

(1976) 04 AP CK 0005

In the Andhra Pradesh High Court

Case No : Criminal Miscellaneous Petition No. 205 of 1975

P. Hemalatha

APPELLANT

Vs

The Govt. of Andhra Pradesh

RESPONDENT

Date of Decision : 23-04-1976

Acts Referred:

Constitution of India, 1950 — Article 19(1), 372
Criminal Procedure Code, 1973 (CrPC) — Section 85, 95
Penal Code, 1860 (IPC) — Section 124

Citation : AIR 1976 AP 375

Hon'ble Judges : Sambasiva Rao, J;Lakshmaiah, J;Alladi Kuppu-Swami, J

Bench : Full Bench

Advocate : T. Bali Reddi, for C. Padmanabha Reddy and K.G. Kannabhiram, for the Appellant; Public Prosecutor, for the Respondent

Judgement

Sambasiva Rao, J.—I agree with the conclusion drawn by my brothers Kuppuswami and Lakshmaiah, JJ., in their separate judgments, namely that the petition be dismissed.

2. The meaning and scope of Section 124-A, I.P.C. are well known and well established. After the two opinions of my learned brothers, it is unnecessary for me to elaborate the legal position. A mere criticism or denunciation of the Government established by law is not objectionable. Citizens are certainly entitled to express their grievances and to endeavour to get them redressed through lawful means. However, if these attempts or exhortations bring the established Government or tend to bring it into hatred and contempt, they certainly come within the ambit of sedition as stated in Sec. 124-A, I.P.C. The test that should be applied is to find out whether any article or articles intend to have the effect of creating feelings of hostility towards Government and to excite disaffection. I am not referring to the case law on the point since they have been considered at length by my learned brother.

3. Now the question is whether the issue of "Srujana" of May 1974 contains

material which causes or tends to cause such disaffection. In the first poem complained of, people are exhorted to break open godowns and to cut to pieces who come to obstruct. It is also declared that the rickshaw-puller will go to the forest to take up the fight and before he goes away, he will cut the throat of the money grabber (sait) with all vengeance. In the third one, poor people are exhorted to take up axes and sickles and fight. This fight is to put an end to leaches like landlords and exploiters. The way of Naxalbari and the line of Charu Babu, Satyam etc., which are well known to be violent methods of changing the society and the Government, are acclaimed as the best to attain justice. The last one visualises armed struggle behind the strike (at that time all India Railway strike was going on). It ends with saying that there will be no rest till the Government is overthrown with arms.

4. These passages certainly intended to bring into hatred and contempt the Government established by law in India and to excite disaffection towards it. They straightway walk into the ambit of Section 124-A, I.P.C. I am therefore satisfied that the Government of Andhra Pradesh is justified in forfeiting the said issue of "Srujana".

5. Consequently, I join my brothers in dismissing the petition.

Alladi Kuppuswami, J.

6. I have gone through the judgment of Lakshmaiah, J. While I agree with the ultimate conclusion that the petition merits dismissal I would like to give my own reasons.

7. The petition is one u/s 95, Cr.P.C., 1973 for setting aside an order made by the Government of Andhra Pradesh u/s 95 of the Code, declaring that every copy of the Journal "Srujana" May, 1974 issue be forfeited to the Government. In that order it is stated that it appears to the Government that the said issue contains objectionable poems and blank verses referred to in the schedule below, which is calculated to bring into hatred and contempt and excite disaffection towards the Government established by law in India and is prejudicial to maintenance of harmony and publication of which is punishable u/s 124-A of the Indian Penal Code. u/s 95, Cr.P.C. this court is empowered to set aside such a declaration on the ground that the issue of the newspaper or the book or other document in respect of which the declaration was made did not contain any such matter as is referred to in sub-section (1) of Section 95. u/s 95 where (a) any newspaper or book or (b) any document appears to the State Government to contain any matter, publication of which is punishable u/s 124-A or Section 152A or Section 152B or Sections 292, 293, 295A and Section 296, the State Government, may, stating the grounds of opinion, declare every copy of the issue of the newspaper containing such matter and every copy of such book or document to be forfeited to the Government. In this case, in the impugned order it is stated that it appears to the Government that the journal contains matter publication of which is punishable u/s 124-A, I.P.C. We are not concerned with the other sections such

as Section 153A etc., as no reference to contravention of those sections is made in the order.

8. In the petition it is contended that the impugned order violates the petitioner's fundamental rights under Art. 19(1)(a), (c),(f) and (g) of the Constitution, but this contention was not pressed before us, obviously in view of the number of decisions including the decision of the Supreme Court in Kedar Nath Singh Vs. State of Bihar, wherein it was held that the provisions of Section 124-A are not unconstitutional as being violative of the fundamental right of freedom of speech and expression under Article 19(1)(a) of the Constitution. It is therefore unnecessary for us to consider the question whether Section 124-A or the impugned order violates Art. 19(1)(a) or any other sub-clause of that Article.

9. The two main contentions urged by Sri Bali Reddy, learned counsel for the petitioner are (1) While making the order the Government is bound to state the ground of its opinion for coming to the conclusion that the publication of the matter contained in the journal is punishable u/s 124-A, I.P.C. and hence the journal is liable to be forfeited, and as such grounds are not stated, the order is liable to be set aside.

(2) Even if it be held that the Government has stated its opinion, such opinion is not justified as the four poems said to consider matter punishable u/s 124-A, I.P.C are not calculated to bring into hatred or contempt or excite or attempts to excite disaffection towards the Government established by law in India within the meaning of Section 124-A

Contention 1 :

10. In support of the first contention reliance is placed on the decision of the Supreme Court in Harnam Das Vs. State of Uttar Pradesh, where dealing with the provisions of the Code of Criminal Procedure, 1898 similar to those with which we are concerned, the Supreme Court held that where the State Government did not state the grounds of its opinion, the High Court must set aside the order. It observed :

"What then is to happen when the Government did not state the grounds of its opinion? In such a case if the High Court upheld the order, it may be that it would have done so for reasons which the Government did not have in contemplation at all. If the High Court did that, it would really have made an order of forfeiture itself and not upheld such an order made by the Government. This as already stated, the High Court has no power to do u/s 99D. It seems clear to us therefore, that in such a case the High Court must set aside the order u/s 99-D, for it cannot then be satisfied that the grounds given by the Government justified the order."

A different view was taken by the Full Bench of this Court in N. Veerabrahmam Vs. State of Andhra Pradesh, . After referring to this decision and other decisions which took a similar view, the Supreme Court stated tat they were unable to

accept the construction placed by them on Section 99-D. The decision of the Full Bench in so far as this aspect is concerned cannot be regarded as good law in view of the decision of the Supreme Court. The decision of the Supreme Court was followed in *Mohammad Khalid v. Chief Commissioner*, AIR 1968 Delhi 13 . It was observed that the requirement about stating the grounds of opinion being an imperative and integral part of the section, it would follow that a notification in order to be legal and effective must comply with and fulfill that requirement. Such a compliance is a sine quo non of the validity of the notification and a notification, which does not incorporate the grounds of the opinion, would be not in conformity with law. It is not enough to merely reproduce the language of Sections 124-A, 153A or 295A of the Penal Code without specifying as to how or in what manner there has been contravention of the provisions of those sections.

11. In this case however, I am of the view that it cannot be said that the Government has not stated the grounds of its opinion. In the impugned order the four poems and blank verses are set out in the schedule to the order and the order proceeds to state that those verses bring into hatred and contempt and excite disaffection towards the Government established by law in India. Thus the grounds of its opinion are based upon the language of the four poems set out in the schedule. In these circumstances I am of the view that it is unnecessary to state any further grounds of opinion in *Mohammad Khalid v. Chief Commissioner*, AIR 1968 Delhi 13) it was observed that the order merely stated that in the opinion of the Commissioner the book was intended to promote feelings of enmity or hatred between different classes of citizens of India. Neither the passage in the book on which that opinion was based was referred to nor was there any indication of the different classes of citizens between whom the book was alleged to promote feelings of enmity or hatred. The ground on which the opinion was based was not given and the whole thing was left in the realm of vagueness. In this case, however, the actual passages are set out in the schedule. In *Harnam Das Vs. State of Uttar Pradesh*, also the order was merely that the Government was pleased to declare the book forfeited on the ground that the books contain matter, the publication of which was punishable under Sections 153A and 295A of the Indian Penal Code. It was not known which communities were alienated from each other or whose religious beliefs had been wounded according to the Government nor why the Government thought that such alienation or offence to religion had even caused. There also it would appear that the passage were not extracted in the order. Those cases are therefore, distinguishable from the present case where the actual poems have been set out in the schedule and the Government stated that these poems were calculated to bring into hatred and contempt and excite disaffection towards the Government established by law in India. As according to me the Government has given its grounds of opinion, I am unable to uphold this contention

12. The learned counsel for the petitioner also pointed out that the Government in its order has also stated that the poems in question were "prejudicial to maintenance of harmony". It was submitted that Section 124-A, I.P.C. does not

have any reference to the maintenance of harmony at all. Therefore, this reason has no relevance in considering the question whether the publication was punishable u/s 124-A. As this ground is not a valid ground, it was submitted that the entire order is liable to be set aside. In support of this contention reference was made to the series of decisions of the Supreme Court and other Courts regarding orders of detention in which it has been held that if some of the grounds of detention are invalid on the ground that they have no nexus with the maintenance of the security of the State etc., the order of detention has to be set aside in its entirety even though other grounds are valid and relevant. Though there is much to be said against the above view expressed by the Supreme Court and other courts in these cases, we are bound by the decisions of the Supreme Court which have consistently taken the said view. But I do not think that principle can be extended to the cases of an order for forfeiture of a book or a document on the ground it contains objectionable matter. If the book does contain such objectionable matter publication of which would be punishable u/s 124-A or other sections referred to earlier, the Government has the right to declare the publication forfeited. The mere fact that in the order it is also mentioned that the subject-matter is prejudicial to maintenance of harmony would not make the matter anyhow objectionable if it is in fact objectionable under any of the sections. I am therefore, unable to accept the contention that merely because it is also stated in the order that the subject-matter is prejudicial to the maintenance of harmony it would vitiate the order if it is otherwise found that the matter is of such a nature that its publication is punishable u/s 124-A, I.P.C.

13. This leads me to the consideration of the second contention, namely, whether the opinion of the Government that the four poems referred to in the order contain matter, publication of which is punishable u/s 124-A of the Act is justified.

14. In the first verse the author says that while there is plenty of grains in the granaries of the landlords there is hunger in the bellies of the people. He suggests breaking of godowns and distributing the grains and cutting to pieces "the bastards who obstruct them". I do not find anything in this verse which even remotely brings into hatred or contempt or excites or attempts to excite disaffection towards the Government. In this connection it must be remembered that the only section which is said to have been contravened in Section 124-A, I.P.C. and no other section is mentioned in the order.

15. The next song which is styled as "Rickshaw song" describes in detail the poverty of the rickshaw puller, how he is suffering, how most of his earnings are taken away by the owner of the rickshaw who is making money at his expense. His health is impaired and he is not able to find money for treatment. He is not able to support his dying mother. All those again do not have anything to do with hatred or contempt or disaffection against the Government. The only passage which may be said to have some connection with the Government is the passage which says "the police bastard is a Yama for me. He stops me at every place. He

squeezes money out of me". This again, is not directed against the police generally in which case it may be argued that an attack against the State. Vide *Satya Ranjan Bakshi and Another Vs. Emperor*, But this appears to me to be an accusation only of a particular type of policeman who is corrupt and tries to squeeze from the poor rickshawala. In the last few passages he refers to a person who enquired about his earnings and suffering, took pity on him and gave him an address in a forest and asked him to meet him there. In the last verse he says that he will meet the "sait" (obviously the rickshaw owner) and cut his throat with all his vengeance. This again is the outpouring of a suffering rickshawala who swears to attack the life of the owner who is making his life miserable. I do not think there is anything in this poem which contains matters publication of which is punishable under S. 124-A, I.P.C.

16. The third and the fourth verses however stand on a different footing. In the third verse which is "The Fighting sons", people are urged to fight, take up axes and take up sickles. The verse describes the suffering of several poor people like the agricultural labourer, farm-servant, cooly and so on. If really the song is meant to urge the down trodden people to fight for their rights and for justice, no exception could be taken. But this song proceeds further and asks them to fight taking up sickles and axes. In one of the passages it is stated that the police support all the landlords and exploit. In this case there can be no doubt that reference (is) to the police generally. Last but not least it is stated that success will be ours only when we follow this line which in the context means the path of violence. The author exhorts avenging the people and killing them. He finally says that they should fight on the line of Charu Babu, Comrade Satyam etc., who were well known Naxalites whose avowed policy is to overthrow by violence the present establishment. Thus, it is clear that this song which seeks to spread hatred and disaffection against the Government and urges violent reprisal, in my view contains matter, publication of which is punishable u/s 124-A I.P.C.

17. The last one which relates to the railway workers also states that the Government made arrests even before they used the weapon of strike as they saw signs of armed struggle behind the strike. In the last three lines it says that we should not rest till we overthrow with arms the Government. There cannot be a clearer statement of hatred and disaffection to overthrow the Government with violence.

18. As the last two songs contain matter publication of which is punishable u/s 124-A, I.P.C. the Government was justified in declaring the May issue of the journal which contains these verses, forfeited.

19. Reference was made to *The State of Bihar Vs. Shailabala Devi*, where it was stated that writing of this character leave the readers cold and nobody takes them seriously. People laugh and scoff at such stuff as they have become too familiar with it and such writings have lost sting. This contains empty slogans arraying no particular meaning and should not be taken seriously. In this case

however, the last two verses do not read like empty slogans but carry a message to overthrow the Government through violence. Another decision that was referred to was Debi Soren and Others Vs. The State, where there was a clamour by the Adivasis for a separate Jharkhand. It was observed that a democratic Government should not be hypersensitive to criticism. The question whether any particular statement is one calculated to excite, disaffection or hatred or contempt towards the Government has to be considered with respect to the circumstances of each particular case and the manner and the occasion in which it is mentioned. The decisions regarding one particular case cannot be helpful in deciding another. Having gone through the verses referred to in the schedule to the order I am satisfied that the Government cannot be said to be wrong in forming an opinion that the last two verses contain matters publication of which is punishable u/s 124-A, I.P.C.

20. For the reasons above stated I agree with the Lakshmaiah, J, that the petition deserves to be dismissed and the order of the Government declaring the May issue forfeited will stand.

Lakshmaiah, J.

21. This is a petition u/s 96 of the Code of Criminal Procedure, 1973 for setting aside the declaration made by the Government of Andhra Pradesh under Sec. 95 of the Code and contained in G.O.Ms. No. 1346 Home (General-A) Department dated 7-10-1974, by which order the May issue of the monthly journal "Srujana" has been forfeited to the Government on the ground that it contained certain objectionable poems and blank verses allegedly punishable u/s 124-A of the Indian Penal Code. The alleged objectionable poems and verses have been set out in English translation in the schedule to the order.

21-A. "Srujana" is a literary monthly journal published in Telugu from Hanamkonda. Prior to May 1974 the said journal was being edited, printed and published by the petitioner's husband, Sri P. Varavara Rao for "Sahithree Mitrulu". In or about December, 1973, the petitioner's husband, Sri Varavara Rao was detained under the Maintenance of Internal Security Act, one of the grounds of the detention being that he has printed certain poems in the various issues of the said journal which were calculated to incite disaffection against Government and that he preached the violent overthrow of the Government through his speeches and publications. The said order of detention was challenged in this Court through filing a writ petition W.P. No. 6512 of 1973. The order of detention was set aside, the writ petition was allowed and the petitioner therein was set at liberty. Thereafter, and since May, 1974 the petitioner's husband was arrested in connection with what is known as "Secunderabad Conspiracy Case". Since the arrest of the petitioner's husband, the petitioner has been acting as editor, printer and publisher of the said journal for "Sahithree Mitrulu". In the impugned order, four poems/verses are mentioned in the schedule as being objectionable attracting the offence u/s 124-A of the Indian Penal Code.

22. In this petition, the petitioner contended that the impugned order is violative of the petitioner's fundamental rights guaranteed to her under Art. 19(1)(a), (c), (f) and (g) of the Constitution of India. "A citizen of India has a fundamental right to preach the change or overthrow the Government and in the course of the said freedom of speech, he can also preach that violation is one of the modes of overthrow of the Government. The Constitution recognises the said fundamental right and such preaching has been prevalent since more than a century and also in this country since last several decades. The said exercise of the freedom of speech does not attract Section 124-A I.P.C.

23. It is further submitted in the said petition that "even the Supreme Court of the United States of America has declared that the freedom of speech involves and includes the freedom of speech to overthrow the Government by violent means and that such freedom of speech cannot be suppressed under the Constitution. The poems/verses do not attract Section 124-A, I.P.C. and further that if so construed Section 124-A itself is unconstitutional being violative of the freedom guaranteed in Article 19(1)(a) of the Constitution of India. There is absolutely no proximate or real connection between the publication of the said poems/verses and the danger to the security of the State. The petitioner has been acting well within her fundamental right in printing and publishing the said poems/verses in the said journal and they are in no way illegal. In fact, the impugned order is unconstitutional and also unreasonable. The impugned action is arbitrary and totally unjustified and unwarranted in the present context and circumstances.

24. There was no counter filed,

25. Sri Bali Reddi, learned counsel appearing for the petitioner contended that the impugned order is vague and it does not state how the writings are punishable and that it does not contain the grounds of opinion but merely reproduces mechanically the language employed in Section 124-A of the Indian Penal Code and that it does not contain any seditious matter as contemplated under the aforesaid section and, therefore, the impugned order is bad in law.

26. The learned Public Prosecutor contended on the other hand that having regard to the area declared as a disturbed one and having regard to context of the existence of proclamation of emergency by the President of India the order is not liable to be set aside and even on merits there is no substance in the contention of the petitioner.

Provision of law.

27. Whereas Section 94 of the Code of Criminal Procedure, 1973 provides for the making of a declaration of forfeiture of a book by the State Government, where it appears to them that it contains any matter, the publication of which is punishable among other things u/s 124-A of the Indian Penal Code. Section 95 provides for the setting aside by the High Court of such a declaration for forfeiture when it is not satisfied that the book contained any such matter as is

referred to in sub-section (1) of Section 95.

27-A. Section 124-A, I.P.C. reads thus :---

"124-A. 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 punishable 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 : 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."

28. Article 19 of the Constitution of India in so far as it is material reads thus :--

"19. (1) All citizens shall have the right (a) to freedom of speech and expression;

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(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

We shall now read the notification of the Government.

"HOME DEPARTMENT (GENERAL-A).

Forfeiture of journal "Srujana" May, 1974 issue. G.O.Ms. No. 1346 Home (General-A) 7th October, 1974.

Whereas it appears to the Government of Andhra Pradesh that the journal "Srujana" May, 1974 issue collection of some revolutionary writings, printed at Venkataramana Mudranalayamu, J.P.N. Road, Warangal-2 and edited and published by P. Hemalatha for "Sahithe Mitrulu", contains the objectionable poems and blank verses referred to in the Schedule below which is calculated to bring into hatred and contempt and excite disaffection towards the Government established by law in India, and is prejudicial to maintenance of harmony, the

publication of which is punishable u/s 124-A of the Indian Penal Code;

Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 95 of the Code of Criminal Procedure, 1973 (Central Act No. 2 of 1974) the Governor of Andhra Pradesh hereby declares every copy of the aforesaid journal "Srujana" May, 1974 issue continuing the objectionable poems and blank verses referred to in the Schedule below to be forfeited to the Government of Andhra Pradesh." (We shall omit for the present the Schedule appended to the said order).

29. The point that arises for consideration is whether the journal "Srujana" May, 1974 issue contains any matter, the publication of which is punishable u/s 124-A, I.P.C., 1860?

SEDITION :

30. Section 124-A refers to the offence of "Sedition". That expression occurs in the margin to the section but not in the body of section.

30-A. Walter Gellhorn has defined "Sedition" as follows :---

"The crime of sedition consists of advocacy by word of mouth, publication, or otherwise which incites discontent and contempt for the present form of Government, causing persons to flout its laws and tending to destroy the Government itself. It includes advocacy which incited to overthrowing the existing Government, by force and violence, to bring into contempt the form of Government, its public officers, its military forces, flags, and other symbols.

No overt act is required for the commission of sedition. Mere advocacy alone which is likely to incite is the essence of the crime." (Gellhorn, States and Subversion. P. 397)/

31. The offence of "Sedition" as defined in Section 124-A occurs in Chapter VI of the Indian Penal Code (Act XLV of 1860) under the heading "Of offences against the State." This section was inserted only in the year 1870 through Act XXVII of 1870. It was amended in the year 1898 by which the three present separate explanations replaced the then existing single explanation to that section.

32. Chapter V of the Indian Penal Code contains Ss. 121 to 120; waging or attempting to wage war or abetting of waging war against the Government of India is dealt with in Section 121; the special forms of abatement being by conspiracy (Section 121A); through collections of arms (Section 122) and concealment of design (Section 123). Assaulting the various members of the Government of India or local Government is dealt with u/s 124. Section 114A deals with the use of seditious language regarding the Government established by law. Sections 125 - 127 deal with foreign powers and Sections 128, 129 and 130 with prisoners of war.

The Doctrine of Adoption and Art. 372 of the Constitution.

33. The provision of law contained in Section 124-A of the Indian Penal Code enacted in the year 1870 is to be interpreted and applied after more than a century in the year 1976, particularly in the context of Article 19(1)(a) read with clause (2) thereof of the Constitution of India, 1950.

34. "Actual law" says Karl Oliveorona in his "Law as Fact" second Edition "consisted of the commands and prohibition of one single sovereign, and this was the sovereign of the moment. He commanded and he threatened with punishment. Henry VIII could neither command nor threaten in 1760.

But how could it he explained that laws issued in the reign of Henry VIII were commands and prohibitions of George III and his Parliament? The problem found an explanation to the theory of "adoption". The actual sovereign made the laws of preceding sovereigns his own. This he did as a matter of course; if he did not, the whole machinery of Government would drop the pieces. No express declaration of the desire of the sovereign to continue established laws was needed. He manifested his intention by every act of Government providing for the enforcement of those laws." (P. 29).

35. The theory of adoption is based on the sign theory. The adoption of laws issued by previous sovereign takes place when the present sovereign tacitly shows that he continues to exercise the will of his predecessors. Customary law (Judge-made law) is also explained by way of adoption the sovereign "pre-adopts" the acts of the Judges; and their acts service as signs to the people at large that similar acts of power will probably be exercised in the future similar case." (Page 30).

"The legislator is he, not by whose authority the laws were first made, but by whose authority they now continue to be laws." (Hobbes Leviathan 26, 5. The Limits of Jurisprudence Defined). Bentham.

36. The constitutional recognition of this doctrine of "adoption" is found in Article 372 by which "all the laws in force in the territory of India" immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

37. The law contained in Section 124-A answers thus the description of laws in force in the territory of India immediately before the commencement of this Constitution" as occurring in Article 13 of the Constitution and "existing law" occurring in Clause (2) of Article 19 imposing reasonable restrictions on the exercise of the right "to freedom of speech and expression" in the interests of the sovereignty and integrity of India, the security of the State..... public order or incitement to an offence."

Judicial Process and Public Law Approach : "State and Security of State".

38. How the multi-faceted concepts like State and security of State in form and substance are going on varying through judicial process both structurally as well

as functionally culminating ultimately in the triumph of public law approach is manifested in the interpretation of the contents of Section 124-A in the context of Article 19(1)(a) read with clause (2) thereof, giving rise even to the constitutional amendment as well.

39. Justice Fazl Ali, dissenting from the majority opinion of the Supreme Court as regards the concept of "sedition" both in *Romesh Thappar Vs. The State of Madras*, and in *Brij Bhushan and Another Vs. The State of Delhi*, said particularly in the latter case that :

"Sedition owes its gravity to its tendency to create disorder and an authority of Criminal Law like Sir James Stephen has classed sedition as an offence against public tranquillity."

Explaining the circumstances for the omission of the expression "Sedition" in Article 19(2) of the Constitution the learned Judge said :

"In these circumstances, it is not surprising that they decided not to use the word "sedition" in clause (2) but used the more general words which cover sedition and everything else which makes sedition such a serious offence. That sedition does undermine the security of the State is a matter which cannot admit of much doubt. That it undermines the security of the State usually through the medium of public disorder is also a matter on which eminent Judges and jurists are agreed. Therefore, it is difficult to hold that public disorder or disturbance of public tranquillity are not matters which undermine the security of the State."

40. Accepting the above statement of law as contained in the dissenting judgment of Justice Fazl Ali, the Parliament amended clause (2) of Article 19(2) in so far as he had pointed out that the concept of "security of State" was very much allied to the concept of "public order" and that restriction on freedom of speech and expression could validly be imposed in the interests of public order.

41. The concept of "security of State" is thus explicated in terms of the means of its maintenance by the interpretation that "security of State" would be undermined by "sedition" through public disorder or through disturbance of public tranquillity.

42. That take us to the metamorphosis of the concept of the modern State in the context of its changed functions in relation to the freedom of the individual.

43. MacIver in his celebrated book "The Web of Government" says :

"The great expansion in recent times of functions of general welfare is tending more than anything else to foster new conceptions of the nature of the State. It puts Government into more familiar and more co-operative relations with the ordinary man. It is breaking down the tradition of the State as Power, the age-old tradition of the oligarchical State. Were it not for the dominance of power in international affairs the aspect of the State as power would fall into a new perspective wherein power became the guardian of the service of the

community." (Page 340).

"The expansion has done much to change the very conception of the State, so that from being in the eyes of those subject to it, mainly an instrument of power it has become so far as its internal activities are concerned, in large measure as agency of service. (Page 331.

44. Earnest Barker developed an admirable thesis concerning the functions of the Government as lying in the service of rights in his book "Principles of Social & Political Theory" 1952 Edition.

He had this to say :

"It is easy, and perhaps even natural to pose (sic) (oppose?) the functions and powers of Government to the rights and liberties of persons, as if they were mutually exclusive and each of them began at the point where the other ended. They may, indeed, be distinguished in thought, but they are inseparable in operation. Functions of Government cannot be separated from rights of persons, except in the sense in which the reverse of a coin can be distinguished from the obverse. On the one hand, the functions of Government are a condition of the rights of persons, because they are necessary to the enjoyment of those rights and because they exist in order to secure them. On the other hand, the rights of persons are a condition of the functions of Government, because they are the source and the cause of the existence and action of Government."

.....

We may accordingly say that Government is a service on behalf of rights and not a power outside their range : "servitum, propter jura, non potestas praeter jura." We may add that the service rendered by Government to rights is both a consequence and a part of the general rights of persons." (Page 226)

Otto A. Buird in his book. "The Idea of Justice" (1967) says :

"When one turns to the literature on justice, one finds overwhelming evidence that justice is conceived of as a concept that applies to man in his social relations. It is assumed, when it is not stated explicitly, that justice occurs only where many men are gathered together in a social relationship. It is "a quality relating to men in society." Habbes writes, "not in solitude", Kelson calls it "primarily a quality of the social order". For Hume and the Utilitarian philosophers, justice is a "social virtue". According to Aquinas, "justice lies in the communication that men have with each other"." (Page 12).

"Justice consists in serving and promoting the social good Law itself is just or unjust according as it serves or fails to serve the good of society. So too, rights belongs to man only as he is associated with others in a society." (p. 95).

"..... Justice is a social norm and applies only to men in their social relations." (page 80)

"What is at issue is the priority of man or society in accounting for justice. Is it what man is and his good that supplies the basic rule of justice, or does this derive rather from what society is and its good? In this formulation of the basic difference, man need not, in fact he should not, be taken as an individual somehow set against society." (page 171).

45. Morris Ginsberg, the famous English Sociologist said in his "Essays in Sociology and Social Philosophy" under the heading "The Individual and Society" that the ultimate source of conflict in the world today is to be bound in the struggle between two opposed ideals, that which attaches supreme value to be individual and that which subordinates his good to that of the community.

"Everywhere in the modern world there is to be traced a double movement on the one hand, a break-down of the older social structure and with it a liberation of the individual on the other, on enormous increase in collective powers and a process in which the community takes on functions previously left to the individual, the family or some other body. The movement may be described in another way as consisting in a transition from the conception of personal rights inhering in individuals and limiting the law, to a conception of rights as defining social relations and of law as based on rights so defined. The problem has been how to base liberty on law and law on liberty." (pages 56 and 57).

"But a succession of thinkers from J.S. Mill to T.H. Green L.T. Hobhouse, J.A. Hobson, Lord Lindsay, Ernest Barker and others have shown that personal liberty and state control are not necessarily opposed." (page 66).

Functions of Courts in clash resolving process :---

46. The function of the courts is to choose between claims of conflicting interests. That conflict may be between public and private interests and between long range and short range interests embodied in claims for the constitutional protection. Such a conflict may be between the constitution and laws made thereunder, between law and liberty, between State and individual or it may be between interests in the right to freedom of speech and expression protected by the Constitution and the interests supposed by the Legislature to justify their restriction as provided for by the Constitution. That conflict may arise in the ultimate analysis between two opposing ideals that which attaches supreme value to the individual and that which subordinates his good to that of the community. It is a conflict of values.

47-48. Judicial process by its very nature cannot be purely mechanical. It is creative too in the matter of its freedom to choose between competing and conflicting values, whether they are all hierarchical type or kaleidoscopic type.
Method of Sociology :

49. Holmes believed that social policy is the inarticulate major premise for judicial decision. Sociological jurisprudence insists, as a matter of value, that the social advantage of the rule is its major test since the welfare of society is the

general aid of the law. It has specified that the main functions of law is the furtherance of the values of a given time and place.

Pound's Theory of Interests :

50. From 17th century to the close of the 19th century courts spoke in terms of individual natural rights reflecting the free will emphasis of the philosophers and the laissez-faire notions of classical economists. Social interests were pushed into the background during the period of "rugged individualism". In the 20th Century, we have come to think in terms of the social interest in the individual and the individual's stake in society.

50-A. According to Morris Cohen :

"..... The meaning of a statute consists in the system of social consequences to which it leads or the solutions to all the possible social questions that can also arise under it."

"In essence, then, statutory interpretation involves a choice between uncertainties and sociological jurisprudence suggests, that the choice should be made in the light of the social consequence of decision..... "

(From Judicial Process and Social Change by F. James Davis, Henry H. Foster, Jr.)

51. According to dynamic interpretation of Holmes, the functions of the court is to reflect contemporary needs and prevailing values consonant with legislative and executive declarations of policy.

Judicial Process and Values :

Preservation of Government established by Law is the highest value :

51-A. In a thought-provoking article published in (1951) 65 HLR 1, Elliot L. Richardson says ;

"Whatever may be the right of revolution as a theoretical matter, it is clear, surely, that an existing Government need not so construe the organic law under which it has been organised as to block the taking of steps necessary to assure its own safety. It may be that on an abstract scale some human "rights" in some situations at least, are entitled to priority over the sanctity of the duly constituted Government, but it would be absurd in construing a constitution to recognise any such priority. The preservation of the constitution or, what is the same thing, the Government deriving its authority from the constitution, can thus properly be treated as a value transcending any other value in the scale employed by a constitutional court." (page 18)

52. Mr. Justice Frankfurter, in his concurrent opinion of the Supreme Court of America in *Dennis v. United States*, (1950) 95 L Ed 1137 at p. 1155 said :

"The right of a Government to maintain its existence: Self-preservation is the most pervasive aspect of sovereignty. "Security against foreign danger" wrote

Madison, "is one of the primitive objects of civil society", The Federalist No 41. The constitutional power to act upon this basic principle has been recognised by this Court at different periods and under diverse circumstances. "To preserve its independence and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what from such aggression and encroachment come..... The Government possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth

Chinese Exclusion Case (1888) 120 US 581, 606 :32 L Ed 1068,1075 :9 SC 623 See also De lima v. Bidwell, (1890)182 US 1 :42 L Ed 1041 :21 S Ct 743: Mackenzie v. Hare, (1915) 239 US 29 : 60 L Ed 297 :36S C 106 Ann Cas 1916 E 645 : Missouri v. Holland, (1919) 252 US 416 : 64 L Ed 641 : 40 S C 382, 11 ALR 984; United States v. Curtiss Wright Export Corp., (1936) 299 US 304 : 81 L Ed 255 : 57 S C 216. The most tragic experience in our history is a poignant reminder that the Nation's continued existence may be threatened from within. To protect itself from such threats, the Federal Government is invested with all these inherent and implied powers which, at the time of adopting the Constitution were generally considered to belong to every Government as such, and as being essential to the exercise of its functions. "Mr. Justice Bradley, concurring in Legal Tender Cases, (US) (1871) 12 Wall 457, 554, 556 : 20 L Wed 287, 314, 315 and see Re Debs. (1894) 158 US 564, 582 : 39 L Ed 1092, 111 : 15 S C 900".

53. *Dennies v. United States*, (1950 95 L Ed 1137) (supra) is a case where the conviction of the leaders of the Communist Party for the violation of the Smith Act directed at conspiracy to teach or advocate the overthrow of the Government by force or violence was confirmed by the Supreme Court of America. Chief Justice Vinson speaking for the majority said :

"The obvious purpose of the statute is to protect existing Government, not from change by peaceful, lawful and constitutional means, but from change by violence revolution and terrorism. That it is within the power of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial Governments is without force where the existing structure of the Government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the fact of preparation for revolution, which principle carried to its logical conclusion, must lead to anarchy. no one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence." (At page 1146).

54. Referring to the application of "clear and present danger" test the learned Chief Justice observed thus :

"Overthrow of the Government by force and violence is certainly a substantial enough interest, for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then this interest may be protected. If, then the interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permits, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though deemed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient even for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case the trial Judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government "as speedily as circumstances would permit". This does not mean, and could not properly mean, that they would not strike until there was certainly of success." (page 1153).

"Chief Justice Learned Hand, written for the majority below, interpreted the phrase as follows : "In such case (courts) must ask whether the gravity of the "evil" discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 182 F 2d at 212. We adopt this statement of the rule. As articulated by e Had, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant and relates their significances. More we cannot except from words". (page 1153).

England :

55. The situation obtaining in England is admirably brought about by Dias in his "Jurisprudence" Third Edition.

""Values" for present purposes cover all those considerations that shapes the provisional decision of a court and guide its handling of rules by providing the yardsticks for measuring the conflicting interest a that are involved. By "value" judgment is signified the choice of a particular value as well as the result of measuring interests with reference to the chosen value."

"..... "the principle yardsticks," continued the author on the next page, "by which conflicting interests are evaluated may tentatively be listed as national and social safety, sanctity of the person, sanctity of property""

..... When yardsticks compete the Judge has to choose between them, and it is only by collating such cases that it becomes possible to see whether there is hierarchy of values. It is submitted that national and social safety override all other considerations and sanctity of the person is superior to sanctity of property, but beyond this the pattern is kaleidoscopic, not hierarchical. Every social twist alters the balance and settles the values in a new pattern, the position today is different from what it was five years ago, and vastly different from what it was thirty years ago."

Sanctity of the Person :

56. The learned author proceeded in the succeeding para to illustrate his point by referring under sanctity of the person, to the decision in *Sommersett's Case* ((1772) 20 State Tr. 1) and state that there is a discernible tilt in favour of personal liberty. That is a case where the assertion of ownership by a slave-owner over his slave was rejected.

Security of Property :

57. Reference was made under this heading to the case of *Entick v. Carrington* ((1765) 19 State Tr. 1029) which emphasised that a general warrant is no justification for the seizure of private papers and the plea of State necessity was brushed aside with the remark that "the common law does not understand that kind of reasoning."

58. *Attorney General v. De Keyser's Royal Hotel Ltd.* ((1920) AC 508) was then referred to show that respect for property has given rise to the rule that there should be no deprivation without compensation.

National and Social Safety :

59. Both sanctity of the person and of property give way when the safety of the nation or of society is at stake. A reference was then made to the case of *Liversidge v. Anderson* (1942 AC 206): The learned author observes thus :

"By contract, the attitude of the majority is to be explained on the ground that at the date when the situation arose, which, was a most critical phase of the war, the courts were not going to hamper the executive, and every consideration, including that of freedom from arbitrary arrest, was made to yield in the national interest." (page 170).

(See the article by the learned author. "The Value of A Value Study of Law" published in 1969 *Modern Law Review* at page 397 on the subject.)

India.

60. The situation obtaining in India not different. Sinha, Chief Justice of the

Supreme Court in his judgment in Kedar Nath v. State of Bihar, AIR 1962 SC 95 considering the constitutional validity of Section 124-A of the Indian Penal Code as to how far the said section is consistent with the requirements of clause (2) of Art. 19(2) of the Constitution with particular reference to the security of State and public order observed at page 967 of the report thus :---

"..... the section, it must be noted, penalises any spoken or written words or signs or visible representations etc., which have the effect of bringing or which attempt to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law. Now, the expression "the Government established by law" has to be distinguished from the persons for the time being engaged in carrying on the administration. "Government established by law" is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted. Hence, the continued existence of the Government established by law is an essential condition of the stability of the State. That is why "sedition" as the offence in Section 124-A has been characterised, comes under Chapter VI relating to offences against the State. Hence, any acts within the meaning of Section 124-A which have the effect of subverting the Government by bringing that Government into contempt or hatred, or creating disaffection against it, would be within the penal statute because the feeling of disloyalty to the Government established by law or enmity to its imports the idea of tendency to public disorder by the use of actual violence or incitement to violence." (page 967).

.....

"..... The security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation with a view to punishing offences against the State, is undertaken. Such a legislation has, on the one hand, fully to protect and guarantee the freedom of speech and expression which is the sine quonon of a democratic form of Government that our Constitution has established." (p. 968).

61. The learned Judge further observed in para 26 that any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidity.

"The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency to create disorder or disturbance of public peace by resort to violence. As already pointed out, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action however, strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken etc., which have the pernicious tendency or intention of

creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section in our opinion, strikes the correct balance between individual fundamental rights and the interest of public order." (page 969).

Emergency and Security of State :

62. If the President of India is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may by proclamation make a declaration to that effect under Article 352 of the Constitution.

63. Where a proclamation of emergency is in operation the President may, under Article 359(1) of the Constitution order that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order.

64. On December 3, 1971, the President of India in exercise of the power conferred by clause (1) of Art. 352 of the Constitution by a proclamation declared that "a grave emergency exists whereby the security of India is threatened by external aggression. This proclamation of emergency is now in force.

65. On June 25, 1975, the President of India under the aforesaid provision of law, by his proclamation, declared that a grave emergency exists whereby the security of India is threatened by internal disturbances. On the same day, the President in exercise of the powers conferred by clause (1) of Article 359, declared that the right of any person to move any court for the enforcement of the rights conferred by Articles 14, 21 and 22 shall remain suspended for the period during which the aforesaid two proclamations of emergency are in force

66. While the proclamation of emergency is in operation, nothing in Art.19(2) shall restrict the power of the State in Part III to make any law or to take any executive action which the State would but for the provisions contained in that part be competent to make or to take.

67. But yet with all that, the petitioner in this case in para 4 of the petition states that "the impugned order is violative of the petitioner's fundamental right guaranteed to her under Art. 19(1)(a), (c) (f) and (g) of the Constitution of India."

Emergency, Freedom of Speech and Expression and Modern Trends :

68. Speaking about the repression of freedom of speech in times of emergency, Justice Brandeis, a protagonist of free speech, observed to *Whitney v. California*, (1947) 71 L Ed 1085 thus :

"Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is, therefore, always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it."

Freedom of Speech "clear and present danger"--- Test.

Justice Holmes enunciated this famous "clear and present danger" test in *Schenck v. United States* (1919) 63 L Ed 470 for determining the boundary between the speech that can be punished. Said the great Judge in that case :

"But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting "fire in a theatre and causing panic."

"..... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent it is a question of proximity and degree. When a nation is at war, many things that might be said in times of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right....."

Freedom of Speech --- "Bad Tendency" Test :

69. "Bad Tendency" test was formulated by Justice Sanford in *Gitlow v. New York* (1925) 368 US 652. That is a case where Gitlow was convicted under a New York statute making it criminal to advocate, advise or teach the duty, necessity or propriety of overthrowing organized Government by force or violence. The Court there was called upon to choose between the common law test of dangerous tendency and the clear and present danger test. Justice Sanford adopted the former and sustained the conviction saying that ;

"..... By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized Government by force, violence, and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil, that they may be penalised in the exercise of its police power. That determination must be given great weight..... That utterances inciting to the overthrow of organized Government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature involve, danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is nonetheless substantial because the effect of given utterances cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale."

70. The learned Judge distinguished the Schenck case (1919 63 L Ed 470) where Justice Holmes formulated the clear and present danger test by saying that it has no application where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

"Preferred Position" Doctrine--Freedom of Speech.

71. By this doctrine is meant that laws restricting freedom of speech, press etc. were not to be presumed constitutional. This preferred position doctrine shifted only the burden of proof to those who defended legislation restricting First Amendment freedoms in the United States of America.

72. In *Abrams v. United States* (1919) 250 US 616 at partnership. 630, 631 in a famous dissent Holmes said :

"Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exceptions to the sweeping command. "Congress shall make no law"--- abridging the freedom of speech."

73. These cases illustrate that the concept of danger has been transferred from the situation brought about by the speech or utterance to a state of affairs existing independently of those utterances.

74. That the claim to freedom of speech is to be subordinated to that of the security of the State is neatly brought about by Walter Berns in his book "Freedom Virtue and the First Amendment" at page 52 thus---

"By analysing each case in which it has been cited, in either the majority or a dissenting opinion, according to the claim competing with the claim to freedom of speech, an interesting pattern is discovered. The competing claim in the Schenck case, the case that gave birth to the doctrine, was the national security of the United States. Schenck's conviction was affirmed; his socialist anti-war pamphlets were held to constitute a clear and present danger of bringing about an evil that Congress had a right to prevent; the obstruction of the recruitment of the armed forces. The competing claim in the *Abram's* case was the same national security; *Abram's* conviction was affirmed, though Holmes and Brandeis argued that his leaflets, the "puny anonymities", did not constitute a clear and present danger. The same is true in *Gitlow v. New York*; *Scheffer v. United States*, *Pierce v. United States*; *Korematsu v. United States*, *American Communication Ass. v. Douds*, *Dennis v. United States* and in the two State cases of *Gilbert v. Minnesota* and *Whitney v. California*, (1925) 268 US 652."

75. It is not out of place to repeat here the observations of Judge Hand in the *Dennis* case, approved by the Supreme Court in *Dennis v. United States*, (1950 95 L Ed 1137) referred to already :

:In such case they (courts) must ask whether the gravity of the "evil" discounted by its improbability, justifies such invasion of free speech as is necessary to avoid

the danger." *(United States v. Dennis, 183 F 2d 201).

76. Whatever be the nature of the test propounded and applied by the Supreme Court of America in the free-speech cases, whether it be clear and present danger test, bad-tendency test, preferred-position test or the one propounded by learned Judge Hand, the dominant pattern discernible is the recognition of the supremacy of the social interests in the security of the State when it comes into conflict with an interests in the freedom of speech in the judicial scale of social values.

77. Now, we shall consider the matter contained in the journal "Srujana" May, 1974 for the purpose of ascertaining whether he same is punishable u/s 124-A, I.P.C.

78. The Government was of the view that the matter contained therein is objectionable as the same is calculated to bring into hatred and contempt and excite disaffection towards the Government established by law in India and it is prejudicial to the maintenance of harmony. We have already noticed the contents of Section 124-A I.P.C. As per the Explanations 1 and 2 appended to that section, comments expressed in disapprobation without exciting or attempting to excite hatred, contempt or disaffection, of the measures of the Government with a view to obtain their alteration by lawful means or of the administrative or other action of the Government do not constitute an offence under that section. What constitutes an offence under that section is utterance which brings or attempts to bring into hatred or contempt or excites and attempts to excite disaffection towards the Government established by law in India which is rendered punishable with imprisonment for life to which fine may be added. The expression "disaffection" as per Explanation 1, included disloyalty and all feelings of enmity.

79. Sri Comer Petheram, C.J. in his charge to the jury in Queen-Empress v. Jogendra Chandra Bose, I L R (1892) Cal 35 explained the expression "disaffection" to mean "a feeling contrary to affection, in other words dislike or hatred". It is sufficient, according to the learned Judge, for the purpose of Section 124-A that the words used are calculated to excite feelings of ill-will against the Government and to hold it up to the hatred and contempt of people and that they were used with the intention to create such feeling.

80. Strachey, J, in his charge to Jury in Queen Empress v. Bal Gangadhar Tilak, I L R (1893) Bom 112 said :

"The offence as defined by the first clause is exciting or attempting to excite feelings of disaffection to the Government. What are "feelings of disaffection"? I agree with the Comer Patheram in the Bangobasi case that disaffection means simply the absence of affection. It means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government."

81. The same idea was brought out by Sir C,. Farran C.J. in Queen Empress v.

Ramachandra Narayan, I L R (1898) Bom 152 where the learned Chief Justice said :

"An attempt to excite feelings of disaffection to the Government is thus equivalent to an attempt to produce hatred of Government as established by law, to excite political discontent and alienate the people from the allegiance."

82. In the same case, Ranade, J., also defining "disaffection" said that it means "a feeling which tends to bring the Government into hatred or contempt by imputing base or corrupt motives to it, makes men indisposed to obey or support the laws of the realm, and promotes discontent and public disorder."

83. It was observed in Sachin Das v. Emperor, AIR 1926 Cal 524 that "the case of bringing into hatred or contempt and that of exciting or attempting to excite disaffection have, in view of the scheme of this section to be considered together, the one resulting from the other."

84. Horwill J, observed in the case of In Re: S.S. Batliwala, speaking about Section 124-A I.P.C. thus :---

"The sedition does not end with the denunciation of the Government and an exhortation to the people to follow the thousand of Alluris of today. But includes the bringing into hatred and contempt the magistracy and the police. Attacks of this kind on Government employees scandalise the Government by casting a reflection on those who are entrusted with the administration of public affairs and naturally tend to endanger the public peace." (P. 765).

85. Commenting whether an article attacking the police comes within the purview of Section 124-A I.P.C. a Division Bench of Calcutta High Court in the case of Satya Ranjan Bakshi and Another Vs. Emperor, held thus :--

"Judged by these tests it seems to me that the intention of the article was clearly to create feelings of hostility to Government, and to excite disaffection. Indeed no other conclusion is possible. This article exceeds all the limits of fair and reasonable criticism. It vilifies the police as a body in the most opprobrious language, and contains a threat or warning to Government that if the police continue to act as they have in the past, the Empire will be brought to ruin. It is difficult to calculate the amount of harm which may be caused by an article written in language so intemperate and so devoid of all sense of restraint." (p. 280).

86. It is in the light of the aforesaid background we propose to discuss the nature of contents of the journal in question. The translation of the matter in the schedule appended to the impugned order into English seem to be fairly accurate.

86-A. In the first poem or blank verse it is stated thus :

"Bread open all the godowns,

Bread distribute into dust and rubbles,

Cut to pieces,
the bastards who obstruct you,
and run away."

86-B. The second one is Riksaw song by V.B. Gaddar. The following paragraph may be noted :

"..... The police bastard,
Is an Yama for me,
He stop some at every place,
He squeezes money out of me."

.....

"Some hero,
Get into my ricksaw,
He opened my eyes,
enquired about my earnings and sufferings,
He pities me,

.....

He explained,
How the haves earned lakhs,
He explained,
How the others became poor,
He showed me away out of poverty,
He has given me the address in the forest

.....

Before I go to the forest,
I will meet the Sait,
I will cut his throat,
With all my vengeance,
And for all my jor....."

86-C. The third one is "The Fighting Song" by Nammu, printed at page 46 of the Journal "Srujana". The following passages may be noted :

"Fight, Fight, Fight,
Take up axes, Take up sickles,
Fight, Fight, Fight, Fight,
.....
If you let these leeches live,
There can be no peace in the entire life,
They will rob you and kill you,
Lakhs of rogues are there in this country,
All the landlords are exploiters,
All having support them,
The police supports them,
Congress supports them,
No happiness so long as they survive,
You cannot have a house-family,
Fight, Fight
Sharpen your axes, Fight, Fight,
Sharpen you sickles,
Wake up early,
Cut down these pests,
Before dawn these pests,
Before the dawn
Everything should be crimson
This is the line,
Taught by Santal or Naxalbury,
This is what
the forests of Srikakulam thought,
The success will be ours,
Only when we follow this line,
Fight, Fight,
.....

Fight, Fight, Fight, Fight,
On the line of Charu Babu,
On the line of Comrade Satyam,
Along the path of Panigrahi,
Along the path of Bhaskar,
Sharpen the axes,
Sharpen the sickles,
Fight, Fight, Fight, Fight."

87. The last one bears the caption "Can the Jails run the trains?" by Satya a railway employee. The following passage may be noted from the above

".....

This is why we have resorted to strike
The Government had made arrest even before
We used the weapon of strike,
It sees the sings of armed struggle behind this strike,
This is why the ruling classes are in jitters,
We do not rest till we overthrow with arms,
The Government which does not come down with the strike,
We will wage struggle till we achieve proletarian state."

88. The aforesaid passages are certainly calculated to bring into hatred and contempt exciting disaffection towards the Government established by law in India.

89. In the first poem the exhortation was to break open all the godowns and distribute the grains contained therein, cutting into pieces the bastards who obstruct them and run away. The utterances have a tendency to create disorder or disturbance of public peace by resort to violence. In the second one also, the ricksaw driver says that the solution for the evils of suffering from poverty was to cut the throat of the Sait, the owner of the rikshaw, with all vengeance and for his joy and the reference to the police as bastards and "Yama" do certainly create disaffection towards the Government who are responsible for the maintenance of law and order.

90. In the third one, the principles professed and practised by naxalites were commended and the people were exhorted to sharpen their axes and sickles to cut down the pests and the leeches on the lines taught by nexalite leaders like

Santhal of Naxalbury, Charu Babu, Comrade Satyam, Panigrahi and Bhaskar who do not believe in the existence and functioning of Government established by law.

And the last one contained this :

"We do not rest till we overthrow with arms, the Government which does not come down with the strike."

91. These writings incite and advocate the overthrow of the Government with arms by violence and by unlawful means. By their very nature they involve danger to the public peace and to the security of the State. They have the pernicious tendency or intention of creating public disorder or disturbance of public tranquillity and "law and order". The very security of the State depends upon the maintenance of law and order.

92. These writings are not expressing any 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. Now are they intended to express and disapprobation of the administrative action or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, towards the Government established by law in India.

93. They proceed on the assumption that the Government failed in the discharge of their duties. They excite disloyalty and all feelings of enmity. They bring or attempt to bring into hatred and contempt the Government. It may be noted in this connection that even truth, if there is one in these writings, is not a justification for such seditious utterances.

94. So far as the expression of grievances is concerned, there may not be anything objectionable. But the means that were required to be adopted for getting those grievances redressed are certainly unlawful and illegal bringing about public disorder, disturbing public tranquillity, having a tendency to affect the security of the State and the Government established by law. They in our opinion do certainly constitute an offence punishable u/s 124-A of the I.P.C.

95. A contention was raised by the learned counsel appearing for the petitioner that the Government did not apply their mind while issuing the impugned order. We are satisfied that the Government have applied their mind to the contents of the journal. "Srujana" May 1974 part and they have chosen to consider only the four poems or blank verses referred to in the schedule as containing objectionable material and they characterised the same as one calculated to bring into hatred and contempt and disaffection towards the Government established by law. Therefore, there is no substance in the contention of the learned counsel that the Government did not apply their mind to the contents of the objectionable matter in the journal which issuing the impugned order.

96. We may refer to a contention raised in the petition that there is absolutely no proximate or real connection between the publication of the poems/verses and the danger to the security of the State. The modern State protects the rights of

the individual. Unless the State is capable of protecting itself, we cannot expect it to protect the rights of the individual. The preservation, protection and security of the State is the transcendental value to which all other values are to be subordinated in the judicial hierarchy of values. The question is not that the State is not strong to put down any violence or bring about such a state of affairs through objectionable utterances.

97. An attempt to overthrow the Government by force, even though doomed from the outset to failure is a sufficient evil for the Government to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity of Governmental measures in terms of probability of success or the immediacy of the successful attempt. Whether the intervention of the Government, through suppression of speech and expression is either too premature or too late are matters, within the exclusive domain of the Government, over which the Courts cannot have any material in the nature of things to sit in judgment. The pernicious effect of the seditious utterances is to be measured not through the yardsticks of actuality but of potentiality and tendency. Judging by that standard, we find the needed nexus between the utterances and the danger to the security of the State.

98. The learned Public Prosecutor contended that the area wherefrom this journal was published was declared as a disturbed area by a Government notification and that fact also was required by us to be taken into account. There was no counter filed in this case and, therefore, we thought that it is not desirable on our part to permit the respondent to rely upon the circumstances as the consideration of that needs some facts we should be apprised of as regards which the other side also has no opportunity to comment even.

To sum Up.

The Doctrine of Adoption and

Method of Sociology :

99. Laws enacted in the year 1870 by the law-making authorities contained in Section 124-A of the Indian Penal Code are to be interpreted, applied and enforced after more than a century in the year 1975 by the judiciary particularly in the context of Art. 19(1)(a) read with Clause (2) thereof of the Constitution of India, 1950. The interpretative process is predicated on the assumption that the present law-maker adopts as his own, the laws made by the previous law-maker, retaining with him the power to alter, repeal or amend the same, as the exigencies demand.

100. The doctrine of adoption propounded by Hobbes in his Leviathan, that the "Legislature is he, not by whose authority the laws were first made, but by whose authority they now continue to be laws" is thus fundamentally embodied in Art. 372 of the Constitution of India, securing the continuation in force of the laws.

101. Social policy is the inarticulate major premise in the judicial decision while

adjusting law to the changing social environment. Sociological jurisprudence insists as a matter of value, that the social advantage of the rule should be its major test, since the welfare of society is this general aim of law, the main function of law being the furtherance of values of a given time and place.

102. The function of the courts is to reflect the contemporary needs and prevailing values consonant with legislative and executive declarations of policy

Judicial Process and Public Law approach :

103. The Common Law Antedates Legislative Process. The emphasis of the common law was on freedom of the person, freedom of contract and freedom of property. It is treated as a private law system. Common law's lack of concern with public law which is concerned with the rights of obligations of the State in the setting of Municipal Law is too well known. The common law has never understood or accommodated a public right in the changed environment. The Modern Welfare State with its expanded functions is challenging the relevance or the adequacy of the common law concepts and classifications and principles.

104. The age of "rugged individualism" of nineteenth century has gone. Its place has been taken by sociological individualism of the present century. The dominant pattern is no more an individualistic society. It is a collectivist society.

105. The tremendous expansion of functions of general welfare has changed the concept of the State, so that from being mainly an instrument of power, it has become in a large measure an agency of service. The powers and functions of the Government are not opposed to the rights and liberties of persons. The former exists for the latter and the latter realizes through the former.

106. Social justice, the goal of judicial process, consists in serving and promoting social good. Man need no more be taken as an individual some how set against society.

107. There is a transition from the conception of personal rights inhering in individuals and limiting the law to a conception of rights and defining social relations and of law as based on right so defined. Personal liberty and State control are not necessarily opposed. Man is rational and social justice is conceived of as a connect that applies to man in his social relations.

108. This process of transition and transformation of the concepts like "State", "individual", "liberty" and "rights" can be accomplished smoothly and successfully only through creative judicial process by subjecting the private law concepts to public law approach by a conscious recognition of the shift of emphasis from the individual to the society.

Preservation of Government is the Highest Value :---

109. The preservation of the State or the Government established by law is a value transcending any other value employed by a court. The right of the Government to maintain its existence--self preservation--is the most pervasive

aspect of sovereignty. If a State cannot protect itself, whether it be from external aggression or internal disturbances, it cannot protect the rights of individuals guaranteed under the Constitution including right to freedom of speech and expression there is, therefore, involved in the protection of the State, protection of rights protected by the Constitution.

110. In the hierarchy of values, the preservation and protection of security of the State comes first and all others next in the judicial reckoning when such is not the case, the values are kaleidoscopic.

Emergency and Security of State :

111. A grave emergency exists whereby the security of India is threatened both by external aggression as well as by internal disturbance. The right of any person to move any court for the enforcement of the rights conferred by Articles 14, 19, 21 and 22 remain suspended. Still, the petitioner in the petition claims protection for the right conferred under Art.19(2) of the Constitution against the seditious utterances. The danger, actual or apprehended on account of the seditious utterances contained in the "Srujana" issue in question has been transferred from the situation brought about by these utterances in a state of affairs existing independently of those utterances, the State of Emergency adding thus a new dimension to the situation.

112. The social interest in the safety, security and stability of the State threatened with subversion by arms and violence through creating public disorder and disturbing public tranquillity is always paramount to any other interest including those in the right to freedom of speech and expression guaranteed under Art. 19(1)(a) of the Constitution in the judicial scale of social values.

113. After giving our anxious consideration to the contentions raised in this case, we are satisfied, for the foregoing reasons that this petition merits dismissal and it is, therefore, accordingly dismissed.

ORDER OF THE COURT

114. In view of the unanimity of opinion expressed by us, the petition is dismissed.

115. Petition dismissed.