JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P No.59599 of 2022

Haroon Farooq

Versus

Federation of Pakistan & others

J U D G M E N T

Date of Hearing.	14-03-2023
PETITIONERS BY:	M/s Abuzar Salman Khan Niazi, Shezal Khan Burki, Barrister Daraab W. Furqan, Zain Sheikh, Ali Raza Kasuri, Ch. Sabir Ali, Shehzad Ahmad, Ghulam Ahmad Ansari, Ashiq Ali Rana, Mian Faisal Naseer and Syed Kamal Ali Haider, Advocates.
	Ms. Asma Hamid, Advocate/ Amicus Curie assisted by Ms. Noor Ahsan, Advocate.
RESPONDENTS BY:	Mr. Asad Ali Bajwa, D.A.G. Mr. Muhammad Saad Bin Ghazi, A.A.G.

Shahid Karim, J:-. This constitutional petition challenges the validity of Section 124-A of the Pakistan Penal Code, 1860 (**PPC**) which provides that:

> *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 Federal or Provincial Government established by law shall be punished with imprisonment for life to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.*
>
> *Explanation 1: The expression ".disaffection includes disloyalty and all feelings of enmity.*
>
> *Explanation 2: Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*
>
> *Explanation 3: Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."*

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2. The provision is titled 'Sedition' and constitutes the offence of seditious writings and seditions libel. This offence has historical origins and was always an offence at common law punishable with imprisonment or fine on the direction of the court. According to the learned counsel for the petitioner, the provision is unconstitutional and offends the provisions of Articles 14, 19 and 19A of the Constitution of Islamic Republic of Pakistan, 1973 (**"the Constitution"**). In short, the petitioner invites this Court to square the provisions of section 124-A with Articles 14, 19 and 19A of the Constitution and to hold that since section 124-A contravenes and offends the fundamental rights enshrined in these Articles of the Constitution it is void in view of Article 8 of the Constitution which provides that any law insofar as it is inconsistent with the rights conferred by Chapter I Part II of the Constitution shall to the extent of such inconsistency be void.

Standing:

3. The petitioner is a social activist and a public spirited individual. He has deep interest in the preservation of constitutionalism and representative democracy and has contended that the fundamental rights to freedom of speech and expression do not envisage the offence of seditious libel in its present form to be sustained. I have no doubt that the petitioner has standing to maintain this petition. In any case, none of the respondents have raised any objection regarding the standing of the petitioner. Apart from this, the issue broached in this petition touches upon the foundational

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element of every citizen's life in Pakistan and has the invidious potential to upend our lives suddenly and irretrievably. The counsels for the petitioner, Abuzar Salman Niazi, Barrister Daraab W. Furqan and Shezal Khan Burki, Advocates filed skeleton arguments and two bundles of case-law and related material which proved immensely useful and made certain that the legal challenge was soundly based. Mr. Abuzar Salman Niazi, Advocate led the arguments in this Court.

History:

4. A reference to the historical facts would lend actuality to the analysis. The law of sedition was originally drafted in the year 1837 by Thomas Macaulay. Section 124-A was inserted in PPC in 1870 through Penal Code (Amendment) Act, 1870 and according to the learned counsel for the petitioner was a tool to be employed by the colonial masters to suppress and muzzle the peoples' voices of dissent against the government in power. Before the partition of sub-continent prominent politicians across the divide were tried under the sedition law and this trend has continued after partition of the sub-continent by successive governments which made use of the sedition law to suppress voices of dissent. He has pointed out that in Britain the law has been abolished through the Coroners and Justice Act, 2009 and in Australia following the recommendation of Australian Law Reform Commission it was repealed by the Australian legislature. In New Zealand the act of sedition ceased to be a crime following the introduction of The Crimes (Repeal of

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Seditious Offences) Amendment Bill in 2007. Similar examples have been cited by the learned counsel for the petitioner to contend that the crime of sedition and seditious libel is a relic of the past and civilized societies around the globe do not countenance its presence on the statute book.

5. The learned counsel for the petitioner has presented a literary piece by A.G Noorani published on August 14, 2021 in the magazine Frontline. A.G Noorani is a prominent activist, lawyer and journalist from India and the piece is titled 'Sedition in Freedom Struggle'. It refers to the history of the repressive laws of sedition and describes the history of India's struggle for freedom from British rule as the history of repressive laws of sedition in India. The article refers to the painstaking work by an English barrister at the Calcutta High Court Walter Russell Donagh, *A Treaties on the Law of Sedition and Corporate Offences in British India* which also engages a discussion on Vernacular Press Act which was sought to be introduced by the British colonists and the arguments made by British members of the Viceroy's Council which passed the Vernacular Press Act in 1878 a law which merely affirmed the law of sedition contained in Section 124-A which had already been introduced in the year 1870 in PPC. One of the members of the Viceroy's Council stated that:

> "*This is the class that writes for the Native Press, perorates on platforms, and generally vents its spleen upon the government which has not been able to find appointments for more than a friction of its members. To honest, well-informed criticism no English government would ever*

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> *object. But every government has the right to object when its critics wander off from criticism to calumny….*
>
> *"**No government such as ours in India can afford to allow the minds of an ignorant and credulous oriental population to be gradually poisoned and embittered by persistent calumny of the government and all its measures**. If these sections lead to a more careful, well-considered and responsible journalism, they will confer a benefit not only on the state and the public, but on the journalistic profession itself."*

6. Speeches were made by other members which were to a similar effect and which primarily noted that British government could not afford to allow the minds of an ignorant and credulous oriental population to be gradually poisoned and embittered by persistent calumny of the government and all its measures. The article by A.G Noorani then goes on to refer to the trials of *Tilak* in the following words:

> *Tilak's two trials (1897 and 1908) for sedition exposed the falsehoods in the apologies of the draftsmen of the offence of "sedition", which was to be later inserted in the Indian Penal Code. All the top leaders of the Indian National Congress were convicted of sedition—Mahatma Gandhi (1922), Maulana Azad (1922), Jawaharlal Nehru (1921, eight times.)*
>
> *There is, however, one case which Tilak won. On July 22, 1916, in the Court of the District Magistrate of Poona, information was lodged against Tilak citing his speeches. He was asked to show cause why a bond of Rs.2,00,000 for "good behaviour" for one year should not be required of him under Section 105, 112 of the Criminal Procedure Code. Mohammad Ali Jinnah went all the way to Poona to defend Tilak but lost. On August 12, 1916, the Magistrate held against Tilak. Jinnah moved the High Court and won. The order was quashed.*

7. One of the founding fathers of the present India, Jawaharlal Nehru said in Parliament on May 29, 1951:

> *Take again Section 124A of the Indian Penal Code. Now so far as I am concerned that particular section is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in any body of laws that we might pass. The sooner we get rid of it the better. We might deal with that matter in other ways, in*

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> *more limited ways, as every other country does, but that particular thing, as it is, should have no place, because all of us have had enough experience of it in a variety of ways and apart from the logic of the situation, our urges are against it."*
>
> *Nevertheless, in 1962, the Supreme Court of independent India upheld Section 124A of the Penal Code, which defines the offence of sedition, albeit with a tortuous proviso that made no sense. It is deeply worrying that the BJP government, headed by Narendra Modi, should use Section 124A to imprison student leaders and prosecute political leaders.*

8. Jawaharlal Nehru was also tried for the offence under Section 124-A as many as eight times. Finally the learned author referred to a judgment by Allahabad High Court regarding section 124-A '*Ram Nandan v State' I.L.R (1958) 2 All. 84* and stated that each of the learned judges wrote a judgment of considerable learning and cogency of reasoning. The full bench of three judges Allahabad High Court unanimously held section 124A to be void. This was however upset by the judgment of the Constitution Bench of the Supreme Court of India in a later case on January 20, 1962 reported as *Kedar Nath Singh v The State of Bihar (1963) 1 MLJ 40 (SC).* A.G Noorani also referred to the view of Lord Denning who said that *"the offence of seditious libel is now obsolete".*

9. Ms. Asma Hamid, *amicus curie*, filed a brief. She alluded to the history of the law and also referred to a cluster of case law from different jurisdictions. It was brought forth in the brief that the status of sedition laws has been currently put on hold by the Supreme Court of India until the government reexamines it. The authorities from the United States and Australia have also been referred in the brief submitted by the *amicus* and which refers to the judgments

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handed down by the courts in these jurisdictions articulating the concept of freedom of speech and expression. Ms. Asma Hamid referred to a case decided by the Supreme Court of Gambia which adjudicated on the constitutionality of laws relating to the offence of sedition. In conclusion, Ms. Asma Hamid suggested this Court to follow the example of Supreme Court of Gambia on the ground that the present case had identical facts to the one before the Supreme Court of Gambia where the provisions relating to sedition were held to be intra vires the constitution. In that case, the Supreme Court of Gambia was of the view that the courts should not decide upon constitutionality in the abstract and only real cases should be decided which give rise to questions of constitutionality.

10. The decision of the Supreme Court of Gambia is, in my opinion, an inapt example to follow for any court under a constitution which guarantees constitutional rights including the right to freedom of speech and expression as also guarantees freedom of press. It also does not comport with the rule laid down by the courts in Pakistan that not only that a challenge can be laid if a person is directly affected by an act under a law but a challenge can successfully be maintained if there is a potential for abuse of a provision mentioned in our criminal laws. For, a person cannot be compelled to wait for his right to be infringed in order to bring a challenge to a particular provision in the law which in his opinion disregards a clear constitutional mandate. The right to dignity enshrined in the Constitution confers upon a

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person to bring a challenge irrespective of whether criminal prosecution has been set in motion or not. The right to dignity supports a prior challenge in any matter and in particular in the present case. It is also inextricably linked with the concept of abuse of process of law which will be triggered as soon as prosecution is alleged against a citizen. The courts cannot allow a provision to stand and article 19 to be violated before ruling whether a fundamental right has been violated or not. If we are called to make policy preferences then I would be compelled to take a leaf out of the progressive view of developed and liberal constitutional democracies which have done away with the law of sedition rather than relying upon a decadent view taken by the Supreme Court of Gambia. That example does not serve as blazing a trail to be followed. Our Parliament has been slow in realizing the urgency of repealing the law of sedition and so it is for the courts to step up and protect constitutional rights of the citizens.

11. The English background to the repression of ideas and the crimes of seditious libel has been brought forth in '*The First Amendment and the Fourth Estate, The Law of Mass Media* by T. Barton Carter, Marc A. Franklin, Amy Kristin Sanders, Jay B. Wright (Eleventh Edition) as follows:

> *In England, repression of ideas antithetical to the government dates back to the 13th century. In 1275 and again in 1379, Parliament made it criminal to speak against the state. Later known as "seditious libel," words, that questioned the crown in any way were punished by the King's Council sitting in the "starred chamber." Ecclesiastical laws forbidding heresy already existed, thus making it dangerous to say anything in opposition to the Church or the state.*

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With the advent of printing, around 1500, the government became even more concerned about statements that questioned the secular powers. To prevent the wider dissemination that the printing press made possible, the Crown established a system of censorship, similar to one already used by the Church, for all publications. This repression lasted until almost 1700.

The core of the censorship system was licensing. In the Elizabethan era, the system was overseen by agencies of the Queen. The Stationers Company, established in 1556, gave a select group of London printers a monopoly over all printing in the country. Its members had the exclusive right to print certain categories of books, such as Bibles and spellers, and could search other printers' offices to look for "illegal" materials. Because all printed matter had to be registered with the Stationers Company, complete prepublication review was possible.

Violators of the licensing system were tried by the infamous Court of the Star Chamber, which became notorious for its secret proceedings and severe punishments. For example, William Prynn's book, Histrio-Mastix, published without permission, said only whores acted in plays. The book appeared six weeks before Queen Elizabeth appeared briefly on stage, but Prynn was convicted of ridiculing the Queen. He was sentenced to a fine and life imprisonment, to be pilloried, and to have his ears docked.

Bonding was also a part of the licensing system, forcing printers who were not part of the Stationers Company to post a large sum of money, known as a bond, before being granted a license to print. Publishing anything in opposition to the Church or crown meant forfeiture of the bond.

An unlicensed publication meant more. It could lead to charges of criminal libel, which was divided into four categories; (1) blasphemous libel involved heretical statements opposing the Church; (2) obscene or immoral libel dealt with unpermitted literary subject matter; (3) private libel involved offending words directed to private individuals, which also could lead to civil action (suing the publisher for monetary damages to assuage the harm to the offended person's reputation); 4 seditious libel was criticism of the crown. Frederick Siebert in Freedom of the Press in England 1476-1776 (1952) said that "convictions for seditious libel ran into hundreds" during the 17th and 18th centuries in Great Britain."

12. Thus, at common law, the crime of seditious libel dates back to the year 1275 and constitutes words that question the crown in any way and was punishable by the King's Council. In short, seditious libel was criticism of the crown. It can be seen from the above statement that convictions for seditious

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libel ran into hundreds in the Great Britain. At a later time, Criminal Libel Act, 1819 was enacted and it was an offence at common law punishable with imprisonment to publish orally seditious words with a seditious intention or to publish matter containing anything capable of being libel with a seditious intention. The following statement from *Halsbury's Laws of England (Fourth Edition) (Volume 11)* captures the law relating to sedition in the United Kingdom:

> *"828. Seditious words and seditious libel. It is an offence at common law, punishable with imprisonment or fine at the discretion of the court, to publish orally seditious words with a seditious intention or to publish matter contained in anything capable of being a libel with a sedition intention. In the case of seditious libel there must be an incitement to disorder and violence. Free comment, criticism and censure must, however, be distinguished from seditious words or seditious libel.*
>
> *A speech in either House of Parliament is privileged, but if the member afterwards publishes his speech it may constitute seditious libel. The publication of seditious matter by a newspaper in a bona fide report of proceedings in a court of justice or in Parliament is privileged and the publisher is not liable. It is uncertain whether the composition of a seditious writing with the intention that it should be published, but without actual publication, constitutes seditious libel."*

13. It would be borne in mind that seditious libel is not an offence anymore and as such has been repealed in the United Kingdom. The courts however extended the right of free speech even under the Criminal Libel Act, 1819. For instance, in *R v Sullivan and R v Pigott (1868) 11 Cox CC 44 at 49*, it was held that:

> *"the freest public discussion, comment, criticism, and censure, either at meetings or in the press, in relation to all political or party questions, all public acts of the servants of the Crown, all acts of the government, and all proceedings of courts of justice are permissible, and no narrow construction is to be put upon the expressions used in such discussion etc., but the criticism and censure must be without malignity, and must not impute corrupt or malicious motives."*

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14. Similarly, in *R v Collins (1839) 9 C & P 456 at 460, 461, per Littledale J*, it was stated that:

> *"…every man has a right to give every public matter a candid, full and free discussion; something must be allowed for feeling in men's minds and for some warmth of expression, but an intention to incite the people to take the power into their own hands and to provoke them to tumult and disorder is a seditious intention…"*

15. Thus, the courts in U.K did not limit free speech and in particular political speech relating to matters of public interest and did not suppress the candid, full and free discussion and criticism in relation to all political or party questions and all public acts of the servants of the Crown and limited the offence to an intention to incite the people to take the power into their own hands and to provoke them to tumult and disorder which was held to constitute seditious intention. This was in sharp contrast to the construction section 124-A received at the hands of Judges in sub-continent during the pre-partition days. They have been discussed in *Kedar Nath Singh* by the Indian Supreme Court. For instance, in *Queen Empress v Balagangadhar Tilak (1898) I.L.R 22 Bom. 112*, the following statement of law defines the crime of sedition:

> *"You will observe that the section places on absolutely the same footing the successful exciting of feelings of disaffection and the unsuccessful attempt to excite them, so that, if you find that either of the prisoners has tried to excite such feeling in others, you must convict him even if there is nothing to show that he succeeded. Again, it is important that you should fully realise another point. The offence consists in exciting or attempting to excite in others certain bad feeling towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within section 134A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the*

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> *Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt. I can only account for such a view by attributing it to a complete misreading of the explanation attached to the section, and to a misapplication of the explanation beyond its true scope."*

Thus, it was concluded that plainly, the exciting or attempting to excite certain feelings to the authority of the Government was sufficient to constitute the offence. The Judicial Committee of the Privy Council did not dissent from the view and refused to grant leave to appeal. It follows that section 124A is quintessentially a colonial law and has its genesis in the colonial rule. It was enacted to perpetrate and entrench British rule in the sub-continent. It has to be distinguished from other crimes which are commonly found to afflict a human society. Sedition belongs to the species of offences which had no other purpose but suppression of people's voices by the colonial masters.

16. In the historic days, in particular for seditious libel, the Jury decided whether the defendant had published the material and whether it carried the meaning charged by the government. Judges decided whether the words were published with malice and had a bad tendency to damage the government, usually the two crucial points. The defendant could not plead the truth of the words as a defence; indeed truth made the offence more severe because truthful charges would increase the public's disrespect for the crown.

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17. Blackstone, an English jurist, was a major influence on English and American legal thinking in the period when the U.S Constitution was taking shape. He made a distinction between liberty and licentiousness for which the punishment was considered legitimate. The colonial experience which shaped the framing of the U.S Constitution has been summarized in the *First Amendment* by the authors in the following words:

> *"Those who drafted and adopted the U.S. Constitution and the Bill of Rights were well aware of this history of repression in Great Britain. They also knew of, and had experienced, similar restrictions on freedom of expression that Britain had imposed on the colonies.*
>
> *Laws that applied to the press in England during the 17th and 18th centuries were also applied to the emerging colonial press, and the licensing of presses in the colonies closely paralleled the English practice. Colonial printers were jailed, and their books burned, for publishing without permission. In 1662, Massachusetts appointed censors. When Benjamin Harris printed the first edition of Publick Occurrences in 1690, it became the last edition of that newspaper; he had not gained prior approval. The colonies' second newspaper, the Boston News-Letter, published by John Campbell beginning in 1704, clearly informed its readers that it was printed with authority.*
>
> *After Parliament abolished licensing at the end of the 17th century, the colonial governors managed to retain it for several years more. Its decline in the colonies began in the early 1720s when James Franklin, Benjamin's brother, ignored an order to have his New England Courant licensed. He was briefly punished and once substituted his brother's name as publisher, but his refusal to obey the order brought licensing to a halt. In both England and the colonies, the threat of punishment after the fact for matters the authorities deemed licentious continued even after licensing ended. Contempt of the legislative branch was a real risk, and prosecutions for seditious libel occurred."*

18. While the drafting of the U.S Constitution was taking place in 1721, the colonies first discovered the ardent views of *Cato* on freedom of speech in Benjamin Franklin's *Pennsylvania Gazette*. Cato was the pseudonym of two journalists whose essays in London newspapers became popular and were widely reprinted in the colonies. Cato described free speech as "the right of every man as far as by it he does not hurt or control the right of another". He said that "in those wretched countries where a man cannot call his tongue his own he can scarce call anything else his own".

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19. It has been stated in the treaties, the First Amendment, that "*the concept of natural law was actively discussed for two centuries before the Constitution was adopted. In attempting to reconcile government's role with individual rights, certain personal freedoms were seen as inviolable. They were natural rights for individuals, rights that government officials or bodies had no power to affect. Among these rights was freedom of expression."*

20. The concept has been derived in large part from the work of 17th century English philosopher John Locke who contended that government's purpose was to use its power to protect life, liberty and property, natural rights to which each individual was entitled. Locke's views influenced the language of the First Amendment of the U.S Constitution with the notion of free speech as a natural right. Later, Professor Thomas I. Emerson in *"The System of Freedom of Expression" asserted that "the system of freedom of expression in a democratic society*" is based on four premises:

1. *freedom of expression facilitates self-fulfilment,*
2. *it is an essential tool for advancing knowledge and discovering truth,*
3. *it is a way to achieve a more stable and adaptable community, and*
4. *it permits individuals to be involved in the democratic decision-making process.*

21. Individual rights have been named as one of the bases for freedom of expression by the authors in the First Amendment apart from the concept of market place of ideas

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and self-governance. The seminal view that freedom of expression enhances the social good came from John Milton's *Areopagitica* in 1644. Milton, an English poet and essayist wanted a divorce and wrote an essay he hoped would lower the strict prohibitions on divorce. Perhaps Milton's most enduring contribution to the philosophy of freedom of expression was his statement that unrestricted debate would lead to the discovery of truth. He stated that:

> *(quoted by Craig R. Ducat in his Constitutional Interpretation, Ninth ed. Vol.II)*
>
> *Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew the Truth put to the worse, in a free and open encounter?"*

Writing in England some fifty years later, *John Locke* reiterated some of this faith that truth would prevail. In *"A Letter Concerning Toleration" (1689)*, he wrote:

> *"Truth certainly would do well enough if she were once left to shift for herself. She seldom has received, and I fear never will receive, much assistance from the power of great men, to whom she is but rarely known and more rarely welcome. She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. Errors indeed prevail by the assistance of foreign and borrowed succors. But if truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her."*

22. English philosopher and economist John Stuart Mill believed more in full and free discussion than did Milton. Mill in '*On Liberty*, contended that government could not prescribe opinions or determine what doctrines or what arguments people should hear:

> *"The power itself is illegitimate. The best government has no more title to it than the worst. It is as noxious, or more noxious, when exerted in accordance with public opinion, than when in opposition to it. If all mankind minus one were of one opinion, and only one person were of the*

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> *contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind….The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race: posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."*

23. The concept of marketplace of ideas, first enunciated by Milton and later developed by Mill was recognized in American law by Justice Oliver Wendell Holmes in a dissent *Abrams v. United States, 250 U.S. 616 (1919).* Holmes wrote:

> *"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment."*
>
> *"vital of all general interests" was "the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." United States v. Associated Press, 52 F.Supp. 362 (S.D.N.Y.1943), aff'd 326 U.S. 1(1945)."*

24. A third reason that freedom of communication is valuable in a democratic society according to the authors of the *First Amendment* is that such a society is based on self-

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governance, on an informed citizenry that will intelligently elect representatives. *James Madison* (one of the founding fathers of United States) believed that the people not the government were sovereign and that the purpose of freedom of speech was to allow citizens to govern themselves in a free society. This view also finds expression in the preamble of our Constitution where it is stated that:

> *"Now, therefore, we, the people of Pakistan dedicated to the preservation of democracy achieved by the unremitting struggle of the people against oppression and tyranny".*

This statement is a clarion call by the people of Pakistan regarding their dedication to preservation of democracy which can only be achieved by raising voices against oppression and tyranny. These voices cannot be suppressed or stifled by the provisions of section 124-A.

25. In the treaties, the views of Professor Alexander Meiklejohn have also been referred which bring out an important distinction with regard to self-governance and the right of free speech enacted through the First Amendment of the U.S constitution. He advocated distinguishing between two kinds of expression. **Speech concerning the self-governing process was political speech and deserved absolute protection from government interference.** Speech that was non-political in character, private speech was protected only by the due process clause of the fifth amendment, which would permit the government some leeway for regulation.

26. Perhaps the most powerful judicial statement of the justifications for free expression is that of Justice Brandeis,

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concurring in Whitney v. California, 274 U.S. 357, 375-77 (1927):

> *"Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and speak as you think are means indispensible to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principal of the American government. They recognize the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be granted."*

27. In the opinion of Justice Brandeis, freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile. The various expressions and bases for freedom of expression have been used to a greater or lesser extent by the courts around the civilized world to justify the high value placed on freedom of speech in the constitutional scheme of government. Each may justify different notions of the breadth and depth of the freedom and each may apply with peculiar force in particular contexts. In a nub, we cannot define freedom of speech as the freedom to say what is welcome to authority.

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28. The *Black's Law Dictionary (8th Edition)* defines 'sedition' as under:

> *"a. Definition: Sedition has been defined as an agreement, communication, or other preliminary activity aimed at inciting treason or some lesser commotion against public authority. It is advocacy aimed at inciting or producing and likely to incite or produce imminent lawless action.*

29. The above definition is a traditional view of what constitutes the crime of sedition. It is diametrically opposed in breadth to the criminal offence of sedition as defined in section 124-A. In the above definition, the activity must be aimed at inciting treason or commotion against public authority. Or it aimed at inciting imminent lawless action. In the United States, the first Seditious Act was enacted in 1798 and made it a crime punishable with fine and five years imprisonment:

> *"if any person shall write, print, utter or publish ... any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . ., or the President . . ., with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United State."*

30. The Seditious Act 1798 allowed the defendant the defence of truth. The Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. The statute has since been repealed. For jurisprudence regarding relaxation of the strict rules of seditious libel, the statement from the *American Jurisprudence 2d, vol 70* may be referred:

> *"On the subject of seditious libel, the modern tendency is toward a great relaxation of the strict rules which once prevailed, and there is substantial support for the view that an absolute privilege attaches to criticism of government and governmental systems. Similarly, the constitutional*

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> *guarantee of free speech and press forbids criminal sanctions for truthful criticisms of public officials, and also protects false criticism, in the absence of malice or recklessness."*

31. There is a rich body of case law on the First Amendment of the US Constitution which guarantees freedom of speech and prohibits Congress from passing laws abridging speech, press, or peaceful assembly. The subject has been treated extensively in *Treaties on Constitutional Law Substance and Procedure (third edition) Ronald D. Rotunda and John E. Nowak*. The Treaties refers to the views of ancient Greek who widely believed that freedom of speech made their armies more brave. It refers to a book by I.F. Stone, *The Trial of Socrates (1985)* and sets out the following quote from that book:

> During time of war, one of the first casualties is free speech, yet in ancient Athens, the cradle of democracy, the Greeks widely believed that freedom of speech made their armies more brae. *Herodotus, in his history, writes that the Athenians could win victories over the more numerous Persians in the first part of the fifth century B.C. because the Athenians fought as free people, not as slaves. "Thus grew the power of Athens, and it is proved not by one but by many instances that equality is a good thing; seeing that while they were under despotic rulers the Athenians were no better in war than any of their neighbors, yet once they got quit of despots they were far and away the first of all," because "when they were freed each man was zealous to achieve for himself.,"Aeschylus, in his play The Persians, similarly celebrates the victory of the Greeks because: "Of no man are they the slaves or subjects." As one commentator has perceptively noted, "For Aeschylus, and for the Athenians, it was not just a victory of Greeks over Persians but of free men over 'slaves.' The victors at Salamis were men elevated and inspired by the freedom to speak their minds and govern themselves."*
>
> ***Oftentimes we forget this ancient truth. People who are free work more intensely because they work for themselves, not for a master. It is for the same reason that it takes many hunting dogs to catch one fox: the fox works harder because he is self-employed."***

32. The decision by Justice Oliver Wendell Holmes in Abrams case was extensively quoted in the Treaties and in

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particular the portion where Holmes conceded that laws regulating free speech be an effective way for the government to stifle opposition but maintained hope that people would realize that:

> *"the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market…That…is the theory our Constitution."*

Holmes warned against overzealous repression of unpopular ideas:

> *"We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."*

33. Thus, the predominant view of the courts in the United States is that absolute privilege attaches to criticism of government and governmental system. This has been entrenched by U.S Supreme Court and established as a sense of free expression in *New York Times Co. v. Sullivan 376 U.S. 254.* That case not only brought major changes to the law of defamation but also enunciated law that has led to other changes in mass media law.

The Trust Theory:

34. That Pakistan is a 'Republic' admits of no doubt. The preamble of the Constitution declares that the state shall exercise its powers and authority through the chosen representatives of the people; The opening part of the preamble reads:

> *"Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him*

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is a sacred trust."

35. In the Constitution of the United States, the term sovereignty is totally unknown. Yet it is long established that "*it may be said, as a result, that both law-making and executive powers are conditionally conferred on those who hold public office, subject to the doctrine of trust which will be enforced by the courts in the name of the people*". (*Constitutional and Administrative Law by Hillarie Barnett, 8th ed. p.154*). In the context of Pakistan, the difference is that since the sovereignty over the entire universe belongs to Almighty Allah alone, the people are His trustees, His delegates only.

36. The trust theory received authoritative expression in Muhammad Yasin v. Federation (PLD 2012 SC 132) where it was held that:

> *"Holders of public office have to remain conscious that in terms of the Constitution, it is the will of the people of Pakistan which has established the constitutional order under which they hold office. As such, they are first and foremost fiduciaries and trustees of the people of Pakistan. And, when performing the functions of their office, they can have no interest other than the interests of the honourable people of Pakistan in whose name they hold office and from whose pockets they draw their salaries and perquisites.*

37. It was stated in *Syed Yousaf Raza Gillani v. Assistant Registrar Supreme Court* (**PLD 2012 SC 466**) that *"the functionaries of the state are fiduciaries of the people and ultimately responsible to the people who are also their pay masters".*

38. From the trust theory flows the right of the people of Pakistan to hold the trustee (persons holding positions in the Federal Government and Provincial Governments)

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accountable and this can be done either by the exercise of right of freedom of speech or will be enforced by the courts in the name of the people. Any effort on censorship or to restrain normal expression will only free the Government of their limits which will then run amok. The power being wielded by the holders of public office at any time has been committed or entrusted to them to be used in the interest of the people. It is thus inconceivable for a fiduciary to gag and muzzle the delegator by making use of a provision which is archaic and is antithetical to the instincts and traditions of a people under a constitutional democracy. A law which was the product of a colonial mindset must be subjected to a searching scrutiny and analysed punctiliously by placing it against the Constitution and to ask if it is disloyal to the language chosen by the framers of the Constitution. The trust doctrine is one of the motifs of a liberal democracy and section 124-A, which is premised on fear and intimidation runs afoul of that doctrine.

Reading the Constitution:

39. While considering section 124-A against the constitutional framework, the utterance of James Madison (architect of U.S Constitution) must inform our views (The Federalist Papers):

> *"...if men were angels, no government would necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary*

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precautions…"

40. In including the Bill of Rights in the Constitution, he became convinced that judicially enforceable rights are among the necessary auxillary precautions against tyranny. Since angels do not govern us, external controls on government are guaranteed by free expression of political speech.

41. Laurence H. Tribe & Michael C. Dorf in the book '*On Reading the Constitution'*, warn against two interpretative fallacies regarding Constitution. Two ways, according to them, not to read the constitution is reading by dis-integration and reading by hyper-integration. According to the authors, the salient fact is that it is a constitution, and not merely an unconnected bunch of separate clauses and provisions with separate histories. The authors noted that:

> *"…It is a dis-integrated "reading of the Constitution to lift one provision out, hold it up to the light, and give it its broadest possible interpretation, while ignoring the fact that it is immersed in a larger whole."*

***The Right under a Constitutional Democracy*:**

42. A constitutional framework can be achieved by entrenching a set of norms in a constitutional document that sits above ordinary politics and is enforced by an institution different from the legislature. There is an increasing legal discourse on the distinction between the activities of creating and applying the law which is now assumed to be one of the foundations of our existing legal practices. Some institutions or bodies are tasked with creating legal rules for our societies and other institutions are instead chiefly tasked with applying

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those rules. This gives rise to the concept of constitutional democracy. The dependence of constitutional democracy, according to the authors of *The Making of Constitutional Democracy (by Paolo Sandro and George Pavlakos)* is on the distinction between creation and application of law. They consider this to be the core element of the doctrine of modern constitutionalism. The existence of this distinction between creation and application of law is not an original claim and is based on a rich body of scholarly works.

43. The right to vote and freedom of expression are regarded as core democratic rights and both, therefore, qualify for elevated protection within a constitutional system. The free dissemination of ideas, facts and opinions enables the right to be exercised in an informed way. Lord Nicholls (UK House of Lords) stated in *Reynolds v. Times Newspapers [2001] 2 AC 127, 207,* that:

> *"At a pragmatic level, freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country. This freedom enables those who elect representatives to Parliament to make an informed choice, regarding individuals as well as policies, and those elected to make informed decisions."*

44. In the book *Common Law Constitutional Rights* edited by Mark Elliott and Kirsty Hughes, it has been said that:

> *"The precise role that voting plays in conferring democratic legitimacy to a system of government will vary according to different democratic theories. However, for present purposes, it is enough to note that voting is a key component in any democratic system. At its most basic, a system of representative government cannot describe itself as democratic if citizens do not have the means to choose the public officials that hold the ultimate decision-making power. In most representative systems, that will be reflected in the election of members to the legislature.*

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> ***With freedom of expression, the right can be justified for many reasons, including those with no connection with democratic debate. However, in the domestic and Strasbourg jurisprudence, the courts have justified the constitutional protection of the right in terms of its importance in a democracy. The protection of expression is often taken to be what separates a democratic and non-democratic regime".***

45. Thus the right is of crucial importance in a constitutional democracy and the European Court of Human Rights regards it as separating a democratic from non-democratic regime. The authors went on to rely upon observations by Lord Bridge in *Attorney General v Newspapers Ltd. (No.1) [1987] 1 WLR 1248, 1286*:

> *"Freedom of speech is always the first casualty under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensible tool to regulate what the public may and what they may not know. "*

46. The dominant view is that freedom of speech is valued for its services to a democratic society. The book (at page 116) articulates the cluster of cases in England on the importance of freedom of speech as a constitutional right in the following paragraph:

> *"The courts recognized the importance of freedom of speech and freedom of the press on numerous occasions prior to the Human Rights Act, 1998. In Broome v Cassell, the court referred to 'a constitutional right to free speech'. In Spycatcher, Lord Goff stated that 'we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world. In Verrall, Watkins J described freedom of speech as 'a fundamental freedom which this country has prided itself on maintaining, and for which much blood has been spilt over the centuries'. Such self-congratulatory statements possibly overlook the long history of censorship and control of publication (which helped to generate the various campaigns for free speech). Notwithstanding this qualification, the common law has recognized the importance of free speech (even if it has not always secured strong protection)."*

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47. Hugo Black (a U.S Supreme Court Justice) writing extra-curially in *A Constitutional Faith (New York: Knopf, 1968) at 45*, said that:

> *My view is, without deviation, without exception, without any if's, but's, or whereas, that freedom of speech means that government shall not do anything to people, or in the words of the megna carta, move against people, either for the view they have or the views they express on the words they speak or write. Some people would have you believe that this is a very radical position, and may be it is. But all I am doing is following what to me is the clear working of the First Amendment that 'Congress shall make no law….abridging the freedom of speech or the press'.*

48. In similar vein, Lord Hoffman (of the U.K House of Lords) writing in *R v Secretary of State for the Home Deptt. Exp. Simons [2000] 2 A.C 115* said that:

> *The principle is that: "fundamental rights cannot be overridden by general or ambiguous words…In the absence of express language a necessary implication to the contrary the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual".*
>
> *It will be a rare case in which it could be hold that a fundamental right could be abolished or curtailed by necessary implication, and an even rarer case in which this could be held to have been authorized by subordinate legislation."*

49. We live in a constitutional democracy with a limited Government. The Constitution establishes the framework of government and enumerates fundamental rights upon people. Some of these rights, such as freedom of speech, are essential bulwarks against governmental overreach and excess of authority. In *Uncertain Justice*, Lawrence Tribe (one of the leading constitutional experts) and Joshua Matz, said that: *"Speech is powerful. It is lifeblood of democracy, a precondition for the discovery of truth and vital to our self-development."* Our constitutional tradition stands against the idea of Oceania's Ministry of Truth depicted in George

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Orwell's classic dystopian novel, *1984*. These rights provide core elements to sustain constitutionalism, a concept described by Martin Loughlin in *Against Constitutionalism*, as:

> *"...In modern understanding, a constitution is a consciously constructed artifact. A constitution is a document adopted in the name of the people that defines the powers of government, specifies the basic rights of citizens, and regulates the relationships between the established institutions of government and their citizens. By extension, constitutionalism expresses the conviction that the exercise of political power in that regime must be subject to the disciplinary constraints imposed by that special text.*
>
> *"For constitutionalism to be accorded a clear meaning, it must be acknowledge as a purely modern concept. Constitutionalism did not exist before the idea that the basic terms of the governing relationship could be defined in a foundational document. Searching for the intellectual origins of constitutionalism, scholars commonly arrive at the pioneering mid-eighteenth-century work of Montesquieu. Again, this is an error. While extolling the values of constitutional government, Montesquieu believed that no universal solution to the tension between order and liberty could be found. Concluding that each regime must determine its own form of constitutional government, taking into account factors like climate, geography, economy, and political traditions, he maintained that the success of its constitution depended on the vibrancy of its political culture, or what he called "the spirit of the laws". Montesquieu gives us a theory of relativity; constitutionalism, by contrast, is a universalist philosophy. The true foundational text of constitutionalism is James Madison, Elexander Hamilton, and John Jay's Federalist Papers, published in 1787.*
>
> ***Constitutionalism, then, is a theory concerning the role, standing, appropriate institutional form, and telos of a purely modern invention: the documentary constitution. It maintains that the form of government established by the constitution rests its authority on two great pillars.***
>
> ***The first pillar is that of representative government. In Federalist 63, Madison explains that this principle requires "the total exclusive of the people in their collective capacity" from the business of governing and the delegation of that task to a small number of citizens elected by the rest. "The people" are acknowledged as the authors of the constitution and the ultimate source of governmental authority. But, as he notes in Federalist 10, in order to "refine and enlarge the public views," the actual tasks of governing must be entrusted to a representative body "whose wisdom may best discern the true intrest of their country and whose patriotism and love***

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> ***of justice will be least likely to sacrifice it to temporary or partial considerations."***
>
> ***The second pillar requires the establishment of institutional mechanism for limiting, dividing, and balancing the powers of government. This need for institutional differentiation is often presented as the doctrine of the separation of powers, a doctrine that Maurice Vile claims that "the most useful tool for the analysis of Western systems of Government" and "the most effective embodiment of the spirit which lies behind those systems."***

50. According to the authors (and which view is based on modern concepts of constitutionalism and a tapestry of literature) "Government that had been legitimized by divine will or sacred custom are now opposed by a modern principle which authorized government by the consent of free and equal citizens. "(*Thomas Paine, Rights of Man*). He went on to conclude that conflict and dissent are constitutive features of democracy:

> *"The written constitution performs a critical role in providing a framework for institutionalizing such social conflicts. It is a medium through which people express their sense of the right, the good, and the just in ways that transcend particular interests. But the regime retains its democratic character only when, far from achieving reconciliation between basic principles, it holds them in a condition of indeterminacy. Democracy, notes Claude Lefort, is "instituted and sustained by the dissolution of the markers of certainty."*
>
> ***Democracy persists through continuous and active political deliberation over the right and the good. Conflict and dissent are constitutive features that must be preserved, and they are preserved by ensuring that the meaning of these basic and contestable values remains the subject of continuous political negotiation through democratically constituted and democratically accountable processes.***
>
> *This feature of democracy places structural limitations on the degree to which it can be sublimated into constitutionalism. Once a political regime is conceptualized in the language of rights, lawyers too readily assume that it contains on overarching framework to be attended to by the judiciary, with legislative and administration activity being reduced to mere regulative action that can be trumped by a claim of right. This overvalues the ability of the judiciary to reach political judgments on intensely contestable rights claims and undervalues the importance of the implicit rights judgments*

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> *that legislatures and others officials make. The maintenance of institutional sites of democratic deliberation, decision-making, and accountability are essential makers of indeterminacy. They are essential preconditions for upholding Tocqueville's vision of political freedom."*

Institutions for Protecting Constitutional Democracy IPDs:

51. Closely tied in with the broad concept of constitutional democracy is the rise of *Institutions for Protecting Constitutional Democracy* (IPDs). This is the subject of a book by Mark Tushnet, *The New Fourth Branch*, where IPDs have been labeled as the new fourth branch in the book by concluding that the Montesqueian enumeration of three and only three branches of government *"no longer identified the complete set of desiderata for institutional design"*. Mark Tushnet (a Professor of Law Emeritus at Harvard Law School) refers to a novel concept contained in Chapter Nine of South Africa's Constitution, titled 'State Institutions Protecting Constitutional Democracy'. He stated that:

> *"Its list of institutions that strengthen constitutional democracy includes the public prosecutor, the Human Rights Commission, the auditor general and the Electoral Commission. Seen in the context of the Constitution's written text, these institutions form a branch on a par with Parliament and the President'.*

He relies upon Martin Laughlin's study of the "foundations of public law" and the discussion of the modern administrative state and what he calls "*the rise of the ephorate*", a term drawn from the Greeks. The ephors "constantly observe how state business is conducted" and "have the right to make enquiries wherever they can". Crucially for Laughlin, the ephorate "must claim an original, rather than delegated authority, "which is the basis for treating it as a "new branch of government". The book's aim

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is to identify first the conceptual logic and then the functional logic underpinning IPDs:

> *"Briefly: the conceptual underpinning is that the Montesqueian tradition cannot provide sufficient guarantees for constitutional democracy in a political world where political parties play central roles; the functional underpinning is that that difficulty is created by conflicts or convergences of interests in such a world."*

52. In sum, our constitutional democracy enshrines fundamental rights which are conferred upon people and the most cherished of those rights is the right to freedom of speech and expression. There cannot be an abridgement of speech unless it falls within the strict confines of the exceptions to Article 19 of the Constitution. The doctrine of Trust and the role of the Government as a trustee, the structure of constitutional democracy and the new branch of IPDs conjointly bolster the greater need for free speech. This is of the essence of rule of law and hews more closely to constitutionalism. There is little doubt that section 124-A is in significant tension with constitutionalism and constitutional democracy. We cannot define freedom of speech as freedom to say what is welcome to authority. This is precisely what section 124-A seeks to achieve.

Article 19 and Section 124-A:

53. Article 19 of the Constitution provides that:

> *"19 .Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of] or incitement to an offence."*

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54. Section 124-A has to be squared against Article 19 to see if it is an abridgement of fundamental right of freedom of speech. Section 124-A, at first blush, stitches together loose language to support the offence of sedition or seditious libel. It seems that the provision is intended to wreck revenge on a political dissenter so widely worded is the tenor of Section 124-A. *'Revenge is a kind of wild justice which, the more Man's nature runs to, the more ought law to weed it out "(Francis Bacon, 'Of Revenge'*)

55. S.124A requires unpacking to establish that it contravenes Article 19. First and foremost, the offence, as couched, makes serious inroads into the right of freedom of speech and of the press. In a broadly worded provision which gives wide leeway to a Government, the offence restricts spoken and written words both by the people and the press. This impacts the people in a number of ways. On the one hand they are placed under threat of unstructured discretion of a police officer and on the other, they are enjoined to receive restrictive information at the whims of the Government. Thereby, the right granted by Article 19-A is also infringed. The right is qualified only to the extent of the interests mentioned in Articles 19. Otherwise the right is absolute. It will be noticed that right under Article 19A is subject to 'reasonable restrictions imposed by law'. This is distinct from Article 19 where the legislature cannot make just any law to restrict and constrain that right but can only do so "in the interest of the glory of Islam or the integrity, security or

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defence of Pakistan or any part thereof, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, commission of or incitement to an offence". Thus the power to restrict free speech and freedom of press is circumscribed and hedged in by the fields of legislation specifically mentioned in Article 19 itself. Any law which seeks to suppress freedom of speech and press and does not falls strictly within one of the exceptions in Article 19, falls afoul of it and is ultra vires to that extent.

56. The first part of article 19 confers rights to freedom of speech and expression on every citizen. It further goes on to say that "there shall be freedom of the press". This is a call by the Constitution on Federal and Provincial Governments to ensure the freedom of the press. The obligation thus placed is merely an extension of the original and primary right to free speech which has come to inhere in a citizen. The whole purpose of providing for freedom of press is to enable democracy to flourish by keeping the citizenry informed and which will, in turn, feed into the entire democratic process through the right to vote. Thus both, right to freedom of speech and freedom of press are inextricably linked to each to form a whole and constitute the main planks on which the edifice of democracy rests. To what purpose is the freedom of speech if the press is not free. Conversely, to what purpose is the freedom of press if the citizens are not free to speak. An abridgment of any of these rights is abridgment of liberty and constitutional values. It is the curtailment of natural rights. For, without a free press, citizens will not be able to

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gather information to make informed decisions and to raise their voices against tyranny, nepotism, corruption etc. and other vices of like nature which the Governments are engaged in. Although freedom of press has been secured by the Constitution, it has been done for the benefit of citizens and to bolster their ability to participate fully and effectively in democratic process. It is not a right conferred independently on the press and media but is a necessary concomitant of the right to freedom of speech. The Constitution makers did not merely provide a right to freedom of speech and expression but added a further condition that the press shall be free so that the flow and transmission of information to the citizens may not be censored. Thomas Carlyle in 'On Heroes and Hero-Worship (1841) quoted Edmund Burke, who said that *"there were Three Estates in Parliament; but in the Reporters Gallery yonder there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact—very momentous to us in these lines."* Without it the right cannot be enjoyed to its fullest extent and would remain truncated. Information and ideas feed into the decision making process while enriching the mental faculties. This, in turn strengthens the democratic polity and nurtures good governance.

57. As if the enumeration in Article 19 was not enough, the right has been reinforced by the introduction of Article 19A through *Constitution (Eighteenth Amendment) Act, 2010* and provides that:

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> *"19A. Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law."*

58. Article 19 and 19A have to be read together to form a seemless web. Right to freedom of speech is incomplete without freedom of press and which in turn, secures the right to have access to information in all matters of public importance. The Constitution guaranteed freedom of speech by Article 19 and lest its significance be lost, enacted Article 19A to confer a right to have access to information in all matters of public importance. It is incredulous to conceive that the constitutional mandate of free speech and freedom of press would still remain subservient to a colonial law enacted for a specific purpose to stifle speech. The law was meant to place limits so that the primary purposes of servility and subjugation were achieved. The purpose of law then, is an affront to constitutional rights now conferred. Freedom from colonial rule was meant to usher in freedom of thought and it is impermissible for the citizens of Pakistan to be vilified and persecuted by allowing Section 124-A to remain part of our legal system. These provisions in the Constitution are woven into a unified fabric and make a code unto itself. S.124-A seriously dents the right to publish freely by the press and to impart information through different platforms used by media. Any writings on political issues or discourse on matters of public importance may be caught by the mischief of S.124-A and would have the unpalatable effect of inhibiting free press.

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59. There are three key words used in Section 124A: Contempt, hatred and disaffection. They are defined in Webster's Unabridged Dictionary (second edition) as:

> ***Contempt***: *"1. the feeling with which a person regards anything considered mean, vile, or worthless disdain; scorn. 2. the state of being despised; dishonor; disgrace.*
>
> *"CONTEMPT, DISDAIN, SCORN imply strong feelings of disapproval combined with disgust or derision. CONTEMPT is disapproval tinged with disgust for what seems mean, base, or worthless.*
>
> ***Hatred***: *"the feeling of one who hates, intense dislike or extreme aversion or hostility"*
>
> ***Disaffection***: *"the absence or alienation of affection or goodwill: estrangement or disloyalty"."*

60. It is an offence to bring into hatred or contempt or excite disaffection towards the Federal or Provincial Government. From the definitions set out above, it is apparent that there is a wide margin of appreciation of these terms and it is entirely subjective for a construction to be put on them. Their degrees may also vary considerably but that may not matter ultimately since if it is encompassed in the term in the opinion of a decision maker, it is sufficient for an offence to be cognizable. For instance, contempt implies strong feelings of disapproval combined with disgust. Whether the feelings are strong enough to constitute an offence is for the person in authority to determine. At a given time and in a particular case those strong feelings of disapproval may go unnoticed yet in another case and under different circumstances, lesser feelings of disapproval would be enough to attract the offence. In the ultimate analysis the decision to prosecute depends on who wield the authority.

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61. Similarly 'disinfection' is absence of affection or goodwill. It is inconceivable that such a mild sentiment will attract an offence. There is virtually no affection amongst political opponents and so anything they utter will attract section 124-A in its present form. We have seen that in the political arena feelings of enmity run deep in a number of cases. They have nothing but disdain and utter disregard for the others' views. This can be gleaned from speeches made by politicians in public rallies, where, in the heat of sentiments they utter words full of contempt, hatred and disaffection for their opponents who happen to occupy high offices of Federal or Provincial Government. Taken in its present form, S. 124-A demands allegiance and loyalty by all opposition parties and their members by the citizens and members of the press towards the Federal or Provincial Governments of the day. By Explanation 1, disloyalty and feelings of enmity have also been included in the expression disaffection. This means that any political opponents or a citizen holding loyalty to a different political group will be committing an offence by doing so. He will, by necessary implication, be disloyal to the Federal or Provincial Government in power. This is antithetical to the very concept of democracy and constitutionalism. This also implies that at any particular moment, nearly half of the population will be guilty of the offence of seditious libel, *en banc*. Loyalty to the state has to be distinguished from loyalty to the Federal Government whose offices are being occupied by a political party. Not everyone will have doctrinal affinity with a

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political party and must be free to express feelings of disaffection and estrangement towards its policies and programmes. Explanations 2 & 3 of section 124-A are attempts to water-down the harshness of that provision but it still does not make the provision constitutional. These explanations were added later on by amending the original section 124-A . To reiterate, the Explanations do not dilute the offence in any manner but merely afford a defence to a citizen charged with the offence of sedition. If so charged, the accused will have the burden to prove that his case falls in Explanation 2 or 3 and that he was expressing disapprobation without exciting hatred or contempt. And so the basic ingredient of exciting or attempting to excite hatred, contempt or disaffection which constitutes the offence of sedition stays intact. This, then is the foundational question: why should a citizen or a member of press be charged with sedition for expressing hatred, contempt or disaffection towards a Federal or Provincial Government? As human beings we are all susceptible to showing such emotions at some point or the other and to curb them is to make robots out of the citizens of Pakistan. The people of this country are the masters and the holders of offices of the Government are the public servants. This situation cannot be rendered topsy-turvy by arming the public servants with the power to stifle the masters. Section 124-A connotes a stark regression in the protection of right guaranteed by Article 19 and must yield in its favour. Section 124-A is incompatible with the foundational principles of constitutional democracy and as a relic of past, must be

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consigned to oblivion. It has no place in a society which relishes new ideas and critical analysis to advance itself. The prohibition of mere criticism of Government that does not invite violence reflects an antiquated view of the relationship between the state and society. According to E. Barendt in *Freedom of Speech (2nd ed. 2005)* at 163, *"according to this view, the ruler is the superior of the subject and as such is entitled to be shielded from criticism or censure likely to diminish his or her status or authority."*

62. Fundamental rights including the right of freedom of speech and press were guaranteed for the first time by the 1956 Constitution. Before that the government had absolute authority to restrict the freedom of speech and expression by securing legislation to enable it to act in any manner it considered expedient. It was held in *Begum Zeb un Nisa v. Pakistan* (**PLD 1958 SC (Pak) 35, 39**) that "*after the Constitution, however, these powers no longer exist and neither the legislature nor the government can impose any restriction on freedom of speech and expression except for the purposes mentioned in Article 19*". In that case section 12 of the Security of Pakistan Act, 1952 was held to be in conflict with Article 8 of the 1956 Constitution which guaranteed freedom of speech and expression.

63. The case for freedom of speech as fundamental right has rarely been made as effectively as Professor Thomas Emerson has made it in his "*The System of Freedom of Expression*":

> *"First, freedom of expression is essential as a means of assuring individual self-fulfilment. The proper end of man is the realization of his character and potentialities as a human being.*

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For the achievement of this self-realization the mind must be free. Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature. Moreover, man in his capacity as a member of society has a right to share in the common decisions that affect him. To cut off his search for truth, or his expression of it, is to elevate society and the state to despotic command over him and to place him under the arbitrary control of others.

Second, freedom of expression is an essential process for advancing knowledge and discovering truth. An individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, rest his judgment by exposing it to opposition, and make full use of different minds. Discussion must be kept open no matter how certainly true an accepted opinion may seem to be; many of the most widely acknowledged truths have turned out to be erroneous. Conversely, the same principle applies no matter how false or pernicious the new opinion appears to be; for the unaccepted opinion compel a rethinking and retesting of the accepted opinion. The reasons which make open discussion essential for an intelligent individual judgment likewise make it imperative for rational social judgment.

Third, freedom of expression is essential to provide for participation in decision making by all members of society. This is particularly significant for political decisions. Once one accepts the premise of the Declaration of Independence – that governments "derive their just powers from the consent of the governed" – it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment. The principle also carries beyond the political realm. It embraces the right to participate in the building of the whole culture, and includes freedom of expression in the religion, literature, art, science, and all areas of human learning and knowledge.

Finally, freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus. This follows because suppression of discussion makes a rational judgment impossible, substituting force for reason; because suppression promotes inflexibility and stultification, preventing society from adjusting to changing circumstances or developing new ideas; and because suppression conceals the real problems confronting society, diverting public attention from the critical issues. At the same time the process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision making process. Moreover, the State at all times retains adequate powers to promote unity and to suppress resort to force. Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society. It is an essential mechanism for maintaining the balance between stability change."

64. It was said by Justice Holmes in *United States v. Schwimmer, (1929) 279 US 644* that nothing in the Constitution was more scared than "*the principles of free thought—not free thought for those who agree with us but freedom for the thought that* ***we hate***".

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65. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1958 provides:

> *"1. Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedom, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

66. Article 10 received an authoritative pronouncement by the European Court of human rights in *Yankov v. Bulgaria, 15 BHRC 592* as follows:

i. *Freedom of expression constitutes one of the essential foundation of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is not "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions which must, however, be construed strictly, and the need for any restrictions must be established convincingly.*

ii. *That adjective "necessary", within the meaning of Article 10(2), implies the existence of a 'pressing social need", the Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.*

iii. *In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole,*

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including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

iv. In a democratic society individuals are entitled to comment on and criticise the administration of justice and the officials involved in it. Limits of acceptable criticism in respect of civil servants exercising their powers may admittedly in some circumstances be wider than in relation to private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the later when it comes to the criticism of their actions. Moreover, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive, abusive or defamatory attacks when on duty."

67. Relying upon Article 10 of the European Convention, it was noted by Lord Steyn in *R (Rusbridger) v. A.G (2003 4 All ER 784* that "*freedom of political speech is a core value of our legal system. Without it the rule of law cannot be maintained*". It will be noted that section 124-A is a species of political speech which is sought to be curbed. Thus, it is abridgment of political speech which is discountenanced by all liberal democracies based on constitutionalism and which makes such freedom as the very basis of rule of law and one of the core values of any legal system. In the celebrated case of *New York Times v. Sullivan (1964) 376 US 254*, the reliance was placed on the classic formation made by Justice Brandeis in *Whitney v. California (1927) 274 US 357*.

68. From the right to freedom of speech flows the right to freedom of press which are generally the same. In the context

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of freedom of press, in *All Pakistan Newspapers Association v. Federation* (**PLD 2012 SC 1**) the Supreme Court of Pakistan quoted from the Indian decision in AIR 1986 SC 515 on the freedom of press, namely, that:

> *"in today's free world, freedom of press is the heart of social and political intercourse. The press has now assumed the role of public educator making formal and non-formal education possible in large scale particularly in the developing world where television and other kinds of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Newspapers being surveyors of news and view having a bearing on public administration very often carry material which would not be palatable to governments and other authorities""*

69. It is undisputed that the offence of sedition could also be used against the press, its editors etc. This infringes the right of a free press to publish freely what is necessary to do so in order to inform the general public which has a right to know and be informed of the different issues in order to make a more informed decision regarding political matters. The existence of free press therefore is an essential element in a constitutional democracy and rule of law. There is no doubt that in a democracy the majority can participate indirectly exercising their right as citizens to vote, express opinions and make representations to the authorities and form pressure groups and so on. They cannot do so unless they are alerted to and informed about matters which call for consideration and action. It is largely through the media including the press that they will be so alerted and informed. It has been held that the proper functioning of a modern participatory democracy requires the media to be free, active, professional and enquiring. The only limitation that can be placed on a

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free press is one enumerated as exceptions to Article 19 of the Constitution and must be proportionate and no more than is necessary to promote the legitimate object of the restriction. The offence of sedition in section 124-A travels beyond the limitation placed by Article 19 regarding role of press and its freedoms which must not be abridged on the misplaced notion that the government of the day can suppress political speech at will. The significance of free press was recognized by Donaldson M.R. in *A.G. v. Guardian (No.2) (1988) 3 All ER 545, 600* where it was held that:

> *"The existence of a free press is an essential element in maintaining parliamentary democracy. But it is important to remember why the press occupies this crucial position. It is not because of any special wisdom, interest or status enjoyed by proprietors, editors or journalists. It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than that of the general public. Indeed it is that of the general public for whom they are trustees. If the public interest in the safety of the realm or other public interest requires that there be no general dissemination of particular information, the media will be under a duty not to publish. This duty is owed to the public as much as to the confider."*

70. Thus, if section 124-A were allowed to stand in its present form, the media and the press would also be caught by its mischief and contrary to its role of informing the general public regarding issues of a political nature will be shackled by its ability to do so by the provisions of section 124-A which would pose a constant threat to a free press to write freely and to dispense information without any fear of prosecution. In a true constitutional democracy the media and the press owe a duty to the public for dissemination of information. That duty is thrown into jeopardy by the provisions of section 124-A.

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71. Article 19 expressly provides that the right of freedom of speech and expression are subject to reasonable restrictions imposed by law and enumerated in Article 19 itself. It permits restrictions to be imposed by law to save the interests expressly mentioned therein and one consequence of making rights subject to restrictions is that restrictions can be imposed to protect only those interests as are expressly mentioned and none other. It follows indubitably that the restrictions must have nexus with one of the expressly mentioned interests and none else. Cases abound where the superior courts have held that if a restriction did not cover the expressly mentioned interests, then that restriction offended against the Constitution and was ultra vires. It was held in *Reynolds v. Times Newspaper (1999) 4 All ER 609, 628-9* that freedom of expression was the rule and regulation of speech is an exception requiring justification. The same rule of interpretation must inform us while putting a construction on Article 19 since the landscape provided by Article 19 in the words of Lord Steyn in Reynolds is *"a great importance inasmuch as it provides the taxonomy against which the question must be considered. The starting point is now the right of freedom of expression, a right based on a constitutional or higher legal order foundation. Exceptions to freedom of expression must be justified as being necessary in a democracy. In other words, freedom of expression is the rule and regulation of speech is the exception requiring justification. The existence and width of any exception can only be justified if it is underpinned by a pressing social need.*

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These re fundamental principles governing to balance to be struck between freedom of expression and defamation".

72. We are not here called upon to interpret the exceptions mentioned in Article 19. It would suffice for our purposes to note that the offence of sedition enacted through section 124-A is not comprised in any of the exceptions mentioned in Article 19. Further section 124-A abridges and limits political speech which cannot be countenanced in a free constitutional democracy with freedom of speech and press as the core values. Another aspect which will be noted is that by Constitution (Fourth Amendment) Act, 1975, Article 19 was amended and the word "defamation" was omitted. The wrong of defamation is a private wrong and Article 19 is directed against the state as also section 124-A seeks to curb any criticism of the Federal and Provincial Government which makes it a public wrong.

73. Six years ago, in *Packingham v North Carolina* the U.S Supreme Court struck down a law that prohibited convicted offenders from using social media, reasoning that these websites had become 'integrated to the fabric of our modern society and culture'.

74. A half century before that, the U.S Supreme Court decided a series of cases recognizing that the First Amendment protects not only the right to speak but also the right to receive information and ideas from abroad. In one of those cases, *Lamont v Postmaster General 381 U.S 301 (1965)*, the court invalidated a federal law that barred

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Americans from receiving "communist political propaganda" from foreign countries. The court held that the law was an impermissible attempt 'to control the flow of ideas to the public".

75. The offence of sedition and seditious libel is a relic of autocracies and colonial subjugation. It is time that it finds its permanent resting place and suffers a condemnation that it deserves. We live under a constitution which espouses a system of constitutional democracy embellished with fundamental human rights. Section 124-A in its current form, cannot stand the critical interrogation of our Constitution and its ethos. It is time to move on and strengthen the law of defamation to counter malicious speech and outrageous slander. This will serve as a deterrence and help vindicate a person's sullied reputation if the speech or writing does not pursue a legitimate aim. In the deathless lines of Allama Iqbal:

جہان تازہ کی افکا ر تازہ سے ہے نمود
کہ سنگ و خشت سے ہوتے نہیں جہاں پیدا

76. Before I tear myself away, a reference may be made to the new battle over constitutional interpretation in the United States. It promotes interpretation based on common-good of the people. There is a renewed debate among legal and political commentators as to the best method to interpret the Constitution. More recently, however, drawing on the classic legal and natural law tradition, and arguments developed in his extensive work on administrative and constitutional law

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the prominent law scholar Adrian Vermeule argued in a series of recent essays (now in the form of a book Common-Good Constitutionalism) that the time has come for legal conservatives to set originalism aside. In its stead, Vermeule argues that conservatives should approach constitutional interpretation in an openly morally-infused way and should be sanguine about using state power to promote the common-good—an approach to constitutionalism Vermeule dubs "common-good constitutionalism". Vermeule's proposal immediately sparked heated responses and it was welcomed as a much needed reminder that legal interpretation cannot be severed from questions of political morality and a conception of the ultimate purpose of constitutional government.

77. In conclusion it is held that:

- *Section 124-A, PPC is unconstitutional and offends the fundamental rights enshrined in Articles 19 and 19A of the Constitution.*
- *Since section 124-A is inconsistent with and in derogation of fundamental rights, it is held to be void as a whole. It is hereby struck down.*

Petition allowed.

(SHAHID KARIM)
JUDGE

Announced in open Court on 30.03.2023

Approved for reporting.

JUDGE

☆

Rafaqat Ali

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