Sedition Law in Pakistan: An Infringement upon the Right to Free Speech

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Authors' Note: We are delighted to learn that Justice Shahid Karim of the Lahore High Court has declared Section 124 of the Pakistan Penal Code, which pertains to sedition, as unconstitutional on the grounds of violating the fundamental rights guaranteed under the Constitution of the Islamic Republic of Pakistan ("Constitution"). It is commendable that this draconian law from the colonial era has finally been deemed illegal. However, it should be noted that the verdict was passed by a single member bench, and is subject to an appeal.

This Article was originally written in 2021 and emphasises on the importance of examining how the law has impacted Pakistani society and its continuing effects on the formation of laws and policies.

Abstract

The sedition laws of Pakistan are a colonial relic often seen as a political tool to crush dissent. This paper analyses the historical development of these laws in Pakistan and performs a cross-jurisdictional analysis of similar laws in other jurisdictions. It examines case law in light of the right to free speech granted under different Pakistani constitutions while discussing current events in relation to sedition laws. Finally, the paper attempts to draw a conclusion regarding whether the country's sedition laws infringe upon the right to freedom of speech granted under Article 19 of the Constitution.

Introduction

This paper will address whether the sedition law, as set out in Section 124-A of the Pakistan Penal Code 1860 ("PPC"), violates the right to freedom of speech under the Constitution.[1] It examines whether Section 124-A aligns with the purpose of

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[1] The Constitution of Islamic Republic of Pakistan 1973, Article 19.

Article 19, if it is a proportionate restriction, and if it meets the reasonable standard set by Article 19. As Section 124-A is part of the PPC, it is indeed a restriction imposed by law. However, it is crucial to address whether and to what extent the sedition law falls under any of the exceptions in Article 19.

Article 19 of the Constitution does not confer an absolute right to freedom of speech, and it is subject to certain reasonable limitations imposed by law, for example, in the interest of the glory of Islam or the integrity, security, or defence of Pakistan. It lays down caveats to the right to free speech which can be broken down into being subject to reasonable restrictions, imposed by law, and falling under the exceptions mentioned above.

Section 124-A of the PPC characterises sedition as a criminal offence under which any speech which "…brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Federal or Provincial Government established by law shall be punished."[2] The severity of this punishment can include imprisonment for life or imprisonment for three years with a fine.

The Colonial Origin of the Sedition Law in Pakistan

It is crucial to first discuss the historical provenance of the sedition law and how it was used to establish colonial control. A bare reading of the law and relevant case law makes it clear that the government has applied and continues to apply sedition laws to maintain public order and retain control. In fact, it was introduced in the Indian Penal Code by colonist Thomas Macauley in 1860 for similar purposes of countering dissent. "Sedition," as described by Fitzgerald, J. in *R. v Sullivan*,[3] was quoted with approval in *Niharendu Dutt Majumdar v King Emperor*:[4]

> [S]edition embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquillity of the State and lead ignorant persons to subvert the Government. The objects of sedition generally are to induce discontent and insurrection, to stir up opposition to the Government

[2] The Pakistan Penal Code 1860, s 124-A.
[3] (1868) 11 Cox. C. C. 54.
[4] AIR 1942 Federal Court 22.

> and to bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion.[5]

The Chief Justice of the Privy Council in a 1947 case on Section 124-A explained, "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."[6]

The Council acknowledged that this rule was extensively broader than the PPC as it involved not just the *actus reus* of committing the offence but also "an act which is intended or likely to bring [or] brings or attempts to bring" public disorder.[7] However, they resolved that "incitement to violence was not a necessary ingredient of the crime of sedition as thereby defined"[8] nor is the intention to incite. Removing the intention and context from words altogether would mean a broad application of Section 124-A with every statement which is critical of, or expressing disaffection towards, the State falling under this category. From the application of the law and jurisprudence over the years, courts decide considering the facts of the specific case whether the words or acts uttered can count as harmless criticism or hatred.

Explanation 3 under Section 124-A explicitly states and attempts to limit the scope of the provision by noting that "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."[9] However, it has been held that explanations have no bearing on the meaning of the statute or the legislature's intent as "these are added to remove any doubt as to the true meaning of the Legislature; they do not add to or subtract from the section itself; and the words used in the rules ought to be interpreted as if they had been explained in the same way."[10]

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[5] Ibid 55.
[6] *Emperor v. Sadashi v Narayan Bhalerao* PLD 1947 Privy Council 32.
[7] Ibid 5.
[8] Ibid 7.
[9] The Pakistan Penal Code 1860, s 124-A.
[10] *Niharendu* (n 4) 50.

More recently in *Ali Raza v. the Federation of Pakistan*, the Islamabad High Court laid down all the requirements for a sedition charge under Section 124-A:

> [(a)] offence must contain promotion of feeling of enmity, hatred or ill-will between different religious or racial or linguistic or regional groups or castes, (b) words, deeds or writing used to disturb the tranquillity of the State or to subvert the Government, (c) incite the people to incursion and rebellion, (d) complaint must be initiated by the Federal or Provincial Government and by authorised person under the law after considering the relevant factors of the alleged incident with reasons, (e) private persons cannot agitate the matter regarding seditions of charge rather it should be initiated, inquired and investigated by the Government or at least on their direction, (f) criminal conspiracy can only be considered if the other principle offence comes on record on the basis of allegations referred in the complaint in each case whereas, is not a sedition, therefore, criminal conspiracy is not available in the instant matter, and (g) authorised officer shall state reason before issuing any sanction in terms of Sections 196 and 196-A, Cr.P.C. with speaking order.[11]

The vague wording of Section 124-A and the lack of strict standards lead to an arbitrary application of sedition charges. It may leave the door open for governments to weaponise it against political opponents or journalists. According to the internationally recognised principle of legality, an offence must be clearly defined in the law to make sure individuals can act accordingly. However, such vague laws "…leave the door open to selective prosecution and interpretation, based on discriminatory policies of government officials and the personal predilections of judges."[12]

However, with decades of history and the frequent use of this law, it is the need of the hour to assess whether sedition laws are in fact necessary to meet the public order objective especially considering its real-world application.

[11] PLD 2017 Isl 64.

[12] Reema Omer, 'Sedition and Its Discontents' *DAWN* (2020) <https://www.dawn.com/news/1532177> accessed 23 June 2021.

I. Purpose

The purpose of the legislature when introducing a law involves a value laden judgement and "not every purpose can justify a limitation on a constitutional right."[13] The purpose of the law and its limitation are both derived from societal values. The purpose of Article 19 is to promote and preserve democratic discourse. It gives people the right to their own speech, their opinion, the right to protest, and the right to dissent. The purpose of the sedition law is to preserve public order and maintain social control. However, in a seminal Lahore High Court case, Justice Syed Mansoor Ali Shah held that the fundamental rights in our Constitution enshrine our democratic values and "the proper purpose behind sub-constitutional legislations is to uphold these constitutional values."[14]

Looking at the real-world application of the sedition law, many instances have occurred where the law is in violation of this constitutional purpose. More recently, former Minister for Information and Broadcasting, Fawad Chaudhry, was arrested in a case of sedition following his comments against the Election Commission of Pakistan ("ECP"). The broad and ambiguous nature of sedition laws can be assessed from the fact that though Chaudhry's comments included calling an ECP official a "clerk" and noted how "somebody from the government calls ECP and passes an order, and ECP commissioner, like a clerk, just signs the order and passes it on," the case filed accused him of inciting violence against the government.[15] The broad nature of these laws makes them highly susceptible to misuse, resulting in the curtailment of the freedom of expression under Article 19 of the Constitution. This potential for misuse makes it crucial to re-evaluate the law to ensure that it aligns with democratic principles and does not violate constitutional rights.

[13] Gehan Gunatilleke, 'Justifying Limitations on the Freedom of Expression'. (Human Rights Review 22), 91–108 (2021) <https://doi.org/10.1007/s12142-020-00608-8>.
[14] *D.G. Khan Cement Company Ltd. through Chief Financial Officer v. Federation of Pakistan through Secretary Ministry of Law* PLD 2013 Lah 693.
[15] Abid Hussain, "Pakistan Arrests Top Leader from Imran Khan's PTI for 'Sedition'." Imran Khan News | Al Jazeera, Al Jazeera, 25 Jan 2023 <https://www.aljazeera.com/news/2023/1/25/pakistan-arrests-top-leader-from-imran-khans-pti-for-sedition> accessed 23 June 2021.

II. Rational Connection Test

The next element in renowned legal academic and jurist Professor Aharon Barak's definition is the "rational connection" test. This requires that the "means used by the limiting law fit (or are rationally connected to) the purpose the limiting law was designed to fulfil. The requirement is that the means used by the limiting law can realise or advance the underlying purpose of that."[16] Accordingly, the means used to apply the sedition law are arrests which are often made without proper criminal procedure being followed – police barging into homes, or journalists being picked up from the street without being told why. The frequency with which the government applies and uses this provision against its critics and opponents, even if they are later acquitted by the courts, results in it acting as an intimidation tactic to silence dissent. Such was the case of politician Javed Hashmi in which a case under Section 124-A was filed against him by private individuals through the local police.[17] The Lahore High Court, reversing the decisions of the lower courts, held, "there is no concept of registration of case under Section 124-A, P.P.C. by the local police…it can only be taken on the complaint instituted by the Federal Government [under Section 196, Cr.P.C]."[18]

III. Necessity

The third element of proportionality for Professor Barak is the "necessity test," by which he means that "the legislator has to choose – of all those means that may advance the purpose of the limiting law – that which would least limit the human right in question."[19] It is safe to say that upholding the natives' fundamental right to free speech was not the intention of the original legislators of Section 124-A. As mentioned earlier, the sedition law is a colonial relic to suppress those who posed a challenge to the British colonial government. Looking back at its history, from the 1920s to the 1940s, hundreds of independent activists who opposed British rule were tried under the sedition law, such as M. K. Gandhi, Maulana Mohammad Ali

[16] *D.G. Khan Cement Company* (n 14) [21].
[17] *Javed Hashmi v. the State* 2010 PCr.LJ 1809.
[18] Ibid [27].
[19] *D.G. Khan Cement Company* (n 14) [24].

Jauhar, Bhagat Singh, and M.N. Roy.[20] M. K. Gandhi once famously said that Section 124A (under which he was charged) is perhaps the "prince among the political Sections of the Indian Penal Code designed to suppress the liberty of a citizen."[21] Being booked under this provision was seen as a badge of honour for these freedom fighters as a way of standing up to their oppressors.

However, post-partition, "…the nation-states of India and Pakistan were confronted with the paradox of acquiring the twin inheritance of anti-colonial politics premised on popular sovereignty and a colonial state apparatus that was geared towards silencing and terrorising the population."[22] This colonial legacy is still part of both nations and is used by those in power to subdue their critics. In 1951, Marxist poet Faiz Ahmed Faiz was charged with sedition and imprisoned for four years by Liaquat Ali for his role in the Rawalpindi Conspiracy.[23] Such authoritarianism can still be witnessed in Pakistan with the example of Manzoor Pashteen and P.T.M. Similarly, in India, people protesting against the C.A.A. and other policies of the Modi government were booked under the sedition provisions.[24] The sedition law very clearly fails the necessity test as the disproportionate means used to achieve its purpose of public order have always been used discriminatorily to suppress the very basic right of free speech under Article 19.

In support of the above, it is crucial to look at comparative international jurisprudence such as the Universal Declaration of Human Rights 1948 ("UDHR") and the Constitution of South Africa. Article 29(2) of the UDHR contains a general limitation clause according to which restrictions are to be determined by law "…solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[25]

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[20] Bansari Kamdar, 'Sedition Laws and Their Post-Colonial Legacy in India and Pakistan' (Thediplomat.com, 2020) <https://thediplomat.com/2020/02/sedition-laws-and-their-post-colonial-legacy-in-india-and-pakistan/&gt> accessed 23 June 2021.
[21] Ibid.
[22] Gunatilleke (n 13).
[23] Estelle Dryland, 'Faiz Ahmed Faiz and The Rawalpindi Conspiracy Case' (1992) Journal of South Asian Literature 27, no. 2, 175–85. http://www.jstor.org/stable/40874124.
[24] Anumeha Yadav, 'How India Uses Colonial-Era Sedition Law Against CAA Protesters' (Aljazeera.com, 2022) <https://www.aljazeera.com/news/2020/1/21/how-india-uses-colonial-era-sedition-law-against-caa-protesters> accessed 23 July 2022.
[25] Universal Declaration of Human Rights, art 29(2).

IV. Proportionality

The principle of proportionality is a long-standing *grundnorm* in law used to decide whether the restrictions imposed on a fundamental right are reasonable and appropriate. The Lahore High Court has laid down numerous tests that need to be followed in light of Professor Barak's definition when "applying the principle of proportionality to balance and weigh the competing interests of an individual and the society, in order to maintain constitutional equilibrium."[26] In another case, Justice Waqar Hassan Mir advised that the "government should therefore strike a just and reasonable balance between the need for ensuring the people's right of freedom of speech and expression on the one hand and the need to impose social control on the business of publication and broadcasting."[27]

In recent judgments on the sedition law in light of Article 19, such as in *Ali Raza v. Federation of Pakistan*, the courts have clearly moved towards taking a more restrictive reading of the section.[28] In *Mst. Tehmina Doltana v. the State*, the following was held:

> [I]t has also been held repeatedly, by the superior Courts of this country, including in the judgements discussed in this order that the Court has to consider such speeches in fair, free and liberal spirit and not in a narrow-minded or sectarian way nor are we to pick out isolated words or sentences as held by Hamood-ur-Rehman, J. in *Sanghad v. The Province of East Pakistan.*[29]

The right to freedom of speech granted under the 1973 Constitution is identical to that granted under the 1962 Constitution, therefore rendering a similar application. The Court concluded in *Sardar Attaullah Khan Mengal*'s case that "truth and justification is no defence in a case under Section 124 A, P. P. C."[30] However, in the international community, there has been an express intent of the

[26] *D.G. Khan Cement Company* (n 14) [21].
[27] *Pakistan Broadcaster Associations v. PEMRA* PLD 2016 SC 692.
[28] Omer (n 12).
[29] *Mst. Tehmina Doltana v. the State* 2001 PCr.LJ 1199.
[30] *Sardar Attaullah Khan Menga v. the State* PLD 1964 (W. P.) Kar 323.

Supreme Courts to move towards interpreting limitations on freedom of expression restrictively, especially by the Argentinian Supreme Court and the New Zealand Supreme Court.[31] With defences available for journalists such as truth and good-faith reporting, this ensures the scope of the sedition laws is further limited.

Despite the above, Pakistani courts do not allow these defences as they have explained that in cases of sedition, the context must always be considered through judging the speaker's intent from their words and the effect it is likely to have on the specific audience. *Mashiur Rehman v. The State* established that it does not matter whether the allegations made by the offenders are true or not, and whether their speech incited violence is not relevant for determining the guilt of the accused under Section 124-A.[32] Justice Cornelius went into detail to discuss the question of statements being true or false, noting that this is not relevant for the determination of a sentence as "the only question for the Court to decide is whether the effect of the language used is such that it is calculated to create in the minds of those who see or hear it a feeling of revulsion towards the Government by law established, so strong as to amount to hatred or contempt."[33]

By observing and analysing the sedition law in Pakistan in relation to Professor Barak's four elements of proportionality, it becomes apparent that Section 124-A fails to meet the requirements and tests. In its application, it is used as an authoritative tool to curb dissent under the guise of protecting public order. Originating as a colonial weapon, the usefulness of this law in modern democracies, which cherish and protect fundamental rights such as the freedom of speech, has become obsolete.

Section 124-A: A Reasonable Restriction

Sedition laws act as a limitation on the right to free speech. We must first assess whether this limitation aligns with the purpose of the right to free speech and meet the standard of a "reasonable" restriction under Article 19.

[31] Library of Congress, 'Limits on Freedom of Expression' (2019) <https://irp.fas.org/eprint/lloc-limits.pdf> accessed 26 July 2022.
[32] Ali Raza (n 11).
[33] *State v. Attaullah Khan Mengal* PLD 1967 SC 78.

Freedom of speech in Pakistan is not an absolute right. Article 19 of the Constitution lays out multiple restrictions on the right to free speech such as, but not limited to, public order, decency, or morality, or in relation to contempt of court. However, it also states that the restrictions must be reasonable and imposed by law. Courts have extrapolated on what exactly qualifies as a "reasonable" restriction. The test they reached in *Pakistan Broadcaster Associations v. PEMRA*[34] was:

> [I]n examining the reasonableness of any restriction on the right to freedom of expression it should essentially be kept in mind as to whether in purporting to exercise freedom of expression one was infringing upon the right of freedom of expression of others, and also violating their right to live a nuisance free life, and as to whether one is right to time and space was being violated. No one could be forced to listen or watch that he may not like to, and one could not be invaded with unsolicited interruptions while eagerly watching or listening to something of his interest. State was not supposed to remain oblivious of such violation/invasions and could not detract from its obligation, to regulate the right to speech when it came in conflict with the right of the viewers or listeners.

According to the European Convention on Human Rights, free speech is a right that is essential to and must be protected in every democratic society. A determination as to whether a restriction on freedom of expression is necessary "requires the existence of a pressing social need, and . . . the restrictions should be no more than is proportionate."[35]

Sedition Laws and The International Community

Countries around the world have by now recognised that this law is archaic, oppressive, and in violation of the freedom of speech, which is the crown jewel of every democratic society. Britain's law commission had recommended the

[34] *Pakistan Broadcaster Associations v. PEMRA* PLD 2016 SC 692.

[35] Ruth Levush, 'Limits on Freedom of Expression' (Loc.gov, 2019) <https://www.loc.gov/law/help/freedom-expression/compsum.php> accessed 23 June 2021.

abolition of sedition laws in 1977, and they repealed it in 2009.[36] At the time of the repeal, the Parliamentary Undersecretary of State at the Ministry of Justice, Claire Ward, said:

> [S]edition and seditious and defamatory libel are arcane offences – from a bygone era when freedom of expression wasn't seen as the right it is today … The existence of these obsolete offences in this country had been used by other countries as justification for the retention of similar laws which have been actively used to suppress political dissent and restrict press freedom.[37]

Similarly, Article 36 of the Constitution of the Republic of South Africa lays down the requirements for such a limitation to be acceptable:

> […] the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: (a) The nature of the right; (b) The importance of the purpose of the limitation; (c) The nature and extent of the limitation; (d) The relation between the limitation and its purpose; and (e) Less restrictive means to achieve the purpose.[38]

Moreover, the Federal Constitution of Switzerland 1999 adds that restrictions on fundamental rights must have a legal basis, be justified in the public interest or for the protection of the fundamental rights of others, be proportionate, and ensure that the essence of fundamental rights is sacrosanct.[39] For similar reasons, seditions laws worldwide, for example, in New Zealand, Australia, Indonesia, and the US, have been repealed. Pakistan inherited the sedition law from the British and the British have repealed their Sedition Act. It is now crucial to question why Pakistan and India have not.

[36] Clare Feikert-Ahalt, 'Sedition in England: The Abolition of a Law from A Bygone Era' (In Custodia Legis: Law Librarians of Congress, 2012) <https://blogs.loc.gov/law/2012/10/sedition-in-england-the-abolition-of-a-law-from-a-bygone-era/> accessed 27 July 2022.
[37] Ibid.
[38] The Constitution of the Republic of South Africa 1996, art 36.
[39] The Federal Constitution of Switzerland 1999, art 36.

Conclusion

Pakistan prides itself as a democratic state and a key feature of any democratic state is the freedom of speech and the right to protest. However, sedition under Section 124-A comes in direct conflict with this right. Courts in Pakistan have recognised these tensions and noted that "in a civilised and democratic society, restrictions and duties co-existed in order to protect and preserve the right to speech."[40] They have emphasised on reaching a balance.

Therefore, in conclusion and in light of the aforementioned discussion, Section 124-A is an unreasonable restriction on the right to free speech and it is not necessary to meet the public order objective in light of its real-world application. The international community and Pakistan's neighbouring states have accepted the oppressive impact of such laws and how they can be weaponised as an authoritative tool by the state to suppress dissent. Taking from their example, it is due time that the Pakistani superior courts follow suit.

[40] Ali Raza (n 11) [10].