

# “DEMOCRACY, EN GARDE !”

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The protests in the past few months against the Citizenship (Amendment) Act, 2019 that have gripped the nation spurred this author to explore the history of the right of people to protest, and present how the unlawful suppression of this right is dangerous to the democratic ethos regarded so highly in Indian society and the annals of the Apex Court. The roots of the right to protest in India can be traced to the constitutional guarantees of the rights to free speech and peaceable assembly.

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## CONSTITUTIONAL FRAMEWORK- RIGHT TO PROTEST

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Speech is often provocative and challenging- it may strike prejudices and preconceptions and have profound unsettling effects as it presses for the acceptance of an idea. This is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.<sup>1</sup> The right to freedom of speech and expression has been described as “...the matrix, the indispensable condition of nearly every form of freedom.”<sup>2</sup> This freedom alone makes it possible for people to formulate their own views and opinions on a proper basis and to exercise their social, economic and political rights in a free society in an informed manner.<sup>3</sup> Freedom of speech and expression is a fundamental right under Article 19(1)(a) of the Constitution of India.<sup>4</sup> It includes the freedom to hold opinions, to seek, receive and impart information and ideas<sup>5</sup>, and the freedom of expressing ideas and opinions by any visible representation, such as by gestures, or by carrying banners and signs.<sup>6</sup> In short, it is the freedom of communicating ideas through any medium.<sup>7</sup> A demonstration is a visible manifestation of the feelings or sentiments of an individual or group- it is a communication of ideas to others to whom it is intended to be conveyed. A demonstration may also take the form of an assembly. The very idea of government implies a right on the part of its citizens to meet

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<sup>1</sup> *Teminello v. Chicago*, 337 US 1.

<sup>2</sup> *Palko v. Connecticut*, 302 US 319 (1937).

<sup>3</sup> *Union of India v. Motion Picture Association*, (1990) 6 SCC 150.

<sup>4</sup> A. 19 (1)- All citizens shall have the right- (a)- to freedom of speech and expression.

<sup>5</sup> *Hamdard Dawakhana v. Union of India*, (1960) 2 SCR 671.

<sup>6</sup> *Lovell v. Griffin*, (1938) 303 US 444.

<sup>7</sup> 2, Durga Das Basu, *Commentary on The Constitution of India*, p. 2383 (S. S. Subramani & B. P. Banerjee, 8th Ed., 2008, Lexis Nexis Butterworths Wadhwa), citing Geoffrey R. Stone & Louis M. Seidman, et. al., *Constitutional Law*, pp. 1058-59 (Wolters Kluwer, 5<sup>th</sup> Ed., 2005).

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peaceably for consultation in respect of public affairs.<sup>8</sup> It follows, therefore, that the freedom of assembly is an adjunct of and equally essential as the freedom of expression to a democratic system of government.<sup>9</sup> The freedom of assembling peacefully and without arms is guaranteed by Article 19(1)(b) of the Indian constitution.<sup>10</sup>

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## **SUPPRESSION OF THE RIGHT TO PROTEST**

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Citizens have a fundamental right to assembly and peaceful protest which cannot be taken away by an arbitrary executive or legislative action.<sup>11</sup> A two-pronged approach by governments in suppressing this right can be made out- firstly, the misuse of S. 144 of the Code of Criminal Procedure, 1973<sup>12</sup>, to prevent protests from being held; and secondly, the unconsidered addition of the charge of sedition under S. 124A of the Indian Penal Code, 1860<sup>13</sup> to charge sheets against protesters, and their prosecution therefor.

### MISUSE OF S. 144, CR.PC

The colonial State keenly regulated the ability to assemble- the imperative for this was the interest of the State in preventing organising around the freedom movement. In contemporary India, the Cr.PC substantially impacts the right to freely assemble.<sup>14</sup> S. 144 of the Cr.PC vests in an Executive Magistrate the wide power of ordering persons to abstain from a certain act, or take certain actions, in multiple situations- such as when a riot or affray, or danger to human life, health and safety is apprehended. It has most commonly been invoked to prevent public gatherings of five or more people, a failure to comply with which attracts the offence of unlawful assembly.<sup>15</sup> S. 144 also provides several safeguards to ensure that the power is not abused, viz. prior inquiry before exercising this power, setting out material facts for exercising this power and modifying/rescinding the order when the situation so warrants.<sup>16</sup> The test laid down in the section is not mere likelihood or tendency- the section says that the Magistrate must be satisfied that immediate prevention of particular acts is necessary to counteract danger to public safety.<sup>17</sup> Unfortunately, the provisions of S. 144 Cr.PC and the allied provisions in state laws<sup>18</sup> have been

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<sup>8</sup> Id., *U.S. v. Crawshaw*, 92 US 542 (1875).

<sup>9</sup> Basu, *supra*, n. 7, p. 2675.

<sup>10</sup> A. 19 (1)- All citizens shall have the right- (b)- to assembly peacefully and without arms.

<sup>11</sup> *In Re Ramlila Maidan Incident*, (2012) 5 SCC 1.

<sup>12</sup> Hereinafter, "Cr.PC".

<sup>13</sup> Hereinafter, "IPC".

<sup>14</sup> Menaka Guruswamy, *Assembly and Association*, Ch. 46, p. 835 (Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta, T The Oxford Handbook of the Indian Constitution, 1<sup>st</sup> Ed., 2016, Oxford University Press)

<sup>15</sup> S. 141, Indian Penal Code 1860.

<sup>16</sup> *Anuradha Bhasin v. Union of India*, W.P. (Civil) No. 1031 of 2019 [SC].

<sup>17</sup> *Ramlila Maidan*, *id.*, n. 11.

<sup>18</sup> Various state laws have provisions similar to S. 144 Cr.PC relating to the maintenance of public order and safety.

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repeatedly misused to prevent protests against any governmental policy or actions, with the result that the said orders have been found by the judiciary in numerous instances to be arbitrary and illegal- two recent examples of which are in Majalgaon and Maharashtra. In January 2020, a number of people in Majalgaon, Maharashtra had sought permission from the police to conduct an indefinite hunger strike as a mark of protest against the Citizenship (Amendment) Act 2019.<sup>19</sup> The main reason for the police refusing to grant permission for the said protest was an order passed by a district magistrate under S. 37(1)(3) of the Maharashtra Police Act, 1951, which, *inter alia*, prevented sloganeering, singing and the beating of drums. A writ petition challenging the magistrate's order, as well as the refusal of permission by the police, was filed in the High Court of Bombay at Aurangabad. Both of these were quashed and set aside by the Hon'ble division bench, which made a serious observation in the judgement, "It can be said that though the order on face appears to be against everybody, in reality the order is against persons who want to agitate, to protest against CAA."<sup>20</sup> On 18<sup>th</sup> December 2019, an order was passed under S. 144 in Bengaluru prohibiting all public rallies for a certain amount of time. A number of public rallies against the CAA were scheduled to occur on 19<sup>th</sup> December. The legality of this order was challenged in a writ petition before the High Court of Karnataka. On 13<sup>th</sup> February 2020, a bench of Hon'ble Chief Justice A.S Oka and Justice Hemant Chandangoudar held that the order passed was illegal, as there had been no application of mind by the magistrate so as to form an opinion of his own, and he had merely acceded to the requests made by the Deputy Commissioners.<sup>21</sup>

### ERRONEOUS APPLICATION OF S. 124A, IPC

Sedition is perhaps the vaguest of all offences known to criminal law, and historically, is one of the chief means governments have used to put down hostile critics.<sup>22</sup> In India, S. 124A of the IPC defines the offence of sedition. According to it, whoever, by words, signs or any visible representation, brings or attempts to bring *hatred or contempt*, or excites or attempts to excite *disaffection* towards the Government established by law, commits sedition.<sup>23</sup> The explanations to

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<sup>19</sup> Hereinafter, "CAA".

<sup>20</sup> *Iftikar Shaikh v. State of Maharashtra*, Cri W.P. No. 223 of 2020 (Bom HC, Aurangabad Bench).

<sup>21</sup> Rintu Mariam Biju, CAA Protests: Section 144 order imposed in Bangalore on December 18 was illegal: Karnataka HC, Bar And Bench, (Feb. 2020), <https://www.barandbench.com/news/breaking-caa-protests-section-144-order-imposed-on-december-18-in-bangalore-was-illegal-karnataka-hc>.

<sup>22</sup> Basu, *supra*, n. 7, p. 2539, citing EDWARD JENKS, *The Book of English Law*, p. 136 (6<sup>th</sup> Ed., 1967, P.B. Fairest Publication).

<sup>23</sup> S. 124A- Sedition-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. [emphasis supplied]

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S. 124 A provide clarity as to the scope of the section. Explanation 1 states that “disaffection” includes disloyalty and all feelings of enmity. Explanations 2 and 3 provide that disapprobation of the Government or its actions without exciting or attempting to excite hatred, contempt or disaffection is not an offence. The vagueness of this section, particularly the word ‘disaffection’, poses a serious threat to the liberty of individuals and their right to protest. This was recognized by the Supreme Court as early as 1962 in *Kedar Nath Singh*<sup>24</sup>, where S. 124A was narrowly interpreted to mean that an utterance would be punishable under the section only when it is intended or has a reasonable tendency to create disorder or disturbance of the public peace by resort to violence. The Supreme Court also observed that the expression ‘Government established by law’ had to be distinguished from persons for the time being who were visibly symbols of the State. What would be punishable under S. 124A, therefore, is not a criticism of the Government, however strong it may be, but utterances which intend or have a tendency to subvert the existing Government by means of violence. The law as laid down in *Kedar Nath Singh* is absolutely clear- it is only if there is incitement to violence or the creation of public disorder or disturbing the law that the offence of sedition is made out. This position of law has been reiterated many times including in *Bilal Ahmed Kaloo’s case*<sup>25</sup> and *Common Cause vs. Union of India*.<sup>26</sup> In both these cases, the Supreme Court directed the courts to exercise care while invoking charges of sedition, and were advised to follow the principles laid down in *Kedar Nath Singh*.<sup>27</sup> There have been numerous instances where people have been unreasonably charged with sedition without incitement of any sort, such as Binayak Sen- for possessing Naxalite literature<sup>28</sup>, S Kovan- for singing songs criticizing the Tamil Nadu governments liquor policy<sup>29</sup>, and Aseem Trivedi- for cartoons depicting the Parliament in a bad light<sup>30</sup>- these are blatant abuses of the principles regarding the application of S. 124A and when people ought to be charged for the offence of sedition.

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<sup>24</sup> *Kedar Nath Singh v. State of Bihar*, AIR 1962 SC 955.

<sup>25</sup> *Bilal Ahmed Kaloo v. State of Andhra Pradesh*, (1997) 7 SCC 431.

<sup>26</sup> W.P. (Civil) No. 683 of 2016 [SC].

<sup>27</sup> The valedictory address of Hon’ble Deepak Gupta, J., at a workshop organized by Praleen Public Charitable Trust and Lecture Committee in Ahmedabad on 7<sup>th</sup> September 2019, as reported by THE WIRE, Justice Deepak Gupta: Law of Sedition Needs to be Toned Down if Not Abolished, (Sep. 2019), <https://thewire.in/law/justice-deepak-gupta-supreme-court-sedition>.

<sup>28</sup> India Today, *Binayak Sen gets bail, SC trashes sedition charge*, (Apr. 2011), <https://www.indiatoday.in/india/north/story/sc-grants-bail-to-binayak-sen-drops-sedition-charge-132224-2011-04-15>.

<sup>29</sup> Frontline, *Folk singer arrested on sedition charge*, (Nov. 2015), <https://frontline.thehindu.com/the-nation/folk-singer-arrested-on-sedition-charge/article7866083.ece>

<sup>30</sup> Livemint, *Sedition charges dropped against Aseem Trivedi*, (Oct. 2012), <https://www.livemint.com/Politics/prIECvnf5NYfdksu43v7OK/Sedition-charges-dropped-against-Aseem-Trivedi.html>

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## **POSSIBLE SOLUTIONS- THE WAY AHEAD**

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The rights to free speech and assembly, and the numerous unlawful restrictions that continue to be placed on it, is a pan-Indian problem, not limited only to the battlefield where liberty and the maintenance of law and order are at constant loggerheads. The people, other political parties, and the media are not mere spectators- but are active participants, and can play an important role in a balance being struck between the exercise of the right to protest and the genuine need to curb violence and anarchy.

### ROLE OF PRINCIPAL ACTORS

All of the principal actors in a democracy have a role to play in ensuring that the fundamental right to protest is respected and effectively enforced. Firstly, the government has to do its part in ensuring compliance by local authorities of the standards and guidelines laid down by the apex court for the exercise of powers under S. 144, Cr.PC and in charging people under S. 124A of the penal code. One way this could be done is the sensitization of officers vested with powers in the nature of S. 144 by giving them proper training on human rights which are incorporated as fundamental rights in the constitution.<sup>31</sup> The failure of the government to act as per said standards and guidelines must be called out by the people, who should not shy away from exercising their right to protest and voicing their opinions on issues of public importance. The media has a key role to play as well, for it should strive to be neutral and present a complete picture of societal happenings. Lastly, the judiciary, the guardian of the Constitution and the fundamental rights, has to hold the government accountable for its unreasonable transgressions of the right, as it has had to do frequently over the last few months.

### RESURGENCE OF STRONG OPPOSITION

While the role of opposition parties could have been dealt with in the above point itself, it is pertinent to elaborate on the need for a strong opposition to whichever government is in power, as it is one of the single most effective checks on the policies and actions of the government. The sweeping mandate received by the ruling party has been the cause of the crumbling foundations of opposition parties in India, with defections coming to be accepted as a part and parcel of our polity. The ethico-constitutional problems with such defections aside, the fading away of strong, effective criticism of the government in power, spearheaded by the members of the opposition has been a burgeoning thorn in the heart of Indian democracy. What this

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<sup>31</sup> Ifikar Shaikh, *supra*, n. 20.

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situation has led to is the resurgence over the better half of the past decade of majoritarian politics- which, in simple terms, is politics that believes in acting for the majority of the people. The attention of the populace keeps shifting from one achievement to another- and but for a handful of voices, no one seems to remember long enough the serious problems that are plaguing India. The systematic stifling of dissent has furthered the perception of the polity as being less concerned with what is just and fair, and more concerned with it maintaining its unruffled image.

The ruling party, therefore, does not fear the opposition anymore- and believes that whatever policies and decisions it takes reflect the *vox populi*. The recent Delhi Legislative Assembly Elections in February 2020 may be cited in this regard as an example. Although the accepted belief is that the developmental work carried out by the Aam Aadmi Party was the main reason behind their winning the elections, an argument may legitimately be made out that to an extent, the people of Delhi rejected the uber-nationalist, anti- dissent rhetoric peddled by the BJP in the Delhi campaign. Opposition parties should take note of this victory, for it is a clear example that the people of a state are primarily concerned with development being done and the fulfilment of pre- election promises, as time and experience have shown them that controversial and divisive statements are, unfortunate as it may be, a key element in the tennis match that is politics, and hence to be ignored. Once the opposition begins devoting its time to earnestly fulfilling their manifesto promises, providing quality basic services [public transport, water, electricity and education] to the people, and ensuring the local administration is efficient and blemish free, it is highly likely that they will reap the benefits of the people's trust and confidence.

The adoption and enforcement of such a policy by political parties will drastically affect the nature of Indian polity, and lead to a change from the current 'trample the other parties to earn brownie points with the people' system to a development-based 'actually work for the people' system. A corollary of a shift to such a system is greater respect for the fundamental freedoms and the rule of law, for the party in power at any point of time will be mindful of the fact that there exists a strong opposition in the country that is ever ready to go to town convincing the people on why a failure to follow the rule of law and disregard shown to fundamental rights ought to be punished.

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## CONCLUSION

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Dissent is the safety valve of a democracy<sup>32</sup>- hence, those who express views which are critical of prevailing social reality have a valued position in the constitutional order.<sup>33</sup> If dissenters are punished for expressing non-conforming views, they will fail to disclose what they know and believe to the society.<sup>34</sup> The shadows of suppression have been slowly but surely creeping up over the Indian democracy, and it would not be remiss to prophesize that if the people of India refuse to look past the grandiose promises and statements of political parties, and condemn unlawful clampdowns on the right to protest, it would lead to an Orwellian ‘Thoughtcrime’ system rearing its ugly head, which penalises people for having any thought, idea or consideration not in line with that of whichever party is in power. Democracy is based essentially on free debate and open discussion, for that is the only corrective of Governmental action in a democratic set up. If democracy means government of the people and by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.<sup>35</sup>

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<sup>32</sup> Shaswati Das and Abhiram Ghadyalpatil, *Dissent is the safety valve of democracy*, says SC, LIVEMINT, (Aug. 2018), <https://www.livemint.com/Politics/SiXRDqBThdK92lfR0CRyEP/Dissent-is-the-safety-valve-of-democracy-says-SC.html>, quoting the observations of Hon’ble D.Y. Chandrachud, J., in the course of proceedings in W.P. Diary 32319/2018.

<sup>33</sup> *F.A. Pictures International v. C.B.F.C.*, AIR 2005 Bom. 145.

<sup>34</sup> Basu, *supra*, n. 7, p. 2371.

<sup>35</sup> *Maneka Gandhi v. Union of India*, [1978] 2 SCR 621.

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