The apex court's interim order on sedition (Section 124A of IPC)

Can innocent citizens breath freely from now onwards?

E A S Sarma
Former Secretary to Govt of India

The recent interim order of the apex court putting on hold the operation of Section 124A of the IPC on sedition has certainly brought a breath of fresh air for safeguarding the interests of the innocent citizens in India. However, there are several other draconian laws and many weak links in the criminal judicial system that need to be addressed urgently, not only to make sure that the executive refrains from exercising arbitrary authority to suppress democratic dissent, but also to provide relief to thousands of undertrials, especially those belonging to the disadvantaged sections of the society, who are unable to defend themselves.

Essential ingredients of a functioning democracy:

Democracies function effectively only when there is a reasonable space for dissent, debate and discussion on issues of public importance. The rule of law and equality before the law are both necessary and essential requirements for democracies to survive.

In addition, the two principles of natural justice, that need to be scrupulously fulfilled for safeguarding the citizen's interests, are that "***a person accused of a crime is considered innocent until proven guilty***" and "***the burden of the proof lies upon him who affirms, not he who denies***".

As a result of the draconian laws we have and the way the political leadership's insatiable appetite to misuse them and also as a result of the sheer insensitivity of the rulers to the plight of the disadvantaged in the society, these principles of natural

justice are often thrown to the winds and, as a result, thousands of citizens, many of them perhaps innocent, are forced to languish indefinitely in jails.

Both the politicians and the law enforcement officials have perfected the art of forcing persons, yet to be proven guilty, into unending detention. It is unfortunate that they have even institutionalised that practice.

The apex court's interim order on sedition:

It was as early as in 1870 that the colonial rulers introduced Section 124A of the Indian Penal Code (IPC) with a view to rule the people by suppressing dissent, in the name of "sedition". It is unfortunate that, even after Independence, the democratically elected governments that came to power have chosen to retain such a regressive provision and continue to misuse it, as their colonial predecessors did.

While India may have attained independence from the colonial rule on August 15, 1947, it is yet to extricate itself from the colonial attitude and the colonial practices!

It is equally unfortunate that, in the name of safeguarding the security of the nation, the successive governments should further add to the woes of the innocent citizens by enacting several regressive laws such as the Unlawful Activities (Prevention) Act, 1967 (UAPA) and the National Securities Act, 1980 (NSA). While national security is indeed of paramount importance and it should be protected zealously, it should not provide an open-ended alibi to the political executive to suppress dissenting voices, which are an essential ingredient of a functioning democracy.

It is in this context that the apex court's recent interim order suspending the operation of Section 124A of the IPC, pending a review of the provision by the Centre, has come as a pleasant relief for the citizens. One can only hope that the review will ultimately result in a realignment of the relevant provision of the IPC so as to safeguard the citizen's right to freedom.

How detentions without trial have got institutionalised in India:

In Plato's words, "*good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws.*" T

Most law enforcement authorities, subservient to the political executive, adopt many innovative ways to arrest and detain citizens indefinitely.

One such ingenious practice is to charge a targeted citizen with multiple offences alleged to have been committed under several draconian laws. It is not unusual for an innocent citizen to find himself charged not merely under the IPC but also under the UAPA and the NSA.

Another intelligent way to justify indiscriminate detentions is to charge the accused for conspiracy against the State (Section 121A) and abetment of those alleged to have committed the above offences (Chapter V of the IPC), which open avenues for roping in anyone into the dragnet of forced detentions. Of late, the political executive has started using the narcotics laws and the money laundering law to intimidate the dissenters.

Mere relief from the court under one law does not therefore necessarily provide freedom to the citizen under the other laws. Sometimes, even if a citizen charged for an offence under one law gets relief from the court, he or she is rearrested immediately under another law and sent back to the jail casually. Unless the judiciary looks at the citizen's right to freedom in a holistic manner and establishes the inviolability of the two principles of natural justice cited above, namely, "***a person accused of a crime is considered innocent until proven guilty***" and "***the burden of the proof lies upon him who affirms, not he who denies",*** the idea of

protecting an innocent citizen will remain illusory. Unless these principles become sacrosanct in practice and unless innocent citizens feel assured that they would not be subject to undue harassment, it will be difficult for us as a nation to take pride in being a functioning democracy that others could emulate.

The other weak links in the criminal justice system:

It is not just enough if the oppressive laws are reexamined and set in alignment with the citizen's interests. There are several other weak links in the criminal justice system that need to be addressed and set right.

According to a news report (https://prsindia.org/theprsblog/understanding-vacancies-in-the-indian-judiciary), between 2010 and 2020, vacancies across all levels of the judiciary increased from 18% to 21% (from 6% to 12% in the Supreme Court, from 33% to 38% in High Courts, and from 18% to 20% in subordinate courts). Further, there is a backlog of 40 million cases, mostly attributable to the understaffing of the courts (https://www.india.com/news/india/huge-backlog-in-legal-system-40-million-pending-court-cases-in-india-chief-justice-nv-ramana-5367510/)). While some of them could be cases pending before the civil courts, there are many pending before the courts dealing with criminal cases. This has resulted in thousands of "undertrials" languishing in jails indefinitely, without the benefit of getting their cases disposed of by the courts.

The National Crime Records Bureau (NCRB) of 2020 shows that the total number jail inmates in the country to be 4,72,901, out of whom only 1,01,063 (21%) are those convicted by the courts and serving their jail terms. The rest (79%) are undertrials, many of whom have committed petty thefts and detained for the same. They largely belong to the disadvantaged sections of the society. One should remember in this context that, through its discriminatory practices, the society itself has made criminals out of innocent persons. Had the undertrials been able to secure adequate legal

assistance to pursue their cases before the courts, many of them would have succeeded in proving their innocence or in avoiding long jail terms. The legal assistance services available for the poor are woefully in short supply and, where they are available, there is no provision for their reaching out on their own to those who are in need of the same.

It is imperative that free legal assistance is provided as a matter of right to the undertrials who cannot afford to pay for it. Those who provide such legal assistance should reach out to the needy, without waiting for the undertrials seeking it.

It is also pertinent to appreciate the fact that our criminal justice system lays little emphasis on reformative approaches towards the undertrials. Usually, long durations of stay in jails convert even innocent persons into criminals. Therefore, from the point of view of the overall good of the society, it is desirable that every effort is made to reduce the scope for persons remaining in detention as undertrials for unduly long periods.

One immediate measure that the judiciary and the government could perhaps jointly take is to fill in the existing vacancies in the courts on a war footing. Also, it may be necessary for them to create additional courts on a one-time basis to dispose of the backlog.

Investigation work- the weakest link:

The lack of professionalism, sloppiness and understaffing of the investigating agencies constitutes the weakest link in the criminal justice system. Sometimes, the courts find it difficult to dispose of cases even if they wish to, as a result of the investigations proceeding slowly. There are no statutory time limits prescribed for different stages of investigation and as a result, the investigating agencies are at liberty to prolong investigations, insensitive to the fact that those at the receiving end are forced to remain in jails indefinitely. If there is a problem of understaffing with

those agencies, the State with all the resources at its command could easily address that problem. Unless the higher courts lay down strict time limits for investigation with penalties for delays, this problem is bound to continue, as a result of which innocent persons will suffer.

When persons from poor families are detained indefinitely, their livelihoods get disrupted, their families get traumatised and their children deprived of their education. Unless some public spirited lawyers come to their help, get the trial expedited and get them released, the misery undergone by the undertrials and their families gets prolonged with no relief and compensation in sight, as and when they get released. Till date, the policy for sanctioning compensation for those wrongly jailed has remained ad hoc.

It has become commonplace these days for the police to detain persons summarily and leave them to suffer confinement for years together. In some north eastern States, for example, there have been numerous instances of the local police summarily detaining persons suspected to be "foreigners" under the Foreigners Tribunal Act and forcing them to remain in jails without trial, till such time that activist lawyers' groups take up their cases, establish their bonafides as Indian citizens and get them released, after they have spent years in jails. The children of the persons thus detained are either looked after by their relatives or allowed to remain with their parents in jails. Once acquitted, there are no formal institutional arrangements for compensating such families for the trauma they have undergone and the loss of educational opportunities for their children. Those who detained them wantonly in the first instance are rarely held accountable and proceeded against. Rarely do courts and the human rights commissions intervene suo moto and grant compensation to them, to which they are entitled (https://countercurrents.org/2021/10/undertrials-for-how-long-guilty-till-proven-innocent/)

The importance of laying down a formal, transparent set of norms for granting compensation will become evident by looking at the unfortunate case of an 82-year

old resident of Haritikar village, about 20 km from Silchar. She was summoned by the Foreigners Tribunal in Assam in February, 2022, based on a case first registered in 2000 alleging she had "illegally" entered India after March 25, 1971. Nine years ago, her son allegedly died by committing suicide after being served a notice to prove his citizenship in Assam. Three months ago, this year, she received a similar notice. She was finally declared "Indian" a few days ago. (https://indianexpress.com/article/cities/guwahati/9-yrs-after-son-died-under-citizenship-cloud-assam-woman-declared-indian-7912378/). The loss suffered by her and her family is irreparable and it is desirable that the judiciary takes cognisance of such cases on its own and lays down a clear policy that not only provides adequate compensation but also imposes deterrent penalties on those resorting to indiscriminate arrests and delaying investigation.

High profile detainees:

According to the information provided by the Union Home Ministry on March 9, 2021 in the Lok Sabha, during the years 2015-19, 7,050 arrests were made by the authorities in different States under the UAPA alone. Most of those arrested are still awaiting their trial. Since 2019, the Jammu and Kashmir (J&K) administration has booked over 2,300 people in more than 1,200 cases under the UAPA and also another 954 people under the J&K Public Safety Act (PSA). Out of them, 46 per cent of those booked under the UAPA and about 30 per cent of those detained under the PSA are still in jail, both inside and outside J&K, without the prospect of an early trial. (https://indianexpress.com/article/india/2300-booked-under-uapa-in-jk-since-2019-nearly-half-still- in-jail-7438806/).

The question of compensating innocent persons detained arises even in high profile cases filed under the IPC, the UAPA and the NSA, as such detentions also violate the principles of natural justice.

In the specific case of detentions under Section 124A of the IPC, the UAPA and the NSA, it is possible that the investigating agencies have acted at the instance of the ruling political elite to intimidate the opposition and suppress dissent. In the Prakash Singh case on police reform, the apex court had laid down in 2006 several salutary norms to de-politicise the police and allow them to discharge their duties independently. Even where the States have ostensibly adopted those norms, the executive continues to exert undue influence indirectly on the investigating wings of the police, leading to misuse of the relevant provisions of the law and targeting those in opposition or those who express dissent. It is desirable that a more rigorous system of checks is put in place to impart functional autonomy to the police and make them accountable, not to the political executive, but directly to the judiciary.

Universal Declaration of Human Rights (UDHR):

India is a signatory to the Universal Declaration of Human Rights (UDHR). Article 9 of the UDHR reads as follows.

"*No one shall be subjected to arbitrary arrest, detention or exile*"

Arbitrary arrest of citizens and their detention therefore violates our commitment to the UDHR.

Curtailing the freedom of the individual amounts to eroding democracy:

In Mahatma Gandhiji's words,

"*Freedom is never dear at any price. It is the breath of life. What would a man not pay for living*?"

The apex court, as recently as on December 1, 2021, observed as follows.

"Deprivation of personal liberty without ensuring speedy trial is not consistent with Article 21 of the Constitution of India. While deprivation of personal liberty for some period may not be avoidable, period of deprivation pending trial/appeal cannot be unduly long. At the same time, timely delivery of justice is part of human rights and denial of speedy justice is a threat to public confidence in the administration of justice"

We cannot afford to have a criminal justice system in which an individual's freedom can be routinely curtailed by a power-hungry, arbitrary executive.

As rightly cautioned by the apex court, denial of speedy justice to the those undergoing detention is a serious threat to public confidence in the administration of justice. While the judiciary has been issuing directions to the State to review individual laws, as and when such cases come up, unless a more holistic approach to protecting the individual's freedom is adopted, innocent citizens will continue to be harassed and the executive will continue to exercise arbitrary, discriminatory powers to curb the freedom of innocent citizens. While many of the salutary directions from the judiciary have come as a result of the individuals seeking judicial intervention in relation to specific laws, the resources available with the individuals are far too limited for them to approach the judiciary on a case to case basis. This underlines the need for a more integrated review of all preventive laws along with the delays in the delivery of justice so as to ensure that the review so undertaken revolves around the central theme of the freedom of the individual and the principles of natural justice to which he or she is entitled.

It is hoped that the latest interim order of the apex court on sedition will usher in such an integrated look at the ways and means to protect innocent citizens.