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Sedition: Prince Closing Up on Kingship

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Abstract

In May 2022, the Hon'ble Apex Court recently ordered that the colonial-era sedition law under Sec. 124A of the Indian Penal Code should be kept in abeyance until the Centre has reconsidered it. In this context, it becomes pertinent to submit that the history of the law relating to sedition in India is very tainted. The law that was once used to prosecute some of our greatest freedom fighters still exists today in our statute book. In free India, when some of the High Courts had started declaring the law's unconstitutionality, it was finally the turn of our Apex Court to show up and uphold its constitutionality. The survival of this provision in free India in the paradigm of parameters set out in Part III of the Constitution is a fascinating and problematic story. This research work traces the origin of Sedition Law in the Indian Penal Code and also elaborates upon its survival in the post–constitutional regime. There has been a drastic increase in Sedition cases recently, and suppressing dissent and discourse during Covid-19 has reminded us of the misuse of this law against one of our greatest freedom fighters, viz. Bal Gangadhar Tilak. Is it a situation where the saw given to the carpenter to cut a piece of wood has been used to clear the entire forest? In light of the Apex Court's stand that it is high time we have to decide the limits of sedition, this research paper would be a needful inquiry into the same.

Keywords: Sedition, Colonial, Freedom Struggle, Free Speech, Constitutionalism.

I. Origin of the Law of Sedition: An Erroneous Omission

It will be pertinent to point out that the draft prepared by Lord Macaulay in 1837 did contain a provision penalizing Seditious conduct against the Government of East India Company. It was in the background of the Great Revolt of 1857 that the need was felt to immediately enact and enforce the Penal Code. The Penal

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Code that was enacted in 1860, however, needed to be added with this provision, which was there in the original draft. In 1870, the Bill, which finally inserted the provision on sedition, was introduced by Sir James Fitzjames Stephen. Stephen has stated that the provision was erroneously left out due to 'some unaccountable mistake' of someone.[2] However, the other theory suggests that by that time, since it had lost its relevance as an offence in England, it was intentionally excluded. [3]

The original law on sedition was as follows: "Whoever by words either spoken or intended to read or by signs or by visible representation or otherwise excites or attempts to excite feelings of disaffection to the Government established by law in British India shall be punished with transportation for life or for any term to which fine may be added or with imprisonment for a term which may extend to three years to which fine may be added or with fine.".[4] In 1898 an amendment was further done by renumbering it as Sec. 124A of the Indian Penal Code. The law was introduced in the immediate backdrop of the Wahabi Movement in the late 19th century. It was purported to be an effective tool to suppress dissent and curb nationalist tendencies from getting developed.[5] The Wahabis were traveling from village to village and propagating the idea of Jihad against the British government. This was finally discovered in 1863 after one such significant case comes to their acknowledgment.[6]

II. A Tool to Suppress Freedom Struggle

The anxiety of the British regime against the growing nationalist tendencies was apparent by the end of the 19th Century. The newly introduced Sedition Law was misused against some of our greatest freedom fighters. The first case on sedition seems to be the Bangabasi Case. In this case J. C. Bose was charged for sedition

[2] A. Chandrachud, *Republic of Rhetoric: Free Speech and the Constitution of India,* (Penguin Random House, Gurgaon, 2017).
[3] N. Saksena and S. Srivastava, "An Analysis of the Modern Offence of Sedition" 7 *NUJS Law Review* 121 (2014).
[4] C. SINHA, THE GREAT REPRESSION: THE STORY OF SEDITION IN INDIA, (Penguin Random House, Gurgaon, 2019).
[5] S. Kumar, "Is Indian sedition law colonial? JF Stephen and the jurisprudence on free speech" 58(4) THE INDIAN ECONOMIC & SOCIAL HISTORY REV 477-504 (2021).
[6] J. Stephens, *The Phantom Wahhabi: Liberalism and the Muslim Fanatic in mid-Victorian India,* 47(1) MODERN ASIAN STUDIES 22-52 (2013).

based upon his criticism of the Age of Consent Bill. The Bill was treated as interference by the British Regime in personal and religious matters.

Notably, the cases against Bal Gangadhar Tilak need to be specially mentioned. There were three sedition cases against Lokmanya Tilak. The first case concerned the articles he wrote in Kesari in the background of the murder of the Plague Commissioner Rand. The link was drawn between his speech and the associated Crime. The fact that may be noted is that the Plague in Pune led to enacting the Epidemic Diseases Act, 1897. This Act gave vast discretionary powers to the Plague Commissioner. These powers were widely misused, and dissent and criticism could be perceived as a natural consequence of such misuse.[7] Nonetheless, the fate of such speech was meted with a Sedition case. He was tried again in 1908 and was represented by MA Jinnah. Nevertheless, his application for bail was rejected, and he was sentenced to six years. The Second Sedition Case against B. G. Tilak pertains to the unrest that had crept into the Bengal Partition's aftermath. The link between bomb attacks and his writing was drawn, and he was held guilty of sedition.[8] The Third Sedition Case was pertaining to the lectures that he had publically delivered. The central theme behind the lectures was attaining swaraj through constitutional methods.[9]

Likewise, in the backdrop of the Chauri Chaura incident, Mahatma Gandhi was also charged with sedition based on specific articles he wrote in Young India.[10] Mahatma Gandhi pleaded guilty to his charge against Sedition.[11] He stated Sec. 124A as the "prince among the political sections of IPC designed to suppress liberty of the citizen ."Moreover, "affection cannot be manufactured or regulated by law. If one has no affection for a person or system, one should be free to give fullest expression to his disaffection so long as it does not contemplate, promote or incite to violence".[12] In the same way we can see that many other great names

[7] S. Kamra, *Law and Radical Rhetoric in British India: The 1897 Trial of Bal Gangadhar Tilak*, 39(3) JOURNAL OF SOUTH ASIAN STUDIES 546-559 (2016).
[8] M. Mukherjee, *Sedition, Law, and the British Empire in India: The Trial of Tilak (1908*), Vol. 16(3) LAW, CULTURE & THE HUMANITIES, 454-476 (2020).
[9] *Emperor v. Bal Gangadhar Tilak*, (1917) 19 BOMLR 211.
[10] S. KAMRA, THE INDIAN PERIODICAL PRESS AND THE PRODUCTION OF NATIONALIST RHETORIC 99-126 (Palgrave Macmillan, New York, 2011).
[11] B. Sexton, "The Trial of Gandhi" 16(3) *Current History (1916-1940)* 440–444 (1922).
[12] A. G. NOORANI, INDIAN POLITICAL TRIALS, 1775-1947 235 (Oxford University Press, New York, 1974).

like Ali Brothers, Annie Besant, Bhagat Singh, J. Nehru, etc. which were associated with Indian struggle for Independence had to face Sedition Charges.

III. The Inherent Discrimination

It must be pointed out that from its very inception, sedition per se seems to suffer from the inherent bias and discrimination of the Colonial Regime. At that time, India was a British Colony, and the applicable law in England was the common law. In due process, when the laws were codified in India, the same provided these colonized countries as a testing ground for the later adoption of those laws in England.[13] The inherent bias and discrimination can be manifested by comparing the ambit of the sedition law, which was introduced in India, vis-a-vis the limited or the Strict Sedition law applicable in Britain. In England, the offense was insignificant as compared to a felony and also the imprisonment was up to two years. However, in India, it was introduced as a law not only having a wider ambit, but when it came to punishment, it could attract transportation for life.

By the first half of the 19th century, only if there was incitement to violence did it attract the Sedition charge, as then in England, it was narrowed down in scope and application. Justice Fitzgerald had accordingly stated that in sedition there is a tendency to incite insurrection and rebellion.[14] However, in ***Bangabasi Case,***[15] it was the broader law of sedition that was applicable. In this case, Chief Justice Petheram pointed out that "a feeling contrary to affection, in other words, dislike or hatred," would be seditious and included disloyalty towards the government. Therefore, in India, the safeguard of 'incitement to violence' was not made applicable; even the slightest amount of invoking disaffection against the British Government would be treated as Seditious.

In *Queen Empress v. Bal Gangadhar Tilak,*[16] **Justice Starchey** stated that the gist of the offense is contained in exciting certain bad feelings towards the government. It does not necessarily connote the idea of exciting mutiny, rebellion,

[13] A. SINGH, SEDITION IN LIBERAL DEMOCRACIES, (Oxford University Press, New Delhi, 2018).
[14] R. v. Sullivan, (1868) 11 Cox CC 44.
[15] *Queen Empress v. Jogendra Chunder Bose And Ors.*, (1892) ILR 19 Cal 35.
[16] (1897) I.L.R. 22 Bom. 112.

or actual disturbance. It is immaterial to assess whether any disturbance was caused or not by such seditious conduct.

It is against this inherent bias and discrimination when Mahatma Gandhi is quoted saying that Sec 124A is "the prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen."[17] He also described it as the "Sword of Damocles" hanging over the freedom movement.[18]

IV. Continuation of the Law in Independent India

In the pre-independence era, there seemed to be a conflict between the Federal Court and the Privy Council as far as the scope and ambit of the Sedition Law were concerned. This becomes a solid basis where the delimited scope of Sedition Law has to be examined in free India. In *Nihrendu Dutt Majumdar v. Emperor,* [19] Federal Court resorted to the strict law of sedition. The charge of sedition would be attracted in those limited cases only where there was incitement to violence. This was in tandem with the applicable law in England. It was emphasized that 'public disorder' or the 'likelihood of public disorder' was an essential element to be observed in such cases. [20] However, in *Emperor v. Sadashiv Naryan Bhalerao,*[21]the Privy Council overruled the decision of the Federal Court. It reiterated the wider law of sedition that was used as a colonial tool to suppress nationalism and the law that was used to convict some of the great freedom fighters like B. G. Tilak. It clearly stated that Nihrendu's Case proceeded on a wrong construction of Sec. 124A. Precisely, because of the Privy Council 'incitement to violence' was not the deciding parameter in adjudging a case on sedition. Exciting feeling of enmity would be sufficient to constitute the offence of sedition.

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[17] S. B. KHER (ed.), THE LAW AND THE LAWYER BY M. K. GANDHI, (Navjivan Publishing House, Ahmedabad, 1st edn., 1964).
[18] Publications Division, Ministry of Information and Broadcasting, Government of India, 46 *The Collected Works of Mahatma Gandhi*, (2000).
[19] 1942 F.C.R.38.
[20] A. K. Mukherjee, "THE FEDERAL COURT AND THE LAW OF SEDITION IN INDIA" 5(1) *The Indian Journal of Political Science* 94-104 (1943).
[21] 1947 SCC OnLine PC 9.

When India gained independence, Part III of the Constitution ensured Fundamental Rights to its individuals. Accordingly, those laws that were inconsistent with Part III would be treated as Eclipsed by the Constitution. The irony is that the very law which was used as a tool to suppress India's struggle for independence was debated to be included as a reasonable restriction to Free Speech under Art. 19(2). However, due to the initiative undertaken by a renowned lawyer, K. M. Munshi, who also took part in the freedom struggle, sedition as one of the grounds for restricting free speech was struck down in the Constitution's Final Draft. It was worth taking into account how the Sedition law was misused and abused to stifle dissent and criticism to warrant its exclusion as a reasonable restriction.[22]

Since sedition was not a restriction in Art. 19(2); likewise, 'public order' was not mentioned as grounds for restricting speech under Art. 19(2) It was only after the case of Romesh Thapar v. State of Madras,[23] it was inserted in Art. 19(2) thorough 1st Constitutional Amendment. In this case, Romesh Thapar had challenged a decision by the Madras Government which banned his journal, Cross Roads, arguing that the ban imposed based on "public safety" was very broad and violated his right to free speech and expression. The Court noted that such expansive restrictions were unconstitutional and that only narrow restrictions on freedom of expression were permitted.

V. Chilling effect on Free Speech and the *Kedarnath* Judgement

The exclusion of sedition as a reasonable restriction had subjected the law to constitutional scrutiny. Even some of the High Courts had started declaring the law unconstitutional as it produced a chilling effect on the right to free Speech. Notably, in *Ram Nandan v. State,*[24] the Allahabad High Court declared the law as unconstitutional. It also *interalia* quoted a case of Punjab High Court[25] which had also declared it as unconstitutional.

[22] K. Singh and Vikram Singh, *Fourth Estate in the Constitutional Ambit: Analyzing Free Speech under Democracy*, 4 INDIAN JOURNAL OF LAW AND JUSTICE (2013).
[23] 1950 SCR 594.
[24] AIR 1959 All 101.
[25] AIR 1951 Punjab 27.

The ongoing controversy was finally settled in the leading case of *Kedarnath v. State of Bihar*,[26] wherein the constitutional validity of Sec. 124A was finally upheld. It was held that 'public order' and 'security of State' in Art. 19(2) save Sec.124A and 505 of the Penal Code from the vice of unconstitutionality. It is interesting to note that had the Apex Court resorted to the wider application of the law taken by the Privy Council in Sadashiv Narayan's case, the same would not have passed constitutional scrutiny. Instead, it resorted to the Federal Court's stricter view of the law and upheld its validity. Therein, the principle that there must be 'incitement to violence' gained popularity. It can be quoted as under:

"It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence. As already pointed out, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and consistent with the fundamental right of freedom of speech and expression. When the words, written or spoken, have the pernicious tendency or intention of creating public disorder or disturbance of law and order, the law steps in to prevent such activities in the interest of public order. So construed, the section strikes the correct balance between individual fundamental rights and the interest of public order."

The question now arises when the controversy is settled and the law was seen as having appropriate safeguards which protect criticism without giving any 'incitement to violence.' However, there is a tendency to misuse this law in the old colonial fashion. Recent times have proved that it has immense potential for misuse, and the safeguards given in the explanation are not paid due attention while instituting cases under sedition. This in turn, suppresses dissent and creates fear, ultimately producing a chilling effect upon the right to free speech.

[26] 1962 AIR 955.

Current Context: Using the Saw to clear entire Forest

Keeping in view the ***Kedarnath Judgment*** the law was supposed to be used sparingly and in rare cases only. However, the recent year-wise data retrieved from NCRB database from the year 2014-2020 discloses the grim picture of the issue.[27] These recent sedition cases include some of the popular cases including the *Patidar Agitation, Jat Agitation, Pathalgadi Movement, Citizenship Amendment Act Protests, Cases in COVID-19, Hathras Case,* etc. The data provided by National Crime Records Bureau shows that sedition cases which were 47 in 2014 increased to 93 in 2019, hence, there was an enormous 163% rise in Sedition cases. However, the conviction is a mere 3% in such cases. This demonstrates that the state authorities are using the sedition laws arbitrarily to raise an alarm amongst the citizens and is significantly suppressing dissent by creating a fear in the minds of the people. This produces a chilling effect on the right to free speech. Given below is the retrieved data:

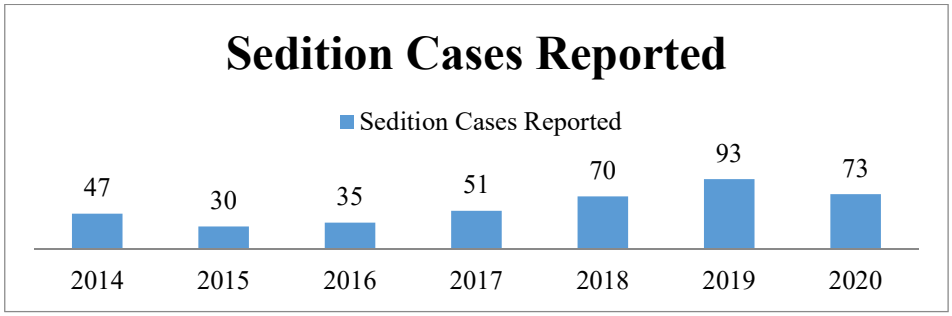

Figure 1: ***Sedition Cases:2014-2020 National Crime Records Bureau, Crime in India Statistics.***[28]

Apart from the fact that as compared to the previous regime, the number of cases has substantially increased. Another disturbing issue is its frequent use even in those cases which were issues of national importance and were under wider public

[27] National Crime Records Bureau, "Crime in India 2014 statistics" (2014); National Crime Records Bureau, "Crime in India 2015 statistics" (2015); National Crime Records Bureau, "Crime in India 2016 statistics" (2016); National Crime Records Bureau, "Crime in India 2017 statistics" (2017); National Crime Records Bureau, "Crime in India 2018 statistics" (2018); National Crime Records Bureau, "Crime in India 2019 statistics" (2019); National Crime Records Bureau, "Crime in India 2020 statistics" (2020);
[28] *Id.*

scrutiny. The situation is even worse if we are to rely on the data presented by Article 14, which is the subject of ongoing research.[29] According to them, many more actual cases exist than in the NCRB data.

Chief Justice of India, Justice N. V. Ramana, while hearing a plea challenging the constitutionality of the Sedition Law, questioned the need to keep this law, which was blatantly misused to suppress our freedom struggle. An environment persists, which creates fear in the public's mind against such misuse by law enforcement agencies. Recently, the law has been misused on several occasions, which has caught the media's attention. These include the cases against activists such as Binayak Sen, Arundhati Roy, Disha Ravi, Vinod Dua, people opposing the Citizenship amendment, people protesting against farm laws, etc.

The most problematic aspect of the law remaining in the statute book is that when a case is filed under sedition, the lower courts do not thoroughly examine the charge, and securing bail becomes very difficult. This, in turn, contributes to an environment of fear as people might end up behind bars even for those speeches that seek to criticise policies of the government without inciting violence. By the time a person would get bail it would be too late to undo the damage already caused.

In the times of pandemic, a crisis appearing similar to those during British Rule seemed to have emerged. Some people who raised their voices against the government's handling of the situation were welcomed by Sedition charges. Famous Jornalist, Vinod Dua, was accordingly criticizing the government's handling of the pandemic and also he had highlighted the plight of migrant laborers during the crisis. Based on his video an individual from Himachal Pradesh filed Sedition case against him stating that the Journalist was spreading misinformation. Finally, Vinod Dua had to approach the Supreme Court, wherein his FIR was finally quashed. In Vinod Dua v. Union of India [30] the Hon'ble Bench composing of Justices U. U. Lalit and Vineet Saran stated:

> *"... a citizen has a right to criticize or comment upon the measures undertaken by the Government and its functionaries, so long as he does*

[29] K. Purohit, "Our New Database Reveals Rise In Sedition Cases In The Modi Era", *Article14,* https://www.article-14.com/post/our-new-database-reveals-rise-in-sedition-cases-in-the-modi-era (last visited on 22nd January, 2022).
[30] 2021 SCC OnLine SC 414.

> *not incite people to violence against the Government established by law or with the intention of creating public disorder; and that it is only when the words or expressions have pernicious tendency or intention of creating public disorder or disturbance of law and order that Sections 124A and 505 of the IPC must step in."*

Another popular case involved the airing of an interview of a rebel YSR Congress MP criticising the handling of the Covid situation. The coercive action against two news channels was challenged before the Supreme Court. While staying the sedition cases against them, the Apex Court restrained the arrest of those individuals who were involved in showing grievance concerning the pandemic issue. Justice D. Y. Chandrachud in M/S Aamoda Broadcasting Company v. State Of Andhra Pradesh[31] observed that it is the time when the limits of Sedition has to be properly defined. It was observed *inter alia*:

> *"we are of the view that the ambit and parameters of the provisions of Sections 124A, 153A and 505 of the Indian Penal Code 1860 would require interpretation, particularly in the context of the right of the electronic and print media to communicate news, information and the rights,even those that may be critical of the prevailing regime in any part of the nation"*

VI. Conclusion

It may be relevant here to submit that, at the very outset, the fundamental problem associated with Sedition Law is the wide and improper definition. The expressions which form the operative part is "brings or attempts to bring into hatred or contempt" and "excites or attempts to excite disaffection."What speech will actually be treated as 'bringing hatred' or 'exciting disaffection' is subject to numerous interpretations. The inherent scope within the Sedition Law to interpret it in different ways creates a grey area that acts as a cogent tool to suppress dissent and thereby creates a chilling effect on free speech. This scope of Sedition Law is inherent in its very definition, which the law enforcement agencies can easily put to misuse by incriminating individuals on such flimsy grounds. Since there is no clear indication within the law that precisely delimits what 'words, signs, or visible representation' would actually be Seditious, the situation becomes

[31] 2021 SCC OnLine SC 407.

intensely problematic. The explanation, which seems to insulate positive criticism without inciting violence, does not operate as a working safeguard against such abuse and misuse as witnessed in these recent cases.

The Rights guaranteed under the Constitution are the very foundation of a modern liberal democracy. Sedition Law produces a chilling effect on the rights enshrined in the Constitution, and it is high time the judiciary proactively stepped in and read down the scope of this colonial-era law. There should be strict instructions that should be mandatorily followed by law enforcement agencies while instituting a case under Sec—124A of the Indian Penal Code.