seditious Offences) Amendment Act of 2007 removed sedition in New Zealand

<sup>32</sup> Madhu Limaye v. Sub-Divisional Magistrate, Monghyr, (1970) 3 SCC 746

<sup>33</sup> Babulal Parate v. State of Maharashtra, AIR 1961 SC 884

**RECENT CASES OF MISUSE OF POWER BY THE STATE:****1. ANURADHA BHASIN V. UNION OF INDIA<sup>34</sup>**

In August 2019 when special status under Article 370 was removed, in apprehension of unrest and disturbance in Jammu and Kashmir, the government issued orders under Section 144 CrPC. Movement was restricted and internet services were suspended in the state. Issue of internet shutdowns was questioned by journalists, who argued that right to expressing through internet is a part of Article 19(1)(a). The court held such indefinite suspension of internet as illegal for not passing the proportionality and necessity test and further stated that power under Section 144 cannot be used to suppress the opinions of the citizens.<sup>35</sup>

**2. ARRESTS DURING PROTESTS AGAINST CITIZENSHIP AMENDMENT BILL / ACT**

The passing of citizenship amendment bill faced huge criticism by the public, who were out on the streets in different parts of the country revolting against the government actions. Various charges of sedition and orders under S.144 CrPC were passed, detaining people who were expressing their dissent against the bill by involving in peaceful protests.<sup>36</sup> The arrests made by the police chasing the students in JNU and that of old people like Ramchandra Guha was highly criticized for abuse of government power to suppress voices.

**3. KANHAIYA KUMAR V. STATE (NCT OF DELHI)<sup>37</sup>**

In February, 2016 an FIR under S.124A IPC was filed against the president of the Students Union of Jawaharlal Nehru University, because students were raising slogans against the judicial killing of Afzal Guru. Questions were raised whether only raising slogans without causing any violence can be a threat to the security of the nation or disturb public order, to bring under Section 124A of IPC. The judges were of the opinion that an investigation be conducted to decide liability of Kanhaiya Kumar on sedition, but held that any statement encouraging the crowd into violent activities can be brought under Article 19(2) and their fundamental right of speech can be curtailed.<sup>38</sup>

**4. SANSKAR MARATHE V. STATE OF MAHARASHTRA & ORS.<sup>39</sup>**

Asseem Trivedi was charged with sedition for publishing cartoons portraying “India Against

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<sup>34</sup> (2020) 3 SCC 637

<sup>35</sup> Id.

<sup>36</sup> More than 1,100 arrests and 5,558 preventive detentions against protesters of Citizenship Amendment Act were reported in U.P. alone by the Times of India on December 26, 2019; Retrieved from: <https://timesofindia.indiatimes.com/india/anti-caa-protests-1113-arrests-5558-preventive-detentions-19-dead-in-up/articleshow/72980374.cms>

<sup>37</sup> 2016 SCC Online Del 1362

<sup>38</sup> Id.

<sup>39</sup> 2015 Cri LJ 3561

*Corruption*”, alleged to insult the Parliament and the National Emblem. The court held that S.124A IPC cannot be invoked only for criticizing the Government, as it is a breach of free speech. Only those activities which create disorder or disturbance to public peace through violence can be penalized under this provision.<sup>40</sup> Some guidelines for invoking Section 124A were also submitted by petitioner to avoid its arbitrary use, but was not recognized by the court.

#### **5. RAMLILA MAIDAN INCIDENT, IN RE<sup>41</sup>**

On June 4, 2011 Baba Ramdev conducted a hunger strike at Ramlila Maidan against the issue of black money with a huge crowd. At midnight, when everybody in the camp were sleeping, an order under S.144 CrPC was issued, and a scuffle between the police and supporters of Baba Ramdev took place. Police resorted to firing tear gas and lathi charge, causing injuries to many and death of a woman. The court recognized abuse of power by the police on peacefully sleeping protestors who were not a threat to public peace and tranquility and emphasized on use of this provision only in emergency situations, giving reasonable notice before invoking the provision.<sup>42</sup>

### **III. SUGGESTIONS AND CONCLUSION**

#### **1. REPEAL THE SEDITION LAW IN INDIA**

The evolution of the Indian law of sedition as an outcome of the law of England, which has itself been abolished, does not hold good today. With the changing times of more liberalized situation, laws should match the needs of the democratic society. Further, the purpose of protecting “*public disorder*” or any violence is already served by other laws prevalent in the code like that of riots, affray, waging war or unlawful assembly. So, there is no need of the law of sedition which is vague and uncertain, opening doors for miscarriage of power. Despite various judgments explaining conditions of invoking the provision only in case of violence, the recent trends show that in the guise of “*reasonable restrictions of public order or security of the state*”, government takes an opportunity to abridge the fundamentals rights of the individuals. It can thus be concluded that only judicial interventions do not solve the problem of misuse and the law of sedition in India needs to be repealed altogether so that it does not infringe the rights of the citizens.

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<sup>40</sup> Id.

<sup>41</sup> (2012) 5 SCC 1

<sup>42</sup> Id.

## 2. NEED TO REFORM SECTION 144 CRPC

It is accepted that for a smooth functioning of any democracy, disturbance in ‘*public order*’ should not be allowed.<sup>43</sup> The positive sides of imposing S.144 CrPC to prevent citizens from assembling together, are observed in the current state of pandemic, which was needed to maintain social distancing and preserving public health. Indian Judiciary has consistently stressed upon a cautious use of the provision to check arbitrary and excessive use of power by the executive. Nonetheless, recent incidents reveal that the government often invokes the provision in apprehension of danger, and fails to follow directions of courts. Hence there is an eminent requirement to exclude words like “*apprehended danger*” from the provision, to limit the discretionary powers. Further, a deterrence effect can be helpful for enforcement of judgments in two ways – (i) Disobedience of guidelines issued by judiciary should be penalized; (ii) Compensation should be given to victims in case of malafide application of the provision by the State. Publication of orders and disallowing repetitive orders can be other measures to limit the scope of suppressing dissent against the government.

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<sup>43</sup> Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740

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