IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. _____ OF 2021

(Under Article 32 of the Constitution of India)

**IN THE MATTER OF:**

1. [redacted]

...PETITIONER NO. 1

2. [redacted]

...PETITIONER NO. 2

**VERSUS**

The Union of India,

Through its Secretary,

Ministry of Law and Justice,

Shastri Bhawan, New Delhi-1. ...RESPONDENT

**PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA CHALLENGING THE CONSTITUTIONAL VALIDITY SECTION 124-A OF THE INDIAN PENAL CODE 1860**.

TO

THE HON'BLE CHIEF JUSTICE OF INDIA

& HIS LORDSHIP'S COMPANION JUSTICES

OF THE SUPREME COURT OF INDIA.

THE HUMBLE PETITION OF THE

PETITIONERS ABOVE NAMED

**MOST RESPECTFULLY SHOWETH:**

1. This writ petition is being filed challenging the constitutional validity of section 124-A of the Indian Penal Code, 1860, which penalises the crime of "sedition". The impugned section clearly infringes the fundamental right under Article 19(1)(a) of the Constitution of India which guarantees that "all

citizens shall have the right to freedom of speech and expression". Further, the restriction imposed by the section is an unreasonable one, and therefore does not constitute a permissible restriction in terms of Article 19(2) of the Constitution. Hence this petition is filed to humbly pray that Section 124-A be declared unconstitutional and void by this Hon'ble Court and be struck out of the Indian Penal Code.

1A. It is respectfully submitted that the Petitioners have not approached the authorities concerned seeking similar relief, in view of the nature of the issues involved and the relief sough in the instant Writ Petition.

## *KEDAR NATH SINGH* JUDGMENT:

## OBSOLETE IN PRESENT TIMES

2. The Petitioners acknowledge that this issue has come before this Hon'ble Court in 1962; where the validity of the section was upheld. This Hon'ble Court in *Kedar Nath Singh* v. *State of Bihar* (1962) held that Section 124-A imposed a reasonable restriction on Article 19(1)(a), falling within the ambit of Article 19(2). The central tenet of the Petitioners' argument is that while the Hon'ble Supreme Court may have

been correct in its finding nearly sixty years ago, Section 124-A no longer passes constitutional muster today. This is described in detail later in the instant Writ Petition.

## FRIVOLOUS SEDITION CASES AGAINST THE PETITIONERS UNDER SECTION 124A

3. Petitioners No. 1 and 2 are journalists working in the states of Manipur and Chhattisgarh. As outspoken and responsible journalists they have been raising questions against their respective state governments as well as the Central Government. They have been charged with sedition under section 124A of IPC in various FIRs for comments and cartoons shared by them on the social networking website Facebook.

### Petitioner No. 1:

### Charged with sedition for criticising political leaders

4. Petitioner No. 1 has been a journalist working in Manipur for 7 years. Before that, he worked as a teacher, and continues to teach students even now. In 2014, he joined as a News Anchor at Impact TV. In 2015, he was appointed as the

sub-editor at Impact TV. In 2017, he joined ISTV as a News Anchor and Desk Editor. Several FIRs have been registered against him since 2018 with a view to silence him and to suppress his journalism. He has spent a total of 210 days in custody regarding different FIRs under Section 124A IPC since 2018. He also lost his job when he was arrested under Section 124A in November 2018.

5. The first FIR registered against Petitioner No. 1 was FIR No. 173 (8) 2018 IPC under Section 505(2)/500 of the Indian Penal Code, 1860 dated 9.8.2018. The FIR was registered pertaining to his criticism of the Government through his Facebook post regarding a crisis at the Manipur University and the students' hue and cry against the Vice-Chancellor for alleged embezzlement of funds and suppression of the students' union. He was arrested on 10.8.2018. He was in police lock-up for one day and for three days in judicial custody. He was finally granted bail on 13.8.2018.

True copy of FIR No. 173 (8) 2018 IPS dated 9.8.2018 registered at Imphal West is attached herewith as **Annexure P-1 at page no. _91-92.**

6. The second FIR registered against Petitioner No. 1 was FIR No. 286(11) 2018 IPC under Section 124A/194/500 IPC dated 19.11.2018. The FIR was registered pertaining to certain comments he had made in a video he posted on his Facebook account criticising certain political leaders. A reading of the FIR makes it clear that there was absolutely nothing made out in the FIR which would constitute a case of sedition, and yet Petitioner No. 1 spent over 140 days in custody based on this FIR.

True copy of FIR No. 286 (11) 2018 IPS dated 19.11.2018 registered at Imphal West. is attached herewith as **Annexure P-2 at page no. 93-94.**

7. Initially, he was arrested on 20.11.2018, and was in police custody for 6 days. He was released on bail on 26.11.2018. The Hon'ble CJM, Imphal West, in the bail order dated 26.11.2018 noted as under:

> "From the materials of the prosecution, it is seen that the accused had made videos and posted them on his timeline using derogatory words against the Chief Minister of Manipur calling them as agent of the Prime Minister and had used many vulgar and undiplomatic

words. The said video appears to be made regarding the Chief Minister attending a Birth anniversary of Rani Jhanshi Bai where the Chief Minister had given a speech. On perusal of the said materials, I am satisfied there exist materials against the accused person for expressing his opinion in very undiplomatic words and terms and gesture. However, I find the said words, terms and gesture used by the accused and the context in which they are used, and the comment made by the accused person cannot be termed seditious to attract offence u/s 124-A IPC. It appears to be more expression of opinion against the public conduct of a public figure in a street language. It does not appear to me to such which is intended to create enmity between different groups of people community, sections etc. nor does it appear to be one which attempts to bring hatred, contempt, dissatisfaction against the government of India or of the State. It is mere expression of opinion against the Prime Minister of India and Chief Minister of Manipur, which cannot be equated with an attack to invite people to violence against the Govt. of India or Manipur to topple it. The same is the view of the Hon'ble Supreme Court in Kedar Nath case. In giving the speech, the accused person transgressed beyond decent human conduct but it cannot be termed seditious. The government, especially its functionary like Prime Minister or Chief Minister cannot be so sensitive as to take offence upon

expression of opinion by its citizen which may be given every nicely by using proper words or indecently by using some vulgar terms.

In the result, I am of the considered opinion the offence u/s. 124-A IPC is not attracted at all by the video made and published by the accused in social media."

True copy of Order dated 26.11.2018 passed by Chief Judicial Magistrate, Imphal West, Manipur, in Cril. Misc. (B) Case No. 283 of 2018, is attached herewith as **Annexure P-3 at page no. 95-97_.**

8. However, after Petitioner No. 1 was released on bail on 27.11.2018, he was detained on the same day under a detention order bearing No. Cril/NSA/No. 4 of 18 passed by the District Magistrate, Imphal West. The reason for this detention also was his critical comments against the political leaders.

9. Petitioner No. 1 remained in detention for over 134 days, till the Hon'ble High Court of Manipur quashed the set aside the detention order vide its order 8.4.2019. He was finally released on 10.4.2019. True copy of the order dated 8.4.2019 passed by the Hon'ble High Court of Manipur at Imphal in Writ

Petition (Cril) No. 18 of 2018 is attached herewith as **Annexure P-4 at page no. 98-115.**

10. The third FIR registered against Petitioner No. 1 is FIR No. 14(9) 2020 Sen-PS under Section 124A/153A/503 IPC & 3(1)(r) SC & ST POA Act, 1989. This FIR, dated 11.9.2020, pertains to a statement made by the Petitioner No. 1 on Facebook regarding certain derogatory remarks made by the partner of a prominent politician against the wife of said the politician who belongs to the Scheduled Tribe community. There was nothing seditious in his comments. Yet Petitioner No. 1 was arrested on 29.9.2020 and was in custody for 70 days until he was released on bail vide order dated 7.12.2020.

True copy of FIR No. 14(9) 2020 Sen-PS dated 11.9.2020 registered at Senapati is attached herewith as **Annexure P-5 at page no. 116-117.**

Petitioner No.1 was initially granted interim order from arrest in the said FIR. True copy of order dated 14.9.2020 passed by Sessions Judge, Senapati in Cril. Misc. (AB) Case No. 3 of 2020 is annexed herewith and marked as **Annexure P-6 at page no.**

**_118-122**

The said order passed by Session Judge, Senapati, whereby the Interim anticipatory bail granted to Petitioner No. 1 was cancelled as the FIR included provisions of the SC/ST (Prevention of Atrocities) Act, 1989 under which anticipatory bail is statutorily barred. True copy of order dated 28.9.2020 passed by Sessions Judge, Senapati in Crl Misc (AB) No. 3 of 2020 is annexed herewith and marked as **Annexure P-7 at page no. 123-138**

True copy of Order dated 7.12.2020 passed by the Special Judge for SC/ST (Prevention of Atrocity) Act, Senapati, in Crl. Misc. (B) Case No. 16 of 2020 is attached herewith as **Annexure P-8 at page no. 139-147**

11. Therefore, Petitioner No. 1 has spent a total of over 210 days in custody due to FIRs registered under section 124A of IPC simply for his statements critical of certain political leaders.

**Petitioner No. 2:**

**Charged with sedition for sharing a cartoon**

12. Petitioner No. 2 has been working as a journalist in Chhattisgarh for many years. He is a well-recognised journalist and has written hundreds of articles in various publications. He is keeping a compilation of his articles ready to be shown to the Court at the time of arguments. A perusal of these articles will show that many of them are in respect of fake encounters. An FIR was registered against him on 28.4.2018 with FIR No. 156/2018 registered at P.S. Kanker, Chhattisgarh under section 124-A IPC and Section 66D of Information Technology Act, 2000. The said FIR was registered pertaining to certain cartoons that Petitioner No. 2 had shared on Facebook. Petitioner No. 2 states that the FIR was lodged against him under section 124A by the State to take revenge against him because of his work as a human rights activist and journalist. True copy of FIR No. 156/2018 dated 28.4.2018 registered at Kanker is attached herewith as **Annexure P-9 at page no. _148-151).**

13. Petitioner No. 2 was granted anticipatory bail regarding the said FIR by the Hon'ble High Court of Chhattisgarh, Bilaspur, vide order dated 26.7.2018. True copy of order dated 26.7.2018 passed by the Hon'ble High Court of Chhattisgarh in M.CR.C(A)

No. 719 of 2018, Bilaspur is attached herewith as **Annexure P-10 at page no. 152-155.**

14. The submissions of the State Government in the above case were recorded in the order dated 26.7.2018 as under:

> "It is submitted that posting of objectionable cartoons in facebook depicting senior leaders and other persons and adding comment by the applicant of his own is complete to constitute commission of offence under Section 124A of the IPC."

15. Rejecting the State Government's submissions noted above, the Hon'ble High Court granted anticipatory bail to Petitioner No. 2.

16. It is submitted that these FIRs have an unacceptable 'chilling' effect on the Petitioners as well as on other journalists and threatens their work and their right to freedom of expression. Asserting their constitutional right under Article 19(1)(a), the Petitioners respectfully request that the Supreme Court review its 1962 ruling where it found Section 124-A to be a constitutionally permissible restriction on Article 19(1)(a).

## THE IMPUGNED SECTION

17. Section 124-A of the India Penal Code is as follows:

> **"**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 inciting or attempting to incite 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.

18. In case of *Kedar Nath Singh v. State of Bihar* the

Supreme Court of India decided on the scope of Section 124-A. The Court read down the section; holding that acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence would be made penal by section 124-A. (Kedar Nath Singh v. State of Bihar 1962 Supp (2) SCR 767: AIR 1962 SC 955: (1962) 2 Cri LJ 103 at para 26).

19. In reading down the section, and endorsing the stricter interpretation give to the section by the Federal Court in 1942, the court rejected the very wide interpretations of early cases and that of the Privy Council in 1944 which brought far more acts within the scope of the offence of the section and made it very easy for the colonial government to class any criticism of the state seditious.

20. It is respectfully submitted that the Supreme Court in *Kedar Nath's* case did not go far enough in reading down the section. Retaining 'intention' and 'tendency' as basis for criminal liability means that these inherently subjective terms can be used (and abused) to penalise those who have not caused any violence or public disorder.

21. It is submitted that when this interpretation, as defined by *Kadar Nath's* case is applied, there are two "scenarios" where a person could be guilty of sedition;

a) "*Scenario A*" is the obvious one; person A take an action (makes a speech or publishes a pamphlet, etc, etc) which *actually results* in violence or public disorder. "A" is guilty of sedition.

b) In "*Scenario B*" the words or acts of person B *do not* actually result in any violence or public disorder, however the authorities feel that the words or acts had this "tendency", or person B had had the subjective "intention" to cause this mischief. "B" is also guilty of sedition.

22. It is submitted that the use of sedition in *Scenario B* is not use, but rather misuse – it is most frequently employed in India to supress democratic debate, criticism of the government and the advocacy of new ideas.

## THE CONSTITUTIONAL CHALLENGE

23. Section 124-A of the IPC clearly infringes Article 19(1)(a) of the Constitution. It is submitted that the question of whether Article 19(1)(a) is infringed by the impugned section this should not form part of the matters in dispute; The Constitutional bench of the Supreme Court held in *Kedar Nath's* case that "[t]here can be no doubt that apart from the provisions of clause (2) of Art. 19, Sections 124A...[is] clearly violative of Art. 19(1)(a) of the Constitution." (*Kedar Nath Singh* v. *State of Bihar*, para 26).

24. It is submitted that the question in dispute is whether the section constitutes a *reasonable restriction* falling within the ambit of Article 19(2), thereby saving the section from constitutional invalidity.

25. As per accepted constitutional principles, in considering the reasonableness of laws imposing restrictions on fundamental right, a court should take into account various factors, these are: the nature of the right alleged to have been infringed; the underlying purpose of the restrictions imposed; the extent and

urgency of the evil sought to be remedied thereby; the disproportion of the imposition; and the prevailing conditions at the time. (*State of Madras* v. *V. G. Row* 952 AIR 196, 1952 SCR 597 at Pg 607).

26. It is submitted that the situation with regard to these factors has materially changed, both legally and factually, since the Supreme Court's adjudication of this issue in 1962. This petition will show how, given these material changes, sedition now constitutes an unreasonable restriction on Article 19(1)(a).

27. This petition will fully address each of these factors and considerations in turn (broadly under the headings I – V below); it will be shown that Section 124-A is an unreasonable restriction on freedom of expression, and how consequently Section 124-A is unconstitutional.

28. It is submitted by the Petitioners that it is necessary that this issue be re-adjudicated by this Hon'ble Court in 2021. International law requires that established restrictions on freedom of expression should be reassessed and reviewed periodically. International law places the onus the governments to prove that

any restrictions on the freedom of expression are valid. India is thus obligated to review of this restriction.

## I. THE NATURE OF RIGHT INFRINGED- ARTICLE 19(1)(A)

29. Freedom of expression is widely accepted to be the "cornerstone of democracy". Without freedom of expression democracy cannot exist. In 2010 this Hon'ble Court expressed that **"**change through free speech is basic to our democracy, and to prevent change through criticism is to petrify the organs of democratic Government." It was held that freedom of expression is not only politically useful "but that it is indispensable to the operation of a democratic system". (*Indirect Tax Practitioners Assn.* v. *R. K. Jain* (2010) 8 SCC 281).

30. The democratic system necessarily involves an advocacy of the replacement of one government by another. World-wide, the media and free speech are recognised as essential accountability checks on governments. Citizens cannot exercise their right to vote effectively or take part in public decision-making if they do not have free access to information and ideas and are not able to express their views freely. The Supreme Court

has expressed that "the freedom of expression is a preferred right which is always very zealously guarded by the Supreme Court" (*The Secretary, Ministry Of Information and Broadcasting* v. *Cricket Association Of Bengal* (1995) 2 SCC 161 at Para 14).

31. Freedom of expression has various important functions; The supreme court held in *Bennett Coleman* that *'*Free expression is necessary: (1) for individual fulfillment, (2) for attainment of truth, (3) for participation by members of the society in political or social decision making and (4) for maintaining the balance 'between stability and change in society." Freedom of expression importantly, allows the political discourse which is necessary in any country which aspires to democracy. (*Bennett Coleman & Co.* v. *Union of India* (1972) SCC 788 at pg 810 ).

32. In 2010, giving approval to its 1972 dicta in *Bennett Coleman*, the Supreme Court again asserted the importance of freedom of expression for democracy in *Indirect Tax Practitioners Assn. vs R.K.Jain;*

> "In a democracy the theory is that all men are entitled to participate in the process of formulating- common

> decisions...The crucial point is not that freedom of expression is politically useful but that it is indispensable to the operation of a democratic system. In a democracy the basic premise is that the people are both the governors and the governed. In order that governed may form intelligent and wise judgment it is necessary that they must be appraised of all the aspects of a question on which a decision has to be taken so that they might arrive at the truth." (Bennett Coleman & Co vs Union of India (1972) SCC 788 at pg 811).

33. It has been explicitly recognized by the Human Rights Council of the United Nations General Assembly that Freedom of expression is a cornerstone of democratic rights and freedoms and the exercise of the right to freedom of opinion and expression is one of the essential foundations of a democratic society. The Human Rights Council has also recognized that the effective exercise of the right to freedom of opinion and expression is an important indicator of the level of protection of other human rights and freedoms in member states. When other human rights violations occur in states, typically freedom of expression is restricted by governments in a bid to cover up other atrocities and governmental failures.

34. Freedom of expression is essential in enabling democracy to work and public participation in decision-making. Citizens cannot exercise their right to vote effectively or take part in public decision-making if they do not have free access to information and ideas and are not able to express their views freely. Freedom of expression is thus not only important for individual dignity but also to participation, accountability and democracy. Freedom of speech is the soul of a democratic society. It is the basis for all of the individual rights and for the protection of the democratic regime and social order. Repression of free speech and of open criticism of government undermines the very foundations of this order.

35. In the case of *Javed Habib vs The State* , the Delhi High Court aptly described criticism of the government as the 'hallmark of democracy", court expressing;

> "The criticism of the government is the hallmark of democracy. As a matter of fact the essence of democracy is criticism of the Government. The democratic system which necessarily involves an advocacy of the replacement of one government by another, gives the right to the people to criticize the government."

36. The nature of this fundamental right is clearly that it is of paramount importance in a democratic society. The Petitioners do not dispute that this Hon'ble Court gave due recognition to the fundamental nature of this right when in *Kedar Nath's* case, in fact the court expressed that "freedom of expression is the *sine quo non* of democracy." The right is, and has always been of an essential nature and of paramount importance. Hence the situation with regard to the nature of this fundamental right has not changed, save for the anticipation that India's democracy has matured in the last sixty years, to the extent that this right should be even more zealously guarded today. The Supreme Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression.

37. People in India have the right to criticize the government, and this is a right that needs to be zealously guarded if India wants to maintain its status as a democracy.

## II. THE PURPOSE OF THE RESTRICTION – SECURITY OF THE STATE AND PUBLIC ORDER

38. The next point of consideration is the underlying purpose of the restriction. It is submitted that when the section was originally inserted into the IPC, its purpose was to protect the British colonial power from any expressions of contempt, hatred or discontent; it was liberally employed to silent political dissent and supress India Nationalist sentiments. Post-independence, however, the underlying purposes of Section 124-A, the restriction imposed on Article 19(1)(a) are accepted to be preventing 'public violence' and 'public disorder'. The Supreme Court in *Kedar Nath's* case, reading down the section, held these to be legitimate purposes, falling within the interests of "security of the State" and of "public order", two of the grounds enumerated under article 19(2) of the Constitution.

39. The Petitioners do not in any way dispute the importance and necessity of preventing public violence and public disorder. Indisputably, state security and public order important interests, deserving of protection. What is disputed by the Petitioners is the necessity and proportionality of the use of Section 124-A in this

regard.

40. It is submitted that in 1962 there may have a need to use Section 124A as a means to prevent the public violence and public disorder that fell short of waging war against the state. Section 124-A, was, at the time a necessary tool in crime control. It is conceivable that if sedition had been held unconstitutional in 1962, there may have been a lacuna in the law, the mischief – public disorder and violence – going unpunished. Contrastingly, in 2021, this is not the case.

41. Freedom of expression is not absolute; it can be limited for the protection of various interests. The Supreme Court in 1962 held that sedition fell within the ambit of the interests of 'security of the State' and 'public order,' permissible in terms of clause (2) of Article 19.

42. Indisputably, security in India is an important issue. A common response to criticism of Section 124-A and calls for the repeal of sedition is "it is necessary for national safety and security". It will be shown in this petition that this is not so. (*See below*: "NEW LEGISALATION").

43. The Petitioners wish to emphasise that they are not a threat to national security or the public order in India. It is very important at this stage to make clear exactly whose interests declaring sedition unconstitutional would protect.

44. Declaring Section 124-A unconstitutional will stop the prosecution of individuals who want to air their legitimate (possibly controversial) views, start debates, write articles or make films about controversial issues and possess literature discussing various ideologies. These people are not terrorists, but right-thinking members of Indian society those who want to excise their democratic and constitutional right to free speech and expression.

45. It must be emphasized that preventing the prosecution of terrorists or others who pose actual security threats is not the aim, nor will it be the consequence. Other laws in India can sufficiently deal with security threats without having to employ section 124-A. Terrorists would not go free if sedition is done away with.

46. India's criminal law sufficiently 'covers the field' when an

action creates violence or public disorder. As well as the actual violence and public disorder, Indian law already criminalises incitement to violence and abetting an offence.

47. If a person wages war, attempts to wage war or conspires to wage war against the government of India here will punished under sections 121, 121A and 122 of the IPC, respectively. New legislation (fully expounded upon below) serves to penalise conduct which falls short of the conduct made penal by these sections of the IPC.

48. Therefore sedition is not necessary for the protection of national security or the public order. All the overt acts that Section 124-A it seeks to punish are covered by other penal sections.

49. Whenever someone is guilty of waging war against the government or terrorism, frequently he may be simultaneously held him guilty of sedition. Sedition is a lesser step than treason; and generally if one is guilty of the greater offence then one typically also would be seditious. This situation seems rather unproblematic given the importance of security in India, and does

not seem to offend anyone's sense of justice. On the other hand, the problematic scenario arises where an individual makes a controversial statement on air, merely possesses communist literature, speaks out against police atrocities or makes a film that highlights issues in India. They are not terrorists, the words or actions fail to excite any violence or public disorder, however this person is arrested for sedition on the basis that the authorities *subjectively* assess that the person had a 'seditious intention' or the conduct had a 'seditious tendency'.

50. Here we are not dealing which people who pose actual, direct threats to India's integrity or security, but rather those who are merely excising their democratic right to freedom of expression. Once charged with sedition, these people face possible life imprisonment.

51. It is submitted that this imposes an unacceptable chilling effect on freedom of expression and is markedly detrimental to democracy. If a person is under a fear of being arrested, they may not express themselves freely on public issues and this would chill public debate on important issues.

52. The Supreme Court has said, “In a free democratic society it is almost too obvious to need stating that those who hold office in Government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.” (*R. Rajagopal* v. *State Of T.N.* 1995 AIR 264, 1994 SCC (6) 632 at Para 20).

53. The Supreme Court has held that “The law should not be used in a manner that has chilling effects on the `freedom of speech and expression'.” (*S. Khushboo* v. *Kanniammal* (2010) 5 SCC 600 at Para 47). It is submitted that sedition is being used in this way in the current instance. It is submitted that the use of sedition against those who criticize the government is not ‘use’ but rather inevitability ‘misuse’.

**SUBSEQUENT LEGISLATIONS**

54. It is submitted that the Supreme Court in *Kedar Nath* did not engage in an extensive enquiry into the ‘necessity’ of Section 124-A in order to justify it. The necessity and effectiveness of the offence of sedition as a means to ensure

public order and state security seem to have been unquestioningly assumed by the court. In 1962 there may have a need to use Section 124A in order to prevent the public violence and disorder that fell short of waging war against the state. Conceivably, if sedition had been held unconstitutional in 1962, there may have been a lacuna in the law. The lack of alternative legislation made sedition a necessity in crime control. In the last sixty years, however new legislation has been passed dealing directly with the overt conduct that sedition seeks to make penal – inciting violence and public disorder.

55. In 1969, the Unlawful Activities (Prevention) Act (ACT NO.37 of 1969) was passed to provide for the more effective prevention of certain unlawful activities. 'Unlawful activity' is very broadly defined as 'any action including acts, words, either spoken or written, signs or any visible representation which is intended, or supports any claim to bring about on any ground whatsoever... the cession or succession of any part of India... or which incites any individual or group of individuals to bring about such cession or succession *or which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of*

*India*.'

56. 'Unlawful association' is also broadly defined by s 1 (g) as anyone who encourages or aids persons to undertake 'unlawful activities', or encourages or aids persons to undertake any activity punishable under Section 153A or Section 153B of the IPC.

57. Section 13 of UAPA provided punishment for 'whoever: (a) takes part in or commits, or (b) *advocates abets, advises or incites* the commission of, any unlawful activity. It also provides a punishment for whoever, in any way, assists association declared unlawful. The 2004 (Act No. 29 OF 2004) and 2008 (Act No. 35 OF 2008) amendments to this Act broadened its scope to deal extensively with terrorism. The definition of unlawful activity was broadened further to include any activity 'which causes or is intended to cause disaffection against India.' (Section 2 (o) (iii)).

58. Not only actual terrorism is covered by the Act, but also "whoever *conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates* the commission of, a terrorist act or any act preparatory to the commission of a

terrorist act" is liable for punishment for conspiracy.

59. It can be seen that various acts which would fall under sedition, causing or inciting public disorder or violence, would simultaneously be covered by this Act.

60. In 1978 the Jammu and Kashmir Public Safety Act (Act No. 6 of 1978) was passed to provide measures for dealing with acts with threatened the interests of the State and the public order. This Act gives the government, once satisfied that a person is acting in a manner prejudicial to the 'security of the state of the maintenance of public order', the power to detain that person (Section 8 (1)).

61. Acting in a manner prejudicial to the 'the maintenance of public order" is broadly defined, and included "making preparations for using, or attempting its use, or using, or instigating, inciting, or otherwise abetting the use of force where such preparation, using, attempting, instigating, inciting, provoking or abetting, disturbs or is likely to disturb public order" (Section 3(b)(ii)). Again it can be seen that conduct meeting the requirements for sedition would fall within the purview of this Act.

62. The National Security Act (Act No. 6 of 1978) was passed in 1980. Section 8 (1) gives the Central Government or the State Governments the power to detain persons if satisfied that it was necessary to do so to prevent him from 'acting in any manner *prejudicial to the defence of India* ... or the security of India' (Section 3 (1)(a)), or to 'prevent him from acting in any manner prejudicial to the *security of the State* or from acting in any manner prejudicial to the *maintenance of Public order*' (Section 3 (2)) This legislation would clearly also cover the same material offences as section 124A.

63. It is submitted that these Acts, together with a myriad of state level safety and security legislation now "cover the field" in dealing with public order and violence. If sedition was done away with, *bone fide* terrorists and security threats would clearly not go unpunished.

64. It is trite that the actions of an individual can be simultaneously unlawful under multiple penal sections, this multiplicity *in itself* does not invalidate the legislation. However the fact that the criminal conduct is already sufficiently dealt with effects 'proportionality' in terms of the constitutionality enquiry

under Indian law, which affects the reasonableness of the restriction.

65. The last nearly sixty years have seen the extensive enactment of new legislation dealing directly with safety and security, public disorder and terrorism. Prominent among these legislative enactments are the Unlawful Activities Act, the Public Safety Act and the National Security Act. Various sections of these Acts deal directly with the overt conduct that sedition seeks to make penal – inciting violence and public disorder.

66. It is submitted that the existence of alternative legislation penalising the 'mischief' bears on the consideration of the "extent and urgency of the evil sought to be remedied" by the restriction. Alternative legislation eliminates the need to employ Section 124-A to deal with public disorder and violence. Further, it cannot be argued that the use of sedition is a justifiable restriction on the basis of an urgent need to deal with the disruption of the public order or for safety and security reasons.

67. The Petitioners would like to emphasise that, while

Section 124-A may indeed penalise those individuals who are actually *bona fide* threats to the public order and national security, these are not the only individuals who it penalises. Currently in India Section 124-A also penalises individuals who merely air their legitimate grievances and attempt to excise their democratic right to freedom of expression peacefully. Accepting that Section 124-A was read down by the constitutional bench in Kedar Nath's case, it is respectfully submitted that the Hon'ble did not go far enough in reading down the section. Retaining 'intention' and 'tendency' to cause public disorder and violence as basis for criminal liability has meant that these inherently subjective terms can be (and have been) used (and abused) to penalise those who have not caused any violence or public disorder.

68. Individuals have been arrested for, charged with, and convicted of Section 124-A for merely publicly criticizing governmental action and inaction, speaking out against army atrocities, possessing maoist literature and merely interviewing people seen as threats by the state. Penalising these individuals is not in line with the purpose of the legislation, yet it is the

effect. It is the democratic rights of these individuals that the Petitioners seek protection for.

69. The existence of alternative legislation penalising the public disorder and public violence, importantly bears on the determination of the 'proportionality enquiry' undertaken in the constitutional analysis. The Court in *Kedar Nath*'s case opined that sedition "strikes the correct balance between individual fundamental rights and the interest of public order". It is submitted that the fact that no less restrictive means' to protect the interest of public order were available in 1962, was instrumental in the reasoning leading to this conclusion.

70. In stark contrast to the situation in 1962, in 2021, various relevant sections of the Unlawful Activities Act, Public Safety Act and the National Security Act constitute less restrictive means' to protect state security and public order. These sections punish only *bona fide* threats to public disorder and violence, whereas the over-inclusive Section 124-A covers both real threats and right-minded individuals attempting to exercise their democratic and constitutional right to freedom of speech and expression. Consequently Section 124-A is an excessive, unnecessary and

disproportionate tool to protect the interests of state security and public disorder.

## III. EXTENT AND URGENCY OF THE EVIL SOUGHT TO BE REMEDIED – PUBLIC VIOLENEC AND DISORDER

71. The existence of alternative legislation penalising the mischief bears on the consideration of the "extent and urgency of the evil sought to be remedied" by the restriction. Alternative legislation completely eliminates the need to employ Section 124-A to deal with public disorder and violence, and it cannot be argued that the use of sedition is a justifiable restriction on the basis of an urgent need to deal with the mischief.

72. The Supreme Court has held that restrictions on this fundamental freedom must "be justified on the anvil of necessity and not the quicksand of convenience or expediency*".* Open criticism of government policies and operations is not a ground for restricting expression. (*The Secretary, Ministry Of Information and Broadcasting* v. *Cricket Association Of Bengal* (1995) 2 SCC 161 at Para 17).

## IV. DISPROPORTION OF THE IMPOSITION

73. When a court decides whether a limitation on Article 19 is a reasonable restriction, it must enquire into the proportionality of the restriction. In this regard the Supreme Court has expressed:

> "Ever since 1950, the principle of 'proportionality' has indeed been applied vigorously to legislative (and administrative action) in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India, - such as freedom of speech and expression, freedom to assessable peacably, freedom to form associations and unions, freedom to move freely throughout the territory of India, freedom to reside and settle in any part of India, - this Court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. The burden of proof to show that the restriction was reasonable lay on the State. 'Reasonable restrictions' under Article 19(2) to (6) could be imposed on these freedoms only by legislation and Courts had occasion throughout to consider the proportionality of the restrictions. In numerous judgments of this Court, the extent to which 'reasonable restrictions' could be imposed was considered... In Chintaman Rao v. State of UP. (1950

SCR 759), Mahajan J (as he then was) observed that 'reasonable restrictions' which the State could impose on the fundamental rights 'should not be arbitrary or of an excessive nature, beyond what is required for achieving the objects of the legislation.' 'Reasonable' implied intelligent care and deliberations, that is, the choice of a course which reason dictated. Legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of reasonableness unless it struck a proper balance between the rights guaranteed and the control permissible under Articles 19(2) to (6). Otherwise, it must be held to be wanting in that quality. Patanjali Sastri CJ in State of Madras v. VS. Row (1952 SCR 597), observed that the Court must keep in mind the 'nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions of the time." (*Om Kumar & Others* v. *Union Of India* 2000 (7) SCALE 524, 2000 Supp 4 SCR 693 at Paras 30).

74. In 1962, when the Supreme Court in *Kedar Nath* had to balance the freedom of expression and interests of public order and state security, Section 124-A was held a proportional measure. At the time there were no less restrictive means' to

protect the relevant interests under Article 19(2).

75. It is submitted, in 2021 with the introduction of new legislation protecting the interests of public order and state security, sedition is a disproportionate infringement on the freedom of expression. The Unlawful Activities Acts and similar legislation constitute less restrictive means' to protect the interests under Article 19(2), consequently Section 124-A an excessive measure, and an unjustifiable infringement of Article 19(1)(a).

76. It is submitted that the current situation; where the democratic freedom of expression of right-thinking individual's who may face life imprisonment, is limited on the basis of security interests already protected by other means, is an unacceptable state of affairs in a democratic country.

77. In the next section it will be shown that, in order to meet international guidelines, limitations on the freedom of expression must to be 'necessary' for the protection of the interests of national security and public order. As the criminal content of sedition is effectively *duplicated* by subsequent specific

legislation means it fails to meet this necessity requirement of International law under the ICCPR.

## V. PREVAILING CIRCUMSTANCES OF THE TIME

78. The constitutional enquiry involves the consideration of the "prevailing conditions at the time". In this regard it is submitted that there are three relevant circumstances in this regard.

### INDIA'S INTERNATIONAL LAW OBLIGATIONS

79. The first of these relevant considerations is the fact that India now has obligations under International Law. India has ratified, and is bound by the International Covenant on Civil and Political Rights ("ICCPR"). Article 19 of the ICCPR protects the freedom of expression as a right of all individuals in the world. Although this right is not absolute, and can be restricted, international law sets stringent standards which need to be met in order for States to validly restrict this right. Various international instruments guild the interpretation of the ICCRP, of these the *Johannesburg Principles* and the principles set out by the United Nations Special Rapporteur on Freedom of Opinion

and Expression are of particular importance. International law provides that in order for a restriction on freedom of expression to be permissible, the government must discharge the onus of proving that the restriction is;

a) 'provided for by law';

b) 'necessary'; and

c) in pursuit of one of the legitimate aims set forth in the article (is for the respect of the rights or reputations of others; for the protection of national security or of public order, or of public health or morals.)

80. It is submission of the Petitioners that Section 124-A as a restriction of freedom of expression falls short of these requirements in that it is neither "necessary" nor sufficiently "provided by law". "Necessity" entails that the limitation must be proportionate, the least restrictive means available, and in line with democratic principles. For similar to the reasons that make Section 124-A is an unreasonable restriction on Article 19(1)(a) in terms of Indian domestic law, Section 124-A fails to meet this International law standard of 'necessity'.

81. The requirement that any restriction on the freedom of expression be “provided by law” means that Section 124-A not only needs to be national legislation, but that it must meet the standards of “legality”. Therefore for Section 124-A to meet this requirement it needs to be drawn narrowly, and with adequate precision to make clear exactly what is prohibited; it must not be vague; and it cannot be uncertain. It is the submission of the Petitioners that Section 124-A fails to meet this International law standard of legality.

82. The terms “intention” and “tendency” are inherently subjective terms with no ascertainable objective criterion for assessment; they are susceptible to wide and discretionary interpretation, by both authorities and those subject to the law. A person may speak at a rally or write a controversial article, their words fail to excite any violence or disorder, yet the authorities have a wide measure of discretion in assessing whether their words had a ‘seditious intention’ or ‘tendency’. Hence this law becomes the perfect tool for suppression of criticism. After the authority makes their subjective assessment of the situation, the consequence for the ‘offender’ is a potential life sentence in

prison. The vague and uncertain nature of the provision also fails to provide sufficient notice to citizens of exactly what conduct is prohibited. As a result, it exerts an unacceptable “chilling effect” on freedom of expression. Citizens steer well clear of the potential zone of application to avoid censure. When individuals stop exercising their democratic rights for fear life imprisonment, the entire democratic enterprise is gravely undermined. It is submitted that these International law obligations, not in existence in 1962, should bear on the constitutional enquiry undertaken today.

**MISUSE OF SECTION 124-A**

83. The second relevant circumstance is the frequent phenomenon of misuse, misapplication and abuse of Section 124-A since 1962. Tendency and intention have been so widely interpreted and employed in such a discretionary manner that those merely exercising their democratic rights have faced penal sanction under the section. While abuse of a law, in itself, does not bear on the validity of that law, this phenomenon clearly points to the vagueness and uncertainty of the current law. Additionally, it is submitted that the abuse and the inherent

"political association" of this abuse, should be a relevant "prevailing circumstance of the time."

84. It is trite that the abuse, misuse or misapplication of legislation does not, *in itself* affect its constitutionality. However, it is submitted that it is the vagueness, ambiguity and uncertainty of Section 124-A that has led to the situation where it is so frequently misused. The heavily subjective 'intention' and 'tendency' allow for a wide and discretionary scope for interpretation by authorities, both the police and the courts.

85. Many cases have recently made headlines in the regard. In examples of authorities employing the uncertain 'intention' or 'tendency' elements of sedition, people have been arrested and charged for merely possessing maoist literature, merely interviewing people seen as threats, publically criticizing the governmental and speaking out against army atrocities. When sedition is read together with conspiracy, it is virtually possible to make a case against anyone who expresses themselves.

86. It is submitted that the vagueness and discretionary nature of the offence of sedition is what has allowed this abuse.

87. According to the data compiled by the National Crime Records Bureau (NCRB), the number of sedition cases registered across the country doubled from 35 in 2016 to 75 in 2018. However, no chargesheets were filed by the police in over 70% of the cases, and only four of the 43 cases where trial has been completed resulted in convictions. The abysmally low conviction rate is evidence that the police never had any evidence against individuals facing sedition charges to begin with.

88. In the recent past many citizens have been booked under sedition for exercising their legitimate constitutional right to freedom of speech. For instance, in Jharkhand, 10,000 tribals were booked under sedition for protesting against the government for issuing an order allowing commercial use of tribal land. In another case, a single mother of an 11-year-old was charged with sedition after her daughter participated in a purportedly anti-CAA play in Bidar, Karnataka. One JNU student was charged with sedition for a speech he gave during an anti-CAA protest. More than 50 people were booked for sedition in Mumbai for raising slogan in favour of the JNU student.

89. As per a database prepared by the online portal "Article-14.com", a count and analysis of all sedition cases since 2010 reveals that a total of 149 cases of sedition have been registered for making "critical" and/or "derogatory" remarks against the Prime Minister, and 144 cases registered for remarks against the Chief Minister of Uttar Pradesh.

90. In another example, the editor of a Gujarati *Eveninger*, Mr. Manoj Shinde, was arrested on sedition charges in 2006 for using "abusive words" against the Chief Minister of Gujarat in an editorial. The editorial alleged an administrative failure in tackling the flood situation in Surat, his comments held the government responsible for an outbreak of an epidemic in the city.

91. It is submitted that highlighting a failure of government falls squarely within one's democratic rights; given the importance of the media in ensuring the accountability of government to the electorate, such action should not attract sedition charges.

92. In 2010, Piyush Manush, a human rights and environmental justice defender from Salem, was arrested and

charged with Sedition. He had attempted to circulate a pamphlet, for the *Campaign for Justice and Peace*. The pamphlet announced that people will undertake a cycle yatra across Tamilnadu to highlight the Indian and Chhattisgarh government's brutal and inhuman treatment of the Adivasis. This was to be a peaceful protest.

93. The pamphlet asked why the State is denying the guarantees under the Constitution by the Republic of India to adivasis, and why the State Government has refused to obey the Supreme Court order directing them to rehabilitate the 644 evicted villages, and their residents. The cycle rally through the villages of Tamilnadu was intended to build public awareness and opinion.

94. This clearly constitutes a democratic form of protest. A very broad interpretation of 'seditious tendency' needs to be adopted here in order to justify the charges in this circumstance. It is submitted that these are but a two of hundreds of examples in India.

## CAUSATION

95. In cases where “seditious tendency” and “intention” have been liberally interpreted as to be anything which may result in public disorder, for example public unrest or protests when governmental action or inaction is exposed, it is submitted that legal standards of causation need to be scrutinized.

96. If an editorial published excited any unrest, or public disorder, it is arguable that this unrest would be attributable to the failure of government rather than the exposure of such. Similarly any mischief transpiring as a result of the cycle rally would be caused by the government’s failures rather than the rally *per se.*

97. It is submitted that if a government is allowed suppress criticism on the basis that public disorder may result as a consequence of the electorate *finding out about* certain a certain state of affairs or governmental action, transparency and accountability are so severely undermined that India will lose its democratic status.

98. If a peaceful protest to raise awareness is classed as seditious, on the basis that awareness may result in public disorder, the interpretation of Section 124-A becomes as broad as it was during colonial times in India.

99. Unlike in defamation cases, truth is not a defence, as the more truth in words that highlight governments actions are, the more likely they are to result in public disorder. Therefore criticizeing such exposure is democratically unsound given the public interest.

100. Reading causation broadly in 'tendency' together with conspiracy, can lead to other unjust results. If an individual does something which itself would not be seditious, such as passing information between Naxilites. It is submitted that the causation between the individual's actions and any acts eventually committed by *bone fide* criticize, should be extensively questioned. Just because criticize generally threaten security, cause public disorder and cause violence, a person who gives them some assistance cannot automatically be attributed responsibility for all criticize actions. If sedition is employed in

this way, people can become guilty of sedition through mere association.

101. It should be noted that the crime of conspiracy, even when causation is proven, generally carries a lesser penalty than the primary crime.

102. As sedition carries the potential penalty of life imprisonment, it is thus submitted that in order to be guilty of sedition it must be proven that actually and directly caused the violence or public disorder.

103. It is submitted that the abuse and the inherent “political association” of this abuse, should be a relevant consideration in the constitutional enquiry.

104. It is submitted that when sedition is done away with, terrorists will still be punished by other laws, while social activists and right-thinking members of society will be able to exercise their democratic and constitutional rights without the threat of life imprisonment.

105. The third relevant circumstance is the repeal of sedition

sections in comparative post-colonial democratic jurisdictions around the world. The United Kingdom, the author of sedition laws in India and globally, has recently repealed the offence of sedition in its own jurisdiction in 2009. New Zealand and Ghana have already passed legislation repealing sedition, while the Law Commissions of Canada, Ireland and Australia have recommended repeal to their respective parliaments. In both Uganda and Nigeria sedition has been declared unconstitutional. It is submitted that experience of comparative jurisdictions should be persuasive in this courts enquiry. Comparative jurisprudence becomes more significant given the fact that Section 124-A suffers the same vices as comparative sedition offences. These vices led to the repeal and abolition of sedition offences; these sections were done away with based on the fact that sedition offences were found to be;

a) unnecessary in light of more modern criminal offences, such as incitement and other public order offences;

b) undesirable in light of their political nature and history; and

c) inappropriate in modern liberal democracies; where it is accepted that it is a fundamental right of citizens to criticize and challenge government structures and processes.

106. India has ratified and is thus bound by the International Covenant on Civil and Political Rights (ICCPR). Article 19 of which stipulates:

(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of

the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

107. Similarly to in India, the right to freedom of expression is not absolute and may be restricted. There are three requirements that need to be met for restrictions are permissible;

(a) they must be 'provided for by law';
(b) they must be 'necessary'; and
© they must pursue one of the legitimate aims set forth in the article.

108. The General Assembly of the United Nations has emphasised that any restrictions must adhere strictly to this criteria. (CCPR General Comment No. 10: Article 19 (Freedom of Opinion) Adopted at the Nineteenth Session of the Human Rights Committee, on 29 June 1983, at para 4). True copy of CCPR General Comment No. 10 dated 29.6.1983 is attached herewith as **ANNEXURE P-11 at page no. _1**56

109. To aid the interpretation of the ICCPR, various

international instruments set out guidelines and principles which state must adhere to in order to comply with their international obligations, of these the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* ; these were drafted and adopted by a group of experts in international law, and have been endorsed by the UNHRC and the UN Special Rapporteur on Freedom of Opinion and Expression. True copy of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information dated November 1996 is attached herewith as **ANNEXURE P-12 at page no. 157-177.**

110. The established standards and principles of international law relating to the restrictions on freedom of expression have been set out for convenience and reiterated by the United Nations Special Rapporteur on Freedom of Opinion and Expression in his 2010 annual report, these standards and principles are of particular importance. True copy of the 2010 Annual report of the Special Reporter (A/HRC/14/23) is attached herewith as **ANNEXURE P-13 at page no. _178-197.**

111. The UN Special Rapporteur, in his 2010 Annual report,

stated that, despite the provisions of Article 19 0f the ICCPR, States frequently limit or restrict freedom of expression arbitrarily, sometimes by recourse to criminal legislation, in order to silence dissent or criticism.(A/HRC/14/23 at para 75.) In view of such practices, Special Reporter has set out, for convenience, the established standards and principles of International law for the determination of whether or not a limitation or restriction to the right of freedom of expression is legitimate. These established principles are reiterated the importance these is stressed; It is emphasized that these principles are of an exceptional nature; thus should be applied in a comprehensive manner. (A/HRC/14/23 at para 75-80).

112. It is submitted that these two sets of 'principles' are very important in the interpretation of international laws and should act as guidelines to India in adhering to its international obligations. It is submitted that if Section 124-A is to be a permissible restriction it must conform to these principles.

113. The general principle is that permissible limitations and restrictions must constitute an exception to the rule and must be kept to the minimum necessary. (A/HRC/14/23 at para 77).

## 'PROVIDED BY LAW' AS AN INTERNATIONAL LAW REQUIREMENT

114. The requirement, "provided by law" means that, in addition to constituting national legislation, laws restricting freedom of expression must be "accessible, clear, concrete, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful". The law needs to be *understood by everyone* and applied to everyone. (Johannesburg Principles; 1(a))

115. Essentially section 124-A cannot be vague or uncertain is it is to pass this standard. It is submitted that it fails in this regard.

116. Sedition punishes not only those acts that actually lead to violence or public disorder, but also those which this 'tendency' or 'intention'. These are entirely subjective terms; different people may assess them differently, they provide no concrete standards that everyone similarly understands.

117. Vague provisions are susceptible to wide interpretation, by both authorities and those subject to the law. Vague law and

subjective terms are an invitation to abuse by authorities. A person may speak at a rally or writes a controversial article, their words fail to excite any violence or disorder, yet the authorities have a wide measure of discretion in assessing whether their words had a 'seditious intention' or 'tendency'. Who can correct a policeman who claims that in their opinion certain actions had a 'tendency' to cause public disorder? Hence this law becomes the perfect tool for suppression or criticism. After the authority makes their subjective assessment of the situation, the consequence for the 'offender' is a potential life sentence in prison.

118. Vague and uncertain provisions also fail to provide sufficient notice to citizens of exactly what conduct is prohibited. As a result, they exert an unacceptable chilling effect on freedom of expression as citizens steer well clear of the potential zone of application to avoid censure.

119. As per the decision of the Hon'ble Supreme Court in *Kartar Singh* v*. State of Punjab*, (1994) 3 SCC 569,an enactment can be declared as void on the grounds of vagueness. The Court noted as under:

> "It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. Laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

120. The Supreme Court further held in *Shreya Singhal* v. *Union of India*, (2015) 5 SCC 1,that:

> "Where no reasonable standards are laid down to define guilt in a Section which creates an offense, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a Section which creates an offense and which is vague must be struck down as being arbitrary and unreasonable".

121. As observed by the Supreme Court of Sri Lanka, "laws that trench on the area of speech and expression must be narrowly and precisely drawn to deal with precise ends. Over-breadth in the area has a peculiar evil – the evil of creating

chilling effects which deter the exercise of that freedom. The threat of sanctions may deter its exercise as patently as application of the sanctions. The State may regulate in that area only with narrow specificity." (*Perera v. Attorney General & Ors*, [1992] 1 Sri L.R. 199, pp. 215, pp. 228).

122. A person in India may therefore avoid releasing their film or publish their articles for fear of being arrested for sedition; they do not actually intend any violence or public disorder, but fears that the authorities may see the situation differently. Citizens are not provided with any ascertainable standard of what is unlawful and what will attract penal sanction; and are thus unable to guide their conduct in accordance with the law. This unreasonably deters democratic expression and debate.

123. A Constitution bench of the Supreme Court has held that:

> "where the persons applying the law are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution" (*K. A. Abbas* v. *Union of India*, AIR 1971 SC 481 at pg 447).

> It was also observed that the "invalidity arises from the probability of the misuse of the law to the detriment of the individual." (*K. A. Abbas* v. *Union of India*, AIR 1971 SC 481 at pg 447).

124. Section 124-A fails to define the scope of the offence sufficiently clearly and narrowly to prevent abuse by the authorities and the serious chilling effect that it currently exerts.

125. Given that Section 124-A does not meet the international requirement of legality, Sedition is not a legitimate restriction on the freedom of expression protected by the ICCPR. India thus falls foul of international standards in this regard.

126. A counter argument in this regard is that sedition not only applies to 'intentions' or 'tendencies' but also in the situation where actual violence of public disorder *actually transpires*, obviously this this does not suffer from the objection of vagueness or uncertainty; the requirements of actual violence and public disorder make it clear what is prohibited. However, it will be shown in the next section that, in this instance, section 124A fails to meet the international law requirement of 'necessity'.

## 'NECESSITY' AS AN INTERNATIONAL LAW REQUIREMENT

127. International law requires that any restrictions imposed on the exercise freedom of expression must be "necessary". The various 'principles' set guidelines in this regard.

128. International law places onus on the state governments to prove the validity of the any restriction on freedom of expression, this emphasises the importance placed on protecting the freedom given to the individual in IICPR. (Johannesburg Principles, Para 79, Principle (g)).

129. To discharge this onus, a government must demonstrate that:

a) the expression or information at issue poses a serious threat to a legitimate national security interest;

b) the restriction imposed is the least restrictive means possible for protecting that interest; and

c) the restriction is compatible with democratic principles."

(Johannesburg Principles, Principle 1.3)

130. The restriction needs to address a pressing public or social need which must be met in order to prevent the violation of a legal right that is protected to an even greater extent (here national security or public order), importantly, the restriction must be proportionate to that aim and be no more restrictive than is required for the achievement of the desired purpose. (Johannesburg Principles, Para 79, principle (g)).

131. If a restriction is 'necessary', it is entailed that *but for* the restriction the undesirable social or criminal conduct would not be prohibited or sufficiently punished. It is submitted that in India, section 124-A would not meet this *"but for"* test.

132. In India, if an individual causes violence and public disorder, they would simultaneously be liable for other offences under various other legislative provisions, including those in the legislation detailed above. India's criminal law sufficiently 'covers the field' when an action creates violence or public disorder. As well as the actual violence and public disorder, Indian law already criminalises incitement to violence and abetting an offence. If a person wages war, attempts to wage war or conspires to wage war against the government of India, she will punished under

sections 121, 121A and 122 of the IPC, respectively.

133. Therefore sedition is not necessary for the protection of national security or the public order. All the overt acts that Section 124-A it seeks to punish are covered by other penal sections. The protection of State security and public order are important, it is merely disputed that sedition is a necessary, or even appropriate, tool in this regard.

134. Necessity entails proportionality. Perhaps the most serious defect of Section 124 A is that it represents a disproportionately serious interference with democratic debate. Any benefits in terms of protecting public order (which is already protected) are far outweighed by the harm done to freedom of expression, the 'cornerstone of democracy'. Doubly punishing terrorists is done at the price of the democratic rights of those members of society who are not threats; ultimately this is to the detriment of Indian society as a whole as democracy is seriously undermined.

135. International law requires that laws imposing restrictions or limitations must not be arbitrary or unreasonable and must not be used as a means of political censorship or of

silencing criticism of public officials or public policies. (A/HRC/14/23 at para 79(f)).

136. It is submitted that it is clear that Section 124-A fails to meet international standards, and cannot be said to constitute a valid restriction on the rights guaranteed by the ICCPR. India is has an international law obligations in this regard. It is submitted that, given the advent of international law in the determination of the constitutional enquiry, international law standards, specifically necessity, legality and proportionality should be read into 'reasonableness'. When this criterion is read in, it is submitted that Section 124-A no longer constitutes a reasonable restriction. On this basis section 124-A should be declared unconstitutional.

## COMPARATIVE JURIRIDPRUDNECE –

## THE DEMOCRATIC TREND

## REPEAL IN THE UNITED KINGDOM

137. In *Kedar Nath's* case the Supreme Court stated that "the first and most fundamental duty of every Government is the preservation of order, since order is the condition precedent to all

civilisation and the advance of human happiness." The court, however, did not elaborate on why Section 124-A was a necessary or rational tool in this regard. This can be explained by the fact that at the time in England, as well as in numerous other countries penalising sedition, this was taken for granted. Hence, at the time, the court had no apparent cause to question the effectiveness or desirability of sedition in ensuring the stability of the state.

138. In 1962 the Supreme Court judgment depended upon the British use and experience of sedition laws to justify the continuation of the section in India. It claimed that this law was not merely a creation of the colonial state but that it was also in use in England itself, holding:

> "This species of offence against the State was not an invention of the British Government in India, but has been known in England for centuries. Every State, whatever its form of Government, has to be armed with the power to punish those who, by their conduct, jeopardise the safety and stability of the State, or disseminate such feelings of disloyalty as have the tendency to lead to the disruption of the State or to public disorder."

139. This statement does not hold true today. The Coroners and Justice Act 2009 has been passed in the United Kingdom, this act repeals sedition laws in the UK. Sedition was repealed on the recommendations of the Law Commission, who cited various factors that made repeal necessary. A copy of working paper of the Law Commission will be made available and referred to by the Petitioners at time of argument.

140. Notably, sedition in the UK was even more narrowly drawn than the present law in India; nothing short of a direct incitement to disorder and violence was 'seditious libel'. Someone was only guilty of seditious libel if it is satisfied that the defendant; "meant that the people should make use of physical force as their own resource to obtain justice, and meant to excite the people to take the power in to their own hands, and meant to excite them to tumult and disorder." Clearly this is narrower than a mere subjective "tendency". (Littledale J. in the case of *Collin;* The Law Commission, 1977, *Codification of the Criminal Law Treason, Sedition and Allied Offences* Working Paper No. 72).

141. Vagueness was cited as a fundamental flaw of sedition; the UK Law Commission endorsed the dicta of Kellock J in the Canadian case of Boucher v. E, holding that that "probably no crime has been left in such vagueness of definition as that with which we are here concerned [sedition], and its legal meaning has changed with the years." (Boucher v. E. [1951] 2 D.L.R. 369 at p.382; The Law Commission, 1977, Working Paper No. 72, at para 7).

142. The commission also cited Boucher v. *E,* regarding redundancy of sedition:

> "Before a person can be convicted of publishing seditious words, or a seditious libel or of seditious conspiracy he must be shown to have intended to incite to violence, or to public disorder or disturbance, with the intention thereby of disturbing constituted authority. Importantly, in order to satisfy such a test it would, therefore, have to be shown that the defendant had incited or conspired to commit either offences against the person, or offences against property or urged others to riot or to assemble unlawfully. He would, therefore, be guilty, depending on the circumstances, of incitement or conspiracy to commit the appropriate offence or offences." (The Law Commission, 1977, Working Paper No. 72, at para 77).

143. This very importantly shows that when an individual meets the requirements for the charge of sedition, they will simultaneously be guilty of other offences, making the charge of sedition redundant and somewhat unnecessary.

144. Accepting that the UK had a "sufficient range of other offences covering conduct amounting to sedition already*",* the Commission emphasized that these ordinary statutory and common law offences should be preferred; sedition should not be relied on because of the fact that sedition carries with it the undesirable implication that the conduct in question is 'political'. (Law Commission, 1977, Working Paper No. 72, at para 78).

145. The Commission had highlighted the undesirable fact that, historically, in cases of sedition, "prosecutions were usually brought with overtly political motives." (Law Commission, 1977, Working Paper No. 72, at para 68).

146. As there was no need for an offence of sedition, it was recommended that it should be done away with. It is submitted that the same reasoning is applicable in India today given the myriad of other legislation covering the material undesirable

conduct and adequately protecting national security, vagueness and political associations.

## REPEAL IN NEW ZEALAND

147. New Zealand, also a former British Colony, passed the Crimes (Repeal of Seditious Offences) Amendment Act in 2007, repealing sedition. This implemented the recommendations of the Law Commission (NZLC). The NZLC concluded that seditious offences were overly broad and uncertain. Similarly to in India, these suffered from the problem of vagueness. A copy of the report of the NZLC will be made available and referred to by the Petitioners at the time of argument.

148. According to the NZLC sedition infringed on the principle of freedom of expression, and had the potential for abuse – a potential that had been realised in some periods in New Zealand's history, as the offences were frequently being used to stifle or punish political speech. (The New Zealand Law Commission, 2007, *Reforming the Law of Sedition,* NZLC R96, Wellington, at para 3).

149. ‘Seditious intention’ was the key requirement to the offence in New Zealand. An individual could be guilty of sedition even if their actions failed to incite violence or public disorder; as long as they had ‘seditious intention’. The definition of ‘seditious intention’ was extremely wide, and was in breach of freedom of expression. The point was made that such provisions could have an “undesirable chilling effect on speech and writing, particularly if the material was critical of government policy.” (NZLC 96. At para 160)

150. It was concluded that Sedition law in New Zealand flowed from words not actions. (NZLC R96 at para 5). It is submitted that this is true of India’s current law.

151. The NZLC emphasized ‘the ancient and unsatisfactory history’ of sedition, government having employed it to silence any political dissent, as a “political muzzle”. Sedition was misused, inappropriately being employed in New Zealand in times of political unrest and perceived threats to established authority. (NZLC R96 at para 4). It is submitted that this is the situation in India currently.

152. Recommending the repeal of the seditious offences, the NZLC showed that inciting offences of public disorder and revolt against lawful authority were already sufficiently provided for by other offences. This was strongly emphasized that sedition was an inappropriate and undesirable tool to deal with terrorism and 'unnecessarily duplicated' other criminal offences. It is submitted that the same reasoning would apply in India.

153. The NZLC noted that in a free and democratic society, defaming the government is the right of every citizen. (NZLR 96 at page 6). Importantly this would apply in India.

**REPEAL IN GHANA**

154. In 2001, Ghana's parliament unanimously repealed sedition laws, passing the Criminal Code (Repeal of the Criminal and Seditious Laws)(Amendment) Act 2001. The memorandum issued by Ghanaian Attorney-General and Minister for Justice explained that sedition laws were "meant to be weapons in the armory of British imperialism in its attempt to stifle and suppress the growth of Ghanaian nationalism". This memorandum will be

made available and referred to by the Petitioners at the time of argument.

155. The memorandum explains that these laws, having been on the statute books since colonial times, had fallen largely into disuse, until recently when they had been systematically employed to harass and prosecute journalists. Repealing the laws, it was pointed out that laws are "unworthy of a society seeking to develop on democratic principles, on the basis of transparency and accountability in public life."

**REPEAL IN UGANDA**

156. In 2010 the Ugandan Constitutional Court declared the offence of sedition unconstitutional. (Andrew Mujuni Mwenda & Anor v Attorney General (Consolidated Constitutional Petitions No.12 of 2005 & No.3 of 2006) [2010] UGCC 5 (25 August 2010). This case will be made available and referred to by the Petitioners at the time of argument.

157. The sedition sections of the Penal Code were held to unduly restrict the constitutional right to freedom of expression. The state failed to discharge the onus of proving that this was

justified on the basis of the public interest, and more specifically, national security.

158. The sections were also challenged on the basis of vagueness; accepting the submission that the law is vague and discretionally, the court held that a person may not be able to know whether an utterance may attract prosecution or not. The court held that “the section does not define what sedition is. It is so wide and it catches everybody to the extent that it incriminates a person in the enjoyment of one’s right of expression of thought…We find that, the way impugned sections were worded have an endless catchment area”. (Andrew Mujuni Mwenda & Anor v Attorney General at pp 23).

159. The Constitutional Court noted of the history of sedition, originating from England and Colonial rule; the section presumed wisdom of a ruler and mistakes of that ruler were not to be pointed out openly. The colonialists did not want to be criticized. This was contrasted with democracy, it was held that, In Uganda where the President is elected and not born, the actions of the President and activities of the State, administration and justice offices must undergo criticism of the citizens. It was held that a

leader should not cease to tolerate those who elect him, only because they have been elected. (Andrew Mujuni Mwenda & Anor v Attorney General.. at pp 11)

## REPEAL IN NIGERIA

160. In 1983 the Federal Court of Nigeria found that sedition laws were unconstitutional. Acquitting the appellant in the instant case, the Court went on to discuss the validity of the sedition laws in light of the 1979 Constitution. (Chief Arthur Nwankwo v. The State , 27 July 1983 (Federal Court of Appeal, Enugu, Nigeria)) This case will be made available and will be referred to by the Petitioners at the time of argument.

161. The court emphasized that sedition was a colonial law, inconsistent with modern democracy. Chief Justice Belgore commented that the “whole idea of sedition is the protection of the person of the sovereign.’ Contrastingly, ‘the present President is a politician and was elected after canvassing for universal votes of the electorate.” (Chief Arthur Nwankwo v. The State at p.237).

162. In concurrence, Justice Olatawura went on to declare the law of sedition inconsistent with the 1979 Constitution. He

commented that “we are no longer the illiterates or the mob society our colonial masters had in mind when the law was promulgated ...Criticism is indispensable in a free society.” (Chief Arthur Nwankwo v. The State at p.237).

## AUSTRALIA, CANADA & IRELAND

163. The Law reform commissions in Australia, Canada and Ireland have recommended the abolition of existing sedition offences on the basis that they were;

a) unnecessary in light of more modern criminal offences, such as incitement and other public order offences;

b) undesirable in light of their political nature and history; and

c) inappropriate in modern liberal democracies, where it is accepted that it is a fundamental right of citizens to criticise and challenge government structures and processes.

164. The Irish Law Reform Commission emphasised that seditious libel had “an unsavoury history of suppression of Government criticism and has been used as a political muzzle.”

(The Law Reform Commission, Ireland; *Report on the crime of libel*; (LRC 41–1991) At p. 9). A copy of this report will be made available and will be referred to by the Petitioners at the time of argument.

165. Questioning its constitutionality, it was concluded that the offence was unnecessary, as the subject of the offence is now punishable in accordance with provisions of Irish legislation. (LRC 41–1991 at p.165).

166. The Law Reform Commission of Canada concluded that the offences of sedition should be repealed on the basis that they were out-dated and unprincipled. The commission emphasised the role of freedom of expression in democracy. (Law Reform Commission of Canada *Crimes Against the State* (Working Paper 49, Ottawa, 1986) at p. 35.).

167. The Commission emphasized that material conduct of seditious offences were already covered by incitement to commit public order type offences. On this basis the commission recommended that the crime of sedition be repealed.

168. Recommending repeal, The Australian Law Reform Commission said that "sedition is a quintessentially 'political' crime". The Commission highlighted that prosecutions in Australia in the 20th century revealed cases in which the law of sedition has been used to stifle political dissent in a manner that many would consider **"**incompatible with modern democratic processes*".* (ALRC, 2006, *Fighting Words*, A Review of Sedition Laws in Australia, Report 104, Para [2.7]) This report will be referred to by the Petitioners at the time of argument.

169. It is submitted that the trend in the democratic world, to repeal sedition laws, should bear on this court's mind as a prevailing circumstance of the time, in consideration of this petition.

## 'POLITICAL NATURE' OF SEDITION IN INDIA

170. In India, section 124A can be condemned for the same vices as sedition law in comparative jurisdiction; vagueness and uncertainty as well as being unnecessary. Similarly to in other jurisdictions, in India the 'political nature,' of sedition is something well established, both in the colonial period and today.

171. The offence of sedition in colonial India was much broader. The British colonial power needed to protect itself from expressions of contempt, hatred or discontent; and liberally employed sedition to silent any dissent and suppress India Nationalist sentiments.

172. A famous case was that of *Queen-Empress* v. *Bal Gangadhar Tilak* (I.L.R. (1898) 22 Bom. 112). Mr Tilak, a famous figure in India's struggle for freedom, was arrested for sedition for his nationalist writings. In Talik's case sedition was very broadly defined by the court, leading to his conviction.

173. The colonial government then utilised a broad interpretation throughout the years to suppress nationalist sentiments. It is apt to recall what Mahatma Gandhi said during the famous Ahmedabad trial in 1922;

> "Section 124 A under which I am happily charged is perhaps the prince among the political sections of the IPC designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by the

law... What in law is a deliberate crime appears to me to be the highest duty of a citizen."

174. Despite the post-independence reading down of the section, it is undeniable that Section 124A retains this 'political' association; many recent cases highlight the frequent phenomenon of activists being arrested and charged with sedition.

175. It is submitted that this 'political history' should bear on this court's mind in consideration of this petition.

**CONSTITUENT ASSEMBLY DEBATES**

176. It is further stated that a careful observation of the Constituent Assembly debars show that there had been a serious opposition for inclusion of sedition as a restriction on freedom of speech and expression under the then Article 13 of the Indian Constitution. Such a provision was termed as a shadow of colonial times that should not see the light of the day in free India. The Constituent Assembly was unanimous in having the word 'sedition' deleted from Article 13 of the draft Constitution. While speaking on the issue, Mr. Ayyangar opined:

> "If we find that the government for the time being has a knack of entrenching itself, however bad its administration might be it must be the fundamental right of every citizen in the country to overthrow that government without violence, by persuading people, by exposing its faults in the administration, its method of working and so on. The word 'sedition' has been obnoxious in the previous regime. We had therefore approved of the amendment that the word 'sedition' ought to be removed, except in cases where the entire state itself is sought to be overthrown or undermined by force or otherwise, leading to public disorder, but any attack on the government itself ought not to be made an offence under the law. We have gained that freedom and we have ensured that no government could possibly entrench itself, unless the speeches lead to an overthrow of the State altogether."

177. Mr. K. M. Munshi, while speaking on his motion to delete the word 'sedition' from Article 13, quoted the following words of the then Chief Justice of India, in Niharendu Dutt Majumdar v. King wherein a distinction was made between "what 'sedition' meant when the Indian Penal Code was enacted and 'Sedition' as understood in 1942":

> "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 that is their intention or tendency."

178. As a result of the vehement opposition in the Constituent assembly, the word 'sedition' does not find mention in Article 19 (2) of the Constitution of India, 1950.

179. In light of the above circumstances the Petitioners are filing the present Writ Petition on the following amoungst other grounds:

## GROUNDS

A. Because Section 124-A violates Article 19(1)(a) of the Indian Constitution, the fundamental, Constitutional and democratic right to freedom of speech and expression,

which is the 'cornerstone' and the *sine quo non* of democracy;

B. Because Section 124-A is unnecessary to protect the interests of state security and public disorder, and is duplicated by more recent legislation which directly and sufficiently prevents and deals with the mischief of public disorder and public violence;

C. Because there exists no urgency justifying the employment of Section 124-A, given that the interests of state security and the public order are sufficiently protected elsewhere in Indian law;

D. Because Section 124-A is a disproportionate imposition on the freedom of expression, and fails to constitute the least restrictive means to protect state security and public disorder in this regard;

E. Because Section 124-A fails to meet the international standard of 'necessity' which India is under the obligation meet as a party to the ICCPR;

F. Because Section 124-A fails to meet the international standard of ‘legality’ which India is under the obligation meet as a party to the ICCPR;

G. Because the terms ‘intention’ and ‘tendency’ in the interpretation of Section 124-A are so subjective that the law is uncertain and unascertainable and are an invitation to abuse by authorities;

H. Because the vagueness of Section 124-A exerts an unacceptable chilling effect on the democratic freedoms of individuals who cannot enjoy there legitimate democratic rights and freedoms for fear of life imprisonment;

I. Because Section 124-A is frequently abused and misapplied in India;

J. Because India calls itself a ‘democracy’, and throughout the democratic world; in the United Kingdom, Ireland, Australia, Canada, Ghana, Nigeria and Uganda, the offence of sedition has been condemned as undemocratic, undesirable and unnecessary;

K. Because Section 124-A unreasonably restricts Article 19(1)(a) of the Indian Constitution and Article 19(2) of the ICCPR;

180. The Petitioners crave leave of this Hon'ble Court to add, alter or amend any of the above grounds and to file additional affidavits at a later stage if so advised.

181. It is submitted that the Petitioners have filed no other petition of a similar nature in this Hon'ble Court or any High Court.

**PRAYER**

182. In the abovementioned facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased to:

a) Issue a writ of mandamus or any other appropriate writ, order or direction declaring section 124-A of the Indian Penal Code 1860 to be unconstitutional and void.

b) And to pass such other order/s as this Hon'ble Court may deem fit.

AND FOR THIS ACT OF KINDNESS, THE PETITIONERS AS IN DUTY BOUND SHALL EVER BE GRATEFUL

Drawn by: Siddharth Seem

Filed on: 21.2.2021 Filed by:

TANIMA KISHORE

Advocate for the Petitioners