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SYNOPSIS

The present petition has been filed in public interest challenging the constitutional validity of Section 124-A of Indian Penal Code, 1860, as being violative of Articles 14 , 19(1)(a), & 21 of the Constitution of India.

Section 124 A of Indian Penal Code, 1860 provides:

> ***124A Sedition.--****Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in [India], shall be punished with [imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.*
>
> *Explanation 1.-- The expression "disaffection" includes disloyalty and all feelings of enmity.*
>
> *Explanation 2.--Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*
>
> *Explanation 3.--Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*

Sedition is a colonial law which was used expressly to suppress dissent by the British in India. This Hon'ble Court while upholding the constitutional validity of Section 124 A in ***Kedar Nath Singh v State of Bihar, 1962 Supp (2) SCR 769*** read it down in the following terms:

> "24…. *the expression "the Government established by law" has to be distinguished from the persons for the time being engaged in carrying on the administration. "Government established by law" is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted.*
>
> ***....***
>
> *any acts within the meaning of Section 124-A which have the effect of subverting the Government by bringing that Government into*

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contempt or hatred, or creating disaffection against it, would be within the penal statute because the feeling of disloyalty to the Government established by law or enmity to it imports the idea of tendency to public disorder by the use of actual violence or incitement to violence.

....

Similarly, comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal.

25….A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder.

26…The provisions of the Sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence.

....

It is only when the words, written or spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order.

27….we propose to limit its operation only to such activities as come within the ambit of the observations of the Federal Court, that is to say, activities involving incitement to violence or intention or tendency to create public disorder or cause disturbance of public peace."

In '*Kedar Nath'* the constitutionality of Section 124A of Penal Code, 1860, was tested and upheld because faced with two interpretations of Section 124A, the court applied the Doctrine of Presumption of Constitutionality, to adopt the interpretation which could save the section. This Hon'ble Court observed:

"26… *It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and*

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> *another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence…"*

Since then however, this Hon'ble Court in ***Navtej Singh Johar v. Union of India, (2018) 10 SCC 1*** and ***Joseph Shine v. Union of India, (2019) 3 SCC 39,*** has held that the presumption of constitutionality does not apply to pre-constitutional laws as those laws have been made by foreign legislature or body. Therefore, in view of the above it is submitted that the doctrine of "reading down" in absence of presumption of constitutionality cannot be pressed into service of Section 124A of Penal Code, 1860, whose language is otherwise plain and clear.

Further, the judgment of this Hon'ble Court in Kedar Nath failed to take note of judgment of Constitutional Bench in ***Superintendent Central Prison v. Dr Ram Manohar Lohia (1960) 2 SCR 821*** wherein it was held that (a) only aggravated disturbance of 'public order' as opposed to mere 'law and order' could be used to restrict freedom of speech and expression and (b) there should be direct and proximate connection between the instigation and the aggravated disruption of public order. The aforesaid principle has been affirmed by this Hon'ble Court in ***Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574*** and ***Shreya Singhal v. Union of India (2015) 5 SCC 1.*** However, as per '*Kedar Nath'* the offence of sedition is complete if the activities tend to create public disorder or disturbance of law and order or public peace. By casting 'the net' too wide the interpretation given in Kedar Nath falls foul of the judgment of this Hon'ble Court in ***Superintendent Central Prison v. Dr Ram Manohar Lohia (1960) 2 SCR 821.***

It is pertinent to mention that despite reading down of Section 124 A of Penal Code, 1860, in ***Kedar Nath Singh v State of Bihar, 1962 Supp (2) SCR 769***, sedition has come to be heavily abused with cases being filed

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against citizens for exercising their freedom of speech and expression on the basis of the literal definition that is available to law enforcement authorities on the statute books. The abuse of the law has been brought forth in a comprehensive database prepared by *Article 14,* an online news portal, which has meticulously documented all cases of sedition since 2010.

In such circumstances, it is submitted that this Hon'ble Court needs to revisit the judgment of ***Kedar Nath Singh v State of Bihar, 1962 Supp (2) SCR 769*** and strike down Section 124 A of Indian Penal Code, 1860, as being violative of Articles 14, 19(1)(a), & 21 of the Constitution of India.

Hence, the present petition.

LIST OF DATES

1860	A section on sedition was part of Macaulay's Draft Penal Code of 1837-1839 as under: *"Whoever by words either spoken on intended to be read, or by signs or by visible representations, attempts to excite feelings of disaffection to the Government established by law in the territories of the East India Company among any class of people who live under that Government, shall be punished with banishment for life or for any term, from the territories of the East India Company, to which fine may be added, or with simple imprisonment for a . term which may extend to three years, to which fine may be added or with fine. Explanation. Such a disapprobation of the measures of the Government as is compatible with à disposition to render obedience to the lawful authority of the Government against unlawful attempts to subvert or resist that authority is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting"*

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	However, the section was not included in the IPC when it was enacted in 1860.
1870	Sedition was incorporated in the code as an offence under Section 124-A through special Act of XVII of 1870 as under: *"Whoever, by words either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites or attempts to excite feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which a fine, may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.* *Explanation.--Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government, against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation is not an offence within this clause."*
1891	The first judicial decision on the scope of Section 124-A began with the decision of Calcutta High Court in ***Queen Empress v. Jogendra Chandra Bose (1892) ILR 19 Cal 35***. Jogendra Chandra Bose was charged with sedition for criticizing the Age of Consent Bill and the negative economic impact of British colonialism.

	Mr. Chief Justice Petheram, in his charge to the jury explained the scope of sedition in the following terms: *"…Disaffection means a feeling contrary to affection; in other words, dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of a man's sentiments or action and yet to like him. The meaning of the two words is so distinct that I feel it hardly necessary to tell you that the contention of Mr. Jackson cannot be sustained. If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them. It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the Government and to hold it up to the hatred and contempt of the people, and that they were used with the intention to create such feeling…"*
1897	In **Queen *Empress v. Bal Gangadhar Tilak and Keshav Mahadev ILR (1897) 22 Bom 112,*** Justice Strachey while agreeing with the definition of "disaffection" given by Justice Petheram, in *Queen-Empress v. JogendraChunder Bose(supra)* rejected the argument that there can be no offence under section 124-A unless rebellion or armed resistance is incited or sought to be incited. The relevant extract is as follows: *What are "feelings of disaffection"? I agree with*

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	Sir Comer Petheram in the Bangobasi case that disaffection means simply the absence of affection—It means hatred, enmity, dislike, hostility, contempt, and every form of ill-will to the Government. "Disloyalty" is perhaps the best general term, comprehending every possible form of bad feeling to the Government. That is what the law means by the disaffection which a man must not excite or attempt to excite; he must not make or try to make others feel enmity of any kind towards the Government. You will observe that the amount or intensity of the disaffection is absolutely immaterial except perhaps in dealing with the question of punishment if a man excites or attempts to excite feeling of disaffection, great or small, he is guilty under the section. In the next place it is absolutely immaterial whether any feelings of disaffection have been excited or not by the publication in question. It is true that there is before you charge against each prisoner that he has actually excited feelings of disaffection to the Government. If you are satisfied that he has done so, you will, of course, find him guilty. But if you should hold that that charge is not made out, and that no one is proved to have been excited to entertain feelings of disaffection to the Government by reading these articles, still that alone would not justify you in acquitting the prisoners. For each of them is charged not only with exciting feelings of disaffection, but also with attempting to excite such feelings. You will observe that the section places on absolutely the same footing the successful exciting of feelings of disaffection and the unsuccessful attempt to excite them, so that, if you find that either of the prisoners has tried to excite such feelings in others, you must convict him even if there is nothing to show that he succeeded. Again, it is important that you should fully realize another point. The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any

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	disturbance or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within s. 124-A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt. The above interpretation was followed by Courts in India in various cases like*Queen Empress v. Amba Prasad ILR (1898) 20 All 55*and *Mrs. Annie Besant v. Emperor (1916 I.L.R Mad 55.*
1898	In 1898, Section 124A was amended by Indian Penal Code (Amendment) Act, 1898. The amended section also made bringing or attempting to bring in contempt or hatred towards Government established by law punishable under sedition. Further single explanation was replaced by three separate explanation to the section as they stand now: *124ASedition.--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*

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	attempts to excite disaffection towards, the Government established by law in [India], shall be punished with [imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine. *Explanation 1.-- The expression "disaffection" includes disloyalty and all feelings of enmity.* *Explanation 2.--Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.* *Explanation 3.--Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*
1942	The Federal Court *in* ***NiharenduDutt Majumdar v. King Emperor AIR 1942 FC 22***disagreed with the literal interpretation given to Section 124-A in Bal Gangadhar Tilak(supra) case and observed: *"The first and most fundamental duty of every Government is the preservation of order, since order is the condition precedent to all civilization and the advance of human happiness. This duty has no doubt been sometimes performed in such a way as to make the remedy worse than the disease; but it does not cease to be a matter of obligation because some on whom the duty rests have performed it ill. It is to this aspect of the functions of government that in our opinion the offence of sedition stands related. <u>It is the answer of the State to those who, for the purpose of attacking or subverting it, seek (to borrow from the passage cited above) to disturb its tranquillity, to create public</u>*

	disturbance and to promote disorder, or who incite others to do so. Words, deeds or writings constitute sedition, if they have this intention or this tendency; and it is easy to see why they may also constitute sedition, if they seek as the phrase is, to bring Government into contempt. This is not made an offence in order to minister to the wounded vanity of Governments, but because where Government and the law cease to be obeyed because no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must, either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency."
1947	The decision of NiharenduDutt Majumdar (supra) was overruled in **King-*Emperor v. Sadashiv Narayan Bhalerao AIR 1947 PC 82***. The literal interpretation in Tilak's case was restored while observing that the term "excite disaffection" doesn't include " to excite disorder".
01-02.12.1948	The draft constitution had "sedition" as one of the grounds for restricting freedom of speech and expression. **Sh. K.M Munshi** while speaking on his motion to delete "sedition" observed: *"I was pointing out that the word 'sedition' has been a word of varying import and has created considerable doubt in the minds of not only the members of this House but of Courts of Law all over the world. Its definition has been very simple and given so far back in 1868. It says "sedition embraces all those practices whether by word or deed or writing which are calculated to disturb the tranquility of the State and lead ignorant persons to subvert the Government". But in practice it has had a curious fortune. A hundred and fifty years ago in England, holding*

	a meeting or conducting a procession was considered sedition. Even holding an opinion against, which will bring ill-will towards Government, was considered sedition once. Our notorious Section 124-A of Penal Code was sometimes construed so widely that I remember in a case a criticism of a District Magistrate was urged to be covered by Section 124-A. But the public opinion has changed considerably since and now that we have a democratic Government a line must be drawn between criticism of Government which should be welcome and incitement which would undermine the security or order on which civilized life is based, or which is calculated to overthrow the State. Therefore the word 'sedition' has been omitted. As a matter of fact the essence of democracy is Criticism of Government. The party system which necessarily involves an advocacy of the replacement of one Government by another is its only bulwark; the advocacy of a different system of Government should be welcome because that gives vitality to a democracy. The object therefore of this amendment is to make a distinction between the two positions. Our Federal Court also in the case of NiharenduDutt Majumdar Vs King, in III and IV Federal Court Reports, has made a distinction between what 'Sedition' meant when the Indian Penal Code was enacted and 'Sedition' as understood in 1942. A passage from the judgement of the Chief Justice of India would make the position, as to what is an offence against the State at present, clear. It says at page 50 : *"This (sedition) is not made an offence in order to minister to the wounded vanity of Governments but because where Government and the law ceases to be obeyed because no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that*

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	that is their intention or tendency." *This amendment therefore seeks to use words which properly answer to the implication of the word 'Sedition' as understood by the present generation in a democracy and therefore there is no substantial change; the equivocal word 'sedition' only is sought to be deleted from the article. Otherwise an erroneous impression would be created that we want to perpetuate 124-A of the I. P. C. or its meaning which was considered good law in earlier days. Sir, with these words, I move this amendment."* Further **Sh. Seth Govind Das** while supporting the amendment for deletion of sedition said: *"I would have myself preferred that these rights were granted to our people without the restrictions that have been imposed. But the conditions in our country do not permit this being done. I deem it necessary to submit my views in respect to some of the rights. I find that the first sub-clause refers to freedom of speech and expression. 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 would like to recall to the mind of honourable Members of the first occasion when section 124 A was included in the Indian Penal Code. I believe they remember that this section was specially framed for securing the conviction of Lokamanya Bal Gangadhar Tilak. Since then, many of us have been convicted under this section. In this connection many things that happened to me come to my mind. I belong to a family which was renowned in the Central Provinces for its loyalty. We had a tradition of being granted titles. My grandfather held the title of Raja and my uncle that of Diwan Bahadur and my father too that of Diwan Bahadur. I am very glad that titles will no more be granted in this country. In spite of belonging to such a family I was prosecuted under section 124 A and that also for an interesting thing. My*

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	great grandfather had been awarded a gold waist-band inlaid with diamonds. The British Government awarded it to him for helping it in 1857 and the words "In recognition of his services during the Mutiny in 1857" were engraved on it. In the course of my speech during the Satyagraha movement of 1930, I said that my great-grandfather got this waist-band for helping the alien government and that he had committed a sin by doing so and that I wanted to have engraved on it that the sin committed by my great-grandfather in helping to keep such a government in existence had been expiated by the great-grandson by seeking to uproot it. For this I was prosecuted under section 124 A and sentenced to two years' rigorous imprisonment. 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." **Sh. Rohini Kumar Chaudhari** also supported the amendment in the following terms: *"Mr. Vice-President, Sir, I must congratulate the House for having decided to drop the word "sedition" from our new Constitution. That unhappy word "sedition" has been responsible for a lot of misery in this country and had delayed for a considerable time the achievement of our independence."* **Sh. T. T. Krishnamachari** in support of the amendment for the deletion of sedition said: "*The value of that amendment happens to be only, to a very large extent, sentimental. The word 'sedition' does not appear therein. Sir, in this country we resent even the mention of the word 'sedition' because all through the long period of our political agitation that word 'sedition' has been used against our leaders, and in the abhorrence of that word we are not*

	by any means unique." The amendment was accepted by the Constituent Assembly and the word "sedition" was dropped from the draft.
1951	While addressing the Parliament on the Bill relating to the First Constitution of India Amendment 1951, Pandit Jawahar Lal Nehru, referred to the offence of sedition as contemplated by Section 124-A, Indian Penal Code, 1860 and stated as follows: "*Take again Section 124-A of the Indian Penal Code. Now so far as I am concerned that particular Section is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in any body of laws that we might pass. The sooner we get rid of it the better. We might deal with that matter in other ways, in more limited ways, as every other country does but that particular thing, as it is, should have no place, because all of us have had enough experience of it in a variety of ways and apart from the logic of the situation, our urges are against it."*
1962	The constitutional validity of Section 124-A Indian Penal Code, 1860 was upheld by this Court in ***Kedar Nath Singh v State of Bihar, 1962 Supp (2) SCR 769).*** This Hon'ble Court restricted the application of section 124-A to only those activities that has an intention or tendency to create public disorder, or disturbance of law and order or incitement to violence.
2016	Despite the ruling of this Hon'ble Court in Kedar Nath Nath Singh v. State of Bihar 1962 Supp (2) SCR 769, governments have routinely invoked section 124-A of Indian Penal Code, 1860 to suppress dissent. In such circumstances, ***Common Cause v. Union of India,***

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	(2016) 15 SCC 269 Petitioner No.2 had approached this court with the following prayers: *" (a) Issue an appropriate writ making it mandatory for the authority concerned to produce a reasoned order from the Director General of Police (DGP) or the Commissioner of Police, as the case may be, certifying that the "seditious act" either lead to the incitement of violence or had the tendency or the intention to create public disorder, before any FIR is filed or any arrest is made on the charges of sedition against any individual.* *(b) Issue an appropriate writ directing the learned Magistrate to state in the order taking cognizance certifying that the "seditious act" either lead to the incitement of violence or had the tendency or the intention to create public disorder in cases where a private complaint alleging sedition is made before the learned Magistrate."* The Hon'ble Court was however not inclined and was pleased to dispose of the matter in the following terms: *"3. Having heard Mr Prashant Bhushan, learned counsel for the petitioners, we are of the considered opinion that the authorities while dealing with the offences under Section 124-A of the Penal Code, 1860 shall be guided by the principles laid down by the Constitution Bench in Kedar Nath Singh v. State of Bihar [Kedar Nath Singh v. State of Bihar, 1962 Supp (2) SCR 769 : AIR 1962 SC 955 : (1962) 2 Cri LJ 103] .* *4. Except saying so, we do not intend to deal with any other issue as we are of the considered opinion that it is not necessary to do so. The writ petition is accordingly disposed of."*
2018	The Law Commission of India, in its consultation

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paper on sedition observed:

> *"8.1 In a democracy, singing from the same songbook is not a benchmark of patriotism. People should be at liberty to show their affection towards their country in their own way. For doing the same, one might indulge in constructive criticism or debates, pointing out the loopholes in the policy of the Government. Expressions used in such thoughts might be harsh and unpleasant to some, but that does not render the actions to be branded seditious. Section 124A should be invoked only in cases where the intention behind any act is to disrupt public order or to overthrow the Government with violence and illegal means.*
>
> *8.2 Every irresponsible exercise of the right to free speech and expression cannot be termed seditious. For merely expressing a thought that is not in consonance with the policy of the Government of the day, a person should not be charged under the section. Expression of frustration over the state of affairs, for instance, calling India 'no country for women', or a country that is 'racist' for its obsession with skin colour as a marker of beauty are critiques that do not 'threaten' the idea of a nation. Berating the country or a particular aspect of it, cannot and should not be treated as sedition. If the country is not open to positive criticism, there lies little difference between the pre- and post-independence eras. Right to criticize one's own history and the right to 'offend' are rights protected under free speech.*
>
> *8.3 While it is essential to protect national integrity, it should not be misused as a tool to curb free speech. Dissent and criticism are essential ingredients of a robust public debate on policy issues as part of vibrant democracy. Therefore, every restriction on free speech and expression must be carefully scrutinised to avoid unwarranted restrictions."*

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2021	*Article 14,* a web based platform focussing on civil rights, did a comprehensive analysis of the cases of sedition in India from 2010 onwards finding that the provision has been used largely to stifle free speech and against citizens participating in popular movements critical of the governments of the day.
14.07.2021	Hence, the present petition.

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IN THE HON'BLE SUPREME COURT OF INDIA
(CIVIL ORIGINAL WRIT JURISDICTION)

WRIT PETITION (CIVIL) NO. _____ OF 2021
(PUBLIC INTEREST LITIGATION)

IN THE MATTER OF:

1. ARUN SHOURIE

2. COMMON CAUSE

….PETITIONERS

VERSUS

1. . UNION OF LNDIA
THROUGH ITS SECRETARY
MINISTRY OF LAW AND JUSTICE
4TH FLOOR, A-WING
SHASTRI BHAWAN
NEW DELHI - 110001 ...RESPONDENT

PUBLIC INTEREST PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA CHALLENGING CONSTITUTIONAL VALIDITY OF SECTION 124A OF INDIAN PENAL CODE, 1860, AS BEING VIOLATIVE OF ARTICLES 14, 19(1)(a), & 21 OF THE CONSTITUTION OF INDIA

TO,

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THE HON'BLE CHIEF JUSTICE OF INDIA
AND HIS COMPANION JUSTICES
OF THE HON'BLE SUPREME COURT OF INDIA

The Humble Petition
Of the Petitioner's above named

MOST RESPECTFULLY SHOWETH:

1. That the present petition is being filed under Article 32 of the Constitution of India challenging the constitutional validity of Section 124A of the Indian Penal Code, 1860, as being violative of Articles 14 and 19(1)(a) of the Constitution of India.

ABOUT THE PETITIONERS

1A. Petitioner No. 1, Mr. Arun Shourie, is a former Union Minister for Communication and Information Technology. He has worked with the World Bank, the Planning Commission of India, et al. He is a former editor of the Indian Express. He was awarded the Padma Bhushan in 1990 and the Ramon Magsaysay Award in the category of Journalism, Literature, and the Creative Communication Arts. His Aadhar is

Petitioner No.2, Common Cause, is a registered society (No. S/11017) that was founded in 1980 by late Shri H. D. Shourie for the express purpose of ventilating the common problems of the people and securing their resolution. It has brought before this Hon'ble Court various Constitutional and other important issues and has established its reputation as a bona fide public interest organization fighting for an accountable, transparent and corruption-free system. Mr. Vipul Mudgal, Director of Common Cause, is authorized to file this PIL. The requisite Certificate & Authority Letter are filed along

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with the vakalatnama. The average annual income of the Petitioner

There is no personal interest of the petitioner's herein in the instant matter except to the extent of concerned citizens.

There is no civil, criminal, or revenue litigation, involving the petitioners herein which has or could have a legal nexus with the issue(s) involved in the present Public Interest Litigation.

The petitioners have not approached any court with the same prayer as in the present petition.

The cause of action is the indiscriminate abuse of the impugned provision by the State and the chilling effect it has created in the general public.

2. Section 124A of Indian Penal Code, 1860, provides:

> *124ASedition.--Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in [India], shall be punished with [imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.*
>
> *Explanation 1.-- The expression "disaffection" includes disloyalty and all feelings of enmity.*
>
> *Explanation 2.--Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*

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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.

3. Sedition is a colonial law which was used expressly to suppress dissent by the British in India. After India became a democracy, this law was challenged as being violative of fundamental right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution of India in ***Kedar Nath Singh v State of Bihar, 1962 Supp (2) SCR 769.*** In ***Vinod Dua v. Union of India, 2021 SCC Online SC 414***, this Hon'ble Court culled the principles of Kedar Nath Singh which had interpreted Section 124A of Indian Penal Code, 1860, as under:

> ***56.*** *These passages elucidate what was accepted by this Court in preference to the decisions of the Privy Council in Balgangadhar Tilak and in King-Emperor v. Sadashiv Narayan Bhalerao. The statements of law deducible from the decision in Kedar Nath Singh are as follows:—*
>
> *a) "the expression "the Government established by law" has to be distinguished from the persons for the time being engaged in carrying on the administration. "Government established by law" is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted."*
>
> *b) "any acts within the meaning of Section 124-A which have the effect of subverting the Government by bringing that Government into contempt or hatred, or creating disaffection against it, would be within the penal statute because the feeling of disloyalty to the Government established by law or enmity to it imports the idea of tendency to public disorder by the use of actual violence or incitement to violence."*
>
> *c) "comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal."*

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d) *"A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder."*

e) *"The provisions of the Sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence."*

f) *"It is only when the words, written or spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order."*

g) *"we propose to limit its operation only to such activities as come within the ambit of the observations of the Federal Court, that is to say, activities involving incitement to violence or intention or tendency to create public disorder or cause disturbance of public peace."*

4. It would be apparent that while there are certain guiding principles that have been laid down by the apex court to determine what falls within the ambit of sedition, there is no specific definition of sedition capable of guiding the conduct of the ordinary citizen or the law enforcement authorities. The definition of sedition available to law enforcement agencies and the police is the one available on the statute books, which is the literal interpretation that was read down by this Hon'ble Court in Kedar Nath's case. As the guiding principles enunciated by Kedar Nath are unknown to most citizens and police, the law of sedition has come to be heavily abused with cases being filed against citizens for exercising their freedom of speech and expression.

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5. When the judgment in Kedar Nath was considered and delivered, the offence of sedition was non-cognizable. The offence was made cognizable only by virtue of the introduction of Criminal Procedure Code, 1973. In other words, when KedarNath was considered there were some procedural safeguards against the abuse of Section 124A that have been thereafter done away with and hence the need to revisit the judgement in Kedarnath in these changed circumstances. As the section is now cognizable and non-bailable, innocent citizens are facing the brunt of malicious cases. By the time the courts step in to apply the interpretation accorded in Kedar Nath Singh to the facts of the cases, citizens have already had to suffer the deprivation of their liberty.

6. In such circumstances, in ***Common Cause v. Union of India, (2016) 15 SCC 269,*** Petitioner No.2 had approached this court with the following prayers:

> *" (a) Issue an appropriate writ making it mandatory for the authority concerned to produce a reasoned order from the Director General of Police (DGP) or the Commissioner of Police, as the case may be, certifying that the "seditious act" either lead to the incitement of violence or had the tendency or the intention to create public disorder, before any FIR is filed or any arrest is made on the charges of sedition against any individual.*
>
> *(b) Issue an appropriate writ directing the learned Magistrate to state in the order taking cognizance certifying that the "seditious act" either lead to the incitement of violence or had the tendency or the intention to create public disorder in cases where a private complaint alleging sedition is made before the learned Magistrate."*

The Hon'ble Court was however not inclined and was pleased to dispose of the matter in the following terms:

> *3. Having heard Mr Prashant Bhushan, learned counsel for the petitioners, we are of the considered opinion that the authorities while dealing with the offences under Section 124-*

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A of the Penal Code, 1860 shall be guided by the principles laid down by the Constitution Bench in Kedar Nath Singh v. State of Bihar [Kedar Nath Singh v. State of Bihar, 1962 Supp (2) SCR 769 : AIR 1962 SC 955 : (1962) 2 Cri LJ 103] .
4. Except saying so, we do not intend to deal with any other issue as we are of the considered opinion that it is not necessary to do so. The writ petition is accordingly disposed of.

7. It is submitted that the abuse of the law of sedition continues unchecked with cases being filed to silence critics thereby creating a chilling effect on the free speech and expression. The abuse of the law has been brought forth in a comprehensive database prepared by *Article 14,* an online news portal, which has meticulously documented all cases of sedition since 2010.

   A report titled, "*Our New Database Reveals Rise In Sedition Cases In The Modi Era*" dated 02.02.2021 published by Article 14 is annexed hereto as Annexure **P1 (Pages 30 to 44)**

   A compilation of the gist of documented sedition cases filed since January, 2020, is annexed hereto as **Annexure P2 (Pages 45 to 65)**

8. On 16.03.2021, in reply to a question on sedition in the parliament, Government of India stated, "*The National Crime Records Bureau (NCRB) compiles and publishes information on crimes in its publication "Crime in India". NCRB started collecting data on cases registered under the offence of Sedition (Section 124 (A) of the Indian Penal Code, 1860) from 2014 onwards. Published Reports are available till the year 2019.*" The table annexed to the reply shows that an increasing number of cases of sedition are being filed each year since official records have been kept. Data also shows that the conviction rate in these cases is extremely low. A copy of Lok Sabha Starred Question No. 281 and answer thereto laid on the table of the house on 16.03.2021 is annexed hereto as **Annexure P3 (Pages 66 to 68).**

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9. In such circumstances, the petitioners pray for striking down Section 124A of the Indian Penal Code, 1860, on the grounds hereinbelow without prejudice to each other.

10. The Petitioners have not filed any other similar petition before this Hon'ble Court or any High Court or any other Court. The petitioners have no better remedy available.

GROUNDS

IN *'KEDAR NATH'* THE CONSTITUTIONALITY OF SEDITION WAS TESTED AND UPHELD ON THE PREMISE THAT ALL LAWS ENJOY A 'PRESUMPTION OF CONSTITUTIONALITY' WHICH PRESUMPTION HAS SINCE BEEN HELD NOT TO BE APPLICABLE TO PRE-CONSTITUTIONAL LAWS IN SUBSEQUENT JUDGMENTS OF THIS HON'BLE COURT AND HENCE 'KEDAR NATH' NEEDS REVISITING

A. BECAUSE, In ***Kedar Nath Singh v State of Bihar, 1962 Supp (2) SCR 769***, a Constitution Bench of this Hon'ble Court referring to the history of this section and the literal interpretation accorded thereto in ***Queen-Empress v. Bal Gangadhar Tilak (1892) I.L.R. 22 Bom. 112*** which was further affirmed by Privy Council in ***King-Emperor v. Sadashiv Narayan BhaleraoAIR 1947 PC 82*** observed thus about Section 124A of Indian Penal Code, 1860, with respect to Clause 2 of Article 19,

> "*if…. we give a literal meaning to the words of the section, divorced from all the antecedent background in which the law of sedition has grown, as laid down in the several decisions of the Judicial Committee of the Privy Council, it will be true to say that the section is not only within but also very much beyond the limits laid down in clause (2) aforesaid*" (**Para 25 of *Kedar Nath Singh v State of Bihar, 1962 Supp (2) SCR 769***).

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The court thereafter referred to the subsequent decision in ***Nirahendu Dutt Majumdar v. King Emperor, (1942) FCR 38***, in which the Federal Court had departed from the interpretation in Tilak's case. This court observed that the Federal Court had held,

> "*that the gist of the offence of sedition is incitement to violence or the tendency or the intention to create public disorder by words spoken or written, which have the tendency or the effect of bringing the government established by law into hatred*", (**Para 25 of *Kedar Nath Singh v State of Bihar, 1962 Supp (2) SCR 769***).

In view of the conflicting judgements of Privy Council and the Federal Court's interpretation in Majumdars's case, the court referring to the Doctrine of Presumption of Constitutionality observed:

> *26. In view of the conflicting decisions of the Federal Court and of the Privy Council, referred to above, we have to determine whether and how far the provisions of Sections 124-A and 505 of the Indian Penal Code have to be struck down as unconstitutional. If we accept the interpretation of the Federal Court as to the gist of criminality in an alleged crime of sedition, namely, incitement to disorder or tendency or likelihood of public disorder or reasonable apprehension thereof, the section may lie within the ambit of permissible legislative restrictions on the fundamental right of freedom of speech and expression. There can be no doubt that apart from the provisions of clause (2) of Article 19, Sections 124-A and 505 are clearly violative of Article 19(1)(a) of the Constitution. But then we have to see how far the saving clause, namely, clause (2) of Article 19 protects the sections aforesaid. Now, as already pointed out, in terms of the amended clause (2), quoted above, the expression "in the interest of … public order" are words of great amplitude and are much more comprehensive then the expression "for the maintenance of", as observed by this Court in the case of Virendra v. State of Punjab [(1958) SCR 308 at p. 317] . Any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidity. If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of*

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> *the sections would make them unconstitutional in view of Article 19(1)(a) read with clause (2). It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence. As already pointed out, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section, in our opinion, strikes the correct balance between individual fundamental rights and the interest of public order. It is also well settled that in interpreting an enactment the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to suppress [vide (1) Bengal Immunity Company Limited v. State of Bihar [(1955) 2 SCR 603] and (2) R.M.D. Chamarbaugwala v. Union of India [(1957) SCR 930]]. Viewed in that light, we have no hesitation in so construing the provisions of the sections impugned in these cases as to limit their application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence.* (**Para 26 of *Kedar Nath Singh v State of Bihar, 1962 Supp (2) SCR 769)***

It is submitted that the court had erred in construing Section 124A on the anvil of Doctrine of Presumption of Constitutionality. In subsequent decisions, this Hon'ble Court has held that the presumption does not apply to pre-constitutional laws as those laws have been made by non-democratic and colonial powers. Section 124 A does not enjoy presumption of constitutionality since the law was not made by 'legislature' and the makers of law were not

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making law for their 'own people'. There was no Constitutional barrier when the law of sedition was introduced. Further, the section was introduced to suppress dissent. This Hon'ble Court in ***Navtej Singh Johar v. Union of India, (2018) 10 SCC 1,*** (Section 377)has held that pre constitutional law like Penal Code, 1860, do not enjoy presumption of Constitutionality in following terms :

> ***"360.*** *Given the aforesaid, it has now to be decided as to whether the judgment in Suresh Kumar Koushal [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] is correct. Suresh Kumar Koushal [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] judgment first begins with the presumption of constitutionality attaching to pre-constitutional laws, such as the Penal Code. The judgment goes on to state that pre-constitutional laws, which have been adopted by Parliament and used with or without amendment, being manifestations of the will of the people of India through Parliament, are presumed to be constitutional. We are afraid that we cannot agree*
>
> ***361.*** *Article 372 of the Constitution of India continues laws in force in the territory of India immediately before the commencement of the Constitution. That the Penal Code is a law in force in the territory of India immediately before the commencement of this Constitution is beyond cavil. Under Article 372(2), the President may, by order, make such adaptations and modifications of an existing law as may be necessary or expedient to bring such law in accord with the provisions of the Constitution. The fact that the President has not made any adaptation or modification as mentioned in Article 372(2) does not take the matter very much further. The presumption of constitutionality of a statute is premised on the fact that Parliament understands the needs of the people, and that, as per the separation of powers doctrine, Parliament is aware of its limitations in enacting laws — it can only enact laws which do not fall within List II of Schedule VII to the Constitution of India, and cannot transgress the fundamental rights of the citizens and other constitutional provisions in doing so. Parliament is therefore deemed to be aware of the aforesaid constitutional limitations. Where, however, a pre-constitution law is made by either a foreign legislature or body, none of these parameters obtain. It is therefore clear that no such presumption attaches to a pre-constitutional statute like the Penal Code."*

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This Hon'ble Court in ***Joseph Shine v. Union of India, (2019) 3 SCC 39*** while striking down Section 497 (Adultery) of Indian Penal Code, 1860 observed:

> "*Discussion and Analysis*
> *270. Section 497 is a pre-constitutional law which was enacted in 1860. There would be no presumption of constitutionality in a pre-constitutional law (like Section 497) framed by a foreign legislature. The provision would have to be tested on the anvil of Part III of the Constitution."*

MISPLACED APPLICATION OF DOCTRINE OF SEVERABILITY

B. BECAUSE, reliance by the court on ***R.M.D. Chamarbaugwala v. Union of India [(1957) SCR 930]*** to apply the doctrine of severability is misplaced because the court has not 'read down' any part of the definition of Section 124A of Indian Penal Code, 1860. Rather the court has 'read into' the section words that are incompatible with the clear and unambiguous intent of the section. In ***King Emperor V. Sadashiv Narayan Bhalerao (1947)***, the Privy Council reiterated the law on sedition enunciated in the Tilak case and held that the Federal Court's statement of law in the Niharendu Majumdar case was wrong as under:

> *12. Their Lordships are unable to find anything in the language of either Section 124A. or the rule which could suggest that "the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency."The first explanation to Section 124A provides, "The expression 'disaffection' includes disloyalty and all feelings of enmity." This is quite inconsistent with any suggestion that "excites or attempts to excite disaffection" involves not only excitation of feelings of disaffection, but also exciting disorder. Their Lordships are therefore of opinion that the decision of the Federal Court in Niharendu's case proceeded on a wrong construction of Section 124A of the Indian Penal Code*
>
> *15. In Queen-Empress v. Bal Gangadhar Tilak (1892) I.L.R. 22 Bom. 112, 528 the charge was under Section 124A as it then stood, confined to disaffection, without any reference to*

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hatred or contempt, Strachey J., in an admirable charge to the jury, which was subsequently approved, by this Board, said (p. 135):

The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance, or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within Section 124A and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak Or forcible resistance, to the authority of the Government, still if he-tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt. I can only account for such a view by attributing it to a complete misreading of the explanation attached to the section and to a misapplication of the explanation beyond its true scope.

In this regard a Constitution Bench of five Judges of the Supreme Court in ***R.S. Nayak v A.R. Antulay 1986 SCC (2) 716,*** has held:

"… *If the words of the Statute are clear and unambiguous, it is the plainest duty of the Court to give effect to the natural meaning of the words used in the provision. The question of construction arises only in the event of an ambiguity or the plain meaning of the words used in the Statute would be self-defeating.*"

Again this court in ***Grasim Industries Ltd. v Collector of Customs, Bombay***, has followed the same principle and observed:

"*Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for court to take upon itself the task of amending or altering the statutory provisions.*"

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In ***Shreya Singhal v. Union of India, (2015) 5 SCC 1*** this Hon'ble Court has held that the Court cannot read into a provision or add something when the legislature never intended to do so. The relevant extract are as follows:

> *" 51. However, the learned Additional Solicitor General asked us to read into Section 66-A each of the subject-matters contained in Article 19(2) in order to save the constitutionality of the provision. We are afraid that such an exercise is not possible for the simple reason that when the legislature intended to do so, it provided for some of the subject-matters contained in Article 19(2) in Section 69-A. We would be doing complete violence to the language of Section 66-A if we were to read into it something that was never intended to be read into it. Further, he argued that the statute should be made workable, and the following should be read into Section 66-A:*
>
> *"(i) Information which would appear highly abusive, insulting, pejorative, offensive by reasonable person in general, judged by the standards of an open and just multi-caste, multi-religious, multi-racial society;*
>
> *— Director of Public Prosecutions v. Collins [(2006) 1 WLR 2223 : (2006) 4 All ER 602 (HL)] , WLR paras 9 and 21*
> *— Connolly v. Director of Public Prosecutions [(2008) 1 WLR 276 : (2007) 2 All ER 1012]*
>
> *— House of Lords Select Committee 1st Report of Session 2014-2015 on Communications titled as "Social Media And Criminal Offences" at p. 260 of Compilation of Judgments, Vol. 1, Part B*
>
> *(ii) Information which is directed to incite or can produce imminent lawless action;*
> *(Brandenburg v. Ohio [155 L Ed 2d 535 : 538 US 343 (2003)])*
>
> *(iii) Information which may constitute credible threats of violence to the person or damage;*
>
> *(iv) Information which stirs the public to anger, invites violent disputes brings about condition of violent unrest and disturbances;*
> *(Terminiello v. Chicago [93 L Ed 1131 : 337 US 1 (1949)])*

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(v) Information which advocates or teaches the duty, necessity or proprietary of violence as a means of accomplishing political, social or religious reform and/or justifies commissioning of violent acts with an intent to exemplify or glorify such violent means to accomplish political, social, economical or religious reforms;

(Whitney v. California [71 L Ed 1095 : 274 US 357 (1927)])

(vi) Information which contains fighting or abusive material;

Chaplinsky v. New Hampshire [86 L Ed 1031 : 315 US 568 (1942)]

(vii) Information which promotes hate speech i.e.
(a) Information which propagates hatred towards individual or a group, on the basis of race, religion, religion, casteism, ethnicity.

(b) Information which is intended to show the supremacy of one particular religion/race/caste by making disparaging, abusive and/or highly inflammatory remarks against religion/race/caste.

(c) Information depicting religious deities, holy persons, holy symbols, holy books which are created to insult or to show contempt or lack of reverence for such religious deities, holy persons, holy symbols, holy books or towards something which is considered sacred or inviolable.

(viii) Satirical or iconoclastic cartoon and caricature which fails the test laid down in Hustler Magazine Inc. v. Falwell [485 US 46 : 99 L Ed 2d 41 (1988)] ;

(ix) Information which glorifies terrorism and use of drugs;

(x) Information which infringes right of privacy of the others and includes acts of cyber bullying, harassment or stalking;

(xi) Information which is obscene and has the tendency to arouse feeling or revealing an overt sexual desire and should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it;
(Aveek Sarkar v. State of W.B. [(2014) 4 SCC 257 : (2014) 2 SCC (Cri) 291])
(xii) Context and background test of obscenity. Information which is posted in such a context or background which has a

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consequential effect of outraging the modesty of the pictured individual.

(Aveek Sarkar v. State of W.B. [(2014) 4 SCC 257 : (2014) 2 SCC (Cri) 291])"

This extract is taken from Shreya Singhal v. Union of India, (2015) 5 SCC 1 : (2015) 2 SCC (Cri) 449 : 2015 SCC OnLine SC 248 at page 149
52. What the learned Additional Solicitor General is asking us to do is not to read down Section 66-A—he is asking for a wholesale substitution of the provision which is obviously not possible."

In view of the above it is submitted that the doctrine of 'reading down' in the absence of presumption of constitutionality cannot be pressed into service of Section 124-A of Indian Penal Code, 1860, whose language otherwise is plain and unambiguous. There is no scope for reading words into Section 124A of Indian Penal Code, 1860, contrary to its plain and unambiguous meaning and the section must be declared to be unconstitutional on the basis of its plain and unambiguous meaning especially when the legislative intent was to suppress dissent ***[DTC v. Mazdoor Congress (1991) Suppl(1) SC 600 and Subramanian Swamy and Orsv. Raju and Anr.(2014) 8 SCC 390]***.

THE KEDAR NATH INTERPRETATION CASTS A 'WIDE NET' ON FREEDOM OF SPEECH AND EXPRESSION CONTRARY TO THE RATIO OF EARLIER JUDGEMENT OF CONSTITUTION BENCH IN DR. RAM MANOHAR LOHIA'S CASE IN WHICH RESTRICTIONS IN THE INTEREST OF 'PUBLIC ORDER' WERE GIVEN A NARROW INTERPRETATION AND OF WHICH KEDAR NATH FAILED TO TAKE NOTICE

C. BECAUSE, the judgement of the court in Kedar Nath failed to take note of ***Superintendent Central Prison v. Dr Ram Manohar Lohia (1960) 2 SCR 821*** wherein it was held that (a) only aggravated

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disturbance of 'public order' as opposed to mere 'law and order' could be used to restrict freedom of speech and expression and (b) there should be direct and proximate connection between the instigation and the aggravated disruption of public order. As per Kedar Nath, the offence of sedition is complete if there is *"incitement to violence or the tendency or the intention to create public disorder by words spoken or written, which have the tendency or the effect of bringing the government established by law into hatred*." By casting 'the net' too wide this interpretation falls foul of the following observations in Dr. Ram Manohar Lohia's case as under:

> *" **12.**…..We do not understand the observations of the Chief Justice to mean that any remote or fanciful connection between the impugned Act and the public order would be sufficient to sustain its validity. The learned Chief Justice was only making a distinction between an Act which expressly and directly purported to maintain public order and one which did not expressly state the said purpose but left it to be implied therefrom; and between an Act that directly maintained public order and that indirectly brought about the same result. The distinction does not ignore the necessity for intimate connection between the Act and the public order sought to be maintained by the Act.*
>
> ***13.** …….The restriction made "in the interests of public order" must also have reasonable relation to the object to be achieved i.e. the public order. If the restriction has no proximate relationship to the achievement of public order, it* cannot be said that the restriction is a reasonable restriction within the meaning of the said clause.*…..The decision, in our view, lays down the correct test. The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.*
>
> ***14.** We shall now test the impugned section, having regard to the aforesaid principles. Have the acts prohibited under Section 3 any proximate connection with public safety or tranquillity? We have already analysed the provisions of Section 3 of the Act. In an attempt to indicate its wide sweep, we pointed out that any instigation by word or visible representation not to pay or defer payment of any exaction or*

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even contractual dues to Government, authority or a landowner is made an offence. Even innocuous speeches are prohibited by threat of punishment. There is no proximate or even foreseeable connection between such instigation and the public order sought to be protected under this section.We cannot accept the argument of the learned Advocate-General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite a revolutionary movement destroying public order. We can only say that fundamental rights cannot be controlled on such hypothetical and imaginary considerations. It is said that in a democratic set up there is no scope for agitational approach and that if a law is bad the only course is to get it modified by democratic process and that any instigation to break the law is in itself a disturbance of the public order. If this argument without obvious limitations be accepted, it would destroy the right to freedom of speech which is the very foundation of democratic way of life. Unless there is a proximate connection between the instigation and the public order, the restriction, in our view, neither reasonable nor is it in the interest of public order. In this view, we must strike down Section 3 of the Act as infringing the fundamental right guaranteed under Article 19(1)(a) of the Constitution.``

D. BECAUSE, this Hon'ble Court in Kedar Nath Singh v. State of Bihar 1962 (Supp) 2 769 has held that offence of sedition would be complete if the acts complained would have tendency to create public disorder or cause disturbance to public peace. It is submitted that the right to free speech and expression cannot be abridged on the basis of a mere speculation of harm. This Hon'ble Court has observed in ***S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574*** that:

"*45. The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-*

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> *fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a power keg."*

E. BECAUSE,the judgment in Kedar Nath has cast a wide net on public disorder by including remote disturbance of law and order would also fall under the exception of Article 19(2) of the Constitution of India. This Hon'ble Court in ***Shreya Singhal v. Union of India (2015) 5 SCC 1***after relying on the decision of Constitution Bench in Ram Manohar Lohia v. State of Bihar (1996) 1 SCR 709 and Kameshwar Prasad v. State of Bihar [1962 Supp (3) SCR 369 held that:

> *"**93.**The Court further went on to hold that remote disturbances of public order by demonstration would fall outside Article 19(2). The connection with public order has to be intimate, real and rational and should arise directly from the demonstration that is sought to be prohibited…"*

F. BECAUSE, the section doesn't distinguish between mass dissemination and intimate conversation. The section makes an intimate conversation with a minor or paralytic person as an offence of sedition even though there can be no apprehension of any public disorder from such a person. A person hearing a speech may begin to hate the Government, or feel disloyal towards it, or may hold it in contempt, but is not bound to disturb the public order and may refrain from doing any overact. Whether a speech will cause disorder or not depends not only upon its content but also upon the nature of the listener, his opportunities, and the state of the country at the time. The offence under section 124-A is complete if a person speaks anything that has tendency to create public disorder or disturbance of public peace or law and order without in any manner impacting public order. Hence the section doesn't have any proximate relationship with the public order as there is no proximate

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connection between the instigation and public order. Therefore, this Hon'ble Court must strike down Section 124-A of Indian Penal Code, 1860 for infringing Article 19(1) (a) of the Constitution.

THE 'WIDE NET' CAST BY KEDAR NATH TAKES INTO ITS FOLD MERE DISCUSSION AND ADVOCACY. IT DISRUPTS THE 'MARKETPLACE OF IDEAS'

G. BECAUSE, the judgment of Kedar Nath fails to differentiate between advocacy and incitement. The Freedom of speech and expression has three concepts i.e. discussion, advocacy and incitement. The judgment of the US Supreme Court in ***Brandenburg v. Ohio 395 U.S. 444 (1969)*** wherein it was held that,

> *"freedoms of speech and press do not permit a state to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action",*

was accepted by this Hon'ble Court in ***Arup Bhayan v. Union of India (2011) 3 SCC 377*** to hold that mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence. The relevant extract is as follows:

> ***" 10.*** *In Brandenburg v. Ohio [23 L Ed 2d 430 : 395 US 444 (1969)] the US Supreme Court went further and held that mere "advocacy or teaching the duty, necessity, or propriety" of violence as a means of accomplishing political or industrial reform, or publishing or circulating or displaying any book or paper containing such advocacy, or justifying the commission of violent acts with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism, or to voluntarily assemble with a group formed "to teach or advocate the doctrines of criminal syndicalism" is not per se illegal. It will become illegal only if it incites to imminent lawless action. The statute under challenge was hence held to be unconstitutional being violative of the First and Fourteenth Amendments to the US Constitution.*
>
> *.....*
>
> ***12.*** *We respectfully agree with the above decisions, and are of the opinion that they apply to India too, as our fundamental*

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rights are similar to the Bill of Rights in the US Constitution. In our opinion, Section 3(5) cannot be read literally otherwise it will violate Articles 19 and 21 of the Constitution. It has to be read in the light of our observations made above. Hence, mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence. Hence, the conviction of the appellant under Section 3(5) of TADA is also not sustainable."

H. BECAUSE, in ***Shreya Singhal v. Union of India, (2015) 5 SCC 1*** this Hon'ble court differentiated between advocacy and incitement while holding that only the latter can be a ground to curtail the fundamental right of freedom of speech and expression in the following terms:

*"**11.**This last judgment is important in that it refers to the "marketplace of ideas" concept that has permeated American law. This was put in the felicitous words of Holmes, J. in his famous dissent in Abrams v. United States [250 US 616 : 63 L Ed 1173 (1919)] , thus : (L Ed p. 1180)*
"… But when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That at any rate, is the theory of our Constitution."

***12.** Brandeis, J. in his famous concurring judgment in Whitney v. California [71 L Ed 1095 : 274 US 357 (1927)] , said : (L Ed pp. 1105-06 "Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its Government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a*

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political duty; and that this should be a fundamental principle of the American Government. They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable Government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."(emphasis supplied)

***13.** This leads us to a discussion of what is the content of the expression "freedom of speech and expression". There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is*

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> *incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in….It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, etc…."*

It is submitted that mere advocacy and discussion which is protected under Article 19(1)(a) has been made punishable under Section 124 - A of Indian Penal Code, 1860. This is most apparent from the speech of Kedar Nath Singh himself which though it disagrees.

THE OFFENCE OF SEDITION IS UNCONSTITUTIONAL FOR THE INGREDIENTS THEREOF ARE VAGUE

I. BECAUSE, the offence of sedition is vague and it fails to define criminal offence with sufficient definiteness. Ordinarily neither accused be put on notice as to what exactly is the offence which has been committed nor would be authorities administering the section be clear as to on which side of the clearly draw a particular will fall. Further, the terms like "contempt", "hatred", and "disaffection" used in the impugned section are overbroad. The interpretation in Kedar Nath (Supra) which makes " *tendency to create public disorder or cause disturbance of public peace"*as an offence under impugned section invites subjectivity and greatly different readings and application which is incapable of being certain and even handed. Therefore, the whole of 124-A of Indian Penal Code,1860 is incapable of redress. No possibility of carving out and saving a constitutional valid portion of the provisions exist. Where a legislation creates an offence of this kind and there is no constitution fit part to be served, this Hon'ble Court has held that the whole offence is liable to be struck down as unconstitutional

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(**RomeshThappar v. State of Madras, 1950 SCR 594, Supdt., Central Prison v. Dr Ram Manohar Lohia, (1960) 2 SCR 821 and Shreya Singhal v. Union of India, (2015) 5 SCC 1).**

THE OFFENCE OF SEDITION HAS BECOME OTIOSE

J. BECAUSE, the definition of sedition is vague and incapable of accurate appreciation by the common citizen and the law enforcement agencies/police. The interpretation accorded to Section 124A of Indian Penal Code, 1860, by this Hon'ble Court in ***KedarNath Singh v State of Bihar, 1962 Supp (2) SCR 769*** is not understood or appreciated by the police which continues to register cases against citizens who are exercising their right to freedom of speech and expression. By the time the courts step in to apply the interpretation of Kedar Nath to the facts of the cases, the citizens have already been deprived of their liberty.

Pertinently, the offence of sedition has either been abolished or drastically circumscribed in many countries. The offence of sedition libel has been deleted by Section 73 of the Coroners and Justice Act, 2009, in United Kingdom. The reason given for abolishing seditious libel is as follows:

> "*Having an unnecessary and overbroad common law offence of sedition, when the same matters are dealt with under other legislation, is not only confusing and unnecessary, it may have a chilling effect on freedom of speech and sends the wrong signal to other countries which maintain and actually use sedition offences as a means of limiting political debate.*"

The essence of sedition is activities that have an intention or tendency to create public disorder, or disturbance of law and order or incitement to violence.There are various provisions in place which cover the same material offences as section 124A. Some of them are as follows:

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i. Provocation with the intent to cause riot (section 153 of the IPC) is punishable with imprisonment of either description for a term which may extend to one year, or with fine, or with both if the offence of rioting is committed and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

ii. Imputation, assertion prejudicial to national integration (Section 153 B of the IPC) that is punishable with imprisonment which may extend to three years with or without fine or to five years with fine.

iii. Section 146 of IPC describes offence of rioting as use of force and violence by an unlawful assembly or by any of its members in pursuance of common object. The offence of rioting is punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

iv. Rioting armed with deadly weapons (Section 148 of IPC) is punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

v. Section 143 of IPC provides punishment for being a member of unlawful assembly. Unlawful assembly has been defined under section 141 as an assembly of 5 or more persons, if the common object is-

To overawe by criminal force, or show of criminal force, [the Central or any State Government or Parliament or the

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Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

To resist the execution of any law, or of any legal process; or

To commit any mischief or criminal trespass, or other offence; or

By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation. — An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

PRAYER

In these circumstances, it is therefore most respectfully prayed that your Lordships may graciously be pleased to:

I. Issue writ of Mandamus or any other appropriate writ, order, or direction declaring Section 124-A of the Indian Penal Code,1860, as unconstitutional;

II. Alternatively, direct that strict action as per law be taken against concerned public servants and

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complainant/informants in cases where the accused is discharged in a case of sedition and lay down guidelines for the same;

III. Pass such other orders or directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present petition

AND FOR THIS ACT OF KINDNESS, THE PETITIONER AS IS DUTY BOUND SHALL EVER PRAY

FILED BY:

(PRASHANT BHUSHAN)
ADVOCATE ON RECORD FOR PETITIONER

DRAWN BY: ALICE RAJ & RAHUL GUPTA

NEW DELHI
DATED: 14.07.2021