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WHY SEDITION LAW HAS LOST MEANING

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

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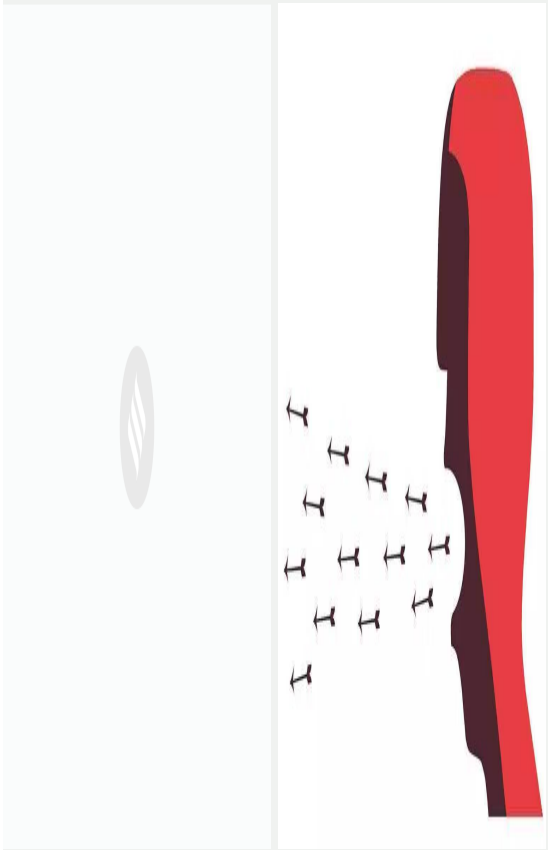

In a recent lecture, Justice Deepak Gupta, a sitting judge of the Supreme Court, noted how the provision in the Indian Penal Code providing for punishment for seditious speech is misused often than not. Justice Gupta wondered whether the time is ripe to have a relook at the law.

Article 19(1)(a) of the Constitution guarantees freedom of speech and expression, subject only to Article 19(2) which saves any law that imposes “reasonable restrictions” on the limited grounds of interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation etc.

Section 124A of the IPC defines sedition and makes every speech or expression that “brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India” a criminal offence punishable with a maximum sentence of life imprisonment. It is classified as “cognisable” — the investigation process (including the powers to arrest) can be triggered merely by filing an FIR, without a judicial authority having to take cognisance — and “non-bailable” — the accused cannot get bail as a matter of right, but is subject to the discretion of the sessions judge.

The illiberal sting in Section 124A is somewhat taken away by an explanation to the provision

that clarifies that mere “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,” and a long line of judicial decisions, including the five-judge constitutional bench decision of the Supreme Court in Kedarnath v. State of Bihar (1962). The apex court in Kedarnath read down Section 124A to mean that only those expressions that either intend to or have the tendency of causing violence are punishable under Section 124A. The Court reiterated the Kedarnath law in 2016 in Common Cause v. Union of India, directing all authorities to scrupulously follow the Kedarnath dictum. The SC has, however, not had a chance to reopen the issue of constitutionality of Section 124A since 1962.

The court in Kedarnath (1962) did not have the benefit of the jurisprudence of fundamental rights that was established by the 11-judge bench decision in R C Cooper v. Union of India (1969) and later, reaffirmed in Indira Gandhi v. Raj Narain (1975), Maneka Gandhi v. Union of India (1978), I.R. Coelho v. State of Tamil Nadu (2007) and, more recently in Puttaswamy v. Union of India (2017). Each of these decisions now establish that fundamental rights in the Constitution are not to be read as isolated silos or as water-tight compartments, but are to be read as if the content of each fundamental right animates the other. They tell us that the entire chapter on fundamental rights has also to be read “synoptically” (see Indira Gandhi & I R Coelho). The court in Kedarnath merely tested the intent of the provision whether being covered under the exceptions to the freedom of speech under Article 19(2) of the Constitution; it did not, for instance, take into consideration the effect of the right to equality (Article 14) or due process (Article 21).

The conjoint reading of Articles 14, 19 and 21 (from Maneka Gandhi), has now evolved the jurisprudence of testing legislation curtailing fundamental rights on the anvil of substantive and procedural reasonableness, necessity and proportionality. The requirement of “necessity” in part comes from India having ratified in the International Covenant of Civil and Political Rights in 1976, which in its Article 19 requires speech-limiting state action to be backed by a law and to be necessary on the grounds of respect for rights and reputations of others, national security etc. Even otherwise, the court in 1962 was not, and could not, have been alive to the consideration of international law and international conventions in interpreting India’s fundamental rights — a practice established only since Jolly Varghese v. Bank of Cochin (1980).

All these developments have now led to us understanding “necessity” in the context of state action limiting fundamental freedoms as the burden being on the state to establish that such a limiting measure is “necessary in a democratic society” (Modern Dental College v. State of Madhya Pradesh, 2016). A rough idea of “proportionality” has informed the understanding of “reasonableness” of restrictions in Article 19 since Chintaman Rao v. State of M.P (1951). However, the understanding of necessity and proportionality under the Constitution to mean the burden being on the state to show that the rights-limiting measure to be the least restrictive of all available alternatives is of recent vintage (2J in Union of India v. Ganayutham, 1997 and more recently, Modern Dental, 2016).

The Kedarnath court in 1962 also did not examine the provision for “chilling effect” on speech it causes — that is, probability of state action causing psychological barriers in the free exercise of the right to free speech. The doctrine of chilling effect gets established even in the US only in 1967, starting with Justice Brennan’s dissenting opinion in Walker v. Birmingham. Indian judgments didn’t use that expression until late 1980s.

The court in Kedarnath also could not have examined Section 124A shedding the presumption as to its constitutionality. It is only as recently as in 2018 (Navtej Johar v. Union of India), that the court found that pre-constitutional legislations have no legal presumption of constitutionality. Incidentally, that was the case in which the court re-examined the constitutionality of Section 377 of the Indian Penal Code, which, among other things, criminalised consensual same-sex acts,

despite an earlier judgment having examined and upheld the provision.

If there is a challenge to the provision today, the court will have to keep in mind all of these developments! The court may also need to examine the classification of the offence of sedition as cognisable and non-bailable and whether that aggravates the chilling effect.

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