
AN APOLOGY TO THE FREEDOM OF SPEECH AND EXPRESSION: REVISITING THE JOURNEY OF SEDITION LAW IN INDIA FROM ‘RAJDROH’ TO ‘DESHDROH’

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ABSTRACT

The Preamble of the Indian Constitution echoes the very sentiment of freedom of speech and expression through the perfect arrangement of words as “liberty of thought, expression, belief, faith and worship”. The ancient Greeks laid the groundwork of free speech as a democratic principle. Ancient Greek word “parrhesia” means “free speech”. Without this freedom the concept of democracy goes absurd. Legitimate opposition to the decisions of the Government is the sole criterion of a living democracy. This criterion cannot be fulfilled without presence of this Fundamental Right, under Article 19(1)(a) of the Indian Constitution. Untold truth is the curtailment of this right. This exercise of freedom of speech and expression and the abuse of power by the authority in a democratic society are inversely proportional to each other. Balancing the blatant effect of rigidity should be the main aim of the legislature. Sedition, being the colonial law has lost all its freedom in a free state. Though the new approaches create the ambience of its death, but now it is prominent via the new criminal law that, mindful mining of the old soil manufactured the new with different shape. The unconstitutionality of the old law of sedition silenced Article 19(1)(a) and paved the way for new, which is now rolled in the blanket of vagueness. This work tries to mournfully memorize the journey of the freedom of speech and expression through the era of a smoggy change from ‘Rajdroh’ to ‘Deshdroh’.

Keywords: - Disaffection, freedom of speech and expression, public order, sedition, treason.

I. Introduction

A revolt is a means, a path and several thoughts gathered for a change. A new outlook strengthens a society. Same was the tradition during the British Raj. Revolt of 1857 in India was a great turning point for those who strived and sacrificed for freedom. But, the after effect of this was the criminalization of sedition, which brought down the opportunity to oppose from the blue sky to the line of a moving train. The law was deemed to curb protests, riots, agitations and spread awareness. But was it all about to spread awareness? A law which strains out any of the fundamental right is always a matter of threat and is therefore the subject of review. Even in the 75th year of republic, India was all entangled into this draconian law of sedition. From free speech to fair election, the country faced several flip-flops and egoic battles to enjoy all its freedoms successfully and satisfactorily. A clash between the Sedition Law and Fundamental Right of Freedom of Speech and Expression under Article 19(1)(a)¹ existed since time immemorial. But, a step to cut down the rotten provision from the universal criminal law of the country was never opted for. After the passage of 160 years of the Indian Penal Code by Macaulay, the legislature has forwarded its utmost caring step towards the initialization of new criminal laws, free from each and every drastic colonial touch. From targeting Bal Gangadhar Tilak, Annie Besant, Mahatma Gandhi to the Kedar Nath Singh's Case, the Sedition Law has seen several nasty impacts of itself to the modern lines of democracy. An hour for a change has emerged long ago, but the year of 2024 will always find its place into the golden history of banishing the law which snatched our pillar of democracy.

Section 124A of the Indian Penal Code (IPC)², the most prominently wielded piece of legislation, was added to the IPC by the British colonial government in 1870. It has been surmised that the absence of the law on sedition came to be keenly felt due to the increased activities of Wahabis between 1863 and 1870, whose agents moved freely amongst the established Muslim population of Bengal and Bombay⁶ and also in view of the 'Mutiny' of 1857. This 'law on sedition' was present as section 113 in Thomas Macaulay's draft IPC of 1837. However, in the introduced Penal Code of 1860, this clause was for some unaccounted reason, omitted. It was only 10 years later that by way of a Special Act (XXVIII of 1870) that the IPC was amended to add Macaulay's provision, practically the same as it stood at the time of its original conception.³ After the initiation of the law of sedition in 1870, it was allowed to remain

¹ The Constitution of India, 1950, art. 19(1)(a).

² The Indian Penal Code, 1860, (Act 45 of 1860), s.124A.

³ Abhishek Hari, "How the Sedition Law Has Been Used in the Modi Era", *available at:*

in force, unaltered, for a period of 27 years. Throughout this period, one of the primary objectives of the British Government was to strengthen this law. Therefore, it ultimately approved the enactment of two cognate laws: the Dramatic Performances Act⁴ ('DPA') and the Vernacular Press Act⁵. These Acts came to be popularly referred to as 'preventive measures'.⁶ While the former law was primarily introduced to keep a check on seditious activities in plays, the latter was formulated to actively suppress criticism against British policies and decisions in the wake of the Deccan Agricultural riots of 1875-76. The need for such a law was felt shortly after the Penal Code came into operation and on the suggestion of Sir James Stephen, the then law member of the Government of India.

Now after approximately 160 years of the old draconian law, the question, whether we are kneeling down to apologise to the great inconvenience caused in the exercise of freedom of speech or not, again imports the need for mindful dissection of the new provision.

II. A notion of the term 'Sedition'

The term 'Sedition' was not defined in the Penal Code of Macaulay, but it was used as a marginal note to Section 124-A. the term has Roman origin, derived from the word "Sedition", the literal meaning of which is 'going apart' and which refers to the offence of collective disobedience toward a magistrate, which included both military mutiny and civilian mob action. Sedition is nothing but libel of the established authority of law, i.e., Government. Hence, it is called seditious libel in England. Sedition in the ordinary sense means a stirring up of rebellion against the Government.⁷ However, in law sedition has a technical meaning. It includes all those acts and practices which have for their object to excite discontent and dissatisfaction toward the Constitution, or the Government, or Parliament to create public disturbance, or to lead to civil war, and generally all endeavors to promote public discord and disorder.

As stated in Kenny's Outline of Criminal Law, the law of sedition relates to the uttering of the seditious words, the publication of seditious libels, and conspiracies to do an act for the furtherance of a seditious intention. Sir James Stephen defined a seditious intention as "an

<https://thewire.in/law/explainer-how-the-sedition-law-has-been-used-in-the-modi-era>(last visited on: December 20, 2024).

⁴ The Dramatic Press Act, 1876 (Act 19 of 1876).

⁵ The Vernacular Press Act, 1878 (Act 9 of 1878).

⁶ Nivedita Sakshena & Siddhartha Srivastava, "An Analysis of the Modern Offence of Sedition", 7 of *NUJSLREV* 121, 123 (2014), available at: <http://docs.manupatra.in/new> (last visited on: December 21, 2024).

⁷ K D Gaur, *Textbook on Indian Penal Code* 317, (LexisNexis, Haryana, 6th edn., 2016).

intention to bring into hatred or contempt, or to excite disaffection against, the person of his Majesty, his heirs or successors, or the Government and the Constitution of the United Kingdom by law established, or either House of Parliament, or the administration of Justice or to excite his Majesty's subjects to attempt or otherwise than by lawful means, the alteration of any matters in Church or State by law established.... Or to raise discontent or disaffection amongst the Majesty's subjects, or to promote feelings of ill will and Hostility between different classes of such subjects.”⁸

An examination of the judgments of the Courts of law reveals that judicial thoughts with regard to the meaning and scope of Section 124-A, IPC, has proceeded along two lines. According to one view, the statutory offence of sedition inasmuch as it seeks to punish all types of bad feelings, and unlike English Law that fails to prescribe what has been described as external standard for the purposes of measuring the nature and quality of bad feelings. It punishes not only any positive expression of dissatisfaction but all subjective feelings of enmity in oneself and attempts to cause disloyalty or enmity in others also.

III. Section 124-A of the Indian Penal Code, 1860: Coloniality and Constitutionality

Section 124-A of IPC deals with the offence of sedition. The section states that, “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 Government established by law in India, 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.”

There are also three explanations added to in this section. Explanation 1 illustrates the scope of the word ‘disaffection’. It states that the term “disaffection” includes disloyalty and all feelings of enmity. Explanation 2 states that the comments expressing disapprobation of the measures of the Government with a view to obtain their attention by lawful means without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section. Explanation 3 states that, the comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or

⁸Anshika Juneja, “Sedition: Critical Interpretation”, *available at*: <https://www.lexquest.in/sedition-critical-interpretation/> (last visited on: December 21, 2024).

disaffection, do not constitute an offence under this section.

Therefore, the essential ingredients of this section are as follows:

- i. Bringing or attempting to bring into hatred or contempt; or
- ii. Exciting or attempting to excite disaffection against the Government of India;
- iii. Such act or attempt may be done
 - a) by words, either spoken or written, or
 - b) by signs, or
 - c) by visible representation; and
- iv. The act must be intentional.

Now, the question is, where does the coloniality lie in this provision? This is the provision, which frames the definition of sedition in such a manner that, it does only include the disaffection towards the Government. By giving an exhaustive effect to the provision, the law protected the Government from any opposition made against its arbitrary decisions. The disaffection towards the Constitution and the administration of justice stayed out of the ambit of 'sedition'.

When the question regarding the constitutionality of the same provision arose, protagonists of one view held that, Section 124A, IPC⁹ is ultra vires of the constitution insofar as it seeks to punish merely the bad feelings against the Government. It seems to be an unreasonable restriction on freedom of speech and expression provided under Article 19(1)(a) and is not saved under Article 19(2) of the Constitution by the expression 'in the interest of the public order'.

The debate relating to the establishment of the constitutionality or unconstitutionality of Section 124A continued for a long. A hassle-free provision defining the offence of crossing the limit and violating the mode of opposition against the Government was much needed. But while

⁹ *Supra* note 2.

doing so, maintaining the provision of 'reasonable restriction' under Article 19(2) is also a matter of consideration.

IV. A Journey of Sedition Law: A Curse to the Modern Society in a Democratic nation

The rootlet of the forgoing legal principle can be traced back to the draconian history of the old criminal law when Bal Gangadhar Tilak was sentenced to death in the infamous case of *Queen Empress v. Bal Gangadhar Tilak*¹⁰ in the year of 1897, to serve the needs of the authoritarian British Government, Justice Ames Strachey came up with a repressive interpretation of Section 124A. He said, "the offender must have an intentional desire to instill in the minds of the people hatred, contempt, or disaffection towards the government. It is interesting to note that Justice Ames Strachey's failure to define "intentional desire" provided the British Government with another tyrannical tool to stifle political opponents. But, the first notable case for the offence of sedition was *Queen-Empress v. Jogendra Chunder Bose and ors.*¹¹ in the year of 1891, which is popularly known as the Bangobasi Case. It was held in this case that; the publishers could not be exempt from liability simply because they were not the original writer of the magazine with seditious content. Since the publication and distribution of the magazine were intended to be read by the target audience, it will attract sedition charges. If the accused intended to excite rebellion or disturbance by any form of media, his act would doubtlessly fall within Section 124A even if such an act does not succeed in bringing out the intended result. Balgangadhar was the first victim of this law. In Bal Gangadhar Tilak's case, the Court agreed with the definition given in Joginder Chunder Bose's Case that, "Disaffection means simply the absence of affection. It means hatred, enmity, dislike, hostility, contempt, and every form of ill will to the Government" It was further stated that disloyalty is possibly the finest term to encompass all conceivable manifestations of negative attitudes toward the Government and that no degree of disaffection is relevant to the application of Section 124A. When in 1917, a second sedition case was brought against Bal Gangadhar Tilak, the Court ruled that, in sedition cases, the offender's aim takes primacy and may be inferred from the statements' substance, audience, and context. The Court, however, adopted a more lenient stance this time, dismissing the idea of "disaffection" as something opposed to affection and considering the actual effect of alleged seditious utterances on the public when determining the accused's purpose. In 1922, when Mohandas Karamchand Gandhi was charged with sedition, and tried at the Sessions Court in

¹⁰ (1897) ILR 22 Bom 112.

¹¹ (1892) ILR19 CAL35.

Bhadra, Gujarat, for his politically sensitive articles in the Young India journal, Gandhi referred this section as suppressing the liberty of citizens, stating that “affection towards the Government could not be manufactured.”¹²

In 1942, in *Niharendu Dutt Majumdar v. The King Emperor*¹³, the Federal Court of India defined sedition as leading to ‘public disorder or the reasonable anticipation or likelihood of public disorder’. The Court emphasized that sedition implies some form of resistance or lawlessness. The decision was subsequently overruled by the Privy Council in *King Emperor v. Sadashiv Narayan Bhalera*¹⁴ in 1947. During the phase of 1947-1948, the Constituent assembly debated grievously over the matter of sedition law.

In the post-independence era, the constitutional validity of sedition laws has been subject to review for many a times. 1950 was the year of the most famous landmark judgment by the Supreme Court in the case of *Romesh Thappar v. State of Madras*¹⁵. In this case, the Supreme Court held that, the State of Madras’s decision banning the circulation of a leftist journal on the basis of ‘public safety’, violated the Right to freedom of expression.

The first attempt to demolish this draconian provision was in the case of *Tara Singh Gopi Chand v. The State of Punjab*¹⁶. Chief Justice Watson while delivering the judgment of the Court in this case, observed that, “India is now a sovereign democratic State. Government may go and caused to go without the foundation of the State being impaired. A law of sedition though necessary during the period of foreign rule has become inappropriate by the very nature of the change which has come about. Section 124A is indisputably a restriction on the freedom of speech and expression which is guaranteed to all citizens by Article 19(1) of the Constitution.” As a result, the section was declared void. Thereafter, an amendment was made in the Constitution to rectify the anomaly in the constitutionality of the sedition laws introduced by the Tara Singh Gopi Chand’s case decision.

The Constitutional First (Amendment) Act, 1951 added two new grounds in Article 19(2) to avert the constitutional difficulty. These newly added words were “in the interest of” and

¹² Abdul Hannan, “Sedition Law-UAPA, NSA: A Concerning Threat to Indian Democracy or Government Uses It As A Political Tool”, available at: <https://www.legalserviceindia.com/legal/article> (last visited on: December 21, 2024).

¹³ (1942) F.C.R. 38.

¹⁴ AIR 1947 P.C. 82.

¹⁵ 1950 AIR 124.

¹⁶ AIR 1951 PUNJAB 27.

“public order”, and they were of widest import. Such wide meaning gave great discretion to the State for invoking the law of Sedition.

Again, just after two years, following the implementation of the said amendment, the section was contested in the case of *Debi Soren and Ors. v. State*¹⁷. In this case, the Apex Court ruled that, “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.” Moreover, the Allahabad High Court, 8 years after this judgment, in *Ram Nandan v. State of Uttar Pradesh*¹⁸ in the year of 1959, held that, this section hampered the very root of free speech.

Again in 1962, in *Kedar Nath Singh v. State of Bihar*¹⁹, the Supreme Court upheld and criticized the section at the same point of time. The Apex Court opined that; the very law of sedition is valid but it cannot be used to restrict free speech. The 5 Judges Constitutional Bench held that, sedition can only be invoked if it is proved that speech delivered by someone spreads violence among the masses and such speech may result in public disorder. The Apex Court also further held that, the delivery of any speech against any specific political party or Government is not seditious. Any act of separatism by persuasion or force shall invoke sedition.

In the year of 1995, the Apex Court in *Balwant Singh v. State of Punjab*²⁰ acquitted Balwant Singh, who was charged under Section 124A. The Supreme Court overturned this sedition conviction for the sloganeers who shouted slogans and held that such slogans do not incite violence.

In 2011, in *Arup Bhuyan v. State of Assam*²¹, the Apex Court held that, in order to constitute sedition, there must be an incitement to violence or public disorder. Mere membership in an organization with secessionist demands or expressions of strong views against the government would not amount to sedition unless there is a call for violence.

The decision in *Shreya Singhal v. Union of India*²² in 2015 is one of the bombarding judgments

¹⁷ 1954 CriLJ 758.

¹⁸ AIR 1959 All 101.

¹⁹ 1962 AIR 955.

²⁰ 1976 AIR 230.

²¹ 2011(3) SCC 377.

²² AIR 2015 SC 1523.

given by the Supreme Court, though it was not directly related to sedition. This case dealt with the Constitutional validity of Section 66 A of the Information Technology Act, which criminalized online speech and dealt with the punishment for sending offensive messages through communication service etc. The Supreme Court struck down Section 66 A, stating that it was unconstitutional and violated the freedom of speech and expression.

In *S.G. Vombatkere v. Union of India*²³, at last the Supreme Court kept all pending trials under Section 124A, IPC into abeyance. The other cases which showed the change in the mindset of judiciary regarding the position of Sedition in India are Disha Ravi Toolkit case, Vinod Dua's case, Asim Trivedi's case etc. but the recent trend was that, the almost sedition charges were against the Journalists, Writers or Activists. This leads to the confusion about the standing point of India's democracy. National Crime Records Bureau, in 2019 and 2020, respectively, revealed a rapid increase in Sedition Cases since 2014.²⁴

In May, 2021, a three-judges bench of the Supreme Court ruled in the case of *Aamoda Broadcasting Company and Anr. v. State of Andhra Pradesh*²⁵, that there is a need to define the limits of sedition under Section 124A of the IPC.

In July 2021, the then Chief Justice of India, N.V. Ramana in July 2021, while hearing pleas filed by the Editors Guild of India, had criticized the law, asking: "Sedition is a colonial law. It suppresses freedoms. It was used against Mahatma Gandhi, Tilak... Is this law necessary after 75 years of Independence?"²⁶

V. Analyzing the New Law Replacing 'Sedition'

The 22nd Law Commission was constituted by Gazette Notification for a period of three years, which in its 279th report, recommended retaining the provision for sedition under section 124A of the IPC. The report came after a year after the Supreme Court ordered a halt on all proceedings and registering of fresh cases. The 22nd Law Commission, in its first meeting held on 17th January, 2023 discussed this issue of usage of the law of sedition and considered view that it requires a detailed examination, keeping in mind the various developments in the recent past. In this regard, the Commission requested the Ministry of Home Affairs vide letter dated

²³ (2022) 7 SCC 433.

²⁴ *Supra* note 3.

²⁵ SCC Online SC 407.

²⁶ *Supra* note 3.

16th January, 2023 to furnish their comments. Reminder letters were also issued by the Commission. However, looking into the urgency of the matter, the Commission has discussed this issue with various stakeholders and scholars and made detailed research on the subject-matter, thus finalising this Report. Traditionally, the legal elements of 'sedition' were obscure and thus, failed to provide a precise definition. The offences which would now be classified as 'sedition' were prosecuted under 'treason' or under scandalum magnatum or even under martial law.

In December 2023, the Indian Parliament enacted three new Criminal laws to replace the old. The Bills received Presidential assent, and were published in the Official Gazette on December 25, 2023 and ultimately came into force from July 1, 2024. The main aim of these laws was to decolonize, ensure justice and provide citizen-centric laws to justify this legal reform project. While assessing the whether the new laws succeeded in this aim or not, we must relook into different provisions of these laws very minutely. So is in the case of the deletion of the provision of sedition.

a) Section 152 of Bharatiya Nyaya Sanhita, 2023 (BNS)

Section 152 of BNS²⁷ starts with the marginal note “Act endangering sovereignty, unity and integrity of India”. The section provides that, whoever, purposely or knowingly, by words, either spoken or written, or by signs, or by visible representation, or by electronic communication or by use of financial mean, or otherwise, excites or attempts to excite , secession or armed rebellion or subversive activities, or encourages feelings of separatist activities or endangers sovereignty or unity and integrity of India; or indulges in or commits any such act shall be punished with imprisonment for life or with imprisonment which may extend to seven years, and shall also be liable to fine.

The Explanation attached to this section states that comments expressing disapprobation of the measures, or administrative or other action of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite the activities referred to in the section itself, do not constitute an offence under this section.

So, if it is examined very correctly, the it can be seen that there is a huge difference between the old and the new provision replacing the old. Section 124A used the term ‘Sedition’, meaning

²⁷ The Bharatiya Naya Sanhita, 2023, (Act 45 of 2023), S. 152.

‘Rajdroh’ while Section 152 does not use the term ‘sedition’ but it replaces the term with ‘Act endangering sovereignty, unity and integrity of India’. Section 124 A, IPC focuses on activities that excite hatred, contempt or disaffection towards the government, whereas Section 152, BNS penalizes activities that excite ‘subversive activities’ or encourage ‘feelings of separatist activities’ or endanger the ‘sovereignty or unity and integrity of India’. However, the BNS does not explain what constitutes exciting ‘subversive activities’ or encouraging ‘feelings of separatist activities’.

The Union Government has reasoned that the new provision no longer criminalizes ‘sedition’, but criminalizes ‘treason’ (Deshdroh), since criticizing the government is no longer an offence. Despite this fact, the one important similarity between both is that the nature of both the laws are such that they restrict right to freedom of speech and expression enshrined under Article 19(1)(a) of the Constitution. Moreover, the pith and substance of both the laws is same, despite the different name.²⁸

b) Constitutional Criticism of the Provision under the New Law

Even the Constitutional validity of the new law is in question. Section 152 of BNS broadens the scope of the offense, as it can encompass criticism of the Government, Public Figures, or even society and communities in general. The vague definition puts question mark on the motives of the Government. This vagueness can lead to arbitrary application, violating Article 14 of the Constitution. Not only this, ‘Freedom of Speech and Expression’ is an internationally recognized Human Right, fundamental to every free and democratic society.²⁹ It includes the right to express ideas or views which others unwelcome. Article 19(1) includes right to dissent and it helps to exercise democracy freely and fairly. The Hon’ble Supreme Court emphasized that, every person has a fundamental right to form his own opinion and the State cannot prevent open discussions and open expression of views, however critical of its own views. The section has yet not overcome the draconian effect as under IPC.³⁰ Rather, this section better be termed as “sedition plus” whipping upon our freedom of speech and expression. Sedition with all established interpretations would better balance the right of the citizens and duties of the state very cleanly. But, BNS is drafted vaguely regarding such a long-debated issue which already

²⁸ Srushti Taori & Tatva Damania, “Balancing Free Speech And National Security: A Critical Analysis Of Section 152 Of The Bharatiya Nyaya Sanhita And Section 124-A Of The IPC”, *available at*: <https://www.livelaw.in/lawschool/articles> (last visited on: December 21, 2024).

²⁹ *Ibid.*

³⁰ *Supra* note 2.

flushed out our Fundamental Rights effectively many a times. This will obviously have a future impact of severe violation of the Fundamental Rights time and again.

VI. An Apology While Travelling from ‘Rajdroh’ to ‘Deshdroh’

Now, this is the time to commemorate all the decisions of the Supreme Court regarding the draconian effect of Section 124A, IPC because, again the legislature has failed to provide the citizens with clear and unambiguous provision, so that, they can exercise their freedom of speech and expression fluently. After so many Law Commission Reports for amending the original section under IPC and even after hundreds of the judgments of the Supreme Court, it took 160 years to change the law and that too with such a vagueness is really sorrowful to the society, to the Constitution. The bending backbone of Article 19(1)(a) indexes the responsibility of the legislature to be more concern and more liberal in its law making. It is now a time to draw inference that, after the ignorance of huge violations, Article 19(1)(a) is a crying concern. An immediate apology with determinations and steps to make good the loss of the Article itself will be a prudent summarization of this discussion.

VII. Conclusion

Each country’s legal system brawls with its own different set of realities. The 22nd Law Commission of India stated that, “Repealing Section 124A of IPC on mere basis that certain countries have done so is essentially turning a blind eye to the glaring ground realities existing in India.” BNS keeps this in mind and not only retains the sedition with changed wordings rather, furnishes it with stings of treason. “A thorn by another name pricks just as sharply.”³¹ We have still now not departed from the slap of the law with colonial effect. A process of decolonializing the draconian provision is yet another subject matter of pain and sprain through which Article 19(1)(a) is going to suffer a disease of Osteopaenia. It is therefore a time for regret, a time for kneeling down before the supremacy of our Constitution.

³¹ Ashish K James & Dyuti Anand, “A Thorn by Another Name Pricks Just as Sharply: India’s New Laws Intensifying the Sting of Sedition”, *available at*: <https://lawandotherthings.com/a-thorn-by-another-name-pricks-just-as-sharply-indias-new-laws-intensifying-the-sting-of-sedition/> (last visited on: December 21, 2024).