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To,
The Committee for Criminal Reforms
National Law University Delhi
Sector 14, Dwarka, New Delhi – 110078,
India

Dear Committee Members,

Subject – SFLC.in's submissions to the Criminal Reforms Committee

Greetings from SFLC.in,!

SFLC.IN is the first Indian legal services organization that works exclusively on technology, law,and policy. As a not-for-profit organization engaged in the empowerment of Indian citizens abouttheir digital freedom and rights, it operates as a collective bringing together different stakeholders toa common platform to further the cause of digital rights. SFLC.in promotes innovation and openaccess to knowledge by helping policy makers make informed and just decisions regarding the useand adoption of technology. As of 2020 SFLC.in is the only Indian organization to be inducted as amember of the IFEX, a global network to defend the right to freedom of expression and information.

We are writing this to you in the light of the open submissions for the Criminal reforms committee. We would like to submit our comments to the committee on two issues impacting the Right to Freedom of speech and Expression -

1. Sedition, Section, 124A of the Indian Penal Code
2. Criminal Defmation, Section 499 and 500 of the Indian Penal Code

Please find our submissions herein:

SECTION A

1. Sedition – Section 124-A of the Indian Penal Code

Does the offence of sedition under Section 124-A of the Indian Penal Code require deletion, omission or any amendment in terms of its definition, scope of cognizability?

Introduction:

The purpose for which offences such as sedition were introduced into the criminal justice systems of the world decades back are no longer relevant with democratic systems of government... The roots of this offense, when absolute monarchies and despotic reigns were the ideal form for the governance of the people, lay in preventing any forms of rebellion against a monarch's rule- which was seen as God's wishes ordained on Earth. Therefore, punishments were introduced to prevent any speeches in any forms which would question "God's appointed representative on Earth". However, with the erosion of despotic rules of whatever form after the Second World War, the onset of the *Age of Reason* and the increased inclinations towards democratic societies, the purposes of such laws changed. The intent behind charges, like that of sedition, was to prevent any form of rhetoric which could incite a violent overthrow of a democratically elected Government.

The ideal sedition law seems to serve a noble purpose- to protect the most vital form of expression of the *demos*- that which they express through a fair electoral process. However, misuse of the provision and its misinterpretation over time has had devastating implications to the point where the very purpose of provisions related to sedition are seen as autocratic and dictatorial and the provision itself is seen as an affront to rights which has no place in a society that considers free speech as a fundamental right.

Primarily, responsibility for such a gross deviation from the original *noble* intent of the provision must be borne by Governments. Their misuse of the provision, by blurring the line between speeches which incite hatred towards a Government and speeches which lawfully dissent against their policies, has lead to such a unimaginable degree of violation of fundamental rights that Courts around the world have had to introduce different tests over time (such as the *hostile audience test, fighting words test)* to prevent said usurpation of the provision in different ways. After several years of evolving interpretations, most Parliaments have finally had to reintroduce provisions relating to sedition which put absolute legislative restraints on the Government rather than having to rely on judicial activism to prevent them from censoring lawful protests against them.

The vestiges of British rule in India can be found significantly in its judicial system, most of it having been designed by the colonial rulers. The offence of sedition in the Indian Penal Code is an undesirable inheritances of the criminal justice system introduced by the British.

Britain is one of the societies which has reformed its interpretation of sedition to a legislation which respects the democratic right to dissent. India, however, is yet to evolve its legislation of the offense.

The provision concerning sedition under Section 124A of the Indian Penal Code reads 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 exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*
>
> *Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."*

SFLC.IN's submits suggestions to amend the law of sedition in India so that it may align with the fundamental rights guaranteed to the citizens of India by the Constitution of India and prevent any misuse and align with Fundamental Right enshrined under Article 19 of the Constitution of India.

History of Sedition Law and Case Laws in India:

Sedition was included in the first Penal Code of India designed by Lord Macaulay. It was introduced as Section 124A through a Special Act in 1870. Subsequently, the Act was used by the British to quash any attempts at a movement for the freedom of India. It was largely used in pre-independent India against freedom fighters opposing the British despotism.

At the time when sedition was enacted in British India before the Constitution of India came into being, the purpose of the law was to stomp on dissent. The Law in British India aimed at punishing 'Bad feelings' about the British Government in the Indian landscape, on the other hand the law in Britain was aimed at punishing serious incitements to violence. An act of seditious libel in Britain was punishable with a maximum of 2 years of imprisonment and the same act in British India meant

transportation to an overseas prison for life. Sedition has been a provision that has been used by authoritarian regimes to stifle dissent since times immemorial.

Before the introduction of the Constitution of India (Amendment) Bill, 1951, Courts could provide a literal interpretation of Section 124A, reading it with Articles 19(1)(a) and 19(2) and extend protections of freedom of speech of the accused anyway in cases such as *Romesh Thapar v. State of Madras*[i], *1950 AIR 124*. However, with the introduction of the 1st amendment in 1951, public order was made a reasonable restriction to freedom of speech and with *Kedar Nath Singh v. State of Bihar*[ii], public disorder was recognised as a standard ingredient of Section 124A of the IPC. All subsequent judgements reltaing to sedition have, since then, been based on the guidelines laid down by the Kedar Nath case.

Subsequently, several cases such as the one against Amnesty International for holding an event to seek justice for the victims of human rights violations in Kashmir[iii] where the case was ordered closed by the Court, *Javed Habib v. The State* (NCT of Delhi)[iv] in which the Delhi High Court held that speeches which advocate for the replacement of one Government by another and which are not polite in its criticism does not attract penalties under Section 124A of the Indian Penal Code, are examples of repeated attempts by the Courts to ensure that Government's powers under Section 124A do not transgress the fundamental rights of the citizens. The Court in *V.A. Pugalenthi v. State*[v] was categorical in holding that the Government should not take action against dissent which is lawful and forms of dissent which do not cause law and order situations.

Sedition in Different Jurisdictions:

Several jurisdictions have either modified their laws relating to sedition or have altogether repealed them. The United Kingdom, for example, have repealed offences of sedition and seditious libel stating that these offences simply limit political debate. In fact, it has been recognised that the law in this regard is 'an arcane offence' of a 'bygone era' and, if allowed to prevail, is likely to lead to suppression of political debate in the society.[vi]

The First Amendment of the American Constitution prohibits any restriction on the freedom of speech which is enshrined in their Constitution by the Legislature. Despite that, their Supreme Court, recognising that some speeches may incite violence or advocate overthrow of a democratically elected Government, have introduced various tests such as *the present danger test*, *fighting words test and reasonable listeners' tests*. While these tests serve the function of determining whether a particular speech was worthy of restriction- and mostly govern procedural aspects of adjudication of free speech cases, the country remains largely free of any broadly applicable legislative restrictions such as that of Section 124A of the Indian Penal Code. Australia,

in 2010, has removed the term ‘sedition’ from its penal provisions and punishes acts which urge carrying out violent offences[vii].

Suggestion A : Repeal of Section 124-A of the Indian Penal Code and amendment of Section 95 of the Code of Criminal Procedure, 1973 to accordingly remove references to section 124A - It is suggested that section 124-A be removed completely from the Indian Penal Code. Most modern democracies in the world no longer have sedition as an offence because of the chilling effect it causes on Free speech and expression which is the foundation of the democratic spirit. Moreover, there are other legislations which sufficiently look at punishing offences against the state. Dissent is imperative for the functioning of any democracy, the right to criticize the government freely forms part of the democratic spirit. The law of sedition can often be misused by authoritarian regimes to stifle dissent and break the flow of information needed to help with the functioning of democracies. Sedition is a regressive colonial legacy left to India by the British, It was a law that was enacted to suppress the freedom movement and arrest nationalists. Freedom fighters like Bal Gangadhar Tilak as well as Mahatma Gandhi were charged under this draconian law. The law seeks to eliminate any unpleasant feelings against the state. Repealing a law like sedition means that citizens will be able to express their sentiments and thoughts against the state in a more free manner without fear of repercussions.

K.M Munshi, a member of our constituent assembly said against Sedition: *‘The word sedition has been a word of varying import and has created considerable doubt in the minds of not only the members of this House but of Courts of Law all over the world. Its definition has been very simple and given so far back in 1868. It says, "sedition embraces all those practices whether by word or deed or writing which are calculated to disturb the tranquility of the State and lead ignorant persons to subvert the Government". But in practice it has had a curious fortune. A hundred and fifty years ago in England, in holding a meeting or conducting a procession was considered sedition. Even holding an opinion against, which will bring ill-will towards Government, was considered sedition once. Our notorious Section 124-A of Penal Code was sometimes construed so widely that in a case a criticism of a District Magistrate was urged to be covered by Section 124-A.’*

SUGGESTION B: SENTENCING

Summary- It is suggested that the sentence awarded on conviction under a charge of sedition be reduced in terms of incarceration. The provision as it survives allows for a maximum of imprisonment for life and or imprisonment which may extend to three years. The suggested sentence is that of a maximum of one year.

Punishments for ‘Offences Against the State’ are largely designed to serve the purpose of deterrence- to prove to the population that deliberate acts to violently overthrow a democratically elected Government deserve to be punished. However, there is a severe lack of consistency in the sentencing related to these offences. Particularly for sedition, the Code provides for life imprisonment with fine or a term which may extend up to three years. There is no logical support which can be assigned to this massive gap between the different types of sentences which can be imposed, whatever the degree of the offence.

Section 13 of the UAPA punishes similar actions, except under that provision, speeches which incite disaffection towards India instead of the Government, imposes a maximum punishment of seven years. It does not require a significant argument to prove that speeches against the sovereignty and integrity of India or which incite disaffection towards India, logically, should be subjected to harsher punishments than the punishment imposed for arousing contempt, disaffection or hatred towards a Government. Drawing from the same, it is contrary to reason to award a higher degree of sentence under Section 124A of the IPC rather than Section 13 of the UAPA.

The rampant misuse of the provision has already had a deterrent effect on the citizens in exercising their freedom of speech and expression. Unreasonable penal provisions actualise the injustice of the provision in its current status.

It is therefore humbly suggested that the punishment for Sedition under Section 124A of the IPC be reduced significantly to a maximum of one year.

SUGGESTION C: PROVISION CONCERNING BAIL

Summary: Section 124A is a non-bailable offence. It is humbly suggested that judicial discretion be allowed in matters relating to bail under Section 124A.

The purpose of bail in any criminal justice system is to secure the presence of the accused at the time of trial. Another purpose of bail is to ensure that the accused, who might pose as a threat to the public, is removed temporarily from amongst them until his/her guilt is determined.

In cases relating to sedition, we believe that classifying the offence as a non-bailable offence is a gross overreach of the criminal justice system. The offence of sedition relates to a speech which has already been made of literary work which has already been published. If the need is felt to restrain the accused from engaging in further such discourse while the matter remains sub-judice, instructions regarding the same can be issued. If there is a lapse on this order of the Court by the accused, the same can be redressed by arresting him/her again for contempt of Court. It has the potential to become an instrument for silencing dissent. The accused, on the other hand, without being able to avail the recourse of bail, lose their liberties for the period becomes separate them from the public. Categorising sedition as a non-bailable offence by default, therefore, results in prolonged and unwarranted detention of the accused.

As such it is humbly suggested that Section 124A be categorized as a bailable offence in the interest of the rights of citizens.

SUGGESTION D: SEDITION AS A COGNIZABLE OFFENCE

Summary: Sedition under section 124A was historically a non cognizable offence but through an amendment in 1974, the offence was made a cognizable offence. The suggestion here is that it should be reverted back to being a cognizable offence under the Indian Penal Code.

It is humbly suggested that sedition be re-identified in the Indian Penal Code as a cognizable offense. Once again, where the penal provisions may be misused to exercise aggression against the citizens' rights, it is important to guarantee protection against such provisions. Requiring arrests without warrant for a crime such as sedition provides extraordinary powers in the hands of the State which has already been vested with great powers under Section 124A. Requiring a warrant before the arrest of an accused would align with the principles of a fair criminal justice system that circumventing Courts in curbing rights of citizens by arbitrary arrests should only be invoked where the accused poses a grave threat to the safety and well-being of members of the society in terms of their life and property (such as someone accused of murder). An over-zealous dissenters is highly unlikely to threaten the lives of citizens as much as a murder escaping arrest. As such, the punishment and procedure must equate the alleged crime. In keeping with the same, we humbly submit that the crime of sedition be recognized as a cognizable offense requiring a warrant before arrest.

SUGGESTION E: SANCTIONS COMMITTEE

Summary: Provisions of Section 196 of the Code of Criminal Procedure require that sanction of the State and the Central Government be obtained before prosecuting an accused under the impugned provision. It is humbly submitted that the same may be amended to allow an independent authority to examine the question of prosecuting an accused under Section 124A of the IPC.

Under Section 196(1)(a) of the Code of Criminal Procedure, for any Chapter VI offence, no Court may take cognizance unless a sanction to do so is obtained from Central or the State Government. Section 196(3) empowers the Central or the State Government to order preliminary investigation by a police officer not below the rank of Inspector before granting such sanction. Sedition, under Section 124A of the Indian Penal Code, being a Chapter VI offence, therefore, would require a sanction by the appropriate Government before a Court may take cognizance of the same.

We believe vesting such a power in the Government does not uphold the principle of fairness given that the prosecution of the accused would be for having expressed dissent against the Government under Section 124A. Although it requires drawing an adverse assumption of the Government, doing so is justified where such an attempt is rooted in defending citizens against potential State aggression. As such, both lawmakers and the law must presume a possible misuse of the provision and make contingencies for the same. An example of the possible misuse of the impugned provision would be the following:

Supposing a citizen, X, makes a speech to a public gathering which is critical of the Government's policies only. Although the speech is not contemptuous of the Government in particular, and does not excite disaffection nor hatred against the Government, it does lead to a civil disobedience movement in protest of the Government's policies- an action which the citizens are fully within their rights to carry out. Anticipating further growth of the movement, the Government sanctions the prosecution of the X after his arrest under the charge of attracting penalty under Section 124A of the IPC.

Because there were powers vested in the Government to decide whether a certain speech was seditious or not without any external review as to whether such power was exercised in good faith and judiciously, the Government's actions, in this imaginative scenario, will have the following negative impact:

The detention and prosecution of a citizen who was well within his rights to criticize the Government's policies even under the provisions of Section 124A. However the Court may rule on X's innocence, the institution and furtherance of legal process against a citizen and the unwarranted burden of a trail is not justified;

A fear of lack of protection from arbitrary exercise of the Government's powers for legally dissenting would be a formative and indoctrinated fear in the minds of the citizens, thereby eroding their faith in their fundamental rights over the years;

Both of these implications will have obvious trickle down effects which will ultimately serve as a severe blow to the fundamental fabric of a democracy.

Section 45 of the Unlawful Activities Prevention Act, 1967, which applies, among other provisions of the Act, to Section 2(o) punishable under Section 13 of the Act, is a similar provision which requires the sanction of the concerned Government. Section 2(o) makes any action taken by an individual or association a punishable offence where such action,

> "*(whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise),—*
>
> *(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India*

from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or

(ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or

(iii) which causes or is intended to cause disaffection against India;"

As a Chapter III offence, Section 13 imposes a sentence of imprisonment of a term which may extend up to seven years and a mandatory fine. Per Section 45(1)(i) of the Act, no Court can take cognizance of the offence unless a sanction from the Central Government is obtained for the same. Section 45(2) of the Act requires obtaining a report from a concerned Authority appointed by the Central Government which shall be required to make an "*independent review of the evidence gathered in the course of investigation and make a recommendation"*. Only upon considering such a report, the Government may grant sanction for the prosecution of an accused under Section 13 of the Act.

Such a mechanism ensures that an independent consideration of the matter can be made before prosecuting an accused.

It is humbly suggested that a mechanism similar to this may be set up for the purposes of reviewing the grant of sanctions for cases pertaining to Section 124A of the IPC.

Why is an independent review system better?

Misuse of State authority to quash democratic and legal dissent has been a growing concern in several democracies, including ours. Therefore, provisions which may vest in the State the authority to silence lawful dissent against the Government cannot be left unprotected from arbitrary use. Left unchecked, not only would such powers allow the State to detain and imprison those exercising their fundamental freedoms under Article 19(1)(a) but would also promote a subconscious fear of the State in the minds of the general public, thereby censoring by fear any lawful dissent. Furthermore, such provisions would also allow the State to silence lawful dissenters by way of temporary detention under the guise of alleged violation of provisions like Section 124A, with no actual intent to prosecuting them after the mandatory period of detention under the Code of Criminal Procedure expires. Apart from the above mentioned reasons, Chapter VI offences are allegations of a grave nature and Section 124A, with which we are currently concerned, carries a life sentence as possible punishment.

Therefore, where the members of the Government themselves may have a vested interest in the prosecution of a citizen and there arises a possibility of misuse of authority, it is important to make sure that the extraordinary powers that they have been gifted with are not misused against the comparatively limited powers of an accused.

An independent review of charges under Section 124A would play the role of the protector of citizens from malafide prosecution by the State.

Committee for Review of Sanction for Prosecution

For the purposes of carrying out an independent review, a Committee for Review of Sanction for Prosecution would be the appropriate forum. Such a committee, ideally chaired by a former member of the judiciary, would play the role of an interlocutor before cognizance of any charge under Section 124A is taken.

Section 196 of the Cr.P.C. does not stipulate any time period within which the Government must grant sanction for prosecution of an accused under the charge discussed above. Considering the sensitivity of the nature of the offence, the impact it has on the society and the fundamental right which hangs in the balance, it is important that a mandate be set out within which a sanction is granted after the registering of the FIR to prevent prolonged detention of an accused.

The setting up of such a Committee would not be unprecedented by any measure. Similar committees have been set up under TADA and POTA.

Structure of the Committee:

Since Section 196 of the Cr.P.C., which applies to Section 124A of the IPC, speaks to the powers of both the Central and the State Government to grant sanctions for prosecution of Chapter VI offences, it is only appropriate that such a Committee be formed at both levels by appropriate notified rules.

To prevent any foreseeable lapses in the unbiased nature that this Committee is envisioned to possess, it is suggested that the tenure of the Chairman of the Committee, who shall be the former member of the judiciary, be limited to a fixed term of one year, upon the expiry of which the Government would be required to appoint another member immediately.

Role of the Committee:

The Committee's role would be similar to the role of 'the Authority' set up under Section 45(2) of the Unlawful Activities (Prevention) Act, 1967- to carry out *"an independent review of the evidence gathered in the course of investigation and make a recommendation"*. Therefore, on the question of whether a sanction is to be granted for the prosecution of an individual accused under Section 124A, the Government would rely on the recommendation of the proposed Committee.

The Committee would be required to consider the evidence placed before it by the investigating officer and review it so as to determine whether the same qualifies for prima facie case against the accused. The Committee may then, for reasons recorded in writing, recommend a course of action to the appropriate Government as to whether to grant a sanction or not within *seven days* of receiving the evidence presented by the investigating officer.

Although discretion must be exercised by the Committee in considering the evidence presented before it, it must consider the following factors before granting a sanction to the Government for the prosecution of the accused:

- Whether the words of the accused have caused a law and order or public order situation?
- Whether prosecution of the accused would have a *chilling effect* on the fundamental right of the Freedom of Speech and Expression?
- Whether the speech of the accused has a direct causal link to the hostility of the audience?

It is suggested that among other questions, the Committee consider inquiring into the answers to these questions based on the evidence presented to it, before recommending the grant of sanction for prosecution. As mentioned above, it is recommended that the Committee record their observations and recommendation in writing.

Based on the above, the Court may take cognizance of a matter under Section 12A of the IPC if sanction for the same is received from the appropriate Government.

Additional suggestions with regard to the Committee and its work are stated below so that legislative surety may be provided in the statute. This would not only prevent legislative ambiguity for the Courts to decide any contested matter but would also act as guidelines for all appropriate authorities/parties in an issue arising out of the Section 124A of the IPC:

Where the Court is of the opinion that the sanction was granted without presenting the evidence before an appropriate authority, the Court shall not take cognizance of the charge under Section 124A of the IPC.

No sanction may be filed at a later date through the appropriate procedure and presented before the Court. At the time of taking cognizance, the Court must be satisfied that the recommendation was sent by the appropriate authority after which the sanction has been granted.

Where the sanction is not obtained from the appropriate authority within the prescribed time, the sanction shall stand vitiated and as such, the Court shall not take cognizance of the charges under Section 124A of the IPC against the accused.

Where the Committee has recommended that the sanction must not be granted in a particular matter, the Government must not grant prosecutorial clearance and as such, no Court may take cognizance for any of the charges under the UAPA.

The purpose of presenting the evidence and information available with the police before the sanctioning authority is to allow it to determine whether a prima facie case exists for the prosecution of an accused under Section 124A of the IPC. Where therefore, the Court is of the opinion that the written order of the sanction has not considered all the evidence presented to it, or where there has been a non-application of mind in considering whether sanction should be granted or not, the Court may decline to take cognizance of the matter.

SUGGESTION F: ACTUAL INCITEMENT OF VIOLENCE

Summary: Under the Law of Sedition, a charge should only be imposed if through seditious speech, there is an actual act of violence that is caused. A mere apprehension of danger is not sufficient to evoke the section. In the case of *Sanskar Marathe v.State of Maharashtra &Ors*[viii]. ., the apex court observed that *'.. disloyalty to Government established by law is not the same thing as commenting in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement to public disorder or the use of violence'*

In another leading case in S. *Rangarajan v. P. Jagjivan Ram*[ix] the Supreme Court of India said that the freedom under Article 19 of the Constitution cannot be restricted without a danger to society and public order. The court said *'The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg"'*

Conclusion:

It is humbly submitted therefore that protection of the rights of the citizens should be the priority of any criminal justice system. Especially in offences which involve critical questions where the fundamental rights of the citizens stand against the authority of the State, special precautions have to be taken to ensure that the rights of the citizens are not, even as a mistake or temporarily, suspended wrongfully.

The mechanism suggested above proposes to balance the interests of the state with the fundamental rights granted to its citizens. Although it is our belief that several provisions in our Penal Code exist to suffice the object of Section 124A of the Indian Penal Code, where the existence of such a provision is deemed unquestionable, additional safeguards must be introduced to protect the rights of the citizens. By allowing a Committee to review the question of whether to recommend that the accused be prosecuted or not within legislative guarantees can be installed so that such a decision may be taken within a stipulated period of time by a non-partisan intervener who can recognize the delicate balance of rights and authority in question. This not only prevents unnecessary harassment of the accused but also ensures insulation from the vested interest that the members of the Government might have in the prosecution of the accused.

SECTION - B

Criminal Defamation

- **Introduction**

The draft of Indian Penal Code drafted in the year 1837 by Thomas Macaulay made defamation to be a criminal offense. This draft prepared by Macaulay made truth as an absolute defense to Criminal defamation which was different than the English Common Law on the subject.1With the enactment of Libel Act, 1843 in England, a revision was suggested by the Indian Law Commission in line with the English law that truth should be an absolute defense only in cases where it is for public good, that provision stands till today. Unlike, the English Common Law, oral defamation was also punishable in India and continues to be so. Again, Unlike Law in Britain at the time, the Indian Law only provided for qualified privilege to advocates and witnesses in court proceedings as compared to absolute privilege.2

It has been suggested by the Indian Supreme Court that qualified privilege should be available for statements made against public officials other than judges.

Taking cue from the Constituent assembly debates where Shri Damodar Sarup commenting upon Freedom of speech and expression and the restrictions around it said. *"While the article (Presently Article 19) guarantees all these freedoms, the guarantee is not to affect the operation of any existing law or prevent the State from making any law in the general interests of the public. Indeed, the guarantee of freedom of speech and expression which has been given in this article, is actually not to affect the operation of any existing law or prevent the State from making any law relating to libel, slander, defamation, sedition and other matters which offend the decency or morality of the State or undermine the authority or foundation of the State. It is therefore clear that the rights guaranteed in the article are cancelled by that very section and placed at the mercy or the high-handedness of the legislature"*3.

- **International Context**

  - **United Kingdom**

Criminal libel was repealed in the UK in 2010, when the Coroners and Justice Act 2009 came into effect and abolished the offenses of sedition and seditious libel, defamatory libel and obscene libel.4

Defamation in the UK is governed by the Defamation Act 2013, 1952 &1996. The suit for defamation may only be filed under civil capacity. The UK does not have any criminal provisions for defamation. Further, the UK has abolished sedition as an offense which is a great step considering the UK still has royalty as the head of the State.

- **Ireland**

Defamation in Ireland is governed by the Defamation Act, 2009 . This act provides solely for **civil suits** against 'tort of defamation' which includes both slander and libel. The distinction between the two has been removed.5

- **Sri Lanka**

Defamation was also a criminal offence in Sri Lanka and provided for a two-year jail term under the Penal Code until 2002, when it was repealed by the government. Sri Lanka is the first and only country in the South Asian region to have done away with the law of criminal defamation.6

- **Zimbabwe**

The crime of criminal defamation was abolished in Zimbabwe after the Constitutional Court found it to be unconstitutional.7

The Court found that the criminalization of speech that carried with it a threat of imprisonment for offenders had a stifling effect on free speech and it was a disproportionate instrument for protecting reputation, especially because there was an alternate civil remedy available. This offence was not one which is reasonably justifiable in a democratic society.8

The provision for Criminal Defamation under Section 499 and 500 under the Indian Penal Code reads -

*'Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such reason , is said, except in the cases hereinafter expected, to defame that person'*9

The exceptions to the said section are10-

1. Imputation of truth which public good requires to be made or published.
2. Public conduct of public servants
3. Conduct of any person touching any public question
4. Publication of reports of proceedings of courts
5. Merits of case decided in court or conduct of witnesses and others concerned
6. Merits of public performance
7. Censure passed in good faith by person having lawful authority over another.
8. Accusation preferred in good faith to authorized person
9. Imputation made in good faith by person for protection of his or other's interests
10. Caution intended for good of person to whom conveyed or for public good.

We suggest that section 499 and section 500 of the Indian penal code, 1860 be repealed for the following reasons-

A) Truth is not an absolute defense to criminal defamation

The defence of 'Truth' is not an absolute defense under Section 499. It is only a partial defence, when it is made for "Public Good".11Any truth which is spoken or written can only be defense if it serves a public purpose. India unfortunately does not have a defence which relies on fair comment which doesn't seek to serve the purpose of social benefit or of establishing moral ground. Establishing whether a comment is socially useful or serves social welfare is a challenge as morality is a subjective question. This poses a threat to free speech even in cases where it is truthful in nature.

B) No fault Liability still exists.

Truth is said to be an absolute defense to defamation in the United States. A landmark judgment in this regard has been *New York Times Co. V. Sullivan* where the Supreme Court of the United States held that there needs to be actual malice to be proved in cases of defamation. The court stated that

*"Actual malice standard may protect inaccurate speech, but that the erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the breathing space that they need to survive."*12Section 499 of the Indian Penal code can be said to lack reason as there is no distinction made between error and malice in speech. It doesn't include that a fair comment made without public good can be a defense. In the case of *R. Rajagopal V. State of Tamil Nadu*, placing reliance on the Sullivan said that in order to hold someone guilty for defamation, there needs to be reckless disregard for truth.13 The court in the given case said that no fault liability causes a chilling effect on free speech, the clause still stays. Relying on the Sullivan case, the court said that in order to hold someone liable for defamation, actual malice needs to be proven as well as blatant disregard for the actual truth. Unfortunately, even after the judgment the concept of no fault liability is still a part of criminal defamation in India.14

C) Verbal defamation is still punishable

In England, Criminal defamation was only considered as an offense when it occurred in writing. The Indian Law commission on the other hand believed that a breach of peace could be conducted as verbal communication as well. The Indian Law commission found that verbal defamation mostly delivered through means of speech could end up causing more wide spread harm than an article could. In 1860, Verbal defamation was made a criminal offense upon recommendation of the Law Commission. It is important to note that Great Britain no longer has the provision of Criminal Defamation. With the influx of digital medium and post the age of industrialization, it is fairly easy to convert oral speeches and comments to written form in form of tweets, messages etc. Verbal defamation is deterrent and ensures that self-censorship occurs.

D) It is not necessary for defamatory sentence to provoke a breach of peace or for it to be serious/non-trivial

During the era where libel was a criminal offense, it had to be established by the prosecution that the accused charged with defamation through his words had the tendency to provoke a breach of peace. In India, till date a breach of peace is not an ingredient for a defamation suit to be successful. A person can be accused of defamation without his words/actions causing no harm and yet he can be convicted of defamation.

In *Queen Empress V. Jogayya*151, it has been held that the -*".....law makes punishable insulting provocation which, under the ordinary circumstances, would cause a breach of the peace to be committed and that the offender is not protected from the consequences of his acts because the person insulted became too terrified to accept the provocation in the manner intended"*.16This was

upheld in the *Karnataka HC case of Bheema Rao v. Venkata Rao*. Wherein the Court further relied on *Division Bench of the Bombay High Court in King Emperor v. Chunibhai Dhyabhai*[1]*"To constitute an offence under Section 504, I.P.C. It is sufficient if the insult is of a kind calculated to cause the other party to lose his temper and say or do something violent. Public peace can be broken by angry words as well is deeds"*. The wording of the section indicates that it is not necessary that the complainant should actually commit either breach of the peace or any other offense.[17]

E)Witness/advocates don't have absolute privilege

At the time when Macaulay drafted the Defamation clause, the clause in England made an exception that any witness or an advocate who made a defamatory sentence during a trial in the course of arguments if made a defamatory sentence were protected by absolute privilege. If the words that they used during the trial were spoken with malice, then also they couldn't be charged with defamation. This provision didn't make it to the Indian Draft and till date, there is only conditional privilege that is given to witnesses and advocates during hearings. A witness or an advocate can be charged with defamation in India unless they show that they acted without malice and in good faith.

In Arun Thakur v. State of Chhattisgarh, The Chhattisgarh HC while deciding a case of criminal defamation against an advocate for what he said in Court held that: *"an advocate, who acted professionally as per instructions of his/her client, cannot be made criminally liable for the offence of defamation under Section 500 IPC unless the contrary is alleged and established."* Finding the petitioner's act to be bona fide, it was said: *"As such, imputation was made in good faith and on the basis of instructions of his client in order to protect her right to property which she is claiming."*[18]

It can be safely assumed that unless it is proved that the client and advocate both were acting in good faith and the advocate was acting under the instructions of the client, the advocate may be held criminally liable for defamation. The fact that the advocate had to make a case and fight to prove his innocence shows the dangers of not allowing for absolute liability under Court proceedings. Advocates and witnesses can be targeted by criminal sanctions for their words spoken in Court during judicial proceedings.

F)Violation of Right to Freedom of Speech and Expression

In the case of *Subramaniam Swamy v. Union of India*, one of the arguments was to bring up "constitutional fraternity". It held that criminal defamation law protected the feeling of fraternity — or solidarity — between members of a society. "Constitutional fraternity" is not a part of the

exceptions stated under Article 19(2) of the Constitution, which specifically list out the exceptions under which Freedom of Speech and expression may be restricted. This restriction is unreasonable and shouldn't look at protecting Criminal defamation.19

According to the Section 199 of CrPC which speaks about the prosecution for defamation, it is clear that the accused can only present their defences at the time of the trial. Till the stage of trial is reached, significant harm is already caused to the accused as they go through the harrowing process of a criminal trial. A magistrate can order a process without going to merits of the case. Such a threat often leads to citizens censoring themselves.20 Punishments can often be imposed even before a hearing can take place. This is especially true taking into account the digital ecosystem as well as the age of social media.

On November 11-18, 2003, the UN's special rapporteur said: *"I strongly believe that defamation should be decriminalized completely and transformed from a criminal to a civil action, considering that any criminal lawsuit, even one which does not foresee a prison sentence, may have an intimidating effect on journalists. Furthermore, criminalizing defamation limits the liberty in which freedom of expression can be exercised."* These points were raised again in 2018 when a group of UN Human Rights Experts criticized Thailand's criminal defamation laws.21

The ECHR *in Dalban v. Romania* acquitted a journalist of criminal defamation charges as it was of the view that sentencing him to imprisonment amounted to disproportionate interference with the exercise of his freedom of expression as a journalist.22

Conclusion

India has dropped two places on a global press freedom index to be ranked 142nd out of 180 countries.235This clearly shows the need to lessen the fear of journalists and increasing their protection than upholding the constitutionality of colonial laws.

The fear of criminal sanctions and the ordeal of going through a lengthy trial based on speech acts as a deterrent and discourages citizens to practice their right to free speech and expression. The spirit of a modern democracy lies in dissent, it is through dissent and criticism that a country improves. Imposing criminal sanctions upon people will deter them from voicing opinions. Most modern democracies have done away with criminal sanctions on free speech, a number of these laws have been enacted as far back as the 19th century. Moralities have changed, mediums have changed, societies concepts of right and wrong have changed, it is now important our laws start to accommodate that.

Moreover, there are provisions already existing in the Indian legal landscape that provide for civil remedies for defamation. Defamation should be restricted to a civil offense, if at all.

End Notes - Criminal Defamation – Section B

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6Sulakshana Senanayake, “Freedom Of Speech And Defamation In Sri Lanka: Where To Draw The Line”, RoarMedia. Available at:https://roar.media/english/life/reports/freedom-of-speech-and-defamation-in-sri-lanka-where-to-draw-the-line.

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8Dr. Munyonzwe Hamalengwa, “Criminal defamation is a relic of colonial totalitarianism, it has no place in modern democracy”, ZambianEye. Available at:https://zambianeye.com/criminal-defamation-is-a-relic-of-colonial-totalitarianism-it-has-no-place-in-modern-democracy/.

9Section 499, Indian Penal Code 1860.

10*Ibid*.

11Section 499, Indian Penal Code 1860.

12New York Times Co. v. Sullivan, 376 U.S. 254.

13R. Rajagopal V. State of Tamil Nadu, 1995 AIR 264.

14Gautam Bhatia, “A Sullivan for the Times: The Madras HC on Freedom of Speech and Criminal Defamation”, Indian Constitutional Law and Philosophy.

15Queen Empress V. Jogayya ILR 10 Mad 353.

16*Ibid*.

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23World Press Freedom Index 2020.

i

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ii AIR 1962 SC 955

iii *Sedition Case Against Amnesty International Closed by Court*, https://amnesty.org.in/news-update/sedition-case-against-amnesty-india-closed-by-court/

iv (2007) 96 DRJ 693

v Crl. O.P. No. 21463 of 2017, decided on 9/11/2017

vi *Sedition in England: The Abolition of a Law from a Bygone Era- Library of Congress*: https://blogs.loc.gov/law/2012/10/sedition-in-england-the-abolition-of-a-law-from-a-bygone-era/#:~:text=The%20laws%20on%20sedition%20were,the%20Human%20Rights%20Act%201998.&text=The%20laws%20prohibited%20any%20acts,were%20made%20with%20seditious%20intent.

vii Sedition Law: A Comparative View of India With Other Countries, http://www.lawjournals.org/download/573/5-6-31-266.pdf

viii 2015 SCC OnLine Bom 587

ix 1989 SCR (2) 204