The law of sedition is unconstitutional

An urgent review of the Kedar Nath judgment is necessary as 'sedition' violates the basic right of speech and expression

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In Vinod Dua's case (2021), the Supreme Court of India has reaffirmed the law of sedition laid down in *Kedar Nath Singh* (1962) and directed governments to adhere to it. This reaffirmation seems to be a little problematic. The *Kedar Nath* judgment upheld the constitutional validity of sedition as defined in Section 124A of the Indian Penal Code. And the Court read down the provision by holding that only writings or speeches which incite people to violence against the Government will come within the mischief of sedition. So, as per this judgment, unless speeches or writings tend to cause violence or disorder, there is no sedition.

Issue of 'disaffection'

Section 124A of the IPC, which contains the law of sedition, categorises four sources of seditious acts. They are, spoken words, written words, signs or visible representations. The gist of the offence is: bringing or attempting to bring the government into contempt or hatred, or exciting or attempting to excite disaffection towards the government. There are three explanations attached to this section. The first explanation says that 'disaffection' includes disloyalty and all feelings of enmity. The second and third explanations say that one can comment on the measures of the government or other actions of the government without bringing or attempting to bring it into contempt or hatred or exciting or attempting to excite disaffection towards the government. These explanations do not convey anything different from what the defining section says.

Here is an illustration. If a person writes that the Government is very good but the vaccine policy is bad, perhaps he may not attract the charge of sedition as per the explanations. But he should invariably state that the government is very good. If he only says that the policies and actions of the government are consistently bad and does not say that the government is very good, he is liable to be charged with sedition. The recent examples of sedition cases amply prove this point.

The Supreme Court's assertion in *Kedar Nath* that there is sedition only when writing or speech can lead to violence or disorder has consistently been ignored by governments all these years, and citizens of all ages have been charged with sedition for merely criticising the authorities. The Lakshadweep case is the latest example.

The problem actually lies in the fact that the law of sedition was not struck down by the Supreme Court in 1962 as unconstitutional. There was every justification for doing that because sedition, as defined in Section 124A of the IPC, clearly violates Article 19(1)(a) of the Constitution which confers the Fundamental Right of freedom of speech and expression, the most valuable right of free citizens of a free country.

Not a reasonable restriction

Further, this section does not get protection under Article 19(2) on the ground of reasonable restriction. It may be mentioned in this context that sedition as a reasonable restriction, though included in the draft Article 19 was deleted when that Article was finally adopted by the Constituent Assembly. It clearly shows that the Constitution makers did not consider sedition as a reasonable restriction. However, the Supreme Court was not swayed by the decision of the Constituent Assembly.

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It took advantage of the words 'in the interest ... of public order' used in Article 19(2) and held that the offence of sedition arises when seditious utterances can lead to disorder or violence. This act of reading down Section 124A brought it clearly under Article 19 (2) and saved the law of sedition. Otherwise, sedition would have had to be struck down as unconstitutional. Thus, it continues to remain on the statute book and citizens continue to go to jail not because their writings led to any disorder but because they made critical comments against the authorities.

A few ironies

A great irony here is that the law of sedition, which should have gone out of the Statute Book when the Constitution of India came into force, was softened through interpretation and made constitutionally valid by the Supreme Court. This law was enacted by the British colonial government in 1870 with the sole object of suppressing all voices of Indians critical of the government. James Stephen, the author of the Bill, had clarified then that not only critical comments but even a seditious disposition of a person will attract this penal law. It was the policeman who would decide whether a person's disposition was seditious.

The history of this most draconian law during colonial rule would reveal that the basic propositions laid down by Stephen have been followed by courts in all cases on sedition before Independence. In the Bangobasi case in 1891, Bal Gangadhar Tilak's case in 1897 and 1908 and Mahatma Gandhi's case in 1922, the High Courts, and ultimately the judicial committee of the Privy Council, consistently held that incitement to violence or rebellion is not a necessary part of sedition under Section 124A of the IPC and a mere comment which the authorities think has the potential to cause disaffection towards the government is seditious and the person can be arrested and put on trial. Justice Arthur Strachey, while stating the law of sedition before the jury in Tilak's case, had made it absolutely clear that even attempts to cause disaffection would attract the provision, meaning thereby that rebellion, disorder or violence are not an ingredient of sedition. This statement of law by Justice Strachey was approved by the Privy Council.

The Supreme Court, while dealing with *Kedar Nath*, faced a tricky situation. On the one hand, there was the overwhelming judicial opinion saying that in order to attract sedition, a critical comment which causes disaffection towards the government or bring the government into hatred or contempt, is all that is necessary. If this opinion were followed by the Supreme Court, sedition in the IPC would have become unconstitutional. But the top court, for some unexplained reason, did not want to hold it unconstitutional. So, it adopted the reasoning given by the Federal Court in *Niharendu Dutta Majumdar vs Emperor* in 1942 in which it was held that the gist of the offence of sedition is public disorder or a reasonable apprehension of public disorder. In fact the Privy Council's statement of law of sedition had clearly held that public disorder was not an ingredient of sedition. The Supreme Court itself admits that the Federal Court did not have the advantage of seeing the Privy Council's statement of law, otherwise it would have affirmed the Privy Council's view.

Here we cannot miss the irony that the Supreme Court's attempt to read down Section 124A, to soften it and make its application conditional on public disorder, has made this colonial law constitutionally valid which otherwise it is not. On the other hand, if the judicial opinion on sedition given during the colonial period had been accepted, it would have been held unconstitutional and free India's citizens would not have been thrown into jails for criticising the governments.

Impacting rights

In the ultimate analysis, the judgment in *Kedar Nath* which read down Section 124A and held that without incitement to violence or rebellion there is no sedition, has not closed the door on misuse of this law. It says that 'only when the words written or spoken etc. which have the pernicious tendency or intention of creating public disorder' the law steps in. So if a policeman thinks that a cartoon has the pernicious tendency to create public disorder, he will arrest that cartoonist. It is the personal opinion of the policeman that counts. The Kedar Nath judgment makes it possible for the law enforcement machinery to easily take away the fundamental right of citizens.

In a democracy, people have the inalienable right to change the government they do not like. People will display disaffection towards a government which has failed them. The law of sedition which penalises them for hating a government which does not serve them cannot exist because it violates Article 19(1)(a) and is not protected by Article 19(2). Therefore, an urgent review of the Kedar Nath judgement by a larger Bench has become necessary.

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