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The Law of Sedition and India: An Evolutionary Overview

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An artist's impression of Bala Ganghadhar Tilak's second trial for sedition case being argued at the Bombay High Court in 1908. Tilak was sentenced to six years of transportation. (Circa 1908). From The Hindu Archives.

Article 124A, characterised aptly by the Father of the Nation, Mahatma Gandhi, as the "prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen", has a long legal history, originating from English Law.

*In this article, **Saptarshi Bhattacharya, Senior Coordinator, The Hindu Centre for Politics and Public Policy**, traces the journey of the law from 13th century England through the colonial rule in India and the developments in independent India to its present status where the operation of the law has been put on hold by the Supreme Court of India on May 11, 2022.*

Bhattacharya throws light on the key doctrines that directed the sedition law, the manner in which it was applied to suit the times over the centuries, the judicial pronouncements that shaped its application, and the manner in which it has been easily used as a political tool to thwart dissent in free India.

I. A law of political origin under a monarchy

From their inception, laws suppressing dissent have been political in nature. The earliest known such decree was under The First Statute of Westminster, 1275, which came into being as a direct outcome of a "rebellion of the barons" [1] against the monarch who "was considered the holder of the Divine Right." [2] This was aimed at safeguarding the ruling establishment, including the nobility, from popular uprisings that challenged the existing order. The doctrine of *Scandalum Magnatum* (Latin for 'scandal of the magnates') became the basis for this law, which placed curbs on scandalising or criticising royalty, judges or peers. According to the thirty fourth chapter of the First Statute:

> **"none be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord or slander may grow between the King and his people, or the great men of the realm."** [3]

Over the subsequent centuries this made its journey through the Statues of Treason (1352 and 1534) and evolved into the offence of seditious libel in 1606 at a Star Chamber decision in *de Libellis Famosis* [4], the law of libel or written defamation. In this case, the court held that criticism of public officials and the government would inculcate disrespect for public authority. Interestingly, this case evaded some of the safeguards laid down in the offences of Treason and *Scandalum Magnatum*. [5] The 18 th century, Hamburger [6] points out, saw the increased usage of sedition against the printed word. It continued to be a part of the English law until it was abolished in new millennium.

II. Doctrine of 'Chilling Effect' and Abolition of Sedition in the UK

A notable judicial framing of sedition laws came from the U.S. Frank Askin, retired Professor Emeritus at Rutgers University, points out that the Supreme Court of the United States

> **"developed and explained the chilling effect doctrine in several opinions issued during the McCarthy era involving legislation and regulations aimed at suspected communists and so-called subversives."** [7]

In *Dombrowski v Pfister, 380 U.S. 479 (1965),* the US Supreme Court, while hearing a petition from James Dombrowski seeking relief from prosecution under Louisiana's Subversive Activities and Communist Control Law, invoked the overbreadth doctrine, wherein "a regulation of speech can sweep too broadly and prohibit protected as well as non-protected speech" [8] and discussed the need to protect the First Amendment rights from a 'chilling effect'. The court said:

> **"A chilling effect upon First Amendment rights might result from such prosecution regardless of its prospects of success or failure, as is indicated by appellants' representations of the actions taken under the statutes."** [9]

Although sedition survives as an offence in the US, "it is very narrowly construed and can even said to have fallen in disuse." [10]

Related Article and Resources

Article:

Dissent & Democracy: Why the Sentinel Should Strike Down IPC Sec. 124A, Eklavya Vasudev, August 5, 2022.

Resources:

1. **The Sedition Law in India - Select Resources**.

2. **Resources on Sedition from The Hindu Centre for Politics and Public Policy**.

The Law Commission of U.K., in a working paper in 1977, scrutinised the sedition law (p 48) and expressed its "provisional view" that "there is no need for an offence of sedition in the criminal code." [11] In 2009, the crime of seditious libel was abolished through the enactment of the Coroners and Justice Act, 2009, in the United Kingdom. [12]

III. Sedition in India

The sedition law in its present form owes its origin to the 1830s when codification of Indian laws started. Prior to codification, Indian laws were "a complex array of Parliamentary Charters and Act,

Indian Legislation (after 1833), East India Company Regulations, English common law, Hindu law, Muslim law, and many bodies of customary law." [13]

The Draft Indian Penal Code, 1837, by Thomas Babington Macaulay included a section on Sedition. This Draft's Section 113 was similar in its framing to the current Sec. 124A of the Indian Penal Code (IPC). The punishment proposed was life imprisonment. However, the section was not included in the IPC when it was enacted in 1860 due to what was subsequently attributed to an "oversight". Sec. 124A, which criminalises "disaffection towards the Government established by law" or sedition, was finally introduced through an amendment in 1870, by the then Law Member of the Governor-General's Council, James Fitzjames Stephen. [14], [15]

The first case to be tried under the law of sedition in India was 20 years after its introduction in *Queen-Empress v Jogendra Chunder Bose,* 1891. [16] The proprietor, editor, manager, and printer of the Bengali magazine, *Bangobasi,* were tried under the law for publishing an article criticising the British government's Age of Consent Act that raised the age of consent for sexual intercourse. In this case, however, there was no conviction. The jury could not come up with a unanimous verdict. W. Comer Petheram, Chief Justice of the Calcutta High Court, said that "he would not take any verdict that was not unanimous in this case" and Bose was let out on bail.

IV. The Tilak Trials – differing interpretations

As in England, so in India, the law was used extensively to curb political dissent. Bal Gangadhar Tilak, a nationalist, teacher, and a key activist in the independence movement, was charged with sedition twice, and once more under the Criminal Procedure Code. In 1897, he was convicted by the Bombay High Court for publishing an article in *Kesari*, the Marathi newspaper he founded in 1888, invoking the example of Maratha warrior Sivaji to incite overthrow of the British rule. [17] This judgment broadened the scope of disaffection towards the government to include "disloyalty", which influenced an amendment to the IPC in 1898 to include disloyalty and feelings of enmity in the definition of disaffection. Tilak was convicted of sedition once again in 1908 by the same court for his writings in *Kesari*.

Tilak's brush with the law on matters relating to sedition did not end here. In 1916, he had to face the court for the third time "to revise an order" by the District Magistrate of Poona under Sec. 108 of the Criminal Procedure Code. This Section provided for a security bond to be provided for "good behaviour" including not speaking, writing or disseminating any matter that can be punished under Sec. 124A of the IPC. Tilak was required to pay Rs. 20,000 with two sureties each for "good behaviour

for a year" as the District Magistrate had held that he "disseminated seditious matter in three speeches". This case also had a political context in that Tilak was represented by Mohammed Ali Jinnah. Although issues such as "disaffection" and "Government by law established in British India", were discussed in this judgment, the important outcome was that the Court held that a speech should be seen in its full context:

> **"they must be read as a whole. A fair construction must be put upon them, straining nothing either for the Crown or for the applicant, and paying more attention to the whole general effect than to any isolated words or passages."** [18]

Taking this view, the Court cancelled the order by the District Magistrate and quoted extracts from Tilak's speeches demanding Swaraj and noted:

> **"not only is there nothing illegal, but there is a distinct pleading that the political changes advocated should be obtained by lawful and constitutional means."**[19]

V. "Affection cannot be manufactured" and "wounded vanity of Governments"

The most historic case, and the one most often cited by those opposing the sedition law was in 1922, when Mahatma Gandhi was charged with sedition and tried at the Sessions Court in Bhadra, Gujarat, for his politically sensitive articles in *Young India*. Pleading guilty, Gandhiji said:

> **"Section 124A under which I am happily charged is perhaps the prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by law. If one has no affection for a person or system, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote or incite violence… I have no personal ill will against any single administrator; much less can I have any disaffection towards the King's person. But I hold it to be a virtue to be disaffected towards a Government which in its totality had done more harm to India than any previous system."** [20]

From the judicial perspective, the most important pronouncement, which is of continued relevance, came in *Niharendu Dutt Majumdar v the King-Emperor* in 1942. The Chief Justice of the Federal Court of India, Maurice Gwyer, observed that

> **"This [sedition] is not made an offence in order to minister to the wounded vanity of Governments, but because where Government and the law cease to be obeyed because no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence.**
>
> **The acts or words complained of must, either incite to disorder or must be such as to satisfy reasonable men that that, is their intention or tendency."** [21], [22]

VI. Sedition's uneven journey in free India

As free India sat to chart its own Constitution, the fundamental rights sub-committee, headed by Sardar Vallabhbhai Patel, placed a Draft Interim Report on Fundamental Rights before the Constituent Assembly for its consideration on April 29, 1947. [23] In this Report's annexure on Justiciable Fundamental Rights, Article 8 (a) mentioned seditious speech as one of the restrictions on free speech saying, "Provision may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slanderous, libellous or defamatory matter actionable or punishable". [24]

The Constituent Assembly debated the Article on Freedom of Speech and Expression on December 1 [25] and 2 [26], 1948. Several rights and restrictions, including "freedom of the press" and banning of "beggary" were debated. Specifically with regard to "sedition", an amended Clause 2 of Article 13 before the Assembly read:

> **"Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law, or prevent the State from making any law relating to libel, slander, defamation, offences against decency or morality or sedition or other matters which undermine the security of the State."**

Munshi wanted this to be further amended to read:

> **"Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law, or prevent the State from making any law relating to libel, slander, defamation, or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."**

Munshi's speech at the Constituent Assembly on December 1, when he moved the amendment is quoted *in extenso* as it is a pointer to the minds of the founders of the Constitution:

"Sir, the importance of this amendment is that it seeks to delete the word 'sedition' and uses a much better phraseology, viz. "which undermines the security of, or tends to overthrow, the State." The object is to remove the word 'sedition' which is of doubtful and varying import and to introduce words which are now considered to be the gist of an offence against the State.

…

…

I was pointing out that the word 'sedition' has been a word of varying import and has created considerable doubt in the minds of not only the members of this House but of Courts of Law all over the world. Its definition has been very simple and given so far back in 1868. It says "sedition embraces all those practices whether by word or deed or writing which are calculated to disturb the tranquility of the State and lead ignorant persons to subvert the Government". But in practice it has had a curious fortune. A hundred and fifty years ago in England, holding a meeting or conducting a procession was considered sedition. Even holding an opinion against, which will bring ill-will towards Government, was considered sedition once. Our notorious Section 124-A of Penal Code was sometimes construed so widely that I remember in a case a criticism of a District Magistrate was urged to be covered by Section 124-A. But the public opinion has changed considerably since and now that we have a democratic Government a line must be drawn between criticism of Government which should be welcome and incitement which would undermine the security or order on which civilized life is based, or which is calculated to overthrow the State. Therefore the word 'sedition' has been omitted. As a matter of fact the essence of democracy is Criticism of Government. The party system which necessarily involves an advocacy of the replacement of one Government by another is its only bulwark; the advocacy of a different system of Government should be welcome because that gives vitality to a democracy. The object therefore of this amendment is to make a distinction between the two positions."

Speaking further, Munshi invoked Chief Justice Gwyer's 1942-framing of the sedition law as on that was "not to minister to the wounded vanity of Governments" in *Niharendu*. On December 2, 1948, Munshi's amendment was adopted.

Early judgments and the First Amendment

Meanwhile, governments in independent India continued filing sedition cases. On March 1, 1950, the Government of Madras banned the entry and circulation of a journal, *Cross Roads,* published by Marxist

ideologue, Romesh Thapar, and was critical of Prime Minister, Jawaharlal Nehru's policies, especially foreign policy [27]. Thapar went on appeal to the Supreme Court – the first case in Independent India relating to Sec. 124A of the IPC. In *Romesh Thapar v State of Madras* (1950), the Supreme Court invalidated the ban by the Madras government and declared that unless the freedom of speech and expression threaten the 'security of or tend to overthrow the State', any law imposing restrictions upon the same would not fall within the purview of Article 19(2) of the Constitution. [28]

In another case, this time involving the official publication of the Rashtriya Swayamsevak Sangh, *Organiser*, the Chief Commissioner of Delhi had asked Brij Bhushan, the Printer and Publisher of the magazine, and K.R. Halkani, its Editor,

"to submit for scrutiny, in duplicate, before publication, till further orders, all communal matter and news and views about Pakistan including photographs and cartoons other than those derived from official sources or supplied by the news agencies, viz., Press Trust of India, United Press of India and United Press of America." [29]

On appeal, the Supreme Court's judgment, delivered on the same day as *Thapar*, said: "The imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Art. 19 (1)(a)." In both cases, the majority judgments were delivered by Justice Patanjali Sastri, and Justice Fazl Ali dissented.

The majority judgment delivered by Sastri struck down the ban on the entry and circulation of *Cross Roads* in the State of Madras as the State government's order "falls outside the scope of the authorised restrictions under Clause 2". It further went on to rule that Sec. 9 (1-A) was "wholly unconstitutional and void" with the following reasoning:

> **"(ii) Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out must be held to be wholly unconstitutional and void. Section 9 (1-A) is therefore wholly unconstitutional and void."** [30]

In the *Bhushan* majority judgment, Sastri quashed the pre-censorship order:

> **"There can be little doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by article 19 (1)(a)."**

The Judgment also pointed out from Blackstone that

> **"the liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press."** [31]

Ali's dissent note said the ban on the entry and circulation of *Cross Roads* by the State of Madras was "not unconstitutional or void" as they were within the purview of Clause 2 of Art. 19 of the Constitution. In *Bhushan*, Ali held that the framers of the Constitution had included terms that had wider connotations "which are detrimental to the security of the State as sedition" and that "it would be difficult to hold that it [the order requiring pre-publication censorship on the *Organiser*] falls outside the ambit of Art. 19 of the Constitution". The following year, the Punjab High Court declared section 124A of IPC unconstitutional in *Tara Singh Gopi Chand v The State* for contravening freedom of speech and expression. [32]

The First Amendment in 1951, added two additional restrictions — 'public order' and 'friendly relations with foreign State' — to Article 19(2), which reflected the pronouncements in *Romesh Thapar* and *Brij Bhushan*. Prime Minister Nehru, who was incarcerated under the same law during the British rule, said: "The sooner we get rid of it [Sec 124A] the better." [33] With regard to the punishment under Sec. 124A, an amendment to the Criminal Procedure Code in 1955, replaced "transportation for life or for a shorter period", with "imprisonment for life and/or with fine or imprisonment for 3 years and/or with fine". [34]

The first time the constitutionality of section 124A of IPC was challenged after the First Amendment, was in the case of *Kedar Nath v State of Bihar*. The appellant was convicted of sedition and inciting public mischief because of a speech where he criticised the ruling Congress party and advocated for the Forward Communist Party. The Constitution Bench upheld the validity of section 124A and kept it at a different pedestal. The Court drew a line between the terms 'the Government established by law' and 'the persons for the time being engaged in carrying on the administration' observing:

> **"'Government established by law' is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted. Hence, the continued existence of the Government established by law is an essential condition of the stability of the State. That is why 'sedition', as the offence in Section 124-A has been characterised, comes, under Chapter VI relating to offences against the State. Hence any acts within the meaning of Section 124-A which have the effect of subverting the Government by bringing that Government into contempt or hatred, or creating disaffection against it, would be within the penal statute because the feeling of disloyalty to the Government established by law or enmity to it imports the idea of tendency to public disorder by the use of actual violence or incitement of violence."** [35]

The Court also struck a balance between the right to free speech and expression and the power of the legislature to restrict such right observing:

> **"…the security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with view to punishing offences against the State, is undertaken. Such a legislation has, on the one hand, fully to protect and guarantee the freedom of speech and expression, which is the *sine quo non* of a democratic form of Government that our Constitution has established. This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression with which we are concerned in this case. But the freedom has to be guarded against becoming a licence for vilification and condemnation of the Government established by law, in words, which incite violence or have the tendency to create public disorder. A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder."** [36]

VII. The Law Commission and "the most powerful Supreme Court in the World"

In recent years, the law of sedition made its way into the public discourse after a spate of FIRs were registered against journalists, activists, students, social workers, prominent intellectuals and even a folk musician, invoking article 124A of IPC. As Anushka Singh points out the law has also been used against protestors.

> **"The mass cases of sedition against the anti-nuclear protesters in Kudankulam, Tamil Nadu between 2011 and 2016; against members of pro-reservation agitation like the Jats in Haryana, the Patidars in Gujarat in 2015 and 2016; against pathalgadi protesters in Khunti, Jharkhand in 2019; against anti-Citizenship (Amendment) Act protesters in Delhi, Assam and other parts of India in 2020 and 2021, are examples that reveal the political function performed by the police through the use of the law."** [37]

Statistics by The National Crime Records Bureau's Crime in India, 2019, showed that 93 cases were filed under the sedition law in 2019, (33 in 2016), registering an increase of 165 per cent. [38] Also, the rate of conviction dropped to 3.3 per cent in 2019 from 33.3 per cent in 2016. [39]

The Law Commission of India, on August 30, 2018, came out with a consultation paper tracing the history of the sedition law and drew comparisons with the U.K., the U.S. and Australia. The paper raised several questions for further deliberations, including the wisdom of retaining the provision as a criminal offence. "In a democracy, singing from the same songbook is not a benchmark of patriotism," it noted. [40]

The year 2021 saw several petitions challenging the constitutionality of the sedition law. These include one by two journalists, Kishore Wangkhemcha from Manipur and and Kanhaiya Lal Shukla from Chhattisgarh, who filed a petition in the Supreme Court challenging the constitutionality of sedition law. The one by the Editors' Guild of India sought directions to declare sections 124A and 505 of the IPC as unconstitutional for being violative of fundamental rights enshrined in the Constitution. S.G. Vombatkere, a retired army general, filed a Public Interest Litigation before the Supreme Court challenging the constitutional validity of section 124A of IPC. Others to file petitions were The Journalists Association of Assam; Arun Shourie, former Minister of Communications and former Editor of the *Times of India* and *The Indian Express*; The People's Union for Civil Liberties; Mahua Moitra, Member of Parliament from the Trinamool Congress; Patricia Mukhim, the Editor of the *Shillong Times*; and Anil Chamadia, Chairman of the Media Studies Group. [41]

At a hearing related to the *Vombatkere v Union of India* and the other cases on May 7, 2022, Attorney General Tushar Mehta, submitted in writing that the judgment in *Kedar Nath Singh v State of Bihar* was a good precedent and that the petitioners had not shown any justification based on which the court could record a finding that *Kedar Nath Singh* was patently illegal and required reconsideration. [42]

However, just two days later on May 9, 2022, an affidavit filed by the Additional Home Secretary, Mritunjay Kumar Narayan, before the court, submitted:

> **"The Government of India, being fully cognizant of various views being expressed on the subject of sedition and also having considered the concerns of civil liberties and human rights, while committed to maintain and protect the sovereignty and integrity of this great nation, has decided to re-examine and re-consider the provisions of Section 124A of the Indian Penal Code which can only be done before the competent forum."** [43]

In view of the submission on May 9, the court passed an interim order on May 11, asking for restraint from the state and central governments from registering FIRs under the provision. The court said:

> **"…it is clear that the Union of India agrees with the prima facie opinion expressed by this Court that the rigors of Section 124A of IPC is not in tune with the current social milieu, and was intended for a time when this country was under the colonial regime. In light of the same, the Union of India may reconsider the aforesaid provision of law.**
>
> …
>
> **We hope and expect that the State and Central Governments will restrain from registering any FIR, continuing any investigation or taking any coercive measures invoking Section 124A of IPC while the aforesaid provision of law is under consideration."** [44]

The 152-year old law, which has its origins in monarchical England of the 13 th century, has now been placed on hold by the Supreme Court of India, described as "the most powerful court in the world" by William Hubbard of the University of Chicago, Editor of the *Journal of Legal Studies*, and an author of *The Supreme Court of India: An Empirical Overview*. In an interview to *The Economic Times*, he elaborates:

> **"We aren't the first to make this observation, but the Supreme Court of India (SCI) holds a unique status for several reasons. It is the apex court of the largest common-law court system in the world. The Indian Constitution grants it far-reaching authority to initiate actions and to exercise direct appellate authority over all other courts in the country. The basic structure doctrine gives it the power to review constitutional amendments. These features distinguish it from other powerful Supreme Courts, such as the Supreme Court of the United States (SCOTUS). And the SCI remains a highly respected institution by the people of India (and beyond), giving it legitimacy when it exercises its broad powers."** [45]

The long legislative, judicial, constitutional, executive, and political journey of this "prince among the political sections of the IPC" has now been put on hold by this "most powerful" Supreme Court. The different arms of government have often varied on how they view the law. What stands out in the long history of the law and its usage is that it has more often been used to stifle free speech, especially

dissenting voices that are raised against regimes, irrespective of whether they have been colonial rulers or elected representatives.

*(**Note:** This article was updated on August 6, 2022, after correcting formatting and editing errors.)*

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