The Law Commission's Report on Sedition Misunderstands What the Courts Said

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The 22nd Law Commission of India recently submitted its final report ("Usage of the Law of Sedition") on the constitutionality of section 124A of the Indian Penal Code. Law Commission reports exert considerable influence on both the government and the Supreme Court and, given that the provision's constitutionality is pending, it is important to closely read a document that will likely form an important part of any future judgement on the matter.

The report walks the reader through sedition law's history in India, the Law Commission's previous reports that discussed the law, Constituent Assembly debates, and the courts' public-order jurisprudence. After discussing the threats to India's security and the law's "alleged" misuse (the Commission passes the buck onto the police instead of the "political class," as if the police are an autonomous body) and undertaking a wide-ranging comparative survey of sedition law in diverse jurisdictions (the UK, US, Australia, and Canada!), the report concludes with why the law should be retained on the books.

It adds a series of recommendations that ignore the Supreme Court's post-*Kedar Nath* jurisprudence, set out vague procedural guidelines, and increase the punishment for the offence.

I will not examine the report's history of the provision as, beyond establishing the purpose of the provision, it serves no purpose. Highlighting the colonial origins of the provision is only relevant insofar as it displaces any presumption of constitutionality; it has no bearing on the provision's constitutionality itself. Instead, I will restrict myself to its discussion of the court's free speech jurisprudence, as that forms the basis of its proposed substantive amendment, and the absences that mark the text.

Kedar Nath and its discontents

The Law Commission Report begins its discussion of post-Independence free speech jurisprudence with the two verdicts that prompted the First Amendment to the Constitution of India: *Romesh Thappar v State of Madras* and *Brij Bhushan v State of Delhi* (both handed down, incidentally, on the same day).

While neither specifically dealt with sedition and – therefore – could not have struck it down, their narrow reading of what constituted an act of "undermin[ing] the security of, or tend[ing] to overthrow, the state" (as Article 19(2) read then) was an important step towards the Punjab high court in *Tara Singh Gopi Chand v State* striking down Section 124A.

In came the First Amendment.

The new head of "in the interests of public order" replaced "undermining the security of the state." However, as Gautam Bhatia argues, this replacement can be reconciled with the logic of *Tara Singh*, the crux of which is its overbreadth analysis. However, the Patna high court saw things differently – and the Law Commission uncritically reproduces *Debi Soren v State of Bihar*, which found Section 124A constitutional because of the First Amendment and its broader article 19(2) ground.

This is despite the Report also quoting a contradicting piece of evidence – the Statement of Objects and Reasons of the Amendment – which carried the government's worry regarding "[t]he citizen's right to freedom of speech and expression […] [being] held by some courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence" (emphasis mine). Sedition clearly does not fall within the category of offences that comprise murder and "crimes of violence," but the Law Commission makes no note of that.

The Law Commission then proceeds to make clear its confused interpretation of *Kedar Nath Singh v State of Bihar*. The Commission writes, "The Supreme Court [in *Kedar Nath*] took note of the strict test of proximity as laid down in *Ramji Lal Modi* and reinterpreted in *Ram Manohar Lohia*" (para 4.24).

The problem is there is no "strict test of proximity" taken note of in *Kedar Nath* because the work of reinterpretation had been carried out in *Lohia* and there is no mention of *Lohia* in the court's verdict. Indeed, many scholars have criticised *Kedar Nath* precisely because it dispensed with the proximity requirement nascent in Indian public order jurisprudence and adopted the UK–style "tendency" test – and, at that, one without any subtests – rather than the "imminent danger" test of US jurisprudence.

The Law Commission, therefore, seems to be under the impression that *Kedar Nath* is both promoting a strict test of proximity and the tendency test. It wants to eat its cake and have it too.

Post-*Kedar Nath* jurisprudence

The report then goes on to mention several judgements after *Kedar Nath*.

One – *S. Rangarajan v P. Jagjivan Ram* – is of note. Despite quoting the relevant part of the judgement, the Law Commission refuses to acknowledge the rupture the verdict it marks in Indian public order jurisprudence (para 4.28). The judgement says: "The anticipated danger should not be remote, conjectural or far fetched [sic]. It should have proximate and direct nexus with the expression."

The court here is clearly reinterpreting earlier jurisprudence to read a proximity test into the exceptions to the right to free speech. As it goes on to say, "the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'." The Commission's muddled reading of *Kedar Nath*, however, prevents it from seeing the difference between "tendency" and "proximity," the latter of which is closer to the US's "imminent lawless action" test.

The report further neglects to mention two important cases – both in the 2010s.

The first is *Arup Bhuyan v State of Assam*, which imported the "imminent lawless action" test into Indian free speech jurisprudence, driving the famous distinction between advocacy and incitement (while Bhuyan was recently reversed by a larger bench, the reversal was arguably not on this point). While the question of whether this necessarily runs afoul of *Kedar Nath* and is – by virtue of having been rendered by a smaller bench – bad law is important to grapple with, the Law Commission sidesteps it entirely by not mentioning the judgement at all.

The second, more famous judgement is *Shreya Singhal v Union of India*. As Justice Nariman observed: "Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in" (para 13). The Court here again is clearly doing away with the "tendency" test through a process of creative judicial interpretation. Yet, this opinion, too, finds no place in the Law Commission's Report.

Proportionality, or lack thereof

The final absence – oblique references to "balancing" aside – that should be noted is that of the proportionality test. While there is no uniformity in understanding how proportionality analysis should operate in India, the standard proportionality test is four-pronged: the rights-limiting measure's purpose; the relationship between the measure and the limitation on the right (i.e., whether there is a rational connexion); necessity; and balancing or proportionality *stricto sensu*.

As a measure that limits citizens' free speech rights, proportionality should be the primary standard of review any court – in our "age of proportionality" – deploys.

Debates on whether Wednesbury unreasonableness analysis is smuggled in the guise of proportionality or whether the subtests should be more or less deferential to the executive are redundant when proportionality is not even used as a standard of review. The Law

Commission – perhaps befitting the test's lack of teeth in Indian jurisprudence – has not thought it worth mentioning in a document that assesses the constitutionality of a rights-infringing section. But despite how it has been put to use, its attractiveness lies in how it lays bare the court's – and in this case, the Commission's – reasoning behind upholding – or striking down – a particular measure.

There has been much criticism of the court's delayed handwringing over the offence of sedition.

Several commentators have already pointed out that the Unlawful Activities (Prevention) Act 1967 continuing to stay on the books while sedition is struck down for being unconstitutional defeats the point. However, this report gestures towards the enduring reluctance of the state in letting go of a law that serves the purpose of curbing dissent, even though it now possesses newer and shinier tools of repression.

The report – unfortunately – is the outcome of a rather one-sided view of free speech law in India; it misunderstands the most important judicial statement on sedition's constitutionality and pretends there has been no jurisprudential development on the matter since then. Respectfully, it should not form the basis of any reasoned opinion of the court.

Kieran Correia is a law student at Jindal Global Law School.

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