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Section-121 Changing Proposition of the expression 'waging of war'

Abstract

The offenses related to “waging war” are enunciated in Chapter VI, titled “of offenses against the State”, of the Indian Penal Code. Waging war is an offense that is considered the most serious crime, one can do. However, it has been seen that it is not used properly in recent times that is not in tune with the democratic structure of the country. The expression is used in almost every case which ranges from the violent act for particular purposes, riots, and sometimes a protest was also termed as a waging of war. This project defines the need for change in the understanding of the expression "waging war" by divorcing itself from rationale of vintage decisions which understood the said expression in a restrictive view meaning in a literal sense by strict interpretation of Treason Statute and by following the rationale of the Supreme Court in cases of the parliament attack and the Mumbai attack. The reasons for such need is the changing contemporary conditions that ask for broader acceptance rather than too much reliance on the expression often quoted by Mansfield "to attain the object of general public nature". as it does not justify the democratic ideas and values. In doing so, the article is divided into four parts. Part 1 traces the history of section 121, from its initial definition to present the definition and in doing so; it also defined the true meaning of the expression "waging of war". Part 2 discusses its distinction with terrorism and committing a riot and Part 3 defines its scope that is changed due to recent judgment. Part 4 discusses suggestions along with the concluding remarks for the article.

1. Introduction

A. Understanding the change in phraseology of section 121; tracing its history

Some years ago, it was heard that British extremist who visited Iraq and Syria for showing their allegiance could be termed as a high treason¹ and in India where criticizing or objecting to government policies and projects were attracting serious charges like waging war against the state² then it gets important to revisit the meaning of treason in India as well.

Being a common law country, tracing the history of the Treason is pertinent that could successfully be traced in English law. The first instance of such codification is found during the rule of King Edward III as a 1351 Treason Act which described the treason in the following manner.

“A man doth compass or imagine the death of our lord the King, or of our lady his Queen or of their eldest son and heir.”³

Thus, at that time treason amounts to waging of war against the king which encompasses the sovereign's eldest daughter, majesty's wife, and the wife of the heir to the throne, even killing the king's chancellor or aiding the enemy.⁴ These were treasonous acts punishable by death. Many modifications of this act were passed but they were more or less the same except the punishment that is replaced with a maximum punishment of life imprisonment due to the 1998 Crime and Disorder Act.

It is evident that the offense of treason encompasses killing of the King, levying war, and facilitating the enemies of the King which are also stated by Sir James F. Stephen⁵ and a similar meaning was also available in the United States Constitution, Article III, § 3.

¹Aisha Gani, Treason Act: the facts, the Guardian, (October 17, 2014) <https://www.theguardian.com/law/2014/oct/17/treason-act-facts-british-extremists-iraq-syria-isis> .

² Latha Jishnu, Waging war on the state, Downtoearth.org.in, <https://www.downtoearth.org.in/blog/waging-war-on-state-39714> ..

³Treason Act 1351, Legislation.gov.uk, <https://www.legislation.gov.uk/aep/Edw3Stat5/25/2/section/II?view=plain> .

⁴ Sir William Blackstone, High Treason, LONANG Institute, available at <https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-406/>.

⁵ James Fitzjames Stephen, OFFENCES AGAINST THE STATE—HIGH TREASON, 2 in A HISTORY OF THE CRIMINAL LAW OF ENGLAND 241–297 (2014).

In India, its definition is found in Sections 121⁶ that occur in the chapter "Offences against the State". This definition is more or less the same as above mentioned definition of the UK and USA.

By virtue of the Adaptation of Laws Order of 1950⁷ section 121 now reads, due to the substitution of the expression "Queen" with "Government of India" and the term "wages war" with "levying war"⁸, in the following manner.

"Whoever wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life, and shall also be liable to fine."⁹

It is evident that present definition of waging of war that is now a part of the Indian Penal Code is influenced by 1351 Treason Act.

By being part of Chapter VI of IPC, 1860, it is necessary to take the previous sanction of Central Government or the State Government under Section 196(1) (a) of Code of Criminal Procedure, 1973¹⁰ for the court to take cognizance of any offense. The term 'government established by law' has an abstract meaning that should not be read in connection with any particular ruling party or the bureaucracy running the government.¹¹

Initially, the expression waging a war understood in a literal sense means only those acts that resemble the objective of military operation amount to waging a war. However, the more comprehensive meaning was evolved due to evolved understanding of sovereignty that is changed due to globalization. Therefore, now, a deliberated attack that has a capacity to tarnish the reputations of the country amounts to waging a war. It should be an attempt to paralyze the constitutional machinery or subvert the authority of the Government that vests with people as to hamper the normal channels of the Government so that the public peace could be disturbed.

⁶ The Indian Penal Code, § 121 (1860).

⁷ The Adaptation of Laws Order, 1950, (1950).

⁸ 25 Edw 3 St 5 c 2.

⁹ Supra note 6.

¹⁰ The Code of Criminal Procedure, § 196(1) (a) (1973).

¹¹ The Indian Penal Code, § 17 (1860).

Thus, with the emergence of the new approach the said expression should be examined through the eyes of the real authority of any democratic country that vests with people and keeping in mind the contemporary conditions and the democratic spirit that define the working of our democracy. This could be achieved with a systematic effort of restricting the scope of broad observations made in the earlier decisions.¹²

The judgment of the court in High Court of Karnataka vs Syed Muneeruddin Mulla¹³ can be considered on such effort in this direction in which stated that mere showing dissatisfaction against Government through slogans does not amount to the conspiracy of overthrowing the Government by criminal force.¹⁴ In the present case, the court placed its reliance on Arvindan, v State of Kerala¹⁵ which stated that attempt to educate or to influence people to preach a particular ideology did not make it an offense of waging war.

Looking closely at the phraseology of Section 121 and more importantly, at the verb "wages succeeded by the expression "war" tells that it has different perspectives attached to it and that it should not be read unambiguously. Therefore, any attempt of linking the understanding of Indian Law Commissioners regarding the said provision of the draft Penal Code in 1847 with changing scenario would take away the uniqueness of section 121.¹⁶

B. The true meaning of waging war

Different opinions on the definition of war is obvious where there is no standard definition of war. However, an attempt has been made by Prof. L. Oppenheim.¹⁷ According to him, there should be a conflict between two or more states, the intention of using military operations, explicitly stating the purpose that is domination over the enemy, and last that is having

¹² High Court Of Karnataka v. Izher Baig, CaseMine, <https://www.casemine.com/judgement/in/56094c19e4b0149711279019>.

¹³ High Court Of Karnataka vs Syed Muneeruddin Mulla, Judgmenthck.kar.nic.in, <http://judgmenthck.kar.nic.in/judgmentsdsp/handle/123456789/21/browse?type=respondent&order=ASC&rpp=20&value=SYED+MUNEERUDDIN+MULLA> .

¹⁴ Ibid.

¹⁵ Arvindan, v State of Kerala (1983) CriLJ 1259 (India).

¹⁶ State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 (India).

¹⁷ L Oppenheim & H Lauterpacht, International law (1955).

symmetrical, although opposed, goals. This definition provided by Prof. L. Oppenheim is praised by Yoram Dinstein as well.¹⁸

It is pertinent to be remembered that the concept of war in Section 121 should not be understood in the sense of conventional war between two nations which includes insurrection or a civilian uprising and the reasons of which will be dealt with later.

Before delving into the matter, it is important to understand that the literal meaning of insurrections that indicates a tumultuous efforts to usurp the authority of the government insurrections would not amount to waging of war unless such insurrections was intended for undermining sovereignty of the Government.¹⁹

The Lord George Gordon case²⁰ attempted to explain the meaning of the phrase "levying war against the King" which also said the cautious approach should be taken into consideration while charging anyone under Waging of war against India.

In the case of Amir Kasab²¹, counsel Mr. Ramachandran contented that expression 'waging of war' should amount to an act that is attacking the sovereignty meaning the act that resembles actual war and therefore should not be read in a broadway.

However, rejecting this restricted view court stated that there is no need for any kind of resemblance like actual war and therefore gave expansive, liberal, and extended meaning to this expression.²² The court initiated a good step in giving broaden scope as this interpretation would exclude those matter which generally falls under this section just because they were a violent act.

In the present era of globalization, the government is involved in various functions and it performs such functions with the help of various agencies or institutions. It would defeat the purpose of the section if the restricted approach is allowed to this section as these agencies or institutions would become a soft target for defaming the government.

¹⁸ Yoram Dinstein, War, aggression and self-defense (2017).

¹⁹ Jublia Mallah and ors v. Emperor AIR 1944 Patna 58(India).

²⁰ R. v. Lord George Gordon, (1784) 21 St Tr 485.

²¹ Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid and Another versus State of Maharashtra and another LNIND 2012 SC 1215(India).

²² Ibid.

In doing so literal meaning should not be avoided looking at the work of the Government of India. It would be very dangerous if the court does not consider the act of attacking the persons in a public place in a way to attack the sovereignty of the country under waging of war as would constitute the offense of "waging war".²³

The reasons are obvious as in any democratic government like India, the government derives its authority from the public which governs it through elected representatives and any effect on them would also mean waging of war if it is of nature which resembles an attack on the sovereignty of India.²⁴

2. Distinction Among Waging of War, Terrorism and Committing a Riot

A. The distinction between waging of war and Terrorism

It is a common mistake to consider the terrorist act as waging of war assuming that it is against the government but there is a thin line between them. Sometimes the terrorist act is used to terrorize people to establish authority over the people or to generate fear among people, thus, there is a vast difference between them.²⁵

Therefore one should understand that the terrorist attacks would amount to waging war if it is an attack against the sovereignty of the country and the same is also reiterated by Sir J.F. Stephen²⁶. One should look into the fact is that whether a particular act is against the government or not, therefore this becomes a question of facts.

The court in the case of Navjot Sandhu²⁷ tried to differentiate between terrorist acts and waging of war and stated that though both seem analogous to each other yet there is a fine line that should be there to facilitate the court.

Though the demarcating line is less transparent yet the purpose, intention, magnitude, and consequence of the act would be some of the deciding features to ascertain the intent of the

²³ Ibid.

²⁴ State of U.P. v. Sanjay Kumar, (2012) 8 SCC 537(India).

²⁵ Brij Bhushan And Another vs The State Of Delhi 1950 AIR 129 (India).

²⁶ Supra note 5.

²⁷ Supra note 16.

terrorist acts amount to waging of war.²⁸ At the same time, the distinction gets thinner in the case of conspiracy as in the case of waging of war it is covered by Section 121-A.²⁹

Therefore, only those terrorist acts enunciated with the intention of attacking the conscience of the general public that resides with the sovereignty of the State/Government amount to waging war. Thus, the possibility of the certain terrorist acts manifested themselves into acts of war could not be avoided as court also described terrorism as an "undeclared war" as well as a "proxy war".³⁰

B. The distinction between waging war and committing a riot

While treason is considered the greatest crime one can do and same is affirmed throughout the countries. The riots could be very severe but could not amount to waging of war as they are doing it for their purpose or to fulfill the particular object.³¹

For example, attempting to rescue certain persons from a particular prison even by violence would not be waging war as its objective was not to overthrow the government. Similarly, pressuring the Magistrates to give the desired result or to alter the price of certain commodities in a market would only amount to committing a riot. Hence, it becomes pertinent to remember that in all these cases their action is driven by a certain objective to achieve from a particular government but not overthrowing the present government to achieve their objective.

The case of *R. v. Andrew Hardie*³² demarcated the line between both of them and stated that the objective of committing a riot is to fulfill certain personal objective and it has nothing to resist or to question the King's authority. However, when these riots have a general purpose which is to affect India's authority or that of Parliament, then it amount to waging of war.³³

Sometimes intention does matter to understand when committing a riot would constitute the offense of waging of war. Thus, if groups of people burnt the station and some of them took

²⁸ Wasim Akram Malik vs National Investigation Agency, Casemine.com, <https://www.casemine.com/judgement/in/56090edbe4b014971117d470> .

²⁹ *R.K. Dalmia v. Delhi Administration*, AIR 1962 SC 1821 (India).

³⁰ *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580 (India).

³¹ *Supra* note 19.

³² (1820) 1 State Tr NS 609, 610 (India).

³³ *Hardik Bharatbhai Patel v. State of Gujarat*, 2015 SCC OnLine Guj 2086 (India).

away the rifles. Then it has to be seen whether they wanted this or it happened in a heat of the moment. It should also be considered whether they used these rifles for their increasing the intensity of riots. It should also be seen that whether they retaliated police in a manner that looks like they are waging war.³⁴

In the case of Umayyathantagath Puthen Veetil Kunhi Kadir ³⁵ the court convicted the accused stating that the riot was planned in a way to defame the government and for fulfilling their object which was replacing the British Government. Such intention of establishing another Government was drawn from the fact that the mob aggressively resisted the police with deadly weapons.

The same rationale of drawing reasonable inference from the subsequent acts was also applied in the case of Aung Hla v. Emperor³⁶.

Therefore, it could be understood that it is the objective that differentiate offense of waging war from committing a riot and the factors like numbers, the force, or use of arms are immaterial. ³⁷ To summarize only those riots that was initiated for fulfilling the common objective of the community by force would amount to waging of war.³⁸

3. Scope of section 121

The expression waging of war is often misunderstood as one where factors like the number of participants, use of arms and ammunition, and conflict between two countries are taken into consideration. However, the case of Navjot Sandhu Alias Afsan Guru³⁹ which also quoted the rationale of the court in Mir Hasan Khan v. State⁴⁰ were eye-opening to understand it in contemporary understanding. It has provided the insights that such a restrictive view is no longer hold legitimacy in the present time.

³⁴ Rahul Banerjee And Ors. v. State Of M.P, 2005 (1) MPHT 58 (India).

³⁵ In re Umayyathantagath Puthen Veetil Kunhi Kadir versus LNIND 1921 MAD 164 (India).

³⁶ AIR 1931 Rang 235 (India).

³⁷ Nazir Khan v. the State of Delhi, (2003) 8 SCC 461(India).

³⁸ R. v. Frost, (1835-42) All ER Rep 106.

³⁹ Supra note 16.

⁴⁰ AIR 1951 Pat 60; 52 Cri LJ 462 (India).

In the age of dangerous bombs like nuclear bombs and hydrogen bombs that could be controlled by even a small number of insurgents. One thing that gets clear is that it would not be practical to consider the number of insurgents for constituting waging of war because already stated is that even a small number of people can bring more harm than a large number of insurgents.

Thus, it is immaterial to consider taking the number of a participant in insurgency into account to constitute any act as waging of war against India.⁴¹ For example, suppose 220 individuals were protesting which gets violent but they were doing it for relaxation in any act but on another hand, if people have attacked a particular building with the same intention to defame India's authority then it would be amount to waging of war.

Similarly, how they are armed is not matter as it is often found that people having licensed pistols use it then to hold that person liable under waging of war against India would be very unreasonable. However, it could be seen whether the arms they are using are of government which they have found in their previous insurgency and now they are using it for the objective that is general in character then it would be termed as waging of war against India.

In *Mir Hasan Khan v. State*⁴² gave an initial understanding about those acts which culminate in waging of war. In the present case, the conviction was based on the fact that the armory was possessed was for the purpose of resisting the troops.

However, the court, in this case, considered the element of the overt act with the intended meaning that mere contriving to obtain possession of an armory and refusing to surrender it and using the rifles and ammunition would not constitute the waging of war.⁴³ Therefore, there should be some evidence supporting that this resistance was the result of preplanned deliberations.

A similar contention is provided in the case of *Maganlal Radhakishan v. Emperor*⁴⁴ and emphasized the intention aspect and characterized it as an essential element.

⁴¹ *Maganlal Radhakishan v. Emperor*, AIR 1946 Nag 173 (India).

⁴² *Supra* note 38.

⁴³ *Supra* note 38 at p. 63.

⁴⁴ *Supra* note 41.

However, possession of armory, without any intention of using it further, for several days by the orders of higher authority would not be called as waging of war against India. It would get immaterial to think, as pointed out by Sir James Stephens⁴⁵, whether they deliberately kept the armory for several days as it would be very difficult to conclude that they were doing this to use it for the further insurgency.

Thus, following factors could be deduced to following factors ascertain the intention and objective of the case;

- a) The target of attack.
- b) The intensity of such disaster and its subsequent effect on the whole nation.⁴⁶
- c) The modus operandi adopted.⁴⁷

4. Suggestions and Final Remarks

A. Suggestions

It is to be understood that earlier decision of the court on waging of war give a narrow definition which should be avoided as the oft-repeated phrase "to attain the object of general public nature" coined by Mansfield, L.C.J. and should not be unduly stretched in the contemporary time.

In a time where political parties preach the nationalist ideology so blatantly, it would not be a good option to give such a broad definition to this section. The analogy could be drawn in the case of the mass movement of Adivasi Morcha Sangathan in Dewas district where serious offences were falsely charged.⁴⁸

Efforts should be made to find the nature of the offense meaning court should avoid giving importance to the matters that are politically motivated.⁴⁹ This approach of looking into the

⁴⁵ James Fitzjames Stephen, A Digest of the Criminal Law (5 ed. 2018).

⁴⁶ High Court Of Karnataka vs Syed Mohammed Ibrahim (2015) 1 KCCR 513(India).

⁴⁷ Mohd. Jamiludin Nasir v. State of W.B., (2014) 7 SCC 443.

⁴⁸ Rahul Banerjee, "False" cases like waging war on Indian state continue for three decades: Whither independence for Adivasis?, Counterview.net, (August 15, 2018), <https://www.counterview.net/2018/08/false-cases-like-waging-war-on-indian.html> .

⁴⁹ Supra note 13.

magnitude and repercussions would avoid labeling every offensive violent act as acts of waging war.⁵⁰

Similarly, the court should see the conduct of the accused after analyzing the facts and circumstances carefully. It is well settled that in case of a conspiracy of waging war, an overt act is not necessary, however, the intention still considers an important element. Hence, an inference that is drawn after analyzing the material on record would be a good approach to know the intention in these cases.⁵¹ In this way, the court can avoid convicting the person merely for possessing incriminating articles and at the same time would help the court should in nipping such activities at the bud to avoid irreversible damage.⁵²

The Delhi High Court⁵³ while entertaining a Public Interest Litigation (PIL) against Twitter accusing of promoting anti-India propaganda also advocated for liberal and cautious approach that is initiated in R. v. Hardie⁵⁴ and later supported by the Indian case of Maganlal Radhakishan⁵⁵ .

The court in case of Javed⁵⁶, stated that mere collection of diaries and magazines describing particular cities did not mean that the accused had an intention to commit war against India as various magazines use Photographs of important personalities of India which may be found in anybody's possession.

One should also understand that mere collection of arms and ammunition should also not be considered an act of waging of war as there is a high probability that they might be for other offenses which are also highlighted in the case of Mir Hasan Khan.⁵⁷ Thus court should look through the cases of offenses against the state very cautiously.

⁵⁰ Syed Mohammed Ibrahim vs State Of Karnataka 2014 Law Suit (KAR) 2920 (India).

⁵¹ EMPEROR VERSUS HASRAT MOHANI LNIND 1922 BOM 136 (India).

⁵² Mohammed Razhur Rehaman @ Umesh vs State Of Karnataka, Judgmenthck.kar.nic.in, <http://judgmenthck.kar.nic.in/judgmentsdsp/browse?type=pationer&order=ASC&rpp=20&value=MOHAMMED+RAZHUR+REHAMAN+%40+UMESH>.

⁵³ Delhi HC declines PIL seeking action against Twitter for 'waging war against India', India Today, <https://www.indiatoday.in/india/story/delhi-hc-declines-pil-seeking-action-against-twitter-for-waging-war-against-india-1726912-2020-09-30> .

⁵⁴ (1820) 1 State TR NS 609, 610 (India).

⁵⁵ Supra note 41.

⁵⁶(2007) CriLJ 1386 (India).

⁵⁷ Supra note 40.

If the cautious approach would be taken then an attempting of preaching particular ideology such as working towards the establishment of a socialist state by overthrowing private ownership and capitalism and private ownership would not amount to waging war.⁵⁸

Similarly while framing the charges of section 121 the court in National Investigation Agency vs Wasim Akram Mallik⁵⁹ considered that planting a bomb outside the high court was chosen to defame the government. In the present case also, the court avoided using the restrictive view and followed the footsteps of the case of Afzal Guru⁶⁰ which is a good sign.

B. Conclusions

It is settled that the expression of waging of war should not be understood in the international sense which understands war in a literal sense meaning conflict between two countries that involves military operations. This understanding advocates a whole new concept to analyze this expression "waging of war".

In this article, an attempt is made to distinguish among waging of war, terrorism, and committing of riot and found that though they have many things in common, there still exists a thin line. This line is of purpose and intention that is reiterated by the court in various case laws. In other words, the objective and intention of the warlike operations contrived against the governmental machinery are decisive factors.⁶¹ Similarly, it is found that if a particular act is happening with purpose to accomplish any public objective by violence opposite to private purpose then that would also be deciding characteristics.⁶²

The proposition that the expression 'waging war' must be understood in the general sense and the manner usual in war does not make sense in the contemporary era as to constitute war there is no need for overt acts like a collection of men, arms, and ammunition which is also highlighted in Mir Hasan Khan and Ors. v. The State⁶³.

⁵⁸ Supra note 56.

⁵⁹ Supra note 28.

⁶⁰ Supra note 16.

⁶¹ Extra-Judicial Execution Victim Families Association (EEVFAM) v. Union of India, (2016) SCC OnLine SC 685 (India).

⁶² Jamiludin Nasir vs. State of West Bengal, (2014) 7 SCC 443(India).

⁶³ Supra note 38.

The changing proposition of using the expression "waging of war" in the present time also gives a poor image to the world that the country is not tolerant enough to deal with these issues and it is not able to resort to available constitutional provisions and measures effectively.⁶⁴

The reason for the need for change is obvious which are the growing use of social media and its use by people to express their view in touches of sarcasm manner. If the court starts using such rationale of an earlier time in present time then it would affect the freedom of expression of citizen that is part of fundamental rights.

The test to determine the objective of any such has been diluted in the vintage decisions and is also not in tune with the present day which makes it difficult adopt to adopt it in its literal sense. This approach would save those cases where people are showing disaffection against the government of India and want to preach particular ideology.⁶⁵ This approach also protects the fundamental right of every citizen to have his ideas and theories and to work for their establishment and to propagate them through peaceful means.

Even though the alternative of restrictive view would safeguard various rights but as already discussed restrictive view should also not be avoided completely while broadening the scope of expression waging of war.⁶⁶ The reasons are evident that if the too liberal approach is adopted then it would be wrongly used. People start instigating against the government by calling their activities part of their right to an expression which would also not justify. The judiciary in the judgments of the Red Fort attack⁶⁷ and the Parliament House attack⁶⁸ have already taken initiative to contribute in this important area.

⁶⁴ Supra note 57.

⁶⁵ Venu Nair v. Travancore - Cochin state AIR 1956 SC 99 (India).

⁶⁶ Supra note 28.

⁶⁷ Mohd. Arif v. State (NCT of Delhi), (2011) 13 SCC 621(India).

⁶⁸ Supra note 16.