

Freedom of Speech and National Security: A Comparative Critique of Section 152 of the Bharatiya Nyaya Sanhita and Section 124A of the Indian Penal Code

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Abstract

In the legal debate around the globe, the interrelation between security of nation and free speech has been an arguable issue. This issue is mostly visible in the provision of IPC under section 124A which deals with sedition laws. An age-old provision, which has often been disapproved by many for misusing it against the political rivals, news reporters and other activists since colonial era. The Indian government for replacing the Indian Penal Code came up with the new legislation of Bharatiya Nyaya Sanhita, 2023 which deleted the law of sedition but still having a provision of section 152 which deals with any act which endangering the sovereignty unity and integrity of India.

This article examines critically the consequences of section 152 on freedom of speech and expression and national security, especially in comparison with section 124A of IPC. The first section of the paper talks about the historical evolution of Indian laws relating to sedition over many years and its judicial pronouncement, emphasized given on the case of Kedar Nath vs. State of Bihar (1962).

This paper compares the scope and language of both the provisions of section 124A of IPC and Section 152 of BNS, analyzing its power to violate the free speech and protecting the security of nation. This paper highlights that the new provision in the BNS may be a step towards modernizing the law for protecting national security but it is not free from potential misuse, which obviously remains a concern. The article ends up by recommending some changes in provision of Bharatiya Nyaya Sanhita that national security issues do not override democratic principal of freedom of speech and expression.

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I . Introduction

Freedom of speech and security of state has been a subject of debate from a very long time in the democratic set up of state. Many legislations are there which is helpful in protecting the security of the nation, but there is a problem of clash of those laws with the freedom of the people. In India, the tension between free speech and security of nation is mostly visible in case of law relating to sedition. Constitution provides for fundamental rights which also include the right to free speech, not only that it also imposes restriction on the free speech based on the security of state under Article 19(2).² The main problem is differentiating between the legal dissent and illegal threat. Sedition law was like a sword for British colonial administration to fight against the rebellious Indian populace. In the earlier times, it was beneficial for administration but right now it is creating controversy.

Law of sedition mentioned in the IPC has been criticized throughout the years for being prone to abuse by the authorities by frequently targeting opposition and other social workers for the sake of preserving security of state. Famous freedom fighters have been prosecuted under this section.³ British colonial government always misused to shut the mouth of the natives of the country. This provision is negatively used from a very long time in our country.

Finally, in 2023, the Government of India decided to change this colonial laws and came up new criminal laws which includes Bharatiya Nyaya Sanhita (BNS), 2023 also. Section 124A of the Indian Penal Code (IPC) repealed but a similar kind of provision has been added in the new legislation under Section 152 which is talking about endangering India's integrity and sovereignty while supposedly

2. INDIA CONST. art. 19, cl. 2.

3. Apoorvanand, Explained: What Is Sedition Law, and Why Has the Supreme Court Put It on Hold?, Indian Express (May 12, 2022), <https://indianexpress.com/article/explained/sedition-law-explained-origin-history-legal-challenge-supreme-court-7911041/>

reducing the potential for abuse.⁴ Still the question is there whether this provision is actually helpful in curbing the abuse or just same principle with new name.

The replacement of this provision required a critical analysis. Does the new provision actually address the safeguards required for the application of this provision in this digital age or it is just a tactic used by the state to shut the mouth of the people criticizing their actions and policies. This concern is more serious now because of the expansion of digital platforms, which actually has become a platform for criticism and discussion.⁵

This paper undertakes a comparative analysis of both the provisions in the new act as well as in the old act. It is going to examine the textual formulations, case laws, constitutional conformity and effect on the democratic governance. Finally, the whole conversation is based on the thought that dissent is to be respected and it is essential for the smooth running of democratic society.

II. Historical and Legal Context

If we start with the meaning of sedition first, we will see it basically means “incitement of resistance to or insurrection against lawful authority”⁶. If we talk about the historical evolution of sedition law in India, first one should know this particular type of law was not even there in the great T. Macaulay’s draft of IPC.⁷ It was introduced later after ten years of original IPC through an amendment. The period was full of freedom movement and rebellions at that time. So, it is a step taken by the colonial government to stop the voices of the people who are doing struggle to free their country. We can see the law came with a bad intention, just to protect the interest of the British government so that they can rule in India with smoothly without any obstacles.

4. Bharatiya Nyaya Sanhita, No. 45 of 2023, § 152 (India).

5. Shreya Rastogi, Overview of the Bharatiya Nyaya Sanhita, 2023, Mondaq (Jan. 2024), <https://www.mondaq.com/india/crime/1441772/overview-of-the-bharatiya-nyaya-sanhita-2023-penal-code>.

6. MERRIAM WEBSTAR, <https://www.merriam-webster.com/dictionary/sedition> (last visited Nov 17, 2024)

7. Ankesh, *The origins and validity of Sedition Law in India*, MANUPATRA (Apr 16, 2024) <https://articles.manupatra.com/article-details/The-origins-and-validity-of-Sedition-Law-in-India>.

Sedition law was used by the British government during the pick time of the freedom struggle, when the stalwarts of freedom struggle like Gandhiji, Bal Gangadhar Tilak were prosecuted under this section. Gandhiji addressed this law as one of the political provisions of the Indian Penal Code that aims to restrict citizen's freedom. He also said about this section that Laws cannot control or generate affection. As long as they don't think about, encourage, or inspire violence, people who don't like someone or a system should be allowed to express their distaste as fully as possible.⁸ The oppressive nature of Section 124A was brought to light by its repeated application throughout the fight against colonial rule. It became a representation of imperial power, inspiring nationalist opposition to its abuse.

Many thought that India would no longer require sedition laws after gaining its independence. Sedition was not a restriction on free speech when the Constitution was ratified in 1950. The risks of classifying sedition as a "reasonable restriction" on the right to free speech were known to the Constituent Assembly members. They vigorously discussed this bill because they were worried that the administration may abuse it to stifle critics. One of the members, K.M. Munshi, vehemently opposed the existence of sedition laws in an independent India, claiming that they were a danger to democracy. Although Section 124-A of the Indian Penal Code (IPC) remained in effect, the Assembly ultimately chose to remove the word "sedition" from the Constitution. However, "reasonable restrictions" on the right to free speech and expression were imposed in 1951 by the Constitution's first amendment.⁹

8. Tushar Gandhi, *Sedition law: an imperial legacy, and a weapon of intimidation and subjugation by the regime*, THE LEAFLET (Oct 3rd, 2021 3:21 pm) <https://theleaflet.in/criminal-justice/sedition-law-an-imperial-legacy-and-a-weapon-of-intimidation-and-subjugation-by-the-regime>

9. Ruchi Kumari, *Sedition law: A threat to free speech and democracy*, 9 Int J L 51, 52 (2023) <https://www.lawjournals.org/assets/archives/2023/vol9issue4/9109-1689844666570.pdf>

III. Misuse of Sedition Law and Judicial Interpretation – Post Independence Scenario

India kept the crime of sedition under Section 124A of the Indian Penal Code after obtaining independence in 1947. The IPC's sedition clause was utilized to stifle this fundamental right even though the Constituent Assembly specifically stated that it could not be used as justification for limiting the right to free speech and expression. This section's validity was challenged in court, which had a big impact on how India's sedition laws developed.

In the case of *Tara Singh Gopi Chand v. State* (1951) Because of his anti-government remarks, Tara Singh was charged under Section 124A. One of the earliest cases to contest the sedition statute after independence was this one. According to Article 19(1)(a) of the Indian Constitution, the Punjab High Court declared Section 124A illegal since it infringed upon the basic right to freedom of speech. This ruling, which stated that legislation that restrict free expression must adhere to constitutional principles, was a turning point.

In *Debi Soren & Ors Vs the State*, Debi Soren, an Adivasi leader, was accused of sedition for allegedly inciting tribal groups to rebel against the government and The Patna High Court acquitted Soren, holding that his actions and speeches, although critical of government policies, did not incite violence or public disorder. However, Patna High court also held that Section 124A is constitutional and not violative of fundamental rights.

Now the question of constitutionality came before Supreme Court in *Kedar Nath Singh vs. State of Bihar*. Charges of sedition were brought against Kedar Nath Singh, a Forward Communist Party member, for his criticism of the Congress administration in power. The court maintained that Section 124A was valid, but it severely curtailed its application. It decided that acts that encourage violence or public disruption are the only ones covered by sedition. Sedition is not the same as simply criticizing the government. This seminal case continues to serve as the foundation for interpreting sedition statutes in a way that strikes a balance between the rights of the individual and the power of the state.

In the case of *Balwant Singh v. State of Punjab* (1995) Following the assassination of Indira Gandhi, Balwant Singh and another person were accused of sedition for chanting pro-Khalistan. The accused were exonerated by the court, which ruled that slogans that are used casually and lack the ability or desire to

incite violence do not qualify as sedition. This ruling defended casual statements of opinion by reaffirming that sedition requires a real threat to national security or public order.¹⁰

Over the years, several high-profile incidents have raised concerns about this section's compatibility with freedom of expression, highlighting its contentious application in independent India. Notable examples include charges against JNU students, activists such as Binayak Sen and Hardik Patel, authors like Arundhati Roy, cartoonist Aseem Trivedi, and journalists including Siddharth Varadarajan, Kaneez Fathima, and Vinod Dua. These cases illustrate the persistent misuse of this provision. Human rights defenders and civil rights organizations have called for the repeal of Section 124A, arguing that such a draconian law has no place in a democracy.¹¹

The landmark case recently in this regard is *SG Vombatkere v Union of India* (2022) where the central government filed an affidavit to stay the application of section 124A, considering the misuse of the provision and they wanted to strike a balance between free speech and national security. The court held that all pending cases, appeals and proceedings with respect to charges framed under sedition should be kept in abeyance. Not to use this provision till further re-examination of the sedition law is over.¹²

IV. Comparative Analysis of Section 124A of IPC and Section 152 of BNS

First let us see the two provisions mentioned in the respected legislations. According to section 124A of Indian Penal Code:

*“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, 2*** the Government established by law in 3[India], 4*** shall be punished with 5[imprisonment for*

10. Malavika Parthasarathy, *Sedition Law in India: A Timeline*, SUPREME COURT OBSERVER (Nov 17, 2024, 19:21 pm) <https://www.scobserver.in/journal/sedition-in-india-a-timeline/>

11. RUCHI KUMARI, *supra* note 4

12. SUPREME COURT OBSERVER, <https://www.scobserver.in/cases/sg-vombatkere-v-union-of-india-constitutionality-of-sedition-case-background/> (Last visited Nov 17, 2024)

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."

According to the new Bharatiya Nyaya Sanhita, 2023 which has replaced IPC, the section which came in the replacement of section 124A is section 152. The section is as follows:

"Whoever, purposely or knowingly, by words, either spoken or written, or by signs, or by visible representation, or by electronic communication or by use of financial mean, or otherwise, excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities or endangers sovereignty or unity and integrity of India; or indulges in or commits any such act shall be punished with imprisonment for life or with imprisonment which may extend to seven years, and shall also be liable to fine.

Explanation.—Comments expressing disapprobation of the measures, or administrative or other action of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite the activities referred to in this section do not constitute an offence under this section."

Now if we see the languages are quite different here. Section 124A is stating one offence which is against the government of nation or we can call it "Rajdroh". But if we see the Section 152 of BNS, It is about an act which against the unity, sovereignty of India as a nation. So we can call it as "Deshdroh".¹³

13. BUREAU OF POLICE RESEARCH AND DEVELOPMENT, <https://bprd.nic.in/uploads/pdf/202402200840050785816Deshdroh.pdf> (last visited Nov 17th, 2024).

We already stated the purpose and reason for bringing up section 124A. Britishers wanted to suppress the voice of freedom fighters that is why they were continuing with the idea of Rajdroh, just to sustain their position.

Now after many years of independence the idea of Rajdroh has become little outdated. In this democratic setup this kind of provision is bringing lot of controversy. Government of India finally replaced IPC with new Bharatiya Nyaya Sanhita and through that we got new section of 152 which not exactly like section 124A there is difference in the language itself.

Section 152 formulated in the modern time so it is relevant with the need of the society. Section 152 has the mention of electronic communication and financial means; these two ingredients is proving the former statement that it is formulated keeping in mind the improvement of the society as a whole.

Now if we start comparing both of the sections then we will first see the scope of the provisions. Any conduct that incited or sought to incite hatred, contempt, or disenchantment towards the legally created government was illegal under Section 124A. Speech, writing, signs, visible representation, and any other method were all addressed. Acts that might provoke violence, disturb public order, or threaten governmental authority were all included by the law's broad application.

By concentrating on actions that directly jeopardise India's sovereignty, unity, and integrity, Section 152 reduces the scope. The clause places more emphasis on specific acts that pose a real or immediate threat to national security than it does on merely voicing disapproval.

Next is about the nature of the offence. The clause of the IPC targeted a wide range of activities, including government criticism that could or might not actually affect national security. The broad interpretation made it possible to prosecute people for things like critical journalism, nonviolent protests, and social media posts.

Whereas under Section 152 Acts specifically intended to weaken the state's unity and integrity or destabilise it come into focus. For example, Section 152 would target actions such as assisting outside threats, encouraging community violence with the intention of undermining national unity, or disseminating material that encourages secession. By avoiding penalising nonviolent protest, the provision

aims to strike a compromise between the requirement for security and a more limited target group.

Section 152 commences with words like purposely or knowingly which is basically talk about some act done with clear intention and knowledge. Whereas Section 124A did not specially provide for the intention part.

Section 152 talks about some of the specific situations where it has the role to play. If there is a secession tendency among any state and somebody is behind that, leading it and encouraging it they will be booked under this section. In simple terms it means if some state wants to withdraw them from being a part of India that is secession and coming under this provision. Next type of act is armed rebellion it is basically whatever happened in Bangladesh recently. And acts like separatist activities are also covered example: Khalistan movement. Section 124A was not at all specific about any kind of situation as it was used just to suppress the freedom movement and later with the growing age it has also been used to punish the critics of the government.

From the above discussion it is clear both are different but the logic behind it is somewhere similar. As Law commission report of 2023 suggested not to remove the sedition law entirely so that is why this new law is having this provision of section 152 which aims to protect the national security and also freedom of speech of citizens.

Talking about the Punishments and Legal Consequences, the punishment is similarly stringent for offenses that genuinely threaten national security, potentially including long-term imprisonment.

V. Comparative Perspective with other Countries

A comparative perspective helps to understand the position of our country in the global set up of governance. The liberal states which are also developed are mostly got rid of these restrictive draconian law practices from their system. Let us take two important countries in this regard – United States of America and United Kingdom.

Indian got this law from the Britishers, whereas their own country has removed it long back from their system. All laws related to sedition was removed by the

corners and justice act, 2009.¹⁴ The very reason behind such removal is the offences are outdated, does not go well with modern set up of governance.¹⁵ It is also clashing with another instrument for European Union which emphasized on human rights. UK mostly focuses on the offences which involves any terrorism activity and threat to the country.¹⁶

From the UK model we can see Protection is given to the mere criticism against the government even if it is harsh in nature. And criminal liability only arises if there is evidence of disturbance of public order or there is terrorism activity for that matter.

USA always went for the modern approach and advocates the speech protection model in their system. There are two cases in this regard which laid down certain standards to identify any law as destroyer of speech. The Brandenburg doctrine¹⁷ says that suppose there is advocacy going on for any protest or separatist attitudes are growing in some people or different political ideologies people are having and they are doing ethical movements and protest against government all should be protected unless there is likelihood of violence in the country.¹⁸ Schenck v. United States had introduced the “clear and present danger” test, but Brandenburg refined the standard to make it more speech-protective.¹⁹

From the above discussion it is clear that mature countries moved on from penalizing the dissent, rather they criminalize only those acts which can result into concrete threat. The comparative models reflect a constitutional philosophy that democracy must tolerate radical and uncomfortable speech unless it crosses the threshold into violence.

14. Coroners and Justice Act 2009, c. 25, § 73 (U.K.).

15. UK Killed Sedition Law for Its Chilling Effect on Free Speech, Times of India (May 13, 2022), <https://timesofindia.indiatimes.com/world/uk/uk-killed-sedition-law-for-its-chilling-effect-on-free-speech/articleshow/91505310.cms>

16. Eric Metcalfe & Jessica de Mounteney, Abolition of Sedition and Criminal Libel, House of Commons Library, SN/PC/05211 (Aug. 5, 2010).

17. Brandenburg Test, Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/brandenburg_test

18. Brandenburg v. Ohio, 395 U.S. 444 (1969).

19. Schenck v. United States, 249 U.S. 47 (1919).

VI. Potential Challenges for S.152 of Bharatiya Nyaya Sanhita

After knowing each of the ingredients and comparing with the previous law of sedition we can say that it is not free from ambiguity. It is also need to be tested in future whether it can balance both the national security and freedom of speech. Through various judicial interpretation we will understand more about the provision. Now we are going to state some of the challenges it may face while dealing with the cases.

- A. Terminological Vagueness: Section 152's language, especially terms like "endangering sovereignty and integrity," and "Subversive activities" is thought to be unclear. In many judgments the apex court has clearly stated that penal statute with ambiguity create chilling effect. This unclear expression raises concern on the basis of doctrine of vagueness. This vague criminal provision not really helpful for citizens and they will be confused that which conduct is actually prohibited. Because of its ambiguous meaning, there is potential for abuse and questions over its subjective interpretation.²⁰
- B. Risk of Arbitrary Action: Without clear guidelines, law enforcement agencies might misuse Section 152 to target individuals for criticism of the government under the guise of national security. Arrest can happen at the stage of FIR because of unclear guidelines.
- C. Self-censorship: The constitutional right to free speech may be compromised if people are deterred from voicing views that contradict governmental policies or acts due to the threat of prosecution under Section 152. This is applicable for the persons who show the truth of society also called the fourth pillar of democracy – The media. Because of this prosecution fear factor, they may not be interested to go against any wrong actions or incidents happening in the society. This self-censorship is not at all good for a progressive state.
- D. Overlapping Scope with Other Laws: According to critics, acts endangering national security are already covered by laws like the

20. Shrushti Taori & Tatva Damania, *Balancing Free Speech And National Security: A Critical Analysis Of Section 152 Of The Bhartiya Nyaya Sanhita And Section 124-A Of The IPC*, LIVE LAW (2nd June 2024, 11:25 am).

National Security Act (NSA) and the Unlawful Activities (Prevention) Act (UAPA). The scope is needlessly broadened by Section 152, which targets expressions that might not actually pose a threat. There can also be chances of parallel prosecution for the acts, resulting in harassment of the person. Instead of simplify the laws protecting national integrity it advocates legislative redundancy.

- E. Judicial burden: Section 152's ambiguities could result in more constitutional challenges and lawsuits, adding to the judiciary's already heavy workload.
- F. Federalism concerns: This type of ambiguity can confuse the center and state relations. It may create tension between the federal system.

VI. Recommendations and Suggestions

To address the criticisms and balance the competing interests of free speech and national security, the following reforms are recommended for Section 152 of the Bharatiya Nyaya Sanhita (BNS): To improve Section 152 and make it more democratic, have open meetings with civil society, human rights organisations, and legal professionals. Penalise officials or complainants who are discovered to have deliberately abused the clause to stifle free expression. Direct the gathering of information on cases brought under Section 152 in order to spot abuse trends and areas that require improvement.

By putting these changes into effect, Section 152 will become a more democratic and balanced clause. India may make sure that the law addresses actual dangers to national security without violating the fundamental right to free speech by placing a high priority on clarity, procedural safeguards, and compatibility with international and constitutional norms.