SEDITION LAWS &
THE DEATH OF FREE SPEECH IN INDIA

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INSIDE THE BOOK

It shall be the duty of every citizen of India to cherish and follow the noble ideals which inspired our national struggle for freedom

Art 51A (b) of the Constitution of India
(Fundamental Duties)

INTRODUCTION

1

The recent spate in instances of invoking sedition laws against human rights activists, journalists and public intellectuals in the country have raised important questions on the undemocratic nature of these laws, which were introduced by the British colonial government. The Bilaspur High Court's decision to reject the bail application filed by Dr. Binayak Sen in the face of widespread public criticism of the trial court decision to indict him on charges that included those of sedition has raised serious questions about the validity of these laws in a modern constitutional democracy.

While sedition laws are part of a larger framework of colonial laws that are now used liberally by both the central and state governments to curb free speech, the specificity of these laws lie in the language of 'disaffection' and severity of the punishment associated with them. Sedition laws were used to curb dissent in England, but it was in the colonies that they assumed their most draconian form, helping to sustain imperial power in the face of rising nationalism in the colonies including India. Targets of this law included renowned nationalists like Mahatma Gandhi, Bal Gangadhar Tilak and Annie Besant. It is ironic that these laws have survived the demise of colonial rule and continue to haunt media personnel, human rights activists, political dissenters and public intellectuals across the country.

This note is an effort at bringing together various arguments to make the case for a repeal of these laws. The second chapter deals with the history of sedition laws, the third elucidates the strands of legal interpretation of this law. The fourth chapter deals with how sedition laws are being used in contemporary India. The fifth touches specifically upon sentencing related to sedition. The sixth chapter relates comparative legal developments and the seventh outlines the various provisions in law that deal with disaffection thus forming the larger family of sedition laws that we are addressing here. The last chapter of the note lists our conclusions and recommendations.

HISTORY OF SEDITION LAWS

2

The section corresponding to section 124A, the law that defines sedition in the IPC, was originally section 113 of Macaulay's Draft Penal Code of 1837-39, but the section was omitted from the IPC as it was enacted in 1860. James Fitzjames Stephens, the architect of the Indian Evidence Act, 1872, has been quoted as saying that this omission was the result of a mistake[1]. Another explanation for this omission is that the British government wished to adopt more wide-ranging strategies against the press including a deposit-forfeiture system and general powers of preventive action[2].

Section 124A was introduced by the British colonial government in 1870 when it felt the need for a specific section to deal with the offence. It was one of the many draconian laws enacted to stifle any voices of dissent at that time. Mahatma Gandhi was prescient in recognising the fundamental threat it provided to democracy when he called it the 'prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen.'[3] Prominent persons charged with sedition under this law include Bal Gangadhar Tilak and Mohandas Gandhi.

The framework of this section was imported from various sources- the Treason Felony Act (operating in Britain), the common law of seditious libel and the English law relating to seditious words. The common law of seditious libel governed both actions and words that pertained to citizens and the government, as well as between communities of persons.[4]

The initial cases that invoked the sedition law included numerous prosecutions against the editors of nationalist newspapers. The first among them was the trial of Jogendra Chandra Bose in 1891. Bose, the editor of the newspaper, Bangobasi, wrote an article criticising the Age of Consent Bill for posing a threat to religion and for its co-ercive relationship with Indians. His article also commented on the negative economic impact of British colonialism. Bose was prosecuted and accused of exceeding the limits of legitimate criticism, and inciting

religious feelings. The judge rejected the defence's plea that there was no mention of rebellion in his article. However, the proceedings against Bose were dropped after he tended an apology.[5]

VICTIMS OF SEDITION

Bal Gangadhar Tilak

Ironically some of the most famous sedition trials of the late 19th and early 20th century involved Indian nationalist leaders. Of these, the most well known are the three sedition trials of Bal Gangadhar Tilak, which were closely followed by his admirers nationally and internationally. The fundamental moral question that Tilak raised was whether his trials constituted sedition of the people against the British Indian government *(Rajdroha)* or of the Government against the Indian people *(Deshdroha)*[6]. There are striking similarities between his question and those raised by contemporary targets of sedition law like Arundhati Roy. When faced with the allegation of sedition (along with S.A.R. Geelani, Varavara Rao and others) for speaking at a seminar on Kashmir titled "Azaadi: The Only Way" held in Delhi in 2010, Roy issued a public statement:

> ". . . In the papers some have accused me of giving 'hate-speeches', of wanting India to break up. What I say comes from love and pride. It comes from not wanting people to be killed, raped, imprisoned or have their finger-nails pulled out in order to force them to say they are Indians. It comes from wanting to live in a society that is striving to be a just one. Pity the nation that has to silence its writers for speaking their minds. Pity the nation that needs to jail those who ask for justice, while communal killers, mass murderers, corporate scamsters, looters, rapists, and those who prey on the poorest of the poor, roam free."[7]

Tilak's first trial began in 1897.[8] The government claimed that some of his speeches that referred to Shivaji killing Afzal Khan had instigated the murder of the much reviled Plague Commissioner Rand and Lieutenant Ayherst, another British officer, the following

week. The two officers were killed as they were returning from a dinner reception at Government House, Pune, after celebrating the Diamond Jubilee of Queen Victoria's rule. Tilak was convicted of the charge of sedition, but released in 1898 after the intervention of internationally known figures like Max Weber on the condition that he would do nothing by act, speech, or writing to excite disaffection towards the government.[9]

STRACHEY'S LAW

Once the charges were framed against Tilak, the British government asked Justice James Strachey, who was known for his anti-native bias, to preside over this important case. Living up to his reputation, Strachey rejected the defence's argument that the articles describing the suffering of people were consistent with loyalty. In his interpretation, the amount of disaffection was to be absolutely immaterial in the decision, nor was it important whether any actual feelings of disaffection were created amongst the audience or not. He went further and expanded the scope of the definition of this law, laying down the foundation for the contemporary understanding of sedition law. He held that the term 'feelings of disaffection' meant 'hatred', 'enmity', 'dislike', 'hostility', 'contempt' and every form of ill will to the government. He equated disaffection to disloyalty, and held that the 'explanation' that followed the main section which made allowance for acts of disapprobation, would not apply to "any writing which consists not merely of comments upon government measures, but of attacks upon the government itself, its existence, its essential characteristics, its motives, or its feelings towards people." The case went on appeal to the Judicial Committee of the Privy Council, however, the Council upheld the interpretation of Justice Strachey. The native press condemned this judgement as 'the Strachey Law'.[10]

In 1898, section 124A was amended to reflect Strachey's interpretation. The British included the terms 'hatred' and 'contempt' along with

disaffection. Disaffection was also stated to include 'disloyalty and all feelings of enmity'. While debating these amendments, the British Parliament took into account the defence's arguments in the Tilak case and the decisions in two subsequent cases to ensure loopholes did not exist in the law.[11] The debates in Parliament demonstrate how 'diverse customs and conflicting creeds' in India were used to justify the amendments.[12] These amendments also introduced section 153-A and section 505 of the IPC. The colonial government, particularly the Bombay government, followed the changes in the law with a spate of prosecutions against native newspapers.

In the aftermath of the partition of Bengal, the British enacted the Newspapers (Incitement to Offences) Act in 1908, a law that empowered District Magistrates to confiscate printing presses that published seditious material. The colonial government also enacted the Seditious Meetings Act to prevent more than twenty people from assembling for meetings. These measures came in for severe criticism from Tilak. After the Muzaffarpur bomb incident, in which a bomb meant for Mr. Kingford, the District Magistrate of Muzaffarpur, killed the wife and daughter of Pringle Kennedy, a leading pleader of the Muzaffarpur Bar, Tilak's paper, Kesari, carried an editorial pointing to the effects of governmental repression. The majority of the judges in the case were European and non-Marathi speaking and Tilak was once again prosecuted for sedition. Despite a spirited defence from Mohammad Ali Jinnah, one of the most prominent faces of the Bombay bar, the judges sentenced Tilak to six years rigorous imprisonment with transportation.[13]

In 1916, the DIG of Police, Criminal Investigation Department (CID) J.A. Guider moved the District Magistrate, Pune, alleging that Tilak was orally disseminating seditious information. He cited three of Tilak's speeches in 1916, one given in Belgaum and two in Ahmednagar. Jinnah skillfully argued that since Tilak had attacked the bureaucracy through his speeches and not the government, he could not be charged with sedition. The judge in charge of this case, Justice

Bachelor, held that while the effect of the words in the speech would not naturally cause disaffection, i.e. hostility, enmity or contempt, they would create a feeling of disapprobation (which would not amount to sedition).[14]

Annie Besant

Another famous decision was *Annie Besant v. Advocate General of Madras*.[15] The case dealt with Section 4(1) of the Indian Press Act, 1910, that was framed similar to Section 124A. The relevant provision said that any press used for printing/publishing newspapers, books or other documents containing words, signs or other visible representations that had a tendency to provoke hatred or contempt to His Majesty's government...or any class of subjects (either directly or indirectly, by way of inference, suggestion, metaphor, etc.) would be liable to have its deposit forfeited. In this case an attack was levelled against the English bureaucracy. The Privy Council followed the earlier interpretation of Justice Strachey and confiscated the deposit of Annie Besant's printing press.

Mahatma Gandhi

The most famous sedition trial after Tilak's was the trial of Mahatma Gandhi in 1922. Gandhi was charged, along with Shankerlal Banker, the proprietor of *Young India*, for three articles published in the weekly. The trial, which was attended by the most prominent political figures of that time, was followed closely by the entire nation. The trial was presided over by Judge Strangman. Gandhi explained to the judge why from being a staunch royalist, he had become an uncompromising disaffectionist and non-cooperator, and why it was his moral duty to disobey the law. In a stunning statement which also highlights the fact that the sedition offence is that it is best suited to a colonial regime based upon strict control over any possible criticism of the regime, Gandhi commented on the law that was used to try him and demanded that the judge give him the maximum punishment possible:

. . . Section 124 A under which I am happily charged is perhaps the prince among the political sections of the IPC designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by the law. If one has no affection for a person, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote or incite to violence. But the section under which Mr. Banker and I are charged is one under which mere promotion of disaffection is a crime. I have studied some of the cases tried under it, and I know that some of the most loved of India's patriots have been convicted under it. I consider it a privilege, therefore, to be charged under that section. I have endeavoured to give in their briefest outline the reasons for my disaffection. 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 a virtue to be disaffected towards a Government, which in its totality has done more harm to India than previous system. India is less manly under the British rule than she ever was before. Holding such a belief, I consider it to be a sin to have affection for the system. And it has been a precious privilege for me to be able to write what I have in the various articles tendered in as evidence against me.[16]

Significantly, Gandhi, in his statement before the court, refers to the nature of political trials that were underway at that time:

> My unbiased examination of the Punjab Martial Law cases had led me to believe that at least ninety-five per cent of convictions were wholly bad. My experience of political cases in India leads me to the conclusion that in nine out of every ten the condemned men were totally innocent. Their crime consisted in the love for their country (ibid:234).

Judge Strangman, in a remarkably respectful response, acknowledges the stature of Gandhi and his commitment to non-violence but expresses his inability to not hold him guilty of sedition under the law, and sentences him to six years imprisonment.[17]

SEDITION IN THE CONSTITUENT ASSEMBLY

The irony of the sedition law used against nationalists like Gandhi and Tilak continuing in the statute books of independent India was not lost on those drafting the Constitution. While in their Draft Constitution, the Constitutional Framers included 'sedition' as a basis on which laws could be framed limiting the fundamental right to speech (Article 13)[18], in the final draft of the Constitution sedition was eliminated from the exceptions to the right to freedom of speech and expression (Article 19 (2)). This amendment was the result of the initiative taken by K.M. Munshi, a lawyer and an active participant in the Indian independence movement. Munshi proposed these changes in the debates in the Constituent Assembly.[19] The way in which the sedition law has been used as a convenient medium to stifle any form or expression of dissent or criticism mirrors the fears and concerns expressed by some of the constitutional drafters regarding the ease with which the sedition law can be misused and abused. As K.M. Munshi said:

> 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.

Echoing similar sentiments, TT Krishnamachari, a member of the Madras Legislative Assembly said:

Sir, in this country we resent even the mention of the word 'sedition' because all through the long period of our political agitation that word 'sedition' has been used against our leaders, and in the abhorrence of that word we are not by any means unique. Students of Constitutional law would recollect that there was a provision in the American Statute Book towards the end of the 18th Century providing for a particular law to deal with sedition which was intended only for a period of years and became more or less defunct in 1802. That kind of abhorrence to this word seems to have been more or less universal even from people who did not have to suffer as much from the import and content of that word as we did. Just all the same the amendment of my honourable Friend Mr. Munshi ensures a very necessary thing so far as this State is concerned. It is quite possible that ten years hence the necessity for providing in the Fundamental Rights an exclusion of absolute power in the matter of freedom of speech and probably freedom to assemble, will not be necessary. But in the present state of our country I think it is very necessary that there should be some express prohibition of application of these rights to their logical end. The State here as it means in the amendment moved by my honourable Friend Mr. Munshi as I understand it, means the Constitution and I think it is very necessary that when we are enacting a Constitution which in our opinion is a compromise between two possible extreme views and is one suited to the genius of our people, we must take all precautions possible for the maintenance

and sustenance of that Constitution and therefore I think the amendment moved by my honourable Friend Mr. Munshi is a happy mean and one that is capable of such interpretation in times of necessity, should such time unfortunately come into being so as to provide the State adequate protection against the forces of disorder.

Seth Govind Das, a freedom fighter and, subsequently, a distinguished Parliamentarian, was another supporter of removing 'sedition' from the Article. He said:

I would like to recall to the mind of honourable Members of the first occasion when section 124A was included in the Indian Penal Code. I believe they remember that this section was specially framed for securing the conviction of Lokamanya Bal Gangadhar Tilak. Since then, many of us have been convicted under this section. In this connection many things that happened to me come to my mind. I belong to a family which was renowned in the Central Provinces for its loyalty. We had a tradition of being granted titles. My grandfather held the title of Raja and my uncle that of Diwan Bahadur and my father too that of Diwan Bahadur. I am very glad that titles will no more be granted in this country. In spite of belonging to such a family I was prosecuted under section 124A and that also for an interesting thing. My great grandfather had been awarded a gold waist-band inlaid with diamonds. The British Government awarded it to him for helping it in 1857 and the words "in recognition of his services during the Mutiny in 1857" were engraved on it. In the course of my speech during the Satyagraha movement of 1930, I said that my great-grandfather got this waist-band for helping the alien government and that he had committed a sin by doing so and that I wanted to have engraved on it that the sin committed by my great-grandfather in helping to keep such a government in existence had been expiated by the great-grandson by seeking to uproot it. For this I was prosecuted under section 124A and sentenced to two years rigorous imprisonment. I mean to say that there must be many Members of this House who must have been sentenced under this article to undergo long periods of imprisonment. It is a matter of pleasure that we will now have freedom of speech and

expression under this sub-clause and the word 'sedition' is also going to disappear.

Thus the framers of our Constitution were clearly aware of the tainted history of sedition laws and did not want the right to free speech of independent Indians restricted by these draconian provisions. By removing sedition from the terms included in Article 19(2) the Constitution makers signaled their wish to move away from the colonial order where legitimate dissent was denied to Indians.

[1] *W.R. Donogh, A Treatise on the Law of Sedition and Cognate Offences in British India, 1 (Calcutta: Thakker, Spink and Co., 1911).*

[2] *R. Dhavan., Only the Good News: On the Law of the Press in India, 287-285 (New Delhi: Manohar Publications, 1987).*

[3] *A.G., Noorani Indian Political Trials: 1775-1947, New Delhi: OUP, 2009, p. 235.*

[4] *Op. cit. W.R. Donogh at p. 4*

[5] *Aravind Ganachari, "Combating Terror of Law in Colonial India: The Law of Sedition and the Nationalist Response" in Engaging Terror: A Critical and Interdisciplinary Approach, (eds.) M. Vandalos, G.K. Lotts, H.M. Teixera, A. Karzai & J. Haig, Boca Raton, Florida: Brown Walker Press, 2009 pp. 98-99.*

[6] *Op. cit. Aravind Ganchari at p. 95*

[7] *"Arundhati Roy's Statement on Possible Sedition Case", available at http://www.ndtv.com/article/india/sedition-or-free-speech-arundhati-roy-reacts-62566 accessed on 1 February 2011.*

[8] *Q.E. v. Bal Gangadhar Tilak, ILR 22 Bom 12.*

[9] *Op cit. A.G. Noorani at p. 122.*

[10] *Op. cit. Aravind Ganachari at 93-110.*

[11] *Op cit. Rajeev Dhavan at 287.*

[12] *Op cit. Noorani at 70.*

[13] *Transportation was a form of punishment whereby convicted criminals were deported to a penal colony. In India many political opponents of the British regime were transported to the Cellular Jail in the Andaman Islands*

[14] *Op. cit. A. G. Noorani at pp. 163-184.*

[15] *Annie Besant v. Advocate General of Madras, (1919) 46 IA 176.*

[16] *Op. cit. A.G. Noorani at 235.*

[17] *Op. cit. A.G. Noorani at 236.*

[18] *Clause 13 cited on p. 7 of the Draft Constitution of India prepared by the Drafting Committee. Constituent Assembly Debates of Wednesday 30-4-1947, Vol. III, No. 3 at p. 445 where Clause 8 referred to above is reproduced cited in Para 81, Ram Nandan v State AIR 1959 All 101, 1959 CriLJ 1.*

[19] *Constituent Assembly of India Part I Vol. VII, 1-2 December 1948, available at http://parliamentofindia.nic.in/ls/debates/vol7p16b.htm accessed on 3 February 2011.*

FEDERAL COURT v. PRIVY COUNCIL: CONFLICT IN INTERPRETATION

3

The origins of the legal definition of sedition can be traced back to the colonial period in terms of the legal definition of the scope of sedition, there was a difference in opinion between the Federal Court in India and the Privy Council in Britain (the highest court of appeal for Commonwealth countries at the time). In defining sedition in the *Niharendu Dutt Majumdar case*[20], the Federal Court had held that violent words by themselves did not make a speech or written document seditious and that in order to constitute sedition, *"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."* However, the Privy Council, in the *Sadashiv case*[21] overruled that decision and emphatically reaffirmed the view expressed in Tilak's case to the effect that *"the offence consisted in exciting or attempting to excite in others certain bad feelings towards the Government and not in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small."* Thus, according to the Privy Council, incitement to violence was not a necessary ingredient of the offence of the sedition.

POST-INDEPENDENCE

The idea of having a Fundamental Right of freedom of speech seemed rather inconsistent with the offence of sedition and that serving as a restriction on speech as it did via the Privy Council interpretation in *Sadashiv*[22]. Thus in the final draft of the Constitution it was seen that the restrictions to the right under 19(1)(a) did not contain sedition within them. Commenting on this omission many years later, Justice Fazl Ali said,

> The framers of the Constitution must have therefore found themselves face to face with the dilemma as to whether the word "sedition" should be used in article 19(2) and if it was to be used in what sense it was to be used. On the one hand, they must have had before their mind the very widely accepted view supported by numerous authorities that sedition was essentially an offence against public tranquillity and was connected

> in some way or other with public disorder; and, on the other hand, there was the pronouncement of the Judicial Committee that sedition as defined in the Indian Penal Code did not necessarily imply any intention or tendency to incite disorder. In these circumstances, it is not surprising that they decided not to use the word "sedition" in clause (2) but used the more general words which cover sedition and everything else which makes sedition such a serious offence. That sedition does undermine the security of the State is a matter which cannot admit of much doubt. That it undermines the security of the state usually through the medium of public disorder is also a matter on which eminent Judges and jurists are agreed. Therefore, it is difficult to hold that public disorder or disturbance of public tranquillity are not matters which undermine the security of the State.[23]

Jawaharlal Nehru was aware of the problems posed by the sedition laws to independent India. In the debates surrounding the First Amendment to the Indian Constitution, Nehru came under severe flak from opposition leaders for compromising the right to free speech and opinion. Stung by two court decisions in 1949 that upheld the right to freedom of speech of opinions from the far left and the far right of the political spectrum, Nehru asked his Cabinet to amend Article 19(1)(a).

The two cases that prompted Nehru to do this were the *Romesh Thapar case*,[24] in which the Madras government, after declaring the Communist party illegal, banned the left leaning magazine *Crossroads* as it was sharply critical of the Nehru government. The court held that banning a publication on the grounds of its threat to public safety or public order was not supported by the constitutional scheme since the exceptions to 19(1)(a) were much more specific and had to entail a danger to the security of the state. The second case related to an order passed by the Chief Commissioner, Delhi asking *Organiser*, the RSS mouthpiece, to submit all communal matter and material related to Pakistan to scrutiny.

Nehru's government decided to amend the Constitution inserting the words 'public order' and 'relations with friendly states' into Article 19(2) and the word 'reasonable' before 'restrictions', which was meant to provide a safeguard against misuse by the government. In the debates that followed in Parliament, Nehru clarified that he was not validating existing laws like sedition through this amendment. While addressing the Parliament on the Bill relating to the First Amendment of the Indian Constitution 1951, Nehru said,

> Take again Section 124-A of the Indian Penal Code. Now so far as I am concerned that particular Section is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in any body of laws that we might pass. The sooner we get rid of it the better. We might deal with that matter in other ways, in more limited ways, as every other country does but that particular thing, as it is, should have no place, because all of us have had enough experience of it in a variety of ways and apart from the logic of the situation, our urges are against it.
>
> I do not think myself that these changes that we bring about validate the thing to any large extent. I do not think so, because the whole thing has to be interpreted by a court of law in the fuller context, not only of this thing but other things as well.
>
> Suppose you pass an amendment of the Constitution to a particular article, surely that particular article does not put an end to the rest of the Constitution, the spirit, the languages the objective and the rest. It only clarifies an issue in regard to that particular article."[25]

However, sedition laws remained on the statute books post independence and was used repeatedly by both central and state governments to stifle political dissent (Singh 1998). The first major constitutional challenge to sedition laws arose in the fifties when the sedition law was struck down as being violative of the fundamental right to the freedom of speech and expression in a trilogy of cases-

Tara Singh Gopi (1950),[26] Sabir Raza,[27] and finally Ram Nandan in 1958. In Tara Singh's case, referring to the sedition law, Chief Justice Eric Weston wrote:

> India is now a sovereign democratic State. Governments may go and be caused to go without the foundations of the State being impaired. A law of sedition thought necessary during a period of foreign rule has become inappropriate by the very nature of the change, which has come about. It is true that the framers of the Constitution have not adopted the limitations, which the Federal Court desired to lay down. It may be they did not consider it proper to go so far. The limitation placed by Clause (2) of Article 19 upon interference with the freedom of Speech, however, is real and substantial. The unsuccessful attempt to excite bad feelings is an offence within the ambit of Section 124A. In some instances at least the unsuccessful attempt will not undermine or tend to overthrow the State. It is enough if one instance appears of the possible application of the section to curtailment of the freedom of speech and expression in a manner not permitted by the constitution. The section then must be held to have become void.

In *Ram Nandan's* the constitutional validity of section 124A of the IPC was challenged in an Allahabad High Court case[28] that involved a challenge to a conviction and punishment of three years imprisonment of one Ram Nandan, for an inflammatory speech given in 1954. The court overturned Ram Nandan's conviction and declared section 124A to be unconstitutional. Justice Gurtu said,

> "As a result of the conventions as has been remarked of Parliamentary Government, there is a concentration of control of both legislative and executive functions in the small body of men called the Ministers and these are the men who decide important questions of policy.
>
> The most important check on their powers is necessarily the existence of a powerfully organised Parliamentary opposition. But at the top of this there is also the fear that the Government may be subject to popular

> disapproval not merely expressed in the legislative chambers but in the market place also which, after all, is the forum where individual citizens ventilate their points of views.
>
> If there is a possibility in the working of our democratic system -- as I think there is -- of criticism of the policy of Ministers and of the execution of their policy, by persons untrained in public speech becoming criticism of the Government as such and if such criticism without having any tendency in it to bring about public disorder, can be caught within the mischief of Section 124-A of the Indian Penal Code, then that Section must be invalidated because it restricts freedom of speech in disregard of whether the interest of public order or the security of the State is involved, and is capable of striking at the very root of the Constitution which is free speech (subject of limited control under Article 19(2))."

However, this decision was overruled in 1962 by the Supreme Court in *Kedar Nath Singh v. State of Bihar*,[29] which held that the sedition law was constitutional. The Court, while upholding the constitutionality of the judgement distinguished between "the Government established by law" and "persons for the time being engaged in carrying on the administration". The Court distinguished clearly between disloyalty to the Government and commenting upon the measures of the government without inciting public disorder by acts of violence:

> "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 s. 124A has been characterised, comes under Chapter VI relating to offences against the State. Hence any acts within the meaning of s. 124A 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 to violence. In other words, any written or spoken words, etc., which have implicit in them the idea of subverting Government by violent means, which are compendiously included in the term 'revolution', have been made penal by the section in question. But the section has taken care to indicate clearly that strong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means would not come within the section. Similarly, comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings, which generate the inclination to cause public disorder by acts of violence, would not be penal. In other words, disloyalty to Government established by law is not the same thing as commenting in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement to public disorder or the use of violence.[30]

The Court went on to say:

"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 again 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. The Court, has, therefore, the duty cast upon it of drawing a clear line of demarcation between the ambit of a citizen's fundamental right guaranteed under Art. 19(1)(a) of the Constitution and the power of the legislature to impose reasonable restrictions on that guaranteed right in the interest of, inter alia, security of the State and public order."

Thus the Supreme Court upheld the constitutionality of the sedition law, but at the same time curtailed its meaning and limited its application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence. It is important to note that the Supreme Court read down the offence of sedition in effect removing speech which could be exciting disaffection against the government but which did not have the tendency to create a disturbance or disorder from within the ambit of the provision. The judges observed that if the sedition law were to be given a wider interpretation, it would not survive the test of constitutionality.

[20] *Niharendu Dutt Majumdar v. The King Emperor, AIR 1942 FC 22.*

[21] *King Emperor v. Sadashiv Narayan Bhalerao, (1947) L.R. 74 I.A. 89.*

[22] *King Emperor v. Sadashiv Narayan Bhalerao, (1947) L.R. 74 I.A. 89.*

[23] *Brij Bhushan and Anr. v. The State Of Delhi, 1950 Supp SCR 245.*

[24] *Romesh Thapar v. Union of India, AIR 1950 SC 124.*

[25] *Parliamentary Debates of India, Vol. XII, Part II (1951) p. 9621 cited in Para 81, Ram Nandan v. State, AIR 1959 All 101.*

[26] *Tara Singh Gopi Chand v The State 1951 CriLJ 449.*

[27] *Sabir Raza v. The State, Cri App No. 1434 of 1955, D/- 11-2-1958 (All) cited in Ram Nandan v. State, AIR 1959 All 101.*

[28] *Ram Nandan v. State, AIR 1959 All 101.*

[29] *Kedar Nath Singh v. State of Bihar, 1962 AIR 955.*

[30] *Kedar Nath Singh v. State of Bihar, 1962 AIR 955.*

RECENT DEVELOPMENTS ON SEDITION

4

When the Supreme Court specifically laid down that the provisions of section 124A are only made out where there is a tendency to public disorder by use of violence or incitement to violence, for the other interpretation (earlier afforded by the Privy Council) would conflict with the fundamental right under Art 19(1)(a),[31] how is it that so many cases and FIRs continue to be registered against media persons and others for their speeches and writings?

The conviction of Dr. Binayak Sen under Section 124A of the Indian Penal Code (IPC), among other offences, by a trial court in Raipur, and charges of sedition threatened against Arundhati Roy, Varavara Rao and S.A.R. Geelani, who spoke at a seminar titled 'Azadi, the Only Way' organised by the Committee for the Release of Political Prisoners in Delhi, have given an urgent new voice to the debate on the relevance of the law on sedition, as media personnel and human rights activists across the country continue to be suppressed by this section. The particular injustice of convicting a person who has merely exercised his constitutional right to freedom of expression has attracted the nation's attention to the draconian colonial legacy of a hundred and forty year old offence.

The truth remains that while the SC has stayed firm in its opinion on sedition from *Kedar Nath* onwards,[32] the lower courts seem to continuously disregard this interpretation of the law, most recently seen in the verdict against Dr Binayak Sen. The law on sedition is being used to stem any sort of political dissent in the country, and also any alternate political philosophy which goes against the ruling party's mindset. It is a throwback to the days of British Rule, when the speeches of Tilak and Gandhi used to warrant persecution for they spoke out against the British Rule, but one asks in a country providing a fundamental right to freedom of speech, is such criticism not a right of the individual, so long as it remains within reasonable restrictions?

The charge of sedition law being used to stem dissent is not without force; Binayak Sen, Arundhati Roy, Dr E. Rati Rao, Bharat Desai, Manoj Shinde, V Gopalaswamy (Vaiko), all these individuals did things far from creating a tendency to incite violence against the state, and were expressing their opinion through speeches or writings which criticised specific activities of the State.

Going through the many names that appear when one looks through the recent history of how section 124A is being applied also gives weight to the charge that a great divide presently exists between the Supreme Court and the lower courts, one which is resulting in many instances of injustice for the judges seem ignorant of the position of law in many parts of the country. The problem is more so at the level of the trial court and the investigating authorities, with a number of cases showing that the High Court grants bail or acquits the accused in many ostensible cases of 'sedition'.

The punishment of those accused of sedition begins with the legal process. Even if they are ultimately freed, they have to go through a long legal process, which serves as a punishment and a deterrent for those who dare to speak up. *The Hindu* while discussing cases under sedition in 2010 also highlights the bizarre case of a lecturer in Srinagar being arrested under section 124A because he added questions on the unrest in Kashmir Valley in an examination.[33] This is not an isolated incident. *The Times of India's* resident editor at Ahmedabad, Bharat Desai, faced charges along with a senior reporter and a photographer, for questioning the competence of police officials and alleging links between them and the mafia.[34] This was preceded by charges against one Manoj Shinde, the editor of an eveninger in Surat for 'instigating people against a duly elected government'. He had blamed Chief Minister Modi for the disastrous floods which had occurred in the city.[35]

It appears as if the upper echelons of the criminal justice system are totally disconnected from the lower rungs, with the Trial Courts and

the police authorities continually harassing individuals for no reason in law. The law on sedition is clearly being used to target specific people who choose to express dissent against the policies and activities of the government. Binayak Sen's case is the one of the most striking examples of the unjust nature of sedition laws. Sen is one of the few medical doctors to work in the interiors of Chhattisgarh. His work in public health has been recognized globally.[36] His work with the People's Union for Civil Liberties was groundbreaking, especially his involvement in some of the earliest documentation of the gross violations by the state sponsored vigilante group, Salwa Judum. This has made him languish in jail, after being convicted by the trial court on flimsy charges and denied bail by the Bilaspur High Court.[37] The recent case against Sudhir Dhawale, a reputed Dalit social activist and editor of Vidrohi, at Gondia, Maharashtra is another example of the blatant misuse of the law. Dhavale is well-known for his work in getting justice for victims of caste atrocities in Maharashtra. According to the police, a state committee member of the banned CPI (Maoist) stated in an interrogation that he had given his computer to Dhawale. His arrests have sparked widespread protests among Dalits and progressive Maharashtrians.[38]

The rampant misuse of the sedition law despite the judicial pronouncement in *Kedar Nath's* case circumscribing the scope of the law has meant that there is a serious case for repealing this law. The above examples demonstrate that Article 19(1)(a) continues to be held hostage by Section 124A which has indeed proved Gandhi right in being the 'prince of the political sections of the IPC.' There is no justification for a draconian law of this nature, created to squash peaceful and non-violent dissent, to operate in a country, which claims to be the world's largest democracy.

RECENT CASES AT A GLANCE

Manoj Shinde Editor, Surat Saamna
Aug 2006 Surat, Gujarat
For using "abusive words" against CM Narendra Modi in an editorial on Monday while alleging administrative failure in tackling the flood situation in Surat.

Kahturam Sunani Journalist, OTV;
May 2007 Sinapali, Orissa
Filing a report that Pahariya tribals were consuming 'soft' dolomite stones in Nuapada district due to acute hunger.

Binayak Sen Doctor & Human Rights Activist;
May 2007 Raipur, Chhattisgarh
Allegedly helping courier messages to Maoist leadership. Sen had criticised the Chhattisgarh government's support to the vigilante Salwa Judum

Bharat Desai Resident Editor, Times of India, Ahmedabad
Gautam Mehta Photographer, Gujarat Samachar
June 2008 Ahmedabad, Gujarat
For articles and photographs that alleged links between the Ahmedabad Police Commissioner and the underworld

Kirori Singh Bainsla Gujjar Community leader
June 2008 Bayana, Rajasthan
For leading an agitation demanding ST status for Gujjars

Lenin Kumar Editor, Nishan
Dec 2008 Bhubhaneshwar, Orissa
For publishing a special booklet on the Kandhamal riots entitled 'Dharmanare Kandhamalre Raktonadhi'
(Kandhamal's rivers of blood)

Laxman Choudhury Journalist, Sambadh
Sept 2009 Gajapati District, Orissa
For allegedly possessing Maoist literature.
Chaudhury had been writing about the involvement of local police in illegal drug trafficking.

V. Gopalaswamy (Vaiko) Politician, MDMK
Dec 2009 Chennai, Tamil Nadu
Remarks allegedly against India's sovereignty at a book launch function.

Piyush Sethia Environmentalist and Organic Farmer
Jan 2010 Salem, Tamil Nadu
Pamphlet distributed during protest against Chhattisgarh government's support for Salwa Judum

E. Rati Rao Resident Editor, Varthapatra
Feb 2010 Mysore, Karnataka
Article in Varthapatra alleging encounter deaths in Karnataka.

Niranjan Mahapatra, Avinash Kulkarni, Bharat Pawar, others
Trade Union Leaders and Social Activists
Mar 2010 – June 2010
Gujarat Police allege links with CPI (Maoist).

Arundhati Roy, S.A.R. Geelani, Varavara Rao, Shuddabrata Sengupta, others Writers, political activists, and media theorists
Nov 2010 Delhi
Private complaint alleging that they made anti-India speeches at a seminar on Kashmir titled "Azadi- The only Way".

Noor Muhammed Bhat Lecturer, Gandhi memorial college, Srinagar
Dec 2010 Srinagar
For setting a question paper for English literature students on whether 'stone pelters were the real heroes?'

Sudhir Dhawale Dalit Rights Activist and Free Lance Journalist
Jan 2011 Wardha, Maharashtra
Police allege links with CPI(Maoist) party

[31] *Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955.*

[32] *See Bilal Ahmed Kaloo v. State of Andhra Pradesh, AIR 1997 SC 3483; Balwant Singh v. State of Punjab, AIR 1995 SC 1785.*

[33] *Priscilla Jebaraj, "Binayak Sen Among Six People Charged With Sedition in 2010" in The Hindu (1 Jan., 2011).*

[34] *"Modi Throttling Freedom of Expression" in DNA India (7 Jun., 2008).*

[35] *Subash Gatade, Article Writing Equals Sedition (3 Jun., 2008), available at: http://www.countercurrents.org/gatade030608.htm.*

[36] *"Nobel Laureates Rally Behind Binayak Sen", The Hindu, 9 Feb, 2011*

[37] *Jyoti Punwani, "The Trial of Binayak Sen" 45(52) Economic and Political Weekly (Dec., 2010).*
See Also "Prisoner of Conscience', Frontline Cover Story, Jan 15-28, 2011
See Also, Shoma Chaudhury, "The Doctor, The State and the Sinister Case", Tehelka Magazine, Feb 23, 2008

[38] *Anand Teltumbde. "Yet Another Binayak Sen", Economic and Political Weekly, Feb 5, 2011, pp. 10-11.*

COMPARING SENTENCING

5

The punishment for sedition under section 124A IPC is an astonishing one with the punishment being entirely disproportional to the nature of the charges. This disparity becomes clear when one looks at the scheme of the Indian Penal Code. This offence has been included in the section on "Offences against the state" as opposed to offence like 'unlawful assembly' and 'rioting' that are included in "Offences against Public Tranquility". The disparity becomes clear when one compares the maximum punishment for these offences. Section 153A IPC (promoting enmity between religious groups) and section 153B IPC (imputations prejudicial to national integration) have a maximum of three years, and even for committing an offence under section 153B in a place of worship, the maximum punishment still remains five years imprisonment. Likewise, even other offences in the IPC against public tranquility do not carry as harsh a punishment as the offence of sedition. For instance, the punishment for unlawful assembly under section 143 IPC is imprisonment of either description for a term, which may extend to six months, or with fine, or with both. The imprisonment period extends to a maximum of two years when one joins an unlawful assembly armed with a deadly weapon under section 144 IPC or when one joins or continues in an unlawful assembly that has been commanded to disperse under section 145. Rioting attracts a punishment of imprisonment extending to two years, or fine, or both under section 147 IPC and the imprisonment period extends to a maximum of three years when one is guilty of rioting while being armed with a deadly weapon under section 148 IPC. The disproportionate nature of the punishment associated with sedition makes it difficult for those accused under the section to get bail, and has extremely serious consequences for those convicted under this section.

COMPARATIVE LAW

6

Several formerly colonized countries have retained sedition laws even after their independence from colonial rule. This chapter examines six such countries which have retained these laws, but whose judiciary and civil society actors have been critically engaged in conversations regarding their constitutionality. In these countries, the crime of sedition has either been abolished or the courts have read it down to focus on an extremely narrow range of activities. In all the cases discussed below, either the judiciary or civil society has recommended the abolition of the crime.

While countries like the United Kingdom and New Zealand have abolished the crime of sedition, in the United States and Nigeria, prosecutions for sedition have largely fallen into disuse. Further, in Australia and Malaysia, laws relating to sedition have attracted much criticism.

UNITED KINGDOM

In **England**, the forerunner of the crime of sedition was the crime of treason. Under the Treason Act, 1795, any act which endangered the person of the King, his government or the constitution would be considered treason. The Treason Felony Act of 1848 is still on the statute books.

The crime of sedition extends to a] publication of seditious libel b] utterance of seditious words and c] conspiracy to do an act in furtherance of seditious intention. In all these cases, a seditious intention has to be proved. A seditious intention is one where the person of the sovereign or of the government, the constitution, either House of Parliament, or the justice administration system could be brought into hatred or contempt. It also includes the alteration of church or state by unlawful means and any incitement of disaffection or discontent among the subjects or promoting hostility among different classes of people.

These offences at common law have also been codified to some extent. Section 1 of the Criminal Libel Act, 1918 also mirrors the definition. Incitement to Mutiny and Disaffection Act criminalises promoting ill will among the members of the armed forces.

The last known prosecution of sedition was in 1972[39]; and subsequent attempts to prosecute political activities by activists and intellectuals have not succeeded.[40] In the case of *R v. Chief Metropolitan Stipendiary Magistrate ex parte Choudhury*,[41] the court held that there had to be provocation to violence, resistance or defiance of authority for seditious libel to be proved.

The Criminal Libel Act and the common law offences of seditious libel and criminal defamation were to be repealed, according to the Law Commission in the UK.[42] Following this, in February 2010, the Joint Committee on Human Rights prepared a note on press freedom, privacy and libel. Inter alia, they commented on the crime of seditious libel and criminal defamation.[43] Since the European Convention on Human Rights guarantees wide-ranging protection for political speech, these crimes would be in contravention since they were likely to have a "chilling effect" on criticism and censure of government. Hence, these offences would also violate Article 12 of the Human Rights Act, 1998 in the U.K., which was enacted in furtherance of the ECHR. Subsequently, the Coroners and Justice Act, 2010 abolished the crimes of sedition and seditious libel. However, sedition by an alien is still an offence under section 3 of the Aliens Restriction (Amendment) Act 1919.

In abolishing the crime of sedition, the primary consideration was that the language in which the offence was framed was archaic and did not reflect the values of present day constitutional democracies. Further, although the prosecutions were few and far between, even the sporadic uses of the law had a "chilling effect" on free speech. However, although the crime of sedition has been done away with, the Terrorism Act, 2000 contains offences of "inciting terrorist acts"

and seeking or "providing training for terrorist purposes at home or overseas", which are as broadly defined and as vague as the earlier offences.

NEW ZEALAND

The offence of sedition in **New Zealand** closely mirrors the understanding of sedition in England. It was codified in Sections 81 – 85 of the Crimes Act of 1961. In Section 81, a seditious intention is defined:

> "(1) A seditious intention is an intention:
> (a) to bring into hatred or contempt, or to excite disaffection against, Her Majesty, or the Government of New Zealand, or the administration of justice; or
> (b) to incite the public or any persons or any class of persons to attempt to procure otherwise than by lawful means the alteration of any matter affecting the Constitution, laws, or Government of New Zealand; or
> (c) to incite, procure, or encourage violence, lawlessness, or disorder; or
> (d) to incite, procure, or encourage the commission of any offence that is prejudicial to the public safety or to the maintenance of public order; or
> (e) to excite such hostility or ill will between different classes of person as may endanger the public safety."

As a reading of the section shows, sub-sections (a), (b) and (e), reflect the understanding of seditious intention in England. Sub-sections (c) and (d) are extremely wide-ranging in their potential application, and are vague and ill-defined. In Sections 82, 83 and 84, the offences of seditious conspiracy, seditious statements and publication of seditious documents would be punishable with imprisonment up to two years. Possession or control of a printing press that would be used to create seditious matter was also a crime under Section 85 and was punishable for up to two years.

There are two notable instances of sedition trial in New Zealand, both of which are noted in the background note to the Crimes (Repeal of Seditious Offences) Amendment Bill, 2007 which finally abolished the crime of sedition. The first is the trial of James Liston in 1922. He was prosecuted for having glorified the Irish rebellion of 1916 in a speech at the Town Hall in Auckland. In 2006, in the case of *R v. Selwyn*,[44] Timothy Selwyn was prosecuted for having broken the glass of the Prime Minister's office window and calling on other citizens to do the same in two pamphlets that he had authored and distributed. He was protesting against a particular legislation. The jury convicted him only for the seditious statements in the pamphlet asking New Zealanders to carry out similar acts.

The Bill pointed to the "tainted history" of the crime of sedition and suggested that there were better ways of dealing with such conduct, even in the post 9/11 era. Certain views might be unpopular and unreasonable, but this could not be a reason to criminalise them. It offends the democratic values and in particular, the Bill of Rights in 1990. Since it was vague, uncertain and was used to silence political opposition, the offence was to be done away with.[45]

The New Zealand Parliament, in repealing and not replacing the offence of sedition said that most modern constitutional democracies such as United States, Canada, Australia or England had let the provisions of sedition fall into disuse. It was possible to address elements of the offence, for instance, incitement to violence, through other ordinary criminal law provisions. There was no necessity for this particular crime to be retained on the statute books.

The following points were noted by both England and New Zealand in abolishing the crime of sedition:

- Sedition is defined in vague and uncertain terms. This offends the fundamental principles of criminal law.

- In any case, it refers to a particular historical context (sovereignty residing in the person of the King) which no longer holds. The law is archaic and must be done away with.
- While certain political views may be unreasonable or unpopular, they cannot be criminalised. This offends democratic values.
- The definition of sedition offends fundamental freedoms of speech and expression which are universally recognised.
- In practice, the law is used to silence political opposition or criticism of the government. This has a "chilling effect" on free speech.

There are jurisdictions where the offence of sedition exists on the statute books. However, here a] the provisions have been narrowly construed by the courts and b] prosecutions almost never occur and the law has become obsolete.

UNITED STATES OF AMERICA

In the United States, the Sedition Act was enacted in 1798, in a bid to protect the nation from 'spies' or 'traitors'. Although several prosecutions did take place in this context, in 1840, Thomas Jefferson pardoned all those who had been sentenced under it. The Sedition Act, 1918, was actively used during the World War I, particularly against those who professed a Communist ideology. Its constiutionality was upheld in a series of cases.[46] The Alien Registration Act, popularly known as the Smith Act was enacted in 1940 and again, was used against many members of the Communist Party. As many as 140 prosecutions were carried under this. Both Acts have now fallen into disuse. .

In the case of *Yates v. United States*,[47] the U.S. Supreme Court held that teaching an ideal, however unpopular or unreasonable it might be, does not amount to sedition. Initially, the decisions by the Holmes and Brandeis Courts of the 1920s and 1930s had criticised the "chilling effect" on free speech brought about such crimes. The decision in the case of *New York Times v. Sullivan*[48] was that the free

criticism of public officials and public affairs would not constitute libel. In this context, it stated that the Sedition Act, 1798 had by "common consent" come to an "ignominious end", being a violation of the First Amendment. Finally, in 1969, in the case of *Brandenburg v. Ohio*,[49] a distinction was made between the advocacy of a doctrine or violence in abstract terms and the advocacy of violation of law which resulted in immediate lawless action. The former was held to be protected under the First Amendment.[50] Hence, in the United States, the courts have generally afforded wide protection to political speech, excepting where it results in immediate lawless action.

Article 94 of the Uniform Code of Military Justice, which governs those in the U.S. military, punishes mutiny by creating violence or disturbance, by refusing to obey orders or perform duties. In contrast, sedition governs those who were resisting civil authority. Failure to prevent sedition is also punishable. The offence is punishable by death after a court-martial.

NIGERIA

Introduced during the early years of the twentieth century, the law on sedition in Nigeria too is of colonial origin. Reading Section 51 of the Criminal Code, it is evident that it draws inspiration from the English definition of sedition. It classes an act as seditious if it is done with an intention to harm the person of the President or the governor, the justice administration system or the government, if it attempts to alter "any matter" without the use of lawful means, or if it raises discontent, disaffection, ill will of hostility in the population or between different classes of the population in Nigeria. Writers have come to the conclusion that the law was introduced with a view to curbing the writings and speeches of the educated elite under British colonial rule. Several pamphleteers including Hebert Macaulay and James Bright Davis were punished under these laws.[51] In *R v. Agwuna*,[52] the Court held that words which contained references to "overthrowing" the British imperialist rule in Africa

was considered seditious.

However, in the case of *DPP v. Chike Obi*,[53] where the constitutionality of the sedition laws was to be considered, the Court held that it was permitted to criticise the government in a fair manner, but it was not permissible to criticise the government in a "malignant manner". However, in the case of *State v. Ivory Trumpet Publishing Company Limited*,[54] the court held that the law of sedition does not serve to preserve law & order or security of state, but in fact, undermines it.

The Court held:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsible to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of Constitutional Government.[55]

In the case of *State v. Arthur Nwankwo*,[56] the Federal Court of Appeal held that the offence of sedition was incompatible with the principles of free speech. It was held that it was only a weapon in the hands of a corrupt government to stifle criticism. Referring to criticism fielded by public officials, the Court said:

> They are within their constitutional right to sue for defamation but they should not use the machinery of government to invoke criminal proceedings to gag their opponents as the freedom of speech guaranteed by our Constitution will be meaningless…It is my view that the law of sedition which has derogated from the freedom of speech guaranteed under this Constitution is inconsistent with the 1979 Constitution more so when this cannot lead to a public disorder as envisaged under Section 41 (a) of the 1979 Constitution...to retain Section 51 of the Criminal Code

> in its present form, that is even if not inconsistent with the freedom of expression guaranteed by our Constitution will be a deadly weapon and to be used at will by a corrupt government.

There is presently a divergence of opinion in Nigeria, but scholars have opined that the *Nwanko* case, being decided under the 1979 postcolonial Constitution should trump the decision in *Chike Obi*, which was decided under colonial rule.[57] There are also jurisdictions, such as Australia and Malaysia, where the law has been retained amidst stringent criticism.

AUSTRALIA

Seditious words, participation in a seditious conspiracy and publishing seditious statements were of colonial origin and common law offences, which still remain in the criminal codes of several states. The law was mostly used to censor "undesirable" publishing and as in the case of U.S. and in India, was used to target the Communist Party of Australia. Regulation 27A was inserted into the War Precautions Regulations 1915, which made it an offence to advocate, incite or encourage disloyalty to the British empire or to its "cause" in World War I, or advocates or incites the dismemberment of the British Empire. Provisions criminalising sedition are on the statute books in Australia. It is codified in the Crimes Act, 1961 (they were first introduced through the Crimes Act, 1914). Unlawful organisations were defined under the Crimes Act, 1926, if they carried out any seditious intention. After Final Report of the Royal Commission on Australia's Security and Intelligence Agencies, 1985 submitted by Justice Hope, the references to the U.K. were deleted and the scope of the section on sedition was narrowed insofar as it only applied to instances where there was incitement to violence. The punishments were gradually brought down from imprisonment to fines after a summary procedure by a magistrate.[58] In 2001, the Law and Justice Legislation Amendment Act, 2001, repealed and substituted section 24C to effect the removal of the references in paragraphs 24C (a)-

(c) to agreeing or undertaking to engage in a seditious enterprise, conspiring with any person to carry out a seditious enterprise and counselling, advising or attempting to procure the carrying out of a seditious enterprise.

MALAYSIA

In Malaysia, the Sedition Act, 1948, is of colonial origin. Section 4 defines seditious acts as one where someone "does or attempts to do, or makes any preparation to do, or conspires with any person to do" any act which has or would have a seditious tendency, who utters any seditious words, or who prints, publishes or imports any seditious publication. Furthermore, it is a crime to have in one's possession, without lawful excuse, any seditious publication. Although Article 10(1) of the Malaysian Constitution guarantees freedom of speech and expression, reasonable restrictions have been placed in Articles 10(2) – (4).(4).

Article 10(4) reads:

> In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

It has been used to silence persons and entities (primarily newspapers) who have tried to criticise the government. Members of the Opposition in Parliament or indeed any kind of opposition have been silenced using sedition charges.[59] Most recently, in January 2003, Malaysiakini, a news site, was ordered to be shut down because it published an anonymous letter which drew an analogy between the youth wing of the one of the ruling coalition parties and the Klu Klux Klan.[60] There have been many calls to repeal the law.[61]

Critical Inferences:

Criminalising sedition has obviously met with disfavour among modern constitutional democracies. The current status of the laws in the jurisdictions surveyed above reveals that:

first, in some cases, sedition laws have been repealed without replacement;

second, prosecutions for sedition are few and far between to the point where the law is almost a dead letter;

third, even in cases where the law remains on the statute books, the punishment involves either a fine or minor levels of imprisonment whereas the death penalty is almost never imposed (even in countries where it is still legal for the state to execute its citizens).

fourth, even in cases where the law remains on the statute books, there are ongoing efforts to repeal the same.

There is an understanding that criminalising dissent directed at the government offends democratic values. Some countries, like the U.S. and many countries in Europe adopt an effects-based test (based on the implications of the words) rather than a content-based test (which examines the 'text' closely).[62] Based on the former, most of the courts where sedition laws are still retained allow the charges only when there is a "clear and present danger," for instance, where there is a direct incitement to violence. However, a separate crime of sedition, archaic in its origins and enacted in a particular historical context to silence dissent, is probably unnecessary to prevent incitement to violence. Further, in silencing dissent, it only further fosters discontent among the people and could just as easily lead to situations of public disorder, which is what it is intended to prevent. For this reason, a consensus seems to have emerged that a crime of sedition should not exist in common law jurisdictions.[63]

It is also relevant to look at the place of sedition within the framework of international law. International law gives supreme importance to the tenets of free speech and expression and also guarantees the enforcement of rights which is evident in several international instruments.

In the **Universal Declaration of Human Rights, 1948 (UDHR)**, Article 19 states that *"everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."*

Article 19 of the **International Covenant on Civil and Political Rights, 1966 (ICCPR)** states:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are ***provided by law*** and are ***necessary***:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals."

Article 10 of the **European Convention on Human Rights Act, 2003 (ECHR)** states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 9 of the **African Charter on Human and Peoples' Rights, 1979 (ACHR)** states:

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law."

Article 13 of the **American Convention on Human Rights, 1978**, also known as the pact of San Jose, states:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputations of others; or

> b. the protection of national security, public order, or public health or morals. . .
>
> 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

Restrictions on the freedom of expression can be justified if they are provided by law or if they are in pursuance of a legitimate aim in international treaties such as the protection of national security, public order, public health or morals. There needs to be a necessity to restrict the right in the form of a pressing social need and there needs to be a strict scrutiny regarding the justification of the restriction. What needs to be seen is not just the necessity of the law that seeks to restrict the freedom but also the individual measures taken by the State. When a law restricts freedom of expression by reference to national security or public order imperatives, and that law is couched in general terms, specific justification needs to be provided by the State in prosecution (for compliance) with Article 19 of the ICCPR.

While international instruments can only be enforced in a country if the country has ratified it, they still have an overbearing significance and influence law-making. As a member of the United Nations General Assembly, India has ratified the UDHR and ICCPR and, therefore, has enforcement value in the country. In India, while the offence of sedition is per se not in violation of international standards, any restriction on the freedom of speech and expression needs to be justified as recognised by international covenants and treaties.

[39] *[1991] AER 306.*

[40] *For eg, Salman Rushdie was charged with sedition, but the prosecution failed.*

[41] *R v. Chief Metropolitan Stipendiary Magistrate ex parte Choudhury, [1991] 1 All ER 313.*

[42] *The Law Commission, Treason, Sedition and Allied Offences (Working Paper No 72), paragraphs 78 and 96(6) (1977); The Law Commission, Criminal Law: Report on Criminal Libel (Cm 9618) (1985).*

[43] *Written evidence submitted by the Joint Committee on Human Rights, available at: http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362we14.htm*

[44] *R v. Selwyn, Bell [2003] EWCA Crim 319.*

[45] *Crimes (Repeal of Seditious Offences) Amendment Bill, 2007, available at http://www.parliament.nz/NR/rdonlyres/0B8AD487-C576-4BCE-9A31-FD96362817F7/56750/1523CrimesSedition3.pdf*

[46] *See for e.g., Schnek v. United States 249 U.S. 47 (1919)(upholding the conviction of the general secretary of the American Socialist Party who circulated pamphlets asking for people to petition for a repeal of the compulsory draft law).*

[47] *Yates v. United States, 354 U.S. 298 (1957).*

[48] *New York Times v. Sullivan, 376 U.S. 254 (1964).*

[49] *Brandenburg v. Ohio 395 U.S. 444 (1969).*

[50] *Brandenburg v. Ohio and other cases related to this issue have been discussed most recently by the Supreme Court in the case of Sri Indra Das v. State of Assam Criminal Appeal 1383 of 2007, available at http://www.indiankanoon.org/doc/1525571/*

[51] *F.C. Nwoke, "The Law of Sedition and the Concept of Press Freedom in Nigeria", available at http://dspace.unijos.edu.ng/handle/10485/633. The case discussions are based on this resource.*

[52] *R. v. Agwuna, (1949) 12 WACA 456.*

[53] *DPP v. Chike Obi, [1961] 1 All N.L.R. 186.*

[54] *State v. Ivory Trumpet Publishing Company Limited, [1984] 5 NCLR 736,748.*

[55] *State v. Ivory Trumpet Publishing Company Limited, [1984] 5 NCLR 736,748.*

[56] *State v. Arthur Nwankwo, (1985) 6 NCLR 228.*

[57] *Nwoke, op.cit.*

[58] *Crimes Legislation Amendment Act, 1989.*

[59] *Gail Davidson et al, Lawyers and the Rule of Law on Trial: Sedition Prosecutions in Malaysia, 12 Criminal Law Forum, (2001), 1-23, 5.*

[60] *Article 19, Memorandum on the Malaysian Sedition Act, 1948, London, July*

2003, available at www.article19.org/pdfs/analysis/malaysia-sedit.03.pdf

[61] *Amnesty International, Press Statement, January 20, 2000.*

[62] *David Barnum, 'The Clear and Present Danger Test in Anglo-American and European Law', 7 San Diego Journal of International Law (2006), 264 – 292.*

[63] *See for e.g., L.W. Maher, The Use and Abuse of Sedition, 14 Sydney Law Review (1992), 287, 312.*

OVERVIEW OF SEDITION LAWS IN INDIA

7

While this note has dealt with section 124A of the Indian Penal Code in detail, there are other laws that are related to this section or also criminalise 'disaffection' to the state. This section outlines the gamut of laws that deal with sedition that exist on the statute books.

INDIAN PENAL CODE (IPC), 1960

Section 124A forms the main section that deals with sedition in the Indian Penal Code. 124A[64] carries with it a maximum sentence of imprisonment for life.

CRIMINAL PROCEDURE CODE (CrPC), 1973

The CrPC contains section 95[65] which gives the government the right to forfeit material punishable under section 124A on stating grounds. The section requires two conditions to be fulfilled, (i) that the material is punishable under the mentioned sections (ii) the government gives grounds for its opinion to forfeit the material.

UNLAWFUL ACTIVITIES (PREVENTION) ACT (UAPA), 1967

Supporting claims of secession, questioning territorial integrity and causing or intending to cause disaffection against India fall within the ambit of 'unlawful activity' (Section 2(o) UAPA).[66] Section 13[67] punishes unlawful activity with imprisonment extending to seven years and a fine.

PREVENTION OF SEDITIOUS MEETINGS ACT, 1911

The Seditious Meetings Act, which was enacted by the British a century ago to control dissent by criminalizing seditious meetings, continues to be on our statute books.

Section 5[68] of the Act empowers a District Magistrate or Commissioner of Police to prohibit a public meeting in a proclaimed area if, in his/

her opinion, such meeting is likely to promote sedition or disaffection or to cause a disturbance of the public tranquility. Considering this legislation was specifically enacted to curb meetings being held by nationalists and those opposed to the British, the continuation of this archaic legislation is completely unnecessary and undemocratic.

[64] *Section 124 A, as it stands today, reads:*
"Sedition.-Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the 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.
Explanation 1. - The expression "disaffection" includes disloyalty and all feelings of enmity.
Explanation 2. - Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.
Explanation 3. - Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."
[65] *Section 95 reads:*
"Power to declare certain publications forfeited and to issue search-warrants for the same.-(1) Where-
(a) any newspaper, or book, or
(b) any document,
wherever printed, appears to the State Government to contain any matter the publication of which is punishable under Section 124-A or Section 153-A or Section 153-B or Section 292 or Section 293 or Section 295-A of the Indian Penal Code, the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever

found in India and any Magistrate may by warrant authorize any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any book or other document may be or may be reasonably suspected to be."

[66] *Section 2(o) reads:*

""unlawful activity", in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representations or otherwise),-

(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or

(ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or

(iii) which causes or is intended to cause disaffection against India;"

[67] *Section 13 reads:*

"Punishment for unlawful activities.-(1) Whoever-

(a) takes part in or commits, or

(b) advocates, abets, advises or incites the commission of, any unlawful activity, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be liable to fine."

[68] *5. Power to prohibit public meetings:*

The District Magistrate or the Commissioner of Police, as the case may be, may at any time, by order in writing, of which public notice shall forthwith be given, prohibit any public meeting in a proclaimed area if, in his opinion, such meeting is likely to promote sedition or disaffection or to cause a disturbance of the public tranquility.

CONCLUSIONS AND RECOMMENDATIONS

7

A colonial legacy like sedition law, which presumes popular affection for the state as a natural condition and expects citizens not to show any enmity, contempt, hatred or hostility towards the government established by law, does not have a place in a modern democratic state like India. The case for repealing the law of sedition in India is rooted in its impact on the ability of citizens to freely express themselves as well as to constructively criticise or express dissent against their government. The existence of sedition laws in India's statute books and the resulting criminalization of 'disaffection' towards the state is unacceptable in a democratic society. These laws are clearly colonial remnants with their origin in extremely repressive measures used by the colonial government against nationalists fighting for Indian independence. The use of these laws to harass and intimidate media personnel, human rights activists, political activists, artists, and public intellectuals despite a Supreme Court ruling narrowing its application, shows that the very existence of sedition laws on the statute books is a threat to democratic values. We recommend the following changes to bring this aspect of Indian laws in tune with most modern democratic frameworks including the United Kingdom, USA, and New Zealand.

1. Repeal Section 124A of the Indian Penal Code, 1860

2. Amend Section 95 of the Code of Criminal Procedure, 1973, accordingly remove references to section 124A

3. Repeal the Prevention of Seditious Meetings Act, 1911

4. Amend Section 2(o) (iii) of the Unlawful Activities (Prevention) Act, 1967 to remove references to 'disaffection'

5. Repeal the Criminal Law Amendment Bill, 1961.

In light of these recommendations we propose the following Bill:

The Criminal Law (Amendment) Bill, 2011

A Bill to repeal all laws pertaining to seditious speech.

BE it enacted by Parliament in the Sixty-Second Year of the Republic of India as follows:

1. Short title and commencement.

(1) This Act may be called the Criminal Law (Amendment) Act, 2011.
(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint: Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. Repeal: The following laws are hereby repealed:

(1) Section 124A of the Indian Penal Code, 1860.
(2) Prevention of Seditious Meetings Act, 1911.
(3) Criminal Law (Amendment) Act No. 23 of 1961.

3. Amendment: To give the fullest effect to the repeal of laws as laid down in Section 2 of this Act, the following laws are also hereby amended:

(1) In Section 95 (b) of the Code of Criminal Procedure, 1973, the words "section 124 A or" shall be omitted; and
(2) In Section 108 (1) (i) (a) of the Code of Criminal Procedure, 1973, the words "section 124 A or" shall be omitted; and
(3) For Section 2(o) of the Unlawful Activities (Prevention)

Act, 1967 the following section shall be substituted:

"(o) "unlawful activity", in relation to an individual or association, means any action taken by such individual or association
(i) which directly incites through violent means, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union,
(ii) which has, as a direct consequence of such action, the result of disrupting the sovereignty and territorial integrity of India;"

4. The repeal of laws under Section 2 of this Act, and the amendment of laws under Section 3 of this Act shall have effect as follows:

(1) Immediate cessation and discharge of all persons in respect of pending trials pertaining to all offences under laws repealed under Section 2 of this Act; and
(2) Commutation of sentence of all persons convicted under any provisions of laws repealed under Section 2 of this Act, as well as the immediate vacation and lifting of all penalties, forfeitures, punishment or restrictions incurred or imposed in respect of any offence under such repealed Acts;
(3) Immediate vacation and lifting of all orders passed and restrictions, penalties punishments and forfeitures imposed under Section 95 and Section 108 of the Code of Criminal Procedure, 1973 insofar as such orders pertain to the offence under the repealed Section 124 A of the Indian Penal Code;
(4) The amendment of Section 2 (o) of the Unlawful Activities (Prevention) Act, 2007 shall have the effect of invalidating all previous proscriptions of organisations as enumerated in the schedule to that Act, if such proscriptions are not renewed within a period of ninety days from the coming

into force of this Act;

(3) The amendment of Section 2 (o) of the Unlawful Activities (Prevention) Act, 2007 shall have the effect of invalidating all previous sanctions for prosecution under Section 45 of that Act and fresh sanction for prosecution shall be applied for against all such persons being prosecuted for offences under that Act, and if such sanction is not granted within ninety days of coming into force of this Act, sanction for prosecution shall be deemed to have been refused;

Explanation: Proceedings against all persons being tried for offences, or facing penalties, punishments, forfeitures or restrictions, in respect of offences that have been repealed or circumscribed by this Act, shall continue insofar as such persons are being proceeded against under the provisions of any other laws.

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